## Confirming and Contesting International Law

*The European Union and the United Nations International Law Commission*

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# CONFIRMING AND CONTESTING INTERNATIONAL LAW:

# THE EUROPEAN UNION AND THE UNITED NATIONS INTERNATIONAL LAW COMMISSION

TERESA M. CABRITA

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# The European Union and the United Nations International Law Commission

Teresa M. Cabrita

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# Confirming and Contesting International Law: The European Union and the United Nations International Law Commission

## ACADEMISCH PROEFSCHRIFT

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in het openbaar te verdedigen in de Aula der Universiteit
op woensdag 11 januari 2023, te 11.00 uur

door
**Teresa Mafalda Vieira da Silva Cabrita**
geboren te Lisboa

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Para a minha avó, que já ensinava
'as letras' muito antes de eu vir ao mundo.

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> [O]n the whole, academic subject groups are self-defining, exclusive entities. Each has its own jargon, pecking order, newsletter, professional association ... Each subject, and each conference devoted to it, is a world unto itself, but they cluster together in galaxies.[1]

1 David Lodge, *A Small World* in The Campus Trilogy (Vintage Books 2001) 217.

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# List of Acronyms & Abbreviations |

| | |
|---|---|
| AALCO | Asian-African Legal Consultative Organization |
| ACM | Arab Common Market |
| ACP | African, Caribbean and Pacific Group of States |
| AFSJ | Area of Freedom, Security and Justice |
| ARIO | Articles on the Responsibility of International Organizations |
| ASEAN | Association of Southeast Asian Nations |
| ASR | Articles on the Responsibility of States for Internationally Wrongful Acts |
| CAHDI | Council of Europe Committee of Legal Advisers on Public International law |
| AG | Advocate-General |
| AUCIL | African Union Commission on International Law |
| CAH | Crimes Against Humanity |
| CARICOM | Caribbean Community |
| CETA | EU-Canada Comprehensive Economic Trade Agreement |
| CFSP | Common Foreign and Security Policy |
| CJEU | Court of Justice of the European Union |
| COJUR | Council Working Group on Public International Law |
| EACT | Effects of Armed Conflicts on Treaties (draft articles) |
| EASO | European Union Agency for Asylum |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | European Court of Human Rights |
| ECB | European Central Bank |
| EEC | European Economic Community |
| EU | European Union |
| ECOWAS | Economic Community of West African Countries |
| ECSC | European Coal and Steal Community |
| EEAS | European External Action Service |
| EIA | Environmental Impact Assessment |
| EOA | Expulsion of Aliens (draft articles) |
| ESM | European Stability Mechanism |
| FRONTEX | European Border and Coast Guard Agency |

| | |
|---|---|
| GATT | General Agreement on Tariffs and Trade |
| ICAO | International Civil Aviation Organization |
| GAOR | General Assembly Official Records |
| GC | General Court |
| GSP | Generalized System of Preferences |
| IAJC | Inter-American Juridical Committee |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICSID | International Centre for the Settlement of Investment Disputes |
| IDI | Institut de Droit International |
| IFRC | International Federation of the Red Cross and Red Crescent Societies |
| ILA | International Law Association |
| ILC | International Law Commission |
| IMO | International Maritime Organization |
| ITLOS | International Tribunal for the Law of the Sea |
| IMF | International Monetary Fund |
| LS | Legal Service |
| MFN | Most-Favoured-Nation (draft articles) |
| MoU | Memorandum of Understanding |
| NEIO | New International Economic Order |
| PA | Provisional Application (draft articles) |
| POA | Protection of the Atmosphere (draft articles) |
| PPED | Protection of Persons in the Event of Disaster (draft articles) |
| REIO | Regional Economic Integration 0rganization |
| RIO | Regional Integration Organization |
| SASP | Subsequent Agreements and Subsequent Practice (draft articles) |
| SFRY | Socialist Federal Republic of Yugoslavia |
| SR | Special Rapporteur |
| TEC | Treaty establishing the European Community |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TRNC | Turkish Republic of Northern Cyprus |
| UN | United Nations |

| | |
|---|---|
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |
| UNTS | United Nations Treaty Series |
| VCLT | Vienna Convention on the Law of Treaties |
| VCLT-IO | Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations |
| WTO | World Trade Organization |
| YBILC | Yearbook of the International Law Commission |

# Introduction | Storytelling

## 1. Introduction

The image of the European Union (EU) as a 'global actor' has long attracted the attention of political scientists and legal scholars alike.[1] From its beginnings as an economic integration project, the EU has grown into an increasingly active treaty-maker, with the power to participate in international organizations, to litigate, and to deploy civilian and military missions. Its ambitions 'in the wider world' are broad and far-reaching. The EU Treaties project the image of a Union which contributes to everything on the global stage, from the eradication of poverty, to international peace and security, or the sustainable development of the Earth, whilst upholding EU values and interests, and ensuring the protection of its citizens.[2]

Amongst these ambitions is the Union's objective to, in the words of article 3(5) of the Treaty on the European Union (TEU), contribute not only to 'the strict observance' but also to 'the development of international law'. Or, in the words of the European External Action Service, to 'transform rather than to simply preserve the existing [international] system'.[3] Unlike most international organizations, or even the constitutional orders of EU member

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[1] The term 'global actor' is often used by scholars to describe the different ways in which the EU operates on the international plane, establishing relations with states and international organizations. Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 42 Common Market Law Review 553. Wessel and Larik, in turn, prefer the term 'international actor' to describe 'an entity which interacts with third countries and international organizations (and even its own Member States) in ways which are legally and politically distinguishable from its constitutive Member States'. Ramses A. Wessel and Joris Larik, *EU External Relations Law* (2nd edn, Hart 2020) 2. Both terms serve the same purpose: conveying the growing importance (and implications) of the EU's participation in 'the wider world', in the words of art 3(5) of the Treaty on the European Union. Consolidated Version of the Treaty on European Union OJ C115/13 (9 May 2008) ('TEU').

[2] Art 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

[3] European External Action Service, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016) 10 <https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf>

states,[4] this foreign policy objective has become a recurrent feature in the rhetoric of EU institutions. The EU is often presented as an emerging global rule maker aspiring to 'shape the global future' and to defend and extend international norms.[5]

This thesis examines one concrete and so-far underexplored manifestation of this ambition: the EU's engagement with the work of the United Nations (UN) International Law Commission (ILC) and the significance of this engagement for the EU's objective of contributing to the development of international law. It demonstrates how, by preparing and delivering statements on the work of the ILC, European Commission legal advisers have, since 1975, weaved together a story about how the EU contributes to the development of rules of public international law and about the relationship between the EU and the international legal order. This thesis uncovers this story.[6]

[4] A point made by Larik who notes, for instance, that art 90 of the Constitution of the Kingdom of the Netherlands, whose wording is closer to that of the EU Treaties, is 'particularly open towards international law'. Larik argues, however, that the diversity of foreign policy objectives in the EU Treaties is not unique (or cause for concern) but is instead part of a broader process of internationalisation of constitutional law, the EU being simply at the forefront of a global trend. Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP 2016) 100-103 and 123-124. See Chapter 1, section 2. Specific international organizations, in turn, are also expressly mandated to contribute to international law and its development. See art 13(1)(a), Charter of the United Nations, 1 UNTS XVI (24 October 1945) ('UN Charter'); art 99, Charter of the Organization of American States (A-41), as amended by the Protocol of Amendment to the Charter of the Organization of American States ('Protocol of Buenos Aires') 27 February 1967.

[5] See European Commission, 'Commission staff working document. The external dimension of the single market review. Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A single market for 21st century Europe' COM (2007) 724 final, point 2(b); European Council, 'A New Strategic Agenda 2019-2024' 6 <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf>;
Council of the European Union, '2009 Annual Report from the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament on the main aspects and basic choices of the CFSP' (June 2010) 25.

[6] Within the field of law and literature, Legal Storytelling emerged in the 1990s as an approach (perhaps just shy of a movement) to legal education, thinking and the practice of law. It encourages the use of narrative to describe legal facts. It calls for context and empathy in the use of (and thinking about) the law. With a degree of considerable popularity in the United States, Legal Storytelling has grown into a method widely applied in litigation and legal education more generally. This thesis does not fall squarely in the pursuit or application of this method in its true technical sense. Instead, 'storytelling' is used here to guide the reader through what may at first sight seem like rather dry or technical legal debates about questions of public international law

# 2. Relevance

## 2.1. The EU's engagement with the UN International Law Commission

As a UNGA subsidiary body, the ILC has long been entrusted with preparing draft articles, conclusions, or guidelines which codify and progressively develop rules of public international law.[7] Established in 1947, this body of diplomats, legal scholars and practitioners has studied topics ranging from diplomatic protection to the responsibility of international organizations, in constant dialogue with states and UN observers at the UNGA Sixth Committee (Legal Committee).[8] While the ILC is far from the only body – even within the UN system – tasked with proposing draft texts codifying international rules,[9] its work remains an authoritative source that legal scholarship and adjudicative bodies rely on when interpreting and applying international law.[10] Several ILC drafts have served as the basis for the adoption of international conventions,[11] and are

– from the law of treaties to the rules on the attribution of responsibility to an organization and its member states. Storytelling is used to emphasise the narrative aspects that permeate these debates and to place the analysis of the individual statements into a broader context. EU statements, much like this book, tell a story about a particular understanding of legal facts. Legal storytelling retains, therefore, a strong influence on the chapters to follow. On the evolution and use of legal storytelling see Philip Meyer, *Storytelling for Lawyers* (OUP 2014); Christopher Rideout, 'Applied Legal Storytelling: A Bibliography' (2015) 12 Legal Comm. & Rhetoric 247.

[7] Art 1, UNGA Resolution 174 (II), Statute of the International Law Commission (21 November 1947) last amended by UNGA Res 36/39 of 18 November 1981 ('ILC statute'); art 13(1)(a), UN Charter. See also, Arnold N Pronto, 'Codification and Progressive Development of International Law: A Legislative history of Article 13(1)(a) of the Charter of the United Nations' (2019) 13 Florida Law Review 1101.

[8] A full list of topics studied by the ILC is available on its website. See ILC, 'Analytical Guide to the Work of the International Law Commission' <https://legal.un.org/ilc/guide/gfra.shtml>. See also United Nations (ed), *Seventy years of the International Law Commission: drawing a balance for the future* (Brill Nijhoff 2020); Chapter 2, section 2.1.

[9] Within the UN system alone, the UN Commission on International Trade Law (UNCITRAL) is specifically tasked with 'the promotion of the progressive harmonization and unification of the law of international trade'. Alongside the ILC annual report, UNCITRAL's annual report is also a permanent agenda item of the UNGA Sixth Committee. UNGA Res 2205(XXI), 'United Nations Commission on Trade Law' (17 December 1966).

[10] See Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9(2) Journal of International Dispute Settlement 291, 301, 303-304. See also Chapter 2, section 2.1.

[11] ILC, Draft articles on the law of treaties, 1966 ILC Report (A/6309/Rev.1) chapter II, para 38, and 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331 ('VCLT' or '1969 VCLT'); ILC, Draft articles on the representation of States in their relations with international organizations, 1971 ILC Report (A/26/10) chapter II(B), paras 57–60, and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (14 March 1975) A/CONF.67/16 (not yet in force); ILC, Draft articles

recurringly referred to by regional and international tribunals, including the Court of Justice of the European Union (CJEU).[12]

The Commission Legal Service (LS) has been preparing EU statements on the work of this body since 1975.[13] These statements have addressed the codification and development of rules of international law on issues as diverse as the responsibility of international organizations or the prevention and punishment of crimes against humanity. These statements are, in the words of one EU official, 'diplomatic discussions about legal matters'.[14] Importantly, these statements convey an EU position on the existence and development of rules of public international law, on the EU's contribution to their development, and on the relationship between these rules and the EU, as a legal entity and a legal order.

This thesis offers the first systematic analysis of this hitherto under-researched body of statements. In doing so, it contributes to the academic debates on the relationship between the EU and international law by bringing forth a novel angle of analysis. In examining this relationship, legal scholarship has paid considerable attention to the role of the CJEU in setting the rules of interaction between the EU and the international legal order.[15] The Court's case

on the jurisdictional immunities of States and their property, 1991 ILC Report (A/46/10) chapter II(B) para 25, and 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 December 2004) A/RES/59/38 (not yet in force).

[12] By force of the CJEU's jurisdiction and its distinction between EU law and public international law, references to ILC draft articles, conclusions, or reports are markedly lower in the EU Court's case law than in that of international courts and tribunals. References to the ILC's work can nevertheless be routinely found in Opinions by Advocates-General, and in judgments by the Court addressing questions of international law. See inter alia, Opinion of Advocate-General Hogan in case *Opinion 1/19* [2021] ECLI:EU:C:2021:198, note 187; Case T-279/19 *Front Polisario* [2021] ECLI:EU:T:2021:639, paras 301, 303-304. See also Marija Đorđeska, 'The Process of International Law-Making: The Relationship Between the International Court of Justice and the International Law Commission' (2015) 15(1) International and Comparative Law Review 7.

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

[14] Interview 19 (27 March 2020).

[15] See inter alia, Allan Rosas, 'The European Court of Justice and Public International Law' in Jan Wouters, André Nollkaemper, and Erika de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (TMC Asser Press 2008) 71; Pieter Jan Kuijper, '"It Shall Contribute to ... the Strict Observance and Development of International Law..." The Role of the Court of Justice' in Allan Rosas, Egils Levits, and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013) 589; Marise

law, however, offers limited insights into how the EU contributes to the *development* of international law.[16] By focusing on EU statements concerning the work of the ILC, therefore, this study provides insights into how Commission legal advisers, and those of other EU institutions with whom these statements are discussed, understand this relationship, and this contribution. It demonstrates how the discourse of EU institutional actors is permeated by the narrative of EU autonomy developed by the Court, and how these actors transport this narrative to international fora like the UNGA Sixth Committee, populated by state and non-state UN observers.

The analysis that follows brings together evidence from all the statements prepared and delivered in the EU's name at the UNGA Sixth Committee between its thirtieth (1975) and its seventy-sixth (2021) sessions, addressing this committee's agenda item 'Report of the International Law Commission'.[17] By systematically examining these statements, so far studied in isolation from each other, this research therefore fills a relevant gap in legal scholarship. It provides the first comprehensive review of all the ILC projects on which the EU submitted statements and of the relationship between these EU statements. It is the systematic analysis of these EU positions that allows

Cremona and Anne Thies (eds), *The European Court of Justice and external relations law: Constitutional challenges* (Hart 2014).

[16] Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in Paula García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022) (forthcoming) <https://ramseswessel.eu/.cm4all/uproc.php/0/wessel159.pdf?cdp=a&_=17e828e4070> 19: '[Art 3(5) TEU] *as such* is mentioned only a few times in the Union's decisions and international agreements. At the same time, its substantive objective – the strict observance of international law – is clearly acknowledged in several internal and external acts of the Union. This does, however, not hold true for the related objective to contribute to the development of international law'.

[17] A notable exception to this is the examination of EU statements on the establishment of an international criminal court, which are discussed in section 4.1. of Chapter 5. These statements concerned an autonomous Sixth Committee agenda item and the reasons for their inclusion in this research are outlined in the aforementioned chapter. In addition, to the author's knowledge, the statements analysed in the context of this research, as listed in Annex I and with the delimitations in scope described in section 3 of this Introduction, constitute all the statements prepared by the European Commission Legal Service concerning the work of the ILC. The methods used in the identification and systematisation of these statements are described in section 4 of this Introduction. The author nevertheless reserves the possibility that additional statements may have been prepared and delivered at the UNGA Sixth Committee, without being made public or readily available, and welcomes any information to this effect for future research purposes.

for the identification of relevant similarities and dissimilarities between the EU's views on different rules of public international law, and the EU's understanding of its contribution to the international legal system.

Pursuing this inquiry by studying the EU's engagement with the ILC also has a combined diachronic and longitudinal advantage. Unlike other venues where EU officials might discuss questions of public international law,[18] debates concerning ILC projects are lengthy, technical, and well-documented processes about how international rules are formulated and supported in practice. EU statements on these projects therefore provide particularly useful evidence of the story told by EU institutions at the UNGA Sixth Committee about the EU and international law. Importantly, this study demonstrates how the claim whereby the EU (trans)forms international law has been articulated by Commission legal advisers well before its codification as an express EU foreign policy objective in the EU Treaties, and since the early days of the European Economic Community's (EEC) participation in UN debates.

## 2.2. Situating this study in the literature

Like most research endeavours, this study is part of – and contributes to – a larger field of legal inquiry. It is situated in a growing body of literature which explores the relationship between the EU and international law. This is a relationship which has long been examined by legal scholarship,[19] and which by now forms a core aspect of EU external relations law as a self-standing discipline.[20] As noted by Odermatt, the evolution of the debates about the EU

[18] These include, for instance, the meetings of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), in which the EU participates as an observer. See Council of Europe Directorate of External Relations, 'Co-operation between the Council of Europe and the European Union: Overview of arrangements for co-operation between the Council of Europe and the European Union' DER/Inf (2018) 2 (31 May 2018).

[19] See inter alia Koen Lenaerts and Eddy De Smijter, 'The European Union as an Actor under International Law' (1999) 19 Yearbook of European Law 95; Jan Klabbers, *The European Union in International Law* (Pedone 2012); Katja Ziegler, 'The Relationship between EU law and International Law', in Dennis Patterson and Anna Södersten (eds), *Blackwell Companion for European Union Law and International Law* (Wiley-Blackwell 2016) 42-61; Inge Govaere and Sasha Garben, Garben (eds), *The Interface between International and EU Law* (Hart 2019); Jed Odermatt, *International Law and the European Union* (CUP 2021).

[20] See inter alia, Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) chapter 9, 323ff.; Ramses A Wessel and Joris Laris (eds), *EU Externa Relations Law: Text, Cases and Materials* (2nd ed, Hart 2020) chapter 5, 139ff; Jan Wouters, Frank Hoffmeister, Geert De Baere, and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP 2021) chapter 11, 421ff.

and international law has accompanied the EU's own development as an international actor.[21] While the role of the EU Court in setting the rules for this relationship has received most of the attention in the literature, so has, albeit less prominently, the role of EU lawyers and of the Legal Services of EU institutions in this process.[22]

Scholarly contributions about the EU and international law have approached this relationship from distinct angles. They have critically reflected on the 'Europeanization' of international rules by virtue of their reception within the EU legal order,[23] or on the effects of a growing international EU presence on the EU's own constitutional framework.[24] A growing body of literature has also begun questioning whether, and to what extent, the EU *changes* international law.[25] Nevill has approached this question by inquiring whether CJEU rulings have been used as subsidiary sources in the

[21] Odermatt (n 19) 2.

[22] The role of the Legal Services of the Commission, the Council and the Parliament and of the legal department of the EEAS in making and shaping the EU legal project was one until recently left largely unaddressed by legal scholarship. This has been remedied by Päivi Leino-Sandberg in a recent monograph. See Leino-Sandberg (n 22). See also, Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP 2018).

[23] Jan Wouters, André Nollkaemper and Erika de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (TMC Asser Press 2008); Klabbers (n 18).

[24] Christina Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (OUP 2019).

[25] See inter alia, Jochen A. Frowein, 'The Contribution of the European Union to Public International Law' in Petros C Mavroidis, Yves Mény, Armin Von Bogdandy (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International 2002); Frank Hoffmeister, 'The Contribution of EU Practice under International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008); Bart Van Vooren, Steven Blockmans, Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013); Dimitris Kochenov and Fabien Amtenbrink (eds) *The European Union's Shaping of the International Legal Order* (CUP 2014); Elaine Fahey, *The Global Reach of EU Law* (Routledge 2017); Támas Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar 2021). See also, Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19(3) European Journal of International Law 463; Ramses A. Wessel, 'The Meso Level: Means of Interaction between EU and International Law - Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35 *Yearbook of European Law* 533; Esa Paasivirta, 'Four Contributions of the European Union to the Law of the Sea' in Jenő Czuczai and Frederik Naert (eds) *The EU as a Global Actor - Bridging Legal Theory and Practice. Liber Amicorum in honour of Ricardo Gosalbo Bono* (Brill | Nijhoff 2017) 241; Inge Govaere and Sacha Garben (eds), *The Interface Between EU and International Law. Contemporary Reflections* (Hart 2019).

interpretation of international law.[26] Delgado Casteleiro and Leinarte have examined whether special rules of international law governing the responsibility of the EU and its members are in *statu nasciendi*,[27] and Castellarin looked at the effects of EU participation in international economic institutions.[28] Cremona, Thies, and Wessel's edited volume, in turn, looks at the effects on international law of the EU's growing participation in dispute settlement more generally;[29] and Odermatt explores whether and to what extent international law and international institutions have 'accommodated' a *sui generis* entity like the EU.[30]

Contributions specifically addressing how EU institutions have tried to influence international law-making by engaging with the ILC's work are fewer in number but nevertheless noteworthy. The position of the European Commission on the ILC draft articles on the responsibility of international organizations (ARIO), for instance, has been debated at length by legal scholarship.[31] Beyond this topic, Molnár's review of EU statements on the ILC draft articles on the expulsion of aliens methodically traced the influence of the

[26] Penelope Nevill, 'The European Union as a Source of Public International Law Part IV: Developments in European Law' (2013) Hungarian Yearbook of International Law and European Law 281.

[27] Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016); Emilija Leinarte, 'The Principle of Independent Responsibility of the European Union and its Member States in the International Economic Context' (2018) 21 Journal of International Economic Law 171; Emilija Leinarte, *Functional Responsibility of International Organisations: The European Union and International Economic Law* (CUP 2021).

[28] Emanuel Castellarin, 'The European Union's Participation in International Economic Institutions: A Mutually Beneficial Reassertion of the Centre' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Rassertion and Convergence in International Law* (CUP 2015).

[29] Marise Cremona, Anne Thies and Ramses A. Wessel (eds), *The European Union and International Dispute Settlement* (Hart 2017).

[30] Odermatt (n 19).

[31] See inter alia, Nevill (n 26); Esa Paasivirta and Pieter-Jan Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) 36 Netherlands Yearbook of International Law 169; Scarlet McArdle and Paul James Cardwell, 'EU External Representation and the International Law Commission: An Increasingly Significant International Role for the European Union?' in Steven Blockmans and Ramses A. Wessel (eds), *Principles and Practices of EU External Representation* (CLEER Working Papers 2012/5); Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013). See also, Chapter 4 and ILC, Draft articles on the responsibility of international organizations, 2011 ILC Report (A/66/10) chapter V, para 87 ('ARIO').

EU return acquis on this project.[32] Manin, in turn, has examined the EU's position on the ILC's work regarding the conclusion of treaties with or between international organizations,[33] and Chamon discusses how the EU contributes to the development of international law on the provisional application of treaties, a topic studied by the ILC between 2013 and 2021.[34] Other scholars, such as Wouters and Hermez, have also examined the EU's engagement with the ILC more indirectly, as part of a broader analysis of the EU's participation in Sixth Committee debates.[35]

While different in angle or in scope, all these contributions are driven by a similar inquiry: whether EU integration (trans)forms international law. Whether, in Paul Reuter's words, international organizations in general, and the EU in specific, have exerted 'a radical – and to some extent a structural – change in the international community'.[36] They all form part of a broader critical reflexion on the EU's relationship with, and contribution to, international law and its substance. It is to this debate that the present thesis seeks to contribute and advance.

[32] Tamás Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar 2021); Tamás Molnár, 'EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens – the Case of the ILC Draft Articles' (2017) 58(3) Hungarian Journal of Legal Studies 237. See also, Chapter 5, section 2.

[33] ILC, Draft articles on the law of treaties between states and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63; Philippe Manin, 'The European Communities and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations' (1987) 24 Common Market Law Review 457. See also, Chapter 3, section 3.2 and ILC, Draft articles on the expulsion of aliens, 2014 ILC Report (A/69/10) chapter IV, para 45.

[34] ILC, Guide to Provisional Application of Treaties, 2021 ILC Report (A/76/10) chapter V, para 41S; Merijn Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law' (2020) 31(3) European Journal of International Law 883. See also, Chapter 3, section 4.2.

[35] Jan Wouters and Marta Hermez, 'The EU's Contribution to "the Strict Observance and the Development of International Law" at the UNGA Sixth Committee' in Spyros Blavoukos and Dimitrios Bourantonis (eds), *The EU in UN Politics: Actors, Processes and Performances* (Palgrave Studies in European Union Politics 2017).

[36] ILC, 'Third report on treaties concluded between States and International Organizations or between two or more International Organizations, by Mr. Paul Reuter, Special Rapporteur', 1974 (A/CN.4/279 and Corr.1) 150-151, paras 19-20 (referring to the effect that the recognition of international organizations as subjects of international law might operate on the international legal order).

# 3. Scope

## 3.1. Focus of this thesis

The research underlying this thesis contributes to this growing body of literature by adopting a distinctive perspective. Instead of examining how selected EU policies or legislation contribute to the development of international rules, this work examines the EU's own understanding of its contribution to and relationship with international law. This is done by means of a systematic analysis of the statements prepared by the Commission LS in response to ILC projects. In this sense, the focus of this study is both broader and narrower than that of other contributions.

It is broader in so far as it examines EU statements on a wide range of public international law topics, instead of single ILC projects. This allows us to identify points of distinction and of continuity in the Commission's story, and to connect this story to the narrative of other EU institutions, notably that of the CJEU. In addition, while the ILC's reactions to the EU's claims are secondary to the object of analysis, they are nevertheless examined at the end of each of the substantive chapters (chapters 3 to 5), offering a full picture of this engagement.

At the same time, the analysis is intentionally framed more narrowly than other contributions. Our object of study lies at the intersection of different aspects of both EU and international law. To name but a few, the topics examined in this research touch upon relevant questions of the law of international organizations, such as the use of international organizations' practice in the codification and development of international rules, the legal nature of the rules of an organization, or the origins of international organizations' treaty-making capacity. The statements examined also raise interesting questions concerning the coherence (or lack thereof) between EU international positions and those of its member states.

This study, however, criss-crosses different topics of public international law from a single (EU) angle of analysis, to offer a systematic review of the EU's engagement with the ILC, from a fundamentally EU-institutional perspective. Issues of doctrine, relating to the very structures of international law, to 'the system of prevailing legal ideas and the system of

existing legal rules',[37] are discussed only to the extent that they formed part of EU statements, or where the EU's silence on these issues is noteworthy in view of the research question. At the same time, this study does not attempt an in-depth examination of the relationship between the EU and its member states at the Sixth Committee, except where this helps to contextualise the EU's position on a specific project.[38]

It is this research focus, and the fact that it intersects with different questions of both EU and international law, that bring forth this study's originality. By examining all the EU statements on ILC projects, this thesis provides a full overview of the EU's position on the development of specific rules of public international law and their relationship with the EU legal order. This same global view, in turn, is what allows for the intersections between different questions of EU and international law to come together into a broader story about the EU's contribution to public international law, and its relationship with the international legal order.

## 3.2. Research question

As an inquiry into a particular manifestation of the EU's ambition to contribute to international law, this study was guided by a deliberately broad question, formulated from an EU perspective. It set out to find the following:

> *How has the EU engaged with ILC projects and what does this engagement tell us about the EU's understanding of its relationship with, and contribution to, public international law?*

The term engagement is used here in a broad sense. It encompasses both the formal and informal channels through which the EU expresses a position on the work of the ILC. Formal channels result from the rights accruing to the EU from its observer status at the UNGA, acquired in 1974 and 'enhanced' in 2011.[39] These include the right to participate in UNGA Sixth

[37] Catherine Brölmann, *The Institutional Veil in Public International Law* (Hart 2007) 199.
[38] This is the case, for instance, of the reference to EU member states' positions on the ILC draft articles on crimes against humanity. See Chapter 5, section 4. See also, ILC, Draft articles on crimes against humanity, 2019 ILC Report (A/74/10) chapter IV, para 44.
[39] UNGA Res. 3208, 'Status of the European Economic Community in the General Assembly' (11 October 1974); UNGA Res. 65/276, 'Participation of the European Union in the work of the United Nations' (3 May 2011). See Chapter 2, section 4.1.

Committee debates, to make statements on behalf of the organization and its member states, to present proposals and amendments, as well as to reply to statements addressing the Union's position.[40] In addition, the EU can also make 'written observations' on ILC drafts in response to requests for information circulated on the ILC's behalf by the UNGA Secretariat.[41] Engagement is a broader concept, though – it also includes an evolving institutional practice of informal exchanges of views between EU officials and ILC members. These exchanges occur at the margins of Sixth Committee or Council of the EU meetings, as well as by means of academic publications. Therefore, while this research is strongly grounded on the analysis of official EU statements, it also tries to capture this larger dynamic in answering the research question.

At the same time, while our angle of analysis is an EU one, this study also accounts for how the EU's views concerning its contribution to, and development of, public international law, were received by the ILC. Some precision is in order here, though. Each substantive chapter of this thesis (chapters 3 to 5) offers an overview of the ILC's references to the EU and its practices in each of the projects examined. This illustrates the relevance of EU practices in the ILC's work, and how some specificities of the EU, as a legal actor and a legal order, have been accounted for by the ILC. This analytical angle is, however, secondary to the main research question. Specifically, this study did not purport to measure the degree of success or failure of EU proposals or the EU's broader 'influence' on ILC projects. Yet, it was considered that excluding this dimension from the scope of the research would render the analysis of the EU's engagement with the ILC incomplete and leave the EU's own story only half told. For these reasons, a choice was made to include this analytical angle to the extent relevant for answering the research question, but to exclude it from the question as such.

In addition, the research question refers to *the EU's* engagement with the ILC and to *the EU's* own understanding of its contribution to the development of international law. The analysis that follows, however, singles out the role of the Commission LS in this process. As explained in greater detail in chapter 2, the statements examined in this thesis are prepared by the LS of the European Commission and discussed with legal advisers from other

[40] ibid. See also Chapter 2, section 2.3.
[41] See 2021 ILC Report (A/76/10) chapter III ('Specific issues on which comments would be of particular interest to the Commission') 7. See also, Chapter 2, section 2.3.

EU institutions and from the EU's member states in meetings of the Council of the EU Working Party on Public International Law (COJUR).[42] As meticulously demonstrated by Leino-Sandberg, legal advisers play a fundamental role in the makeup of the EU – each EU institution is endowed with its own group of legal advisers, each with its own internal dynamics and individual contribution to the workings of the EU.[43] Within this constellation, the Commission LS has been described as the most influential of the EU institutions' legal services and the one with the greatest influence, by force of its role in litigation, in shaping the narrative of the EU Court.[44] Its mandate is linked to the promotion of the 'general interests' of the Union, notably of an 'integrationist' approach to EU law.[45]

As demonstrated in this research, the content of the statements examined here is prepared by the Commission LS and is seldom (if ever) changed by national or EU legal advisers, including staff of the EEAS based in Brussels or at the EU delegation to the UN in New York. In New York, these statements are also mostly delivered at Sixth Committee meetings by staff of the European Commission. EU statements on the ARIO, specifically, formed a particular case, wherein statements were delivered expressly by the Observer for the European Commission, not the EU as such.[46] The relevance of underscoring the role of the Commission LS in this process is therefore twofold. It sheds light on the Commission's understanding of the EU's contribution to the development of public international law, and how this relates to that of the CJEU. In doing so, it brings forth a distinctive angle of analysis and contributes to scholarly research in the field of EU external relations. Moreover, it draws the reader's attention to the substance of these statements and to the type of engagement examined. The attribution of these statements to the Commission LS underscores the fact these are statements on legal questions which form part of a broader conversation between EU and international lawyers on topics of public international law. By emphasising the role played by staff of the Commission LS in this process and by framing the analysis through the lens of the EU's objective of contributing to the development of international law (article 3(5) TEU) this study therefore

[42] See Chapter 3, section 3.
[43] Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (CUP 2021).
[44] ibid, 154, 163 and 174.
[45] ibid, 195; Art 17 TEU.
[46] See Chapter 4 and Annex 1.

emphasises the legal dimension of these debates and of the questions discussed therein.

This said, it should be borne in mind that the statements examined in this thesis are official statements of the organization, prepared and delivered in the EU's name. This is true even where they are delivered at the UNGA Sixth Committee by an EU member state, on behalf of the EU or of the EU and its member states. These statements reflect not only the position of the European Commission or of its LS, but of the EU as an organization. This, therefore, justifies the wording adopted in the research question. The story examined here remains, ultimately, an EU story, as told in the statements prepared by the Commission LS, on behalf of the EU.

### 3.3. Angle and framing concepts

As an examination of an EU story, the angle of analysis adopted in this research is an EU one. Therefore, EU statements on the work of the ILC are contextualised, first and foremost, within the rules and principles emerging from the EU Treaties. They are approached as manifestations of the EU's ambition to contribute to the strict observance of international law and to its development, a foreign policy objective with legal expression in article 3(5) TEU.[47]

As argued in greater detail in chapter 1, this article imposes on the EU institutions and its member states an obligation to apply their best efforts in the pursuit of, inter alia, the development of international law, as part of the promotion of a 'European common good'.[48] As an EU foreign policy objective, this ambition is 'constrained' by the constitutional and institutional legal framework in which it is inserted. As noted by Cremona:

> ... in pursuing its interests and values as it is enjoined to do by Article 3(5) of the Treaty on European Union (TEU), the EU is constrained procedurally by its institutional legal framework and substantively by the need to ensure compliance with its own

[47] A characterization endorsed, albeit with some reservations, by authors such as Wessel, who notes that '[i]n a more general sense, the [ILC] may form a venue for EU influence on international law-making' and thus contribute to its development. Wessel (n 25) 553.
[48] See Larik (n 4).

> constitutional principles, including the protection of fundamental rights and the rule of law.[49]

This thesis therefore advances a reading of this foreign policy objective in line with a structural principle governing the relationship between the EU and international law: the principle of autonomy. It focuses on the explanatory power of this principle in framing the EU's ambition to develop international law, in general, and the Commission LS's engagement with the ILC, specifically.

The argument advanced in chapter 1 is that the EU's ambition to develop international law is both a result and a function of its commitment to protect EU autonomy not only *from* international law but also *through* it. The Union's contribution to a legal system whose impact on the EU legal order the CJEU has sought to control is, therefore, part of a larger process of integration through law as an 'external relations enterprise'.[50] Much like states, by participating in debates on the existence and development of international rules, the EU seeks to influence international legal developments in line with its own rules, principles, and values. Through participation, as a form of projection of EU rules, the EU also protects its autonomy, in dialogue with international actors. EU autonomy, therefore, limits the ambit of possible arguments that EU institutional actors can voice externally. Specifically, it shapes the LS's position on what are, and are not, acceptable developments of international law, and what are correct or incorrect readings of international *lex lata* and *lex ferenda*.

Through confirmation and contestation, the statements prepared by the Commission LS produce meaning about the EU as an entity, an actor, and a legal order, in relation to international law and in dialogue with international actors. Confirmation and contestation are used in this research as framing concepts. They serve to distinguish between, and systematise, the different positions adopted by the EU in relation to the rules proposed by the ILC.[51] Autonomy, in turn, renders visible the choices behind these positions.

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[49] Marise Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 65.

[50] ibid, 87.

[51] The concept of contestation used in this work is, therefore, autonomous and distinct from the use of this term in norm contestation theory. While this theoretical framework is indisputably

*Confirmation* is a term reserved for statements where the LS agreed with ILC proposals or otherwise used these statements to project an image of the EU as an actor whose practices (trans)form international law. These are statements largely focused on a positive dimension of EU autonomy – that is, in arguing that the EU operates on the international plane in conditions of near-equality with other actors, despite (and at times because of) its specificities.[52] These statements position the EU as an actor that, in the language of article 3(5) TEU, 'strictly observes' and develops international law. This category of statements includes those in which the LS confirmed ILC draft rules and presented evidence of their existence and application by reference to EU practices.

*Contestation*, in turn, is used in relation to statements where the LS objected to ILC proposals, by contesting the existence (or emergence) of a rule, its absence, its scope, or its application to the EU. These are statements often focused on a negative dimension of EU autonomy – that is, in protecting the 'essential characteristics' of the EU legal order from external interferences, and in safeguarding the EU's right to self-govern.[53] This category of statements includes those in which the LS distinguished EU practices from the established practice of states or other organizations, where it emphasised the unique nature of the EU, and where it sought recognition of EU 'specificities' in the form of special rules, in safeguard clauses, or in the commentary to ILC texts.

As with all taxonomies, the boundaries between each category are often not self-contained or impermeable to each other. As argued in chapter 1, confirmation also satisfies a measure of protection, not just projection, of the EU legal order. As demonstrated in this thesis, the LS will often confirm an ILC draft rule because of its general alignment with EU law. Moreover, the LS might simply use Sixth Committee statements as an opportunity to confirm that the EU is competent to, for instance, conclude international agreements,

relevant in understanding how and why EU actors contest or accept international norms, a choice was made in this research to resort to principles and rules of the EU's own legal system in explaining the legal reasoning and actions of EU actors. The term contestation used here should, therefore, be taken for its practical rather than theoretical value, and should be understood in line with the definition provided in the text. For an overview of the main elements of norm contestation theory, however, see Betcy Jose, *Norm Contestation: Insights into Non-Conformity with Armed Conflict Norms* (Springer 2018) 21-46.

[52] See Chapter 1, section 2.

[53] See Chapter 1, section 3.

without however taking a position on whether this also confirms a general rule whereby *all* international organizations can do so. Conversely, contestation will often not be based solely on a desire to protect the EU legal order. For instance, the LS may contest ILC draft rules, conclusions, or guidelines not simply because they run counter to EU rules or interests but also because they run counter to the EU's objective of promoting broader human rights or environmental law standards. At the same time, the ILC might independently rely on EU practices as evidence of a rule of international law, leading the EU to make a statement on how these practices relate to such rule only in response to the ILC's proposals. Confirmation and contestation are, therefore, dialectic processes. They may emerge from a dialogue or contradictory between opposing sides which may or may not lead to an agreement.[54]

Yet, as framing concepts, confirmation and contestation allow us to systematise these discursive acts into relationship-defining processes. They allow us to move from the 'how' of our research question to its 'what'. In other words, systematisation through the concepts of confirmation and contestation renders clearer the Commission LS's views on the relationship between EU and international law, and on the EU's contribution to the development of the international legal order.

One important point should nevertheless be made when recounting the EU's story on its contribution to the codification and development of international rules. Long and lasting are the debates about whether international law is truly international, and about the European nature of its foundations.[55] This work does not engage with these debates. The aim here is not to convey a normative position or value judgment about whether EU views and practices should or should not be relied on or accounted for in the codification of rules of general application; about whether they correspond to a 'progress' or 'regress' of international law; or whether they should be condoned or condemned in light of legal or extra-legal criteria. Our focus rests instead on these statements as evidence of the European Commission's views regarding international law and its relationship with EU practices and, as such, as research-worthy manifestations of the EU's ambition to contribute to the

[54] Robert Audi, *The Cambridge Dictionary of Philosophy* (2nd ed, CUP 1999) 232-233.
[55] Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 EJIL 113; cf Alexander Orakhelashvili, 'The Idea of European International Law' (2006) 17(2) EJIL 315.

development of international law and to position itself as a global actor. The EU-angle of analysis pursued here should not, therefore, be construed as endorsing a particular reading of international law or as arguing for or against a degree of EU influence on the international legal order. Importantly, the EU is presented here neither as an 'ethical power', nor as its opposite.[56]

### 3.4. Projects analysed

The dynamics of confirmation and contestation structuring this inquiry are illustrated through a systematic analysis of all the statements delivered in the EU's name or on its behalf between the UNGA Sixth Committee's thirtieth session (1975) and this committee's seventy-sixth session (2021).[57] With minor exceptions, the analysis is focused on statements expressly addressing this committee's agenda item 'Report of the International Law Commission' and leaves aside EU statements delivered after the corresponding ILC articles, conclusions, or guidelines were adopted by the ILC on second reading.[58]

In total, this research draws on eleven international law topics included in the ILC's programme of work. These include the following projects, by year of adoption of the corresponding final drafts:

1. Most-favoured-nation clauses[59]
2. Treaties between states and international organizations or between international organizations [60]

[56] Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 International Affairs 65.
[57] See also, supra note 17.
[58] One such exception is the analysis of the EU's position concerning the adoption of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which accounts for the EU's participation at the corresponding UN Codification Conference. The same applies to the analysis of EU statements concerning the establishment of an International Criminal Court, which are examined together with the EU's position on the most recent debates on a draft convention on crimes against humanity. The decision to expand the analysis in these two cases was based on reasons connected with each project, as explained in Chapter 3, section 3.2. and Chapter 5, section 4, respectively.
[59] ILC, Draft articles on most-favoured-nation clauses, 1978 ILC Report (A/33/10) chapter II, para 74.
[60] ILC, Draft articles on the law of treaties between States and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63.

3. The effects of armed conflicts on treaties[61]
4. The responsibility of international organizations [62]
5. The expulsion of aliens[63]
6. The protection of persons in the event of disasters[64]
7. Subsequent agreements and subsequent practice in relation to the interpretation of treaties[65]
8. The identification of customary international law[66]
9. Crimes against humanity[67]
10. The provisional application of treaties,[68] and
11. The protection of the atmosphere[69]

EU statements on these topics are organised around three thematic clusters: the law of treaties, the responsibility of international organizations, and substantive areas of international law. Five of these eleven topics are discussed under the broad theme of the law of treaties (chapter 3),[70] and four under the thematic cluster of substantive areas of international law (chapter 5).[71] EU statements on the articles on the responsibility of international organizations, in turn, are addressed in a chapter of their own (chapter 4), by virtue of their breadth – in number and in substance – and, as explained in greater detail in

[61] ILC, Draft articles on the effect of armed conflicts on treaties, 2011 ILC Report (A/66/10) chapter VI, para 89.
[62] ILC, Draft articles on the responsibility of international organizations, 2011 ILC Report (A/66/10) chapter V, para 87.
[63] ILC, Draft articles on the expulsion of aliens, 2014 ILC Report (A/69/10) chapter IV, para 45.
[64] ILC, Draft articles on the protection of persons in the event of disasters, 2016 ILC Report (A/71/10) chapter IV, para 48.
[65] ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018 ILC Report (A/73/10) chapter IV, para 51.
[66] ILC, Draft conclusions on the identification of customary international law, 2018 ILC Report (A/73/10) chapter V, para 65 ('CIL conclusions').
[67] ILC, Draft articles on crimes against humanity, 2019 ILC Report (A/74/10) chapter IV, para 45.
[68] ILC, Draft guide to provisional application of treaties, 2021 ILC Report (A/76/10) chapter V, para 50.
[69] ILC, Draft guidelines on the protection of the atmosphere, 2021 ILC Report (A/76/10) chapter IV, para 39.
[70] Those listed in points 1-3, 7 and 10: most-favoured nation clauses, treaties with or between international organizations, the effects of armed conflicts on treaties, subsequent agreements and subsequent practice in relation to the interpretation of treaties, and the provisional application of treaties.
[71] Those listed in points 5-6, 9 and 11: the expulsion of aliens, the protection of persons in the event of disasters, crimes against humanity, and the protection of the atmosphere.

that chapter, the importance the European Commission accorded to this project.

By contrast, the statements on the ILC's conclusions on the identification of customary international law (CIL) are treated independently from these three themes. They are addressed at the outset of this thesis, within chapter 2.[72] Among other things, this chapter examines the ILC's reliance on the practice of international organizations, and its understanding of how international organizations contribute to the expression or formation of rules of customary international law, of peremptory norms of international law (*jus cogens*), or of general principles of law. The choice to analyse the EU's statements on this project within this chapter, is justified by our research question and by the broader relevance of the CIL conclusions to the assessment of the EU's engagement with the ILC.

First, while the present study does not aim to offer a comprehensive analysis of international law's evolving position on whether international organizations contribute to (customary) international law, and if so how – a question otherwise pursued by legal scholarship elsewhere[73] – it is submitted that the CIL conclusions have broader implications for how the ILC accounts for the EU's practice in its work. As will be discussed in chapter 2, ILC projects often combine the 'progressive development' of international law with a codification of custom.[74] Therefore, by defining the conditions under which international organizations might contribute to custom, the CIL conclusions also shed light on how the ILC itself might account for the practice of international organizations such as the EU when codifying customary rules.

Second, the LS's statements on this project are of overarching significance for how the European Commission understands the EU's contribution to international law and its development. These statements present an EU view of how EU practice contributes to the formation of custom and are, therefore, contextually relevant when examining the LS's views on how

[72] See Chapter 2, section 2.4.
[73] See most recently, Fernando Lusa Bordin, Andreas T. Müller, and Francisco Pascual-Vives (eds), *The European Union and Customary International Law* (CUP 2022) (forthcoming); Odermatt (n 18) chapter 2, 33ff; Kristina Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) 31(1) European Journal of International Law 201-233.
[74] See Chapter 2, section 2.1.; art 13(1)(a) UN Charter; art 1 ILC statute.

the EU contributes to or otherwise confirms existing or emerging rules of customary international law in fields as diverse as the protection of the atmosphere or the protection of persons in the event of disasters. For these reasons, it was considered that EU statements on this project should already be examined in chapter 2, in view of their relevance for the chapters that follow.

Finally, although Sixth Committee debates on some of the topics referred to throughout this thesis are still ongoing at the time of writing – notably the debates on general principles of law, on peremptory norms of general international law (*jus cogens*), on the protection of the environment in relation to armed conflicts, and on sea-level rise in relation to international law – the analysis carried out only accounts for EU statements on projects adopted by the ILC on second reading up to 2021.[75] The story that these statements tell, however, arguably supports the reading of EU statements to follow. In addition to the analysis in its own right, therefore, this thesis also provides a framework to understand and contextualise these and future statements, to explain and in part predict the choices they convey. As such, these findings may be applied to, and be tested on, EU statements on ILC topics to come.

## 4. Methods of analysis

Broad questions beget broad sources. This thesis therefore relied on a broad range of sources, and on a mixed methods approach, to answer its main research question. While strongly grounded on a qualitative content analysis of primary sources – notably, the EU statements at the centre of this research – this research combined textual analysis with empirical methods. These methods included semi-structured expert interviews with EU officials and ILC members, and observational research. In addition, while the perspective adopted here is one centred on the EU and its story, where necessary, the analysis also draws on how this story is seen from the viewpoint of international law.

In view of the object of study, the primary sources analysed were, first and foremost, the official statements made by the EU (or EU member states on the organization's behalf) concerning ILC projects. The first part of this investigation therefore involved an exhaustive collection of these statements.

[75] EU statements on these projects are not, therefore, examined in detail in this thesis. See, however, Chapter 2, section 2.4; Chapter 5, section 5.

These were retrieved from the Sixth Committee's website, which includes detailed documentation on each Sixth Committee session since 1999.[76] Records of statements delivered prior to 1999 were retrieved from the UN electronic library and its archives in Geneva. In view of the volume of materials, the analysis focused on the documents classed under the agenda item 'Report of the International Law Commission', starting from 1974, the year in which the European Economic Community acquired its observer status at the UNGA. In addition, written statements submitted by the EU to the ILC further to requests for information included in chapter III of the ILC annual report are, by and large, publicly available on the ILC's website.[77] Where documents were not publicly or electronically available, they were requested directly from the European Commission pursuant to Regulation (EC) No 1049/2001 on public access to documents.[78] A list of the main statements analysed under each topic is included in Annex I, to guide the reader.

The process of systematising the statements followed an inductive approach. It was considered that the statements on each topic should stand for themselves, each relaying a fragment of a larger story. All the statements on a specific ILC project were therefore first analysed independently from each other before being brought together under a thematic cluster. In reading the materials, the author was guided by a set of questions or lines of inquiry which sought to focus the analysis on aspects of engagement and representation, and of relationship and contribution, in line with the main research question. At the same time, and for the reasons indicated in section 3.2. above, attention was also paid to the ILC's reception of EU arguments.

The first line of inquiry addressed aspects of engagement and representation:

[76] See UNGA, 'Sixth Committee (Legal) - Previous sessions' <https://www.un.org/en/ga/sixth/previous_sessions.shtml>

[77] Statements by states and international organizations concerning ILC projects are also often collected by the UNGA Secretariat in separate documents or systematised and analysed in Special Rapporteurs' reports. See inter alia, ILC, 'Responsibility of international organizations: Comments and observations received from international organizations', 2008 (A/CN.4/593 and Add.1); ILC, 'Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur', 2020 (A/CN.4/738).

[78] This was the case of a Letter of 22 February 2010, from the Director-General of the European Commission Legal Service, Luis Romero Requena, to Patricia O'Brien, UN Under-Secretary-General for Legal Affairs and UN Legal Counsel (JUR (2010) 50059). See Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145.

- ◊ Who is making the statement and in whose name?

The second examined arguments reflecting on the EU's relationship with, and contribution to, international law:

- ◊ How is the EU defined in these statements, as a legal entity and a legal order?
- ◊ Do these statements refer to EU rules and international practices as aligned with the rules proposed by the ILC or rather as distinct from the established practice of states or of other organizations?
- ◊ If so, are arguments advanced to the effect that the EU's (distinct) practices should be reflected in ILC texts and, if so, in which form?
- ◊ How are these arguments developed, in terms of language and argumentation?

And the third line of inquiry addressed how this position was received and accounted for by the ILC:

- ◊ To what extent, and how, are the EU and its practices referred to in ILC Special Rapporteurs' reports in these different projects?
- ◊ How are some of the proposals put forward by the EU addressed in ILC annual reports and in the final texts as adopted by the ILC on second reading?

Systematic content analysis was relied on only to the extent that it allowed for the volume of materials to be organised in line with the listed lines of inquiry.[79] Categories such as representation, relationship, and reception were, therefore, applied in the analysis of these statements. The aim of this analysis was not, however, to exhaustively 'code' the different segments of text, or to quantify the number of references to particular words within them.[80] The

[79] Maryam Salehijam, The value of systematic content analysis in legal research (2018) 23(1) Tilburg Law Review 34.

[80] Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (2nd edn, SAGE 2013) 4: 'In qualitative data analysis, a code is a researcher-generated construct that symbolizes and thus attributes interpreted meaning to each individual datum for later purposes of pattern detection, categorization, theory building, and other analytic processes'.

analysis sought instead to determine whether a pattern could be inferred from these different textual fragments, the relationship between them, and their underlying story concerning the EU's relationship with, and contribution to, public international law. In addition, the framing concepts of confirmation and contestation (discussed above) were used to systematise the EU's views, as expressed in these statements, concerning the relationship between EU practices and the draft rules, conclusions, or guidelines advanced by the ILC. They were applied to the second line of inquiry indicated above.

In view of the broad concept of engagement adopted in this research, however, it was from the outset clear that a textual analysis of EU statements would not suffice to answer the research question. Semi-structured interviews with EU officials and ILC members were therefore also carried out to gather additional information, rather than to test a hypothesis as such.[81] Interviews with EU legal advisers from the European Commission, the Council of the EU, the European External Action Service (EEAS), and the EU Delegation to the UN in New York, served to contextualise some of the statements examined in chapters 3 to 5. These conversations also helped in developing a better understanding of the institutional practices surrounding the preparation and delivery of these statements, examined in chapter 2. Interviews with ILC members, in turn, focused on the ILC's working methods, the role of international organizations in this process, and ILC members' views about the relevance of EU practices to their work, and of the EU as a subject of – and contributor to – public international law. These interviews informed some of the observations found in chapter 2 and formed part of a larger process of observational research during which the author attended ILC plenary meetings held between 8 July and 9 August 2019 to get a better understanding of the processes and practices of this body. One additional interview was conducted with a member of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), a body in which both the EU and its member states are represented, and which regularly updates the ILC about legal developments within the Council of Europe, as described in chapter 2. This interview explored the role of this and other juridical bodies of regional

[81] The term 'semi-structured interviews' refers to 'a qualitative data collection strategy in which the researcher asks informants a series of predetermined but open-ended questions' which guide the conversation but allow for additional topics to be explored throughout. Lisa M. Given (ed), *The SAGE Encyclopaedia of Qualitative Research Methods* (SAGE 2008) 810-811.

international organizations in the working processes of the ILC and examined the alternative venues in which the EU expresses (and forms) a position on the topics included in the ILC's programme of work.

All interviews were anonymous and their transcripts, where allowed by the participants, are kept on file with the author.[82] In advance of each interview, interviewees were provided with an overview of the research project and its aims, an indicative list of questions, and an Informed Consent Form.[83] Most interviews were held face-to-face, except for those held after March 2020 which were held by phone. It should be stressed that these interviews were complementary to the main method of analysis. The aim was not to interview a large group of EU officials or ILC members but instead to gather further information and, importantly, individual perceptions about the EU's engagement with the ILC, from persons directly and indirectly involved in shaping it, and who expressed their availability and willingness to be interviewed. Although these conversations were complementary to otherwise legal doctrinal research, they both enlightened and enriched the research process and its results.

Other primary sources analysed included the EU Treaties, legal acts, and case law. Each substantive chapter includes a brief overview of EU rules and acts relevant to the ILC topic or topics examined in the corresponding chapter. The relevance of this legal framework is twofold. First, these rules (and their interpretation by the CJEU) provide context to the arguments advanced by the Commission LS. Second, as the analysis demonstrates, the ILC has often relied on EU internal rules as the expression of the practice of the organization, of the regional practice of EU member states, or as 'inspiration' for the development of international law. As such, a review of these rules provides both context for the EU's positions and evidence of the sources relied on by the ILC in its work.

In addition, although this study is primarily concerned with the EU's own position on the draft rules, principles or guidelines proposed by the ILC, the analysis also relies on international law sources. Of notable interest were the reports of the different Special Rapporteurs entrusted with the projects

[82] An anonymised list of interviews is included in Annex II.
[83] Following the model approved by the University of Amsterdam's Ethics Committee, on file with the author.

under analysis, ILC annual reports, and memoranda prepared by the UNGA Secretariat in support of the ILC's work. There are extensive references to these throughout the chapters. The texts of the draft articles, conclusions or guidelines adopted by the ILC, as well as some of the legal instruments referred to in their preparation, are also reviewed. Each chapter introduces the scope of the ILC projects examined within it by reference to these different sources. In doing so, it contextualises the EU's story not only in its own legal framework but also in the system of rules from which it often draws, and which it seeks to contribute to and develop.

## 5. Terminological clarifications

Language plays an important role in the construction of a legal system. The EU legal system, in particular, has intentionally avoided relying on international law concepts to distinguish itself from international law.[84] Unsurprisingly, therefore, an analysis travelling between EU and international law calls for some clarification of terminology.

The term 'practices', instead of practice, is used throughout the text when referring to EU rules or external actions. This terminological choice intends to distinguish the term from its most common association with the objective element of custom (comprised of practice and *opinio juris*).[85] By contrast, 'practices' is used here in a broader sense. It includes the forms of practice accounted for by the ILC in an analysis of custom: such as diplomatic-like acts and correspondence; conduct in connection with resolutions adopted by an international organization; conduct in connection with treaties; executive, legislative and administrative acts; or judicial decisions.[86] And it also includes less tangible, more diffused processes of informal exchanges between legal advisers, formal and informal meetings through which the EU's views on existing and emerging rules of international law are formed and communicated. In light of the broad approach to the concept, and of the fact that the projects reviewed often combine elements of scientific restatement of rules of custom (codification) with a progressive development of international law, it was

[84] Odermatt (n 19) 11.
[85] See James R. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 21-25.
[86] Commentary to conclusion 6, para 7, CIL conclusions.

considered that the use of the term practice, if understood in its narrow sense of 'custom', would be both limiting and misleading.

As in any study referring to the EU in its pre-and-post-Lisbon incarnations, the term 'European Union' also requires clarification. The statements analysed in this research cover the period from 1975 to 2021. During these forty-six years, the institutional design of the EU changed significantly.[87] In 1974, it was the European Economic Community (EEC), established in 1957, that was accorded observer status at the UNGA. Statements on UN matters were mostly delivered by the Community's member state holding the rotating presidency of the Council of the EU, speaking on behalf of the (then) nine EEC member states or on the Community's behalf. Statements addressing the ILC annual report at the Sixth Committee, however, were also early on delivered by the Observer for the European Economic Community or the Observer for the Commission of the European Economic Communities, on matters considered to fall squarely within the Community's competence, such as the granting of most-favoured nation (MFN) treatment to third states in the context of trade agreements (a topic examined in chapter 3).[88] The Maastricht amendment to the EEC Treaty, which came into force in 1993, brought about the European Union and restructured the organization around the well-known 'three pillar' model: the first composed of the European Communities (including the European Coal and Steel Community – established in 1951 and in existence up to 2002 – the European Atomic Energy Community, and the (by then) European Community); the second corresponding to common foreign and security policy (CFSP) competences; and the third to competences on matters of justice and home affairs (JHA). The duality between statements by EU member states' on behalf of the Union and statements by the Observer for the European Community or the European Commission on behalf of the organization (or of the organization and its member states) was a reality of EU external representation up to the adoption of Treaty of Lisbon.[89] The 2009 Lisbon amendment to the Treaties simplified these matters greatly. The pillar structure collapsed into one single organization (the EU) governed by two Treaties – the Treaty on European Union (TEU)

[87] For an overview of this evolution see, inter alia, Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (OUP 2021) chapter 1.
[88] See Chapter 3, section 3.1. See also, Annex I, statements on 'Most-favoured-nation Clauses'.
[89] See Chapter 2, section 4.1.

and the Treaty on the Functioning of the European Union (TFEU). Importantly, EU external representation was centralised by merging the former Council and Commission delegations into 'EU only' delegations, integrated into the European External Action Service and under the coordination of the EU's High Representative for Foreign Affairs and Security Policy.[90] To the extent that these changes are relevant for the delivery of EU statements concerning the work of the ILC, they are examined in chapter 2. For ease of reading (and intelligibility), however, the text refers simply to the 'EU' throughout. Reference is made to the previous incarnations of the organization only where relevant for the purpose or context of the analysis. This is the case, for instance, of the analysis carried out in chapter 3, which refers both to 'EEC statements' delivered in the 1970s and 1980s and also to 'EU statements' delivered in the last decade on the overarching theme of the law of treaties.[91]

By now, the reader will also no doubt have noticed that the EU is often referred to as an international organization. Debates on the legal nature of the EU are long, and long-lasting. As noted by Palchetti, answers to the question 'what is the EU?' vary greatly depending on the proverbial vantage point or 'camp' in which one is situated:

> On the one side, there are those who place an emphasis on the fact that the EU came into existence as, and continues to be, an international organization based on international law. While recognizing that the competences and internal structure of the EU have no parallel substantially in any other international organization, they regard this difference as one of degree and not of nature. On the other side, there are the supporters of the *sui generis* status of the EU. They emphasize its special features and regard it as a new construct, something in between a traditional international organization and a federal state. If, for want of a

[90] Arts 220 and 221, Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 (26 October 2012) ('TFEU'); art 5, Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service OJ L 201 (3 August 2010). See generally, Piet Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in Andrea Biondi, Piet Eeckhout, and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 265, 285ff.

[91] See Chapter 3, sections 3 and 4, respectively.

> better definition, they accept to regard it as an international organization, they still insist that it is a *sui generis* organization.[92]

While the object of study here is the story told by the EU, this is a story told to a Sixth Committee audience, composed of states, non-state observers and international lawyers more generally, who tend to emphasise the international law origins or features of the EU.[93] Importantly, this engagement is one carried out in the language of international law and diplomacy, which is often distinct from the dialect in which EU lawyers converse. As demonstrated in this study, while the LS's classification of the EU in these statements follows the *sui generis* thesis advanced by the CJEU, EU lawyers also rely on the language and legal categories of international law to establish the relevance of EU practices for the ILC's work. To highlight the broader international (law) context in which these statements are made, this thesis refers to the EU as an international organization, with supranational and often unique features, but an international organization nevertheless.

Finally, in the organization of the different chapters a distinction is made between 'procedural' and 'substantive' topics of international law. This distinction is more of a practical rather than a dogmatic order. It results from this study's aspiration to completeness and the ensuing need to systematise the different topics examined in this research. Thus, chapters 3 and 4 fall within the first category. These chapters are devoted to the law of treaties and to international responsibility, respectively. The projects examined in chapter 3 codify rules on the adoption, operation, or termination of treaties. Those examined in chapter 4 codify 'secondary rules' on the legal consequences resulting from a failure to fulfil obligations established by 'primary rules', which define these obligations.[94] These two chapters therefore address 'procedural' or 'structural' rules related to, but distinct from, the rules and principles discussed in the projects examined in chapter 5. For instance, while the latter rules and principles are often included in treaties, the projects examined in chapters 3 and 4 refer to how treaties operate or to the consequences that arise

[92] Paolo Palchetti, 'Unique, Special, or Simply a Primus Inter Pares? The European Union in International Law' (2019) 29(4) European Journal of International Law 1409, 1413.
[93] Odermatt (n 18) 14. See also, Robert Schütze, *European Constitutional Law* (CUP 2012) 67-68.
[94] Eric David, 'Primary and Secondary Rules' in James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010) 27; James R. Crawford, *State Responsibility: The General Part* (CUP 2013) 38.

from their breach, not to the content of treaty obligations as such. By contrast, the projects discussed in chapter 5 define states and other actors' obligations in the treatment of aliens and of persons in the event of disasters, in the protection of the atmosphere, or in the prevention and punishment of crimes against humanity. They are fundamentally different from the projects examined in the two earlier chapters, not only in nature but also, as will be seen, in how they define the legal position of international organizations. This raises the question of whether the EU's statements addressing the different 'substantive' areas of international law examined in chapter 5 are fundamentally different from those addressing the 'procedural' topics examined in chapters 3 and 4. For this reason, EU statements on what we call here substantive areas of international llaw are analysed in a separate chapter. Ultimately, it is hoped that this distinction will be as useful to the reader as it was to the author in systematising, and contextualising, the EU's statements on these different topics.

## 6. Structure

Guided by the division between procedural and substantive topics of international law and the systematisation of EU statements into acts of confirmation and contestation of international law, the first two chapters of this thesis set out the analytical and institutional background for the story of these statements. The following three chapters (3 to 5) recount and examine it, while the last chapter takes stock of the story these statements have told.

Chapter 1 lays out the analytical framework and background of these statements. It proposes a reading of article 3(5) TEU which can help explain, contextualise, and render visible some of the LS's positions and argumentative choices. It argues that the EU's foreign policy objective to contribute to the strict observance and to the development of international law, of which these statements are a manifestation, can only be understood against the principles that govern the EU's interaction with this legal order, notably, the principle of autonomy. Rather than recounting the long narrative of EU autonomy, the chapter focuses on the explanatory power of this principle as a guiding thread to the story told in these EU statements. It first distinguishes between a positive and a negative dimension of EU external autonomy. The first dimension refers to the EU's ability to operate on the international plane in conditions of equality with other actors and to be recognised as an actor which transforms international law. The second refers to the EU's ability to control the effects of

international law on its own legal order and to determine which rules govern the relationship between its members. The chapter revisits how the CJEU has construed the rules of interaction between the EU and international law and then applies the Court's narrative to the EU's foreign policy objective to contribute to the development of international law. It argues that this EU objective, specifically, is a function of – and is conditioned by – the Court's narrative of EU autonomy. The LS's arguments concerning the development of international law and the role of EU practices in this process are framed by a need to preserve the EU legal system and to promote (externally) EU norms. Therefore, the EU's contribution to international law safeguards EU autonomy not only *from* international law but also *through* it. Ultimately, EU autonomy, in its positive and negative dimensions, frames the arguments of EU institutional actors on the international plane, including at Sixth Committee debates addressing the work of the ILC.

Chapter 2 explains the role of the ILC in the EU's pursuit of this foreign policy objective. It examines the rules and institutional practices originating both from the EU and the UN that govern the preparation and presentation of EU statements concerning ILC projects. This is a tale of not two but three cities: Geneva, Brussels, and New York.[95] This chapter travels between them. It begins in Geneva, explaining the mandate and working methods of the ILC and the different ways in which the practice of international organizations feeds into the ILC's work. It distinguishes between two levels of relevance of international organizations' participation in this process. The first of these levels concerns instances where ILC draft rules regulate the legal position of international organizations as subjects of international law. The second concerns the institutionalised processes by which international organizations participate in the ILC's work and how international organizations' practice is accounted for by the ILC. The focus then moves to Brussels, to describe how EU statements are drafted by the Commission LS and discussed with the legal advisers from EU member states and from other EU institutions at the COJUR. This section examines the factors that inform a decision to prepare and deliver an EU statement, and the institutional practices

[95] Alluding, for reasons of structure alone, to the title of Charles Dickens' well-known novel 'A Tale of Two Cities'. Charles Dickens, *A Tale of Two Cities* (Penguin Classics 2003). A similar use of this title can be found in Wouters and Hermez's poignant piece on the EU's participation at UNGA Sixth Committee debates. Wouters & Hermez (n 35).

that have formed in this context. The chapter ends in New York, where these statements are delivered, explaining the principles that govern the EU's presence in this space.

The remaining chapters provide an analysis of the EU's statements on the work of the ILC. They are organised around the aforementioned three thematic clusters: the law of treaties (chapter 3), the responsibility of international organizations (chapter 4), and different substantive areas of international law (chapter 5). Each chapter follows a similar structure. The reader is first introduced to the ILC projects analysed under the relevant chapter: the project's origins, scope, and the key debates held in its context. This introduction is followed by a discussion of the EU powers and practices relevant to understanding the Commission LS's decision to prepare an EU statement on these debates and the legal background of these statements. This includes a review of EU Treaty rules defining the Union's competence, EU acts adopted in exercise of these competences, and academic literature concerning the relevance of EU practices to the development of international law. The analysis of the statements themselves is structured around claims of confirmation and contestation – in other words, around specific illustrations of text where the LS agreed or disagreed with draft rules, conclusions or guidelines prepared by the ILC, and the arguments the LS advanced in this respect. Because stories feel more whole when told in full, each chapter concludes with a brief review of how these statements were received by the ILC membership. As noted above, rather than advancing a claim concerning the measure of EU influence on the formulation of ILC draft rules, these sections examine the degree to which the ILC relied on EU practices in these different projects, and how.

Chapter 3, the first of these three themes, is devoted to an analysis of the EU's statements on five ILC projects addressing different aspects of the law of treaties: the operation of MFN clauses, the rules governing treaties between states and international organizations or between international organizations (VCLT-IO), the effects of armed conflicts on treaties, subsequent agreements and subsequent practice in relation to the interpretation of treaties, and the provisional application of treaties. While fundamentally distinct, all these projects share a common origin in the 1969 Vienna Convention on the Law of Treaties, and they all address, to varying degrees, the position of international organizations as treaty parties. By reviewing the LS's position on these five

projects, this chapter draws from, and contributes to, existing scholarship which explores the effects of EU treaty-making practices on the development of international law. The chapter distinguishes between EU statements concerning projects carried out in the 1970s and 1980s (MFN and VCLT-IO) and statements on projects carried out in the last decade. In doing so, it revisits some of the key questions that animated these debates – such as whether intra-customs unions' benefits should be *ipso iure* exempted from MFN clauses, and the origins of international organizations' treaty-making capacity. It demonstrates how the EU's participation in these debates in the 1970s had an important function of familiarising an international audience with the organization's powers, and of defining EU external autonomy. Statements from the last decade, by contrast, have reflected a more ingrained self-perception of the EU as an actor that shapes international law through its treaty practices. Confirmation, more than contestation, now emerges as a defining feature of the EU's discourse.

Some of the foundational questions raised in ILC debates on the law of treaties are revisited in the ILC's articles on the responsibility of international organizations (ARIO), addressed in chapter 4. The European Commission's position on the ARIO has been extensively examined by legal scholarship.[96] Chapter 4, however, addresses both the Commission LS's contestation and its confirmation of the ILC's text. It demonstrates how through confirmation the LS projected an image of EU autonomy whereby the EU responds for its wrongs, in due measure of its powers. These statements centred mostly on foundational principles of international responsibility and on rules supported on EU practices – they present the EU as a reliable international partner. Contestation, in turn, focused on the claim that special rules govern the international responsibility of the EU and its member states, based on their internally agreed distribution of competences. This chapter revisits the arguments advanced by the LS in defence of competence-based attribution and draws parallels between these and the LS's rhetoric in earlier projects on the law of treaties. It argues that, much like in these earlier projects, the LS contested rules which, in its view, amounted to deterrents to integration or to interferences with the 'essential characteristics' of the EU legal order. The chapter also demonstrates how contestation extended beyond rules of

[96] See inter alia, Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013).

attribution to those on countermeasures and on defences under international law. It argues that, with respect to these rules, contestation reflects a balance between projecting EU autonomy and remaining attentive to EU member states' reservations about international organizations' rights under international law.

Chapter 5 departs from the previous chapters in two important ways. First, it discusses EU statements addressing ILC projects focused on substantive, rather than procedural, topics of international law. The rules advanced in these projects define mostly obligations addressed to states – international organizations are accounted for mostly as 'assisting actors' in the discharge of these obligations. Second, this chapter brings together EU statements on rules distributed across different EU policy areas. The statements analysed cover four topics studied by the ILC between 2009 and 2021: the expulsion of aliens, the protection of persons in the event of disasters, the prevention and punishment of crimes against humanity, and the protection of the atmosphere. As such, the analysis attests to growing EU integration and its external manifestation. It shows how the LS argued that the exercise of EU powers in each of these fields shapes not only the regional practice of EU member states but also that of third states. These statements, much like the narrative of the CJEU, reflect an understanding of the EU *acquis* as a more developed system of rules. They often establish an identity between the values, rules, and objectives of the EU legal system and those of the international legal order. The LS's rhetoric thus draws on the authority of international law to bolster the legitimacy of EU rules, by explicating the degree to which EU rules and actions are embedded in a larger multilateral legal landscape. The LS has nevertheless contested to ILC draft rules which divert from EU practices, or which draw inspiration from EU rules to progressively develop international norms beyond the EU's interests. Examples of this can be found in the EU's statements on the ILC draft articles on the expulsion of aliens, or on the ILC guidelines on the protection of the atmosphere. As such, these discursive acts of confirmation and contestation illustrate how the EU system of values and rules (de)limits the solutions that the LS finds acceptable as far as the development of international law in these different fields is concerned.

The last chapter brings together these different statements and takes stock of the story they have told concerning the EU's contribution to the development of international law. The chapter summarises the main findings

that emerge from these statements and outlines the features that make these statements unique. It submits that the EU's engagement with the ILC has broader implications for the understanding of the EU's relationship with international law, and for international legal thinking about the role that international organizations might play in the (trans)formation of this legal system.

# 1 | The Background Story
## EU autonomy from and through international law

### 1. Introduction

Autonomy is the proverbial 'evergreen' topic of the debates about the European Union (EU) and its legal order.[1] The idea that the EU amounts to an autonomous legal order which interacts with international law to the extent and pursuant to the conditions set by EU law itself, has formed part of this juridical community's imaginary since the Court of Justice of the European Union's (CJEU) landmark rulings in *Van Gend en Loos* and *Costa.*[2] This chapter does not recount the long narrative of EU autonomy. It focuses instead on the explanatory power of the legal construction of EU autonomy as a guiding thread within the story told by EU actors externally, when discussing the EU's contribution to the development of public international law.

This chapter argues that the EU's foreign policy objective of contributing to the strict observance and to the development of international law (found in article 3(5) of the Treaty on European Union) must be understood from the vantagepoint of the EU's own epistemic system, including the CJEU narrative of EU autonomy. The Court's reading of the rules of interaction between the EU and international law, as framed by the principle of autonomy, informs both the reading of EU foreign policy objectives and the social practices of EU institutional actors in their implementation. In other words, the Union's contribution to international law is a function of, and is conditioned by, the legal construction of EU autonomy – it is aimed at protecting EU autonomy not only *from* international law but also *through* it. The EU's contribution to the development of international law is, therefore, a 'milieu goal' through which the EU shapes the environment around it in line with its own values and interests.[3] Its 'contribution' is a self-interested one, not

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[1] Christina Eckes, 'The autonomy of the EU legal order' (2020) 4(1) Europe and the World: A law review 1, 2.

[2] Case C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

[3] Marise Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 69-70.

unlike that of most states.[4] It seeks to influence or shape international law in a manner which pre-empts conflict between the international legal order and the EU's own.

Unlike the Court's narrative, however, in the context of international organizations, the EU's claim that the Union contributes to the development of (public) international law is constrained by the rules and epistemic vantagepoint of this system. Importantly, this is a claim directed at a legal order which the EU perceives as ontologically distinct from (and external to) its own. As such, this claim includes a parallel claim for recognition of the EU as an actor which can effectively contribute to the development of this external legal system and presupposes that EU actors can make said claim in the language and legal categories of international law.

The chapter is structured as follows: section 2 provides a brief overview of the EU's foreign policy objectives – their legal value, and the relation between them – before focusing on the EU's objective to contribute to the strict observance and development of international law. Section 3 contextualises these objectives against the CJEU's understanding of the relationship between the EU and international law. It first provides a working definition of external autonomy. Here, it draws a distinction between a negative dimension of external autonomy, focused on the protection of EU rules, interests and values *from* international law, and a positive dimension, focused on the projection of these same rules, interests and values *through* international law. It then revisits the narrative of EU autonomy emerging from the Court's case law, as illustrative of the first of these dimensions. Section 4 applies this narrative to the EU's foreign policy objective to contribute to the development of international law. It argues that the concept of development of international law found in article 3(5) TEU, as a concept defined within the EU's own epistemic system, is predicated upon an understanding of the EU legal order as a more developed or advanced system of rules. This is demonstrated by reference to the Court's case law. The EU's contribution to international law, therefore, is part of a process of projection of EU rules, and of advancement of EU values and interests, which also protects EU law. In its positive sense, however, autonomy begets recognition of the EU as a relevant actor beyond the EU's own legal community. Section 5 therefore resorts to the concept of

[4] Jan Klabbers, *The European Union in International Law* (Pedone 2012) 91.

recognition to explain why the EU's understanding of its own autonomy is defended not only internally but also externally, notably in the context of international organizations; why it informs the discourse and social practices of EU actors beyond the CJEU. Section 6 offers some concluding remarks about how the EU's understanding of its own autonomy might both constrain and explain EU statements before international bodies dealing with the identification and development of public international law.

## 2. EU foreign policy objectives and the two dimensions of EU external autonomy

> In its relations with the wider world, the Union shall ... contribute to ... the strict observance and the development of international law, including respect for the principles of the United Nations Charter.[5]

The EU Treaties portray the Union as an 'enthusiastic' participant in the international global order.[6] The Treaties task the organization with the development of relations and partnerships both with third countries and with international, regional, and global organizations which share the Union's values.[7] The Union is endowed with external competences in fields as diverse as the environment, energy, and trade and development cooperation,[8] and with a (theoretically) broad foreign policy competence on 'all areas of foreign policy and all questions relating to the Union's security'.[9]

These competences are couched against a broad range of guiding principles and objectives. When exercising its external powers, specifically, the Union is 'guided by the principles which inspired its own creation, development, enlargement', including the promotion of democracy, the rule of law, human rights and respect for the Charter of the United Nations.[10]

[5] Art 3(5), Consolidated Version of the Treaty on European Union OJ C115/13 (9 May 2008) ('TEU').
[6] Joris Larik, 'Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law' (CLEER Working Papers 2011/5) 7.
[7] Art 21(1) TEU.
[8] Arts 194(1), 206 and 208, Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 (26 October 2012) ('TFEU').
[9] Art 24 TEU. See Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart 2019) chapter 3, 39-72.
[10] Art 21(1) TEU.

Articles 3(5) and 21(2) TEU, in particular, set out a rather lengthy list of objectives which the Union is to pursue on the international plane, thereby projecting the Union outwards, as an active global actor. These foreign policy objectives range from the promotion of EU values, interests, and the security of its citizens, to the eradication of poverty, the pursuit of peace and security, economic integration, sustainable environmental development, solidarity among peoples, and respect for international law.[11]

The precise legal value of these foreign policy objectives is debated. The vague, 'normative-idealistic'[12] character of the EU's ambition to operate as a global actor who can contribute to everything from the eradication of poverty to international peace has been likened to 'a wish list for a better world'[13]or the legal equivalent of 'motherhood and apple pie'.[14] The CJEU has at times emphasised the 'programmatic' nature of these aspirations.[15] Larik, however, has argued that EU foreign policy objectives are part of a phenomenon of 'dynamic internationalisation' of constitutional law common to most EU and non-EU member states, the EU being simply at the 'vanguard of a global trend'.[16] The substance and diversity of these objectives in the EU treaties attest to the EU's evolution from the classic paradigm of an international organization into 'something much larger, more complex and more ambitious'.[17] The breadth of EU foreign policy ambitions, in turn, can be seen as a consequence of the EU's very nature – more than sovereign states, the EU is a project 'in need of objectives'.[18]

[11] Arts 3(5) and 21 TEU.
[12] Stefan Oeter, 'Article 21: The Principles and Objectives of the Union's External Action' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A commentary* (Springer 2013) 866.
[13] Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP 2016) 3 (citing Wiebke Drescher, 'Ziele und Zuständigkeiten' in Andreas Marchetti and Claire Demesmay (eds), *Der Vertrag von Lissabon: Analyse und Bewertung* (Nomos 2010) 68).
[14] ibid, 3 (citing René Barents, *Het Verdrag van Lissabon: Achtergronden en Commentaar* (Kluwer 2008) 181).
[15] Case C-149/96 *Portugal v Council* [1999] ECLI:EU:C:1999:574, para 86. Advocate General Sharpston, for instance, has argued that the objectives listed in article 3(5) TEU 'cannot affect the scope of the common commercial policy laid down in article 207 TFEU'. Opinion of Advocate-General Sharspton in case *Opinion 2/15* [2016] ECLI:EU:C:2016:992, para 495.
[16] Larik (n 13) 123-124.
[17] Gráinne de Búrca, 'Europe's raison d'être' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014) 21.
[18] ibid., 29.

These objectives, as Larik argues, are similar to 'directive principles' of constitutional law.[19] They are legally binding 'promotional norms' which impose on the EU institutions – and, by virtue of member states' obligations of loyalty under the Treaties, on member states themselves[20] – an obligation to apply their best efforts in the continuous pursuit of a set of objectives oriented towards the promotion and consolidation of a 'European common good'.[21] Foreign policy objectives operate both as calls for action, limits to action, and 'legal points of reference' in decision-making.[22] While they are not independent grounds for the exercise of EU competence, they guide and inform the Union's external action and the judicial interpretation of EU rules and EU conduct by the CJEU.[23] Importantly, they also paint a picture of what the EU wants to accomplish 'in the wider world', of how it sees itself, and how it wants to be seen by its international partners.

Among this broad list of objectives is the EU's commitment to contribute to the strict observance of international law and to the consolidation of its principles. In its external relations, the Union is tasked with advancing respect 'in the wider world' for the principles of the UN Charter and international law (article 3(5) TEU) and with developing common polices and actions which effectively 'consolidate and support' these principles (article 21(2)(b) TEU). Importantly, article 21(1) TEU elevates the respect for the principles of international law and of the UN Charter to the status of founding principles of the Union. It creates a normative identity, a presumption of equivalence of sorts, between both systems – 'a linkage between the fundamental constitutional principles of the Union and the fundamental principles of the international community.'[24] Article 21(1)(b) has thus been evoked by the CJEU in the context of sanction cases where the Court recalled

[19] Larik (n 13) 126.
[20] Arts 4(3) and 24(3) TEU.
[21] Larik (n 13) 135.
[22] Oeter (n 12) 866; Rudolf Geiger, 'Article 3: Aims of the Union (ex-Article 2 TEU)' in Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur (eds), *European Union Treaties: A Commentary* (Hart 2015) 18.
[23] With respect to the foreign policy objectives listed in art 3(5) TEU, in particular, see Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in Paula García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022) (forthcoming) 6 <http://ramseswessel.eu/.cm4all/uproc.php/0/wessel159.pdf?cdp=a&_=17e828e4070>
[24] Oeter (n 12) 844.

the EU's commitment to 'support democracy, the rule of law, and human rights' when imposing restrictive measures.[25]

The express inclusion in the Treaties, at the time of their Lisbon amendment, of an EU commitment to 'strictly observe' international law can be interpreted as bolstering the EU's commitment to the rules and principles of this legal order. Legal scholarship reflecting on the Court's friendly or unfriendly disposition towards international law, in particular, has drawn attention to the fact that this legal basis requires a more rigorous engagement by the Court with international rules and principles. While Dunbar has argued that article 3(5) TEU has had a limited effect on the Court's predisposition towards international law,[26] Kassoti and Wessel contend that this legal basis has assisted the Court in 'mediating the tension between the need to preserve the autonomy of the EU's legal order and the need to facilitate the participation of the EU in the international scene as an effective global actor'.[27] They argue that article 3(5) TEU has allowed the Court to place a greater emphasis on the EU's commitment to international law and to advance a reading of EU autonomy which also allows the EU to be an active participant on the international scene.[28]

The few cases in which the Court itself has expressly referred to this provision indicate the Court's reliance on its wording to at least underscore the Union's commitment to the strict observance of international law. In *Air Transport of America and Others*, the Court interpreted this obligation as meaning that 'when it adopts an act, the [EU] is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union'.[29] In *Psagot*, the Court relied on article 3(5) TEU and the EU's observance of international humanitarian law to justify

[25] See inter alia, Case T-200/11 *Al Matri v Council* [2013] ECLI:EU:T:2013:275; Case T-133/12 *Ben Ali v Council* [2014] ECLI:EU:T:2014:176; Case T-190/12 *Tomana and Others v Council* [2015] ECLI:EU:T:2015:222.

[26] Rupert Dunbar, 'Article 3(5) TEU a decade on: Revisiting "strict observance of international law" in the text and context of other EU values' (2021) 28(4) Maastricht Journal of European and Comparative Law 479.

[27] Kassoti & Wessel (n 23) 12.

[28] ibid, 18.

[29] Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 101.

why products originating from Israeli settlements should indicate not only their place of origin but also their provenance from these territories.[30]

References to the Union's commitment to the 'development of international law', however, remain limited in the Court's case law.[31] It is submitted that this commitment must nevertheless be understood as part of the broader set of EU foreign policy objectives and, importantly, the CJEU's long-standing understanding of the rules that govern the interaction between the EU and international law.

In the pursuit of the Treaties' objectives, the Court has noted that EU institutions 'must secure the permanent harmonization made necessary by any conflicts between these objectives taken individually and, where necessary, allow any one of them temporary priority'.[32] In *Opinion 2/13*, specifically, the Court stressed that the objectives listed in article 3 TEU are part of a broader set of rules which, combined, contribute to greater EU integration, as the ultimate *raison d'être* of the Union:

> The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — *to the implementation of the process of integration that is the raison d'être of the EU itself*.[33]

This focus on integration and its preservation has shaped how the Court understands the interaction between the EU and international law and the autonomy of the EU, as a legal entity and a legal order.[34] It also conditions the

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[30] Case C-363/18 *Organisation juive européenne and Vignoble Psagot* [2019] ECLI:EU:C:2019:954, para 48.

[31] See Kassoti & Wessel (n 23) 19. See also, section 4.

[32] Case C-29/77 *Roquette Frères v France* [1977] ECLI:EU:C:1977:164, para 30 (concerning common commercial policy objectives).

[33] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, para 172 (emphasis added). See also, Case *Opinion 1/91* [1991] ECLI:EU:C:1991:490, para 17: 'the objective of all the Community treaties is to contribute together to making concrete progress towards European unity').

[34] This chapter, and those that follow, do not consistently distinguish between questions pertaining to the nature of the EU as a legal entity or the EU as a legal order, in so far as, with the exception of EU statements on the ARIO, this is not a distinction generally followed by the Commission LS. See, however, Jed Odermatt, *International Law and the European Union* (CUP 2020) 14ff. See also, chapter 4, section 4.2.

reading of EU foreign policy objectives, including the EU's commitment to contribute to the development of the international legal order.

The next section provides an overview of how the Court has conceptualised EU external autonomy – the EU's relationship with external actors and external legal orders. It first discusses the Court's definition of the 'essential characteristics' of the EU legal order and of its own jurisdictional monopoly as both a method of preserving these characteristics and a 'protected characteristic' in itself. It then to turns to how the Court has allowed international law to be integrated into the EU legal system, before examining how these considerations shape the reading of the EU's objective to contribute to the development of international law.

## 3. Protection: the EU Court's narrative of EU external autonomy

> The Community tends to project its *acquis* on the substantial level as well as on the institutional level; at the same time, the Community protects what it considers to be its fundamental *acquis*, constitutional principles and institutional autonomy.[35]

Autonomy is a recognised feature of international organizations.[36] As noted by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *Legality of Nuclear Weapons*, the constitutive instruments of international organizations are meant to 'create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals'.[37] As legal subjects with a personality distinct from their member states,[38] international organizations enjoy independence vis-à-vis their members (internal autonomy), and independence vis-à-vis external actors (external autonomy).[39]

[35] Loïc Azoulai, 'The Acquis of the European Union and International Organisations' (2005) 11(2) European Law Journal 196, 198.

[36] *See* Henry G. Schermers and Niels Blokker, *International Institutional Law* (6th edn, Brill Nijhoff 2011) 48.

[37] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Reports 66, 75.

[38] *Reparation for injuries incurred in the service of the United Nations*, Advisory Opinion [1949] ICJ Reports 174, 185. See James R. Crawford, *Brownlie's Principles of Public International LLaw* (9th edn, OUP 2019) 115.

[39] Jean d' Aspremont, 'The multifaceted concept of autonomy of international organizations and international legal discourse' in Richard Collins and Nigel D. White (eds), *International*

From an international law perspective, the different types of autonomy enjoyed by international organizations have been subject to distinct categorisations. For instance, distinctions have been made between an organization's institutional autonomy (the ability to freely decide on the distribution of competences between its institutions and its members), normative autonomy (the ability to govern itself by reference to its own system of rules), and jurisdictional autonomy (the ability to adjudicate freely on the content and scope of such rules).[40] All of these forms of autonomy can also be collapsed into a broader concept of institutional autonomy which includes 'the impermeability of the organization to external institutional interferences ... [as well as] the ability of the organization to behave as an independent member of the international community to which it belongs.'[41]

In EU legal discourse, a distinction is often made between the internal and external autonomy of the EU. Internal autonomy refers to 'autonomy from national law and the authority of national courts'.[42] It is a form of independence asserted by the organization vis-à-vis its own constituency.[43] At the EU level, this form of autonomy is often traced back to the EU Court's early landmark rulings in *Van Gend en Loos* and *Costa* and the development of the principles of primacy and direct effect of EU law.[44] In these early cases, the EU Court defined EU law 'in opposition to international law', to assert that the EU formed 'a new legal order of international law' or 'a legal order of its own'.[45] It did so to ensure that all member states would treat EU rules as part of the same legal substrate. In other words, the Court wanted to ensure that states accorded EU law monist precedence in their domestic legal systems and rendered it

*organizations and the idea of autonomy: institutional independence in the international legal order* (Routledge 2011).

[40] Christopher Vajda, 'Achmea and the Autonomy of the EU Legal Order Judgment at the European Court of Justice' Law' (TTIP Working Papers 2019/1) 10-11.

[41] d'Aspremont (n 39) 63-64.

[42] Eckes (n 1) 3.

[43] D'Aspremont (n 39) 63.

[44] Case C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66. On primacy, and more recently, see case C-430/21 ***RS*** [2022] ECLI:EU:C:2022:99.

[45] ibid. See generally, Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (OUP 2021) paras 23.010-23.011 and 23.031-23.035.

effective, instead of approaching this system of rules as a substrate of international law.[46]

This chapter, and those that follow, are, however, concerned with the *external* autonomy of the EU. They leave aside how the EU has asserted its autonomy internally, vis-à-vis its member states. They are instead concerned with how the EU conceptualises its relationship with external actors and with external legal orders. External autonomy is by nature relational and directed at the outside world.[47] It includes, in particular, both a negative dimension of *protection* of the EU legal order *from* international law, and a positive dimension of *projection* of the EU legal order *through* international law.[48]

The first of these dimensions involves a claim to self-govern. This claim relates to the EU's ability to hold a measure of control over the effects of international law on its own legal system and over the 'essential characteristics' of the EU legal order, which cannot be affected by external rules. This negative claim is akin to a claim to sovereignty.[49] It is a claim 'to ultimate authority over where the boundary between the inside and the outside lies and to ultimate authority, to final power of decision which defeats any claim of "external" encroachment, within that self-defined boundary'.[50] The EU Court's case law, as explained below, has been primarily focused on this dimension, on delimiting this boundary.

This dimension, however, is complementary to (and conditions) the second, positive dimension, of external autonomy. Much like sovereignty,

[46] Ramses A. Wessel and Joris Larik, *EU External Relations Law. Text, Cases and Materials* (Hart 2020) 148. cf Ramses A. Wessel 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Nijhoff 2011) 7.

[47] This is so even if its exercise is governed by internal rules defining the external competences of the organization and the relationship between these competences and those of its member states. This chapter does not address this internal dimension. The structural principles underlying this dimension– including the principle of conferral and the principle of loyalty and unity in EU external relations – are instead addressed in chapter 2, as applied to this study's research question. See chapter 2, section 4.2.

[48] The distinction between a positive and a negative dimension of EU external autonomy is one generally endorsed by legal scholarship. See inter alia, Christina Eckes, 'EU Autonomy: Jurisdictional Sovereignty by a Different Name?' (2020) 5(1) European Papers 319; Jed Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in Marise Cremona (ed) *Structural Principles in EU External Relations Law* (Hart 2018) 291.

[49] ibid (Eckes).

[50] Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2013) 22.

autonomy includes both a negative and a positive dimension.[51] This second dimension involves a claim to participation in, and transformation of, the international legal system. It refers to the EU's ability to partake in international affairs in conditions of equality with other actors, and to influence and shape international law in line with its own rules, interests, and values. This second dimension moves the claim from one of authority to delimit the boundary between 'the inside and the outside' to a claim to actively *change* the 'outside', what lays beyond the boundary.

By participating actively in international affairs and influencing international legal developments in line with EU rules, principles, values, and interests, the EU limits the possibility for conflict between EU law and international norms. In other words, by projecting its own rules and values, it simultaneously protects the integrity of its own legal system. The EU's ability to project these same rules, in turn, depends in part on its ability to retain a measure of control over external interferences. This ability to project depends, for instance, on the EU's ability to decide how external rules may affect the distribution of powers or responsibilities between itself and its member states.

The EU Court's case law has been predicated on this understanding. While autonomy is a shared property of international organizations, the EU's understanding of its own autonomy, developed by its Court and an 'invisible college' of EU lawyers,[52] is closer to a claim to sovereignty, and is distinct, in degree and in nature, from the autonomy espoused by most organizations.[53] What distinguishes the EU from other international organizations is a combination of the degree to which powers have been permanently transferred to the organization, and the 'original' conception of the EU legal order as emanating from 'an independent source' of law,[54] with the importance accorded

[51] Eckes (n 48) 328-329.

[52] A term coined by Schachter regarding international lawyers and later used in Vauchez's work on 'Euro-lawyers'. Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72(2) Northwestern University Law Review 217; Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP 2015).

[53] Schermers & Blokker (n 36) 753; Christina Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (OUP 2019) 5 (arguing that 'the EU's autonomy is one of the features that distinguishes it from international organizations.').

[54] Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66; Case C-741/19 *Komstroy* [2021] ECLI:EU:C:2021:655, para 43.

to law in the process of EU integration,[55] and the powers vested on the CJEU to protect and further this very integration process.[56] In the EU legal discourse, autonomy assumes an existential and near-ideological quality. Autonomy is not just functional – rather, it is articulated through the language of sovereignty in the Court's case law and in the political discourse of the European Commission.[57] Scholars have therefore drawn parallels between EU autonomy and state sovereignty, referring to concepts such as 'post-sovereignty' or 'late sovereignty' to describe the claims articulated by EU actors.[58]

These parallels become particularly salient whenever the EU asserts (and defines) its autonomy in relation to, and in the presence of, international actors. In an international setting, where the EU interacts with states and other international organizations, the EU's ability to operate on conditions of equality with these actors depends on its ability to make a claim to sovereignty. As the EU cannot make a valid claim to sovereignty in international law, it instead makes a claim to sovereign-like autonomy.[59]

The following sections provide a brief overview of the CJEU's narrative of EU external autonomy. Having long profiled itself as a gatekeeper of the EU's interests, the Court's narrative has arguably mostly centred on the negative dimension of EU external autonomy;[60] that is, on delimiting 'the inside and the outside' and protecting the former from the latter. While it would be incorrect to discard the Court's willingness to interact with international law – with some authors noting that the CJEU is often more open to international law than most domestic courts[61] – perhaps as the result of the growing

[55] Loïc Azoulai, '"Integration through law" and us' (2016) 14(2) International Journal of Constitutional Law 449; Capelletti Mauro, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law: Europe and the American Federal Experience. Vol. 1: Methods, Tools and Institutions* (De Gruyter 1986).

[56] Joseph H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) 26(4) Comparative Political Studies 510.

[57] Walker (n 50) 12: 'a deep presumption of sovereignty is implicit in the broader constitutional logic espoused by the ECJ and endorsed by the other European institutions.' See also, European Commission, President Jean-Claude Juncker, 'State of the Union Address 2018. The Hour of European Sovereignty', (12 September 2018) <https://ec.europa.eu/commission/news/state-union-2018- hour-european-sovereignty-2018-sep-12_en>.

[58] ibid (Walker); Neil MacCormick, 'Beyond the Sovereign State' (2003) 56 Modern Law Review 1.

[59] Eckes (n 1).

[60] Klabbers (n 4) 129; Odermatt (48) 19.

[61] Enzo Cannizzaro, 'Neo-monism of the European Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union*

ramifications of EU activities with international law, the Court has consistently developed a body of case law which privileges the protection of the primacy and autonomy of the EU legal order.

This protection has been ensured by the Court through a two-pronged strategy: by conceptually distinguishing the legal nature of EU law from international law and identifying the 'essential' characteristics of the EU legal system the integrity of which cannot be undermined by its exposure to international law; and by managing the effects of international law on the EU legal order. The next sections provide an overview of this strategy, by reference to examples from the Court's case law.

### 3.1. The essential characteristics of the EU legal order

The rulings in *Van Gend en Loos* and *Costa* early on foreshadowed the EU Court's ambition to define clear boundaries between the EU legal order and international law; or, to delimit the relationship rules between these two seemingly distinct legal systems. In doing so, the CJEU has consistently dispelled the idea that the EU Treaties are but the constitutive instruments of an international organization, akin to 'ordinary international treaties'.[62] In the discourse of the EU legal community, the EU Treaties form a 'constitutional charter', the principles and 'essential characteristics' of which must be safeguarded much like states safeguard and uphold their own constitutions.[63] Pursuant to this narrative, the EU 'possesses a constitutional framework that is unique to it' and 'has a new kind of legal order, the nature of which is peculiar to the EU'.[64]

This legal conceptualisation of the EU Treaties has allowed the Court to divorce their operation from rules of public international law; to 'protect the Community legal order from interpretations unwarranted by looser integration'

(Martinus Nijhoff 2011) 35, 57. Kassoti and Wessel have also drawn attention to the Court's (implicit) reliance on article 3(5) TEU 'to construe autonomy more narrowly and thus, to allow the EU to participate effectively in the international scene'. Kassoti & Wessel (n 23) 18.

[62] Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

[63] Case C-294/83 *Les Verts* [1986] ECLI:EU:C:1986:166, para 23; Case *Opinion 1/91* [1991] ECLI:EU:C:1991:490, 21.

[64] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, para 158; Case *Opinion 1/17* [2019] ECLI:EU:C:2019:341, para 110.

pursued by other international legal regimes.[65] Thus, while the Court has relied on rules of public international law on treaty interpretation when interpreting the EU Treaties, it has favoured an integrationist approach focused on 'the object and purpose' of EU rules rather than on the 'ordinary meaning' of its terms.[66] Its primary interest has been the preservation of the EU's autonomy and of the process of EU integration.

The concept of 'essential characteristics' has been central to this process.[67] These characteristics correspond to evolving specificities of the EU system whose integrity cannot be affected by international law. They have been defined in the Court's case law as including (i) the protection of norms which form part of the 'very foundations' of the EU legal system, including those setting EU standards for fundamental rights protection, and (ii) the allocation of responsibilities and powers fixed by the Treaties, including the preservation of the Court's jurisdictional monopoly, as both a method to preserve these characteristics and an 'essential characteristic' in itself.[68] These characteristics are features of the EU's very integration project, as a 'process of creating an ever-closer union among the peoples of Europe'.[69]

With respect to norms which form part of the 'very foundations' of the EU legal system, the Court has evoked these in order to set substantive or 'principled' limits to international law's interference with the EU legal order. The most striking rulings to this effect still remain those concerning the well-

[65] Pieter-Jan Kuijper, '"It Shall Contribute to ... the Strict Observance and Development of International Law..." The Role of the Court of Justice' in Allan Rosas, Egils Levits, and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law -La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013) 589, 596; Cannizzaro (n 61) 35, 57.
[66] Art 31, 1969 Vienna Convention on the Law of Treaties 1980 UNTS 33; Gunnar Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) 35(1) Yearbook of European Law 484; Jed Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 Cambridge Yearbook of European Legal Studies 121, 122.
[67] See Cristina Contartese, 'The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) 54 Common Market Law Review 1627.
[68] See Francisco de Abreu Duarte, '"But the Last Word Is Ours": The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System' (2019) 30(4) EJIL 1187.
[69] Art 1(2) TEU. See also Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, para 167.

known *Kadi* saga, addressing the relationship between the EU and UN law.[70] This string of cases emerged from a challenge to the legality of EU acts transposing to the EU legal order targeted sanctions adopted by the UN Security Council (UNSC) against individuals allegedly linked to the terrorist activities of Al-Qaeda. In addressing the relationship between EU and UNSC acts, the Court noted, first, that '[t]he Community must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law'.[71] This reading is in line with the EU's obligation to 'strictly observe' international law which is now codified in article 3(5) TEU. Having said this, the Court stressed that the principle of effective judicial protection (the breach of which formed the core of the applicant's claim) was 'a general principle of [EU] law stemming from the constitutional traditions common to the [EU] Member States' and a 'constitutional principle of the EC Treaty' which could not be affected by obligations undertaken under an international agreement, including the UN Charter.[72] The Court transformed the question from one of validity of an act external to the EU legal system (a UNSCC resolution) into one of compatibility of an EU act (a regulation) with EU law (including its system of fundamental rights protection). In doing so, the Court both confirmed its jurisdiction to entertain the dispute and distanced itself from international law, confirming the autonomy of the EU legal system. The primacy accorded to UN obligations was therefore removed from the Court's reasoning.[73] Reversing the General Court's analysis, and avoiding a direct clash with international law, the CJEU's reasoning addressed the EU institutions' conduct in light of the rules on effective judicial protection agreed within the EU system alone.

The *Kadi* 'saga' has considerable implications for the reading of EU foreign policy objectives and obligations. Pursuant to the Court's narrative, the Union's obligation to respect international law cannot be understood, from an EU perspective, in a manner which calls into question a constitutional principle

[70] See Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' 67(4) SMU Law Review 707.
[71] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461 ('Kadi I'), para 291.
[72] ibid, paras 285 and 335.
[73] See arts 48(2) and 103 Charter of the United Nations, 24 October 1945, 1 UNTS XVI ('UN Charter').

essential to 'the very foundations' of the EU legal order, as an autonomous system of law. The EU's respect for the principles of international law and the UN Charter (listed in article 21(1)TEU as 'principles which have inspired [the EU's] own creation, development and enlargement, and which [the EU] seeks to advance in the wider world') must not affect the preservation of the essential characteristics of the EU legal system, including the system of fundamental rights established therein. This separation between EU and international law has remained a permanent feature of the Court's case law. In *Opinion 1/19*, rendered in October 2021 with respect to the Istanbul Convention, the Court again distinguished between the review of the conduct of EU institutions in light of the Union's own legal system and the assessment of this same conduct under rules of public international law.[74]

In safeguarding the integrity and autonomous nature of the EU legal order, the EU Court has been particularly cautious about opening up the interpretation of EU law to bodies external to the EU legal system. While it has posited that subjecting EU law to the appreciation of dispute settlement bodies established pursuant to a treaty binding on the EU is not *prima facie* precluded by the nature of EU law,[75] the Court's case law has focused on limiting rather than enabling this 'surrender'. In this process, the CJEU has transformed its jurisdictional monopoly over the 'definite interpretation' of EU law from a method of control over EU autonomy into a fundamental premise of European integration. In other words, the Court has elevated its own jurisdiction into an essential characteristic of this autonomous system.

In *Opinion 1/91*, concerning the compatibility of the draft agreement establishing the European Economic Area (EEA) – comprising the EU member states, Iceland, Liechtenstein and Norway – with EU law, the Court rejected the agreement on the basis that allowing the EEA Court to interpret the concept of 'Contracting Parties' might effectively allow it to pass judgment over whether the EU or its member states held competence over the subject-matter of the dispute. This was, in the Court's words, 'likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the

[74] Case *Opinion 1/19* [2021] ECLI:EU:C:2021:198, para 222.
[75] ibid, para 40; Case *Opinion 1/17* [2019] ECLI:EU:C:2019:341, paras 106, 115.

autonomy of the Community legal order, respect for which must be assured by the Court of Justice'.[76]

A similar emphasis on jurisdiction as a method of protecting and preserving the autonomy of EU law marked the Court's reasoning in *MOX Plant*.[77] Here, the Court concluded that EU member states would breach their duty of loyalty to the Union if they submitted a dispute covering issues already regulated under EU law to the jurisdiction of an arbitral tribunal established under the United Nations Convention on the Law of the Sea (UNCLOS). This would entail 'a *risk* that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member states pursuant to Community law'.[78] The Court noted, in particular, that 'an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system'.[79]

Just a few years later, the Court likewise rejected a draft agreement on a European and Community Patents Court on the basis that it might affect the preliminary ruling procedure established under article 267 TFEU and thus sever the dialogue between the CJEU and national courts. In the Court's view, this would affect 'the preservation of the very nature of the law established by the Treaties'.[80] The Court confirmed this position in *Achmea*, extending this reasoning to arbitral tribunals established under bilateral investment treaties between EU member states, on the basis that article 344 TFEU prohibits the transfer of questions of international law to bodies outside the EU judicial system.[81] In *Komstroy*, the same logic was applied to the arbitral clause of the Energy Charter Treaty.[82]

Perhaps the strongest confirmation yet of the Court's protection of the EU legal order against external adjudication, however, remains its rejection of the draft agreement on the EU's accession to the European Convention on

[76] Case *Opinion 1/91* [1991] ECLI:EU:C:1991:490, para 35.
[77] Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345.
[78] ibid, para 177 (emphasis added).
[79] ibid, para 123. See also, ibid, paras 122 and 177.
[80] Case *Opinion 1/09* [2011] ECLI:EU:C:2011:123, para 85.
[81] Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158, paras 37 and 58.
[82] Case C-741/19 *Komstroy* [2021] ECLI:EU:C:2021:655, paras 40-66. See Jed Odermatt, 'Is EU Law International? Case C-741/19 Republic of Moldova v Komstroy LLC and the Autonomy of the EU Legal Order' (2021) 6(3) European Papers 1255. See also, Case C-109/20 *PL Holdings* [2021] ECLI:EU:C:2021:875.

Human Rights (ECHR). This ruling galvanized considerable contestation, in light of its implications for the EU's system of human rights protection and the EU's own Treaty obligation to accede to the ECHR.[83] In the much-debated *Opinion 2/13*, the EU Court rejected the draft agreement for EU accession to the ECHR on the basis that the possibility that the European Court of Human Rights might 'assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions' would ultimately be 'liable to interfere' with the autonomy of the EU legal system, including the Court's monopoly over the definite interpretation of EU law.[84] From the Court's perspective, this would be contrary to EU law itself, whose 'very nature ... requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law'.[85]

The Court's 2019 conclusion in favour of the compatibility of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) with EU law may have reversed this trend but did not change the fundamental premises underlying the Court's reasoning. In *Opinion 1/17*, the Court concluded that the interpretation of EU law by the Investment Court System (ICS) established under the CETA would not compromise the integrity of EU law.[86] In doing so, the Court substantiated its reasoning on the fact that the ICS would not, inter alia, rule on EU law as such but instead refer to it 'as a matter of fact'.[87] While this distinction has been subject to extensive debate and not light criticism, namely when contrasted with the frustration of ECHR accession, it is still grounded on similar premises: the Court's fears that EU law might be unconditionally surrendered to the interpretation of bodies external to the EU judicial system.

[83] Art 6(2) TEU. For an overview of the criticism waged against Opinion 1/13, as well as a defense of the premises underlying the Court's reasoning see Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105.
[84] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, paras 224-225.
[85] ibid, paras 193 and 212.
[86] Case *Opinion 1/17* [2019] ECLI:EU:C:2019:341; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11 (14 January 2017), section F ('Resolution of investment disputes between investors and states').
[87] ibid, para 131.

Critically reflecting on the EU Court's overall construction of its jurisdictional monopoly, and EU autonomy more generally, some scholars have noted that the degree to which the Court has protected EU law from external adjudication effectively hampers the EU's ability to be an active participant in external relations.[88] The Court's approach has been seen as symptomatic of a broader animosity towards international law.[89] While established case law has long held that when exercising its powers, the Union is bound 'to observe international law in its entirety, including not only the rules and principles of general and customary international law, but also the provisions of international conventions that are binding on it',[90] the Court's reasoning also reflects a tension (or delicate balance) between the EU's commitment to actively participate in and shape the international legal order, and the Court's fears about opening up the EU system to international law. As noted by Cremona, Thies and Wessel:

> There is a tension between the principles invoked by the Court to support its approach to EU participation in [international dispute settlement] — including the autonomy of the EU legal order — and other principles which underpin the EU's external action, including effectiveness, openness to international law, and the EU's commitment to, and role within, the international legal order.[91]

Even scholars who consider the Court's disposition towards international law to be 'friendlier' than that espoused by most domestic courts, note that the Court's openness to this external legal system is predicated upon a need to safeguard the uniform interpretation and application of international

[88] Odermatt (n 48) 234; Marja-Liisa Öberg, 'Autonomy of the EU Legal Order: A Concept in Need of Revision?' (2020) 26(3) European Public Law 705.

[89] Bruno de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Marise Cremona and Anne Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014) 33; Jan Klabbers, 'The Validity of EU Norms Conflicting with International Obligations' in Enzo Cannizzaro, Paolo Palchetti, Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 112; Jan Klabbers, 'Völkerrechtsfreundlich? International Law and the Union Legal Order' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Aspects* (Edward Elgar 2011) 95.

[90] See inter alia, Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para 47 and cases cited therein.

[91] Marise Cremona, Anne Thies, Ramses A. Wessel, 'The European Union and International Dispute Settlement: Introduction' in Marise Cremona, Anne Thies, Ramses A. Wessel (eds), *The European Union and International Dispute Settlement* (Hart 2017) 4.

rules throughout the EU.[92] This openness is conditioned by, and predicated on, the Court retaining control over the effects of international law on the autonomous nature of the EU legal order.[93] As examined in the next section, by integrating international rules into the EU legal order or by reviewing EU acts in light of international norms, the CJEU also controls the ability of these rules to change the substance of EU law.

### 3.2. International law in the EU legal order

The Court's settled case law indicates that the EU legal order is permeable to international law where EU law allows for it, and in the manner and to the extent it does so. As noted by Advocate-General Maduro:

> ... although the [CJEU] takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[94]

The Court has, in particular, set forth a number of conditions for individuals to be able to rely on rules external to the EU legal system when challenging the validity of EU acts. As Kuijper notes, the Court's attitude in this respect 'has been liberal in principle, but sometimes restrictive in practice'.[95]

With respect to international agreements, the Court has established that, if certain conditions are verified, these may be invoked to challenge the validity of secondary EU law; that is, of acts adopted on the basis of the EU Treaties. Notably, the agreement must be binding on the Union, and its 'nature and broad logic' must be such that one can reasonably infer that it was intended to create justiciable rights and obligations, while the rules contained therein must

[92] Kuijper (n 65) 592-594.
[93] de Abreu Duarte (n 68).
[94] Opinion of Advocate General Poiares Maduro in case C-402/05 P *Kadi v Council and Commission* ECLI:EU:C:2008:11, para 24.
[95] Kuijper (n 65) 610.

include 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of subsequent measures'.[96] On the basis of this test, the Court has rejected the direct effect of the General Agreement on Tariffs and Trades (GATT/WTO) in well-known cases such as *International Fruit Company and Others*.[97] The Court has likewise rejected the direct effect of the UNCLOS, in *Intertanko*.[98] This means that individuals cannot derive either rights or obligations from these rules, and that EU acts cannot therefore be challenged on their basis.[99] The Court has nevertheless been more open to recognising the direct effect of rules contained in EU bilateral agreements, such as association or partnership and cooperation agreements concluded by the EU with third states.[100] This 'friendliness' towards international law has been ascribed by some authors to the fact that these rules 'are largely EU law in their substance', and thus seldom disturbs the fabric of EU law.[101]

With regard to rules of customary international law, the Court has at times relied on these when interpreting EU law or when assessing the validity of EU acts, including international agreements concluded by the Union.[102] Most notably, in *Poulsen*, a case concerning the application of EU rules on the conservation of fishery resources to third-country vessels, the Court relied on rules of customary international maritime law when interpreting relevant EU legislation and competences – the Court made it clear that the EU's obligation to respect international law extended to customary international law.[103] This

[96] Case C-12/86 *Demirel* [1987] ECLI:EU:C:1987:400, para 14; Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 55.

[97] Joined Cases 21 to 25/72 *International Fruit Company and Others* [1972] EU:C:1972:115, paras 19–27. See Ernst-Ulrich Petersmann, 'Why Do the EU and Its Court of Justice Fail to Protect "Strict Observance of International Law" (Article 3(5) TEU) in the World Trading System and in Other Areas of Multilevel Governance of International Public Goods?' in Christoph Herrmann, Bruno Simma and Rudolf Streinz (eds) Tr*ade policy between law, diplomacy and scholarship: Liber amicorum in memoriam Horst G. Krenzler* (Springer 2015) 145.

[98] Case C-308/06 *Intertanko and Others* [2008] ECLI:EU:C:2008:312, paras 54-65.

[99] Lenaerts, Van Nuffel & Corthaut (n 45) paras 23.031-23.035.

[100] See inter alia, Case C-17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* [1982] ECLI:EU:C:1982:129, para 27.

[101] Klabbers (n 4) 89 and 90.

[102] See Jan Wouters and Dries Van Eeckhoutte, 'Giving Effect to Customary International law Through European Community Law' (KU Leuven Institute for International Law Working Paper No 25, 2002) <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf>

[103] Case C-286/90 *Poulsen* [1992] ECLI:EU:C:1992:453, paras 9-10.

extension, however, is set against a high threshold. On the grounds that 'a principle of customary international law does not have the same degree of precision as provisions of an international agreement', the CJEU has allowed rules of customary international law to be a standard for the review of the legality of an EU act where it is established that there was a 'manifest error of assessment' of the relevant rule by EU institutions.[104] Thus, in *Racke*, the Court concluded that the Council of the EU had not manifestly erred in its assessment of the conditions for unliteral termination of a cooperation agreement concluded between the European Economic Community (EEC) and the Socialist Federal Republic of Yugoslavia (SFRY).[105] The agreement was terminated on account of the outbreak of hostilities in the former Yugoslavia, which the Council considered to amount to 'a radical change in circumstances' affecting the viability of trade relations between the parties.[106] In the Court's view, the Council's justification for unliteral termination did not manifestly misconstrue this customary law exception to the principle of *pacta sunt servanda*:

> it does not appear that, by holding ... that "the pursuit of hostilities and their consequences on economic and trade relations, both between the Republics of Yugoslavia and with the Community, constitute a radical change in the conditions under which the Cooperation Agreement between the [EEC] and the Socialist Federal Republic of Yugoslavia and its Protocols ... were concluded" and that "they call into question the application of such Agreements and Protocols", the Council made a manifest error of assessment.[107]

Overall, the Court's approach to international law has been summarised as one whereby 'in order for an international agreement (or a principle of customary international law) to form part of EU law, it must not call into question the constitutional structure and values on which the EU is founded.'[108] This approach explains the Court's ambivalence towards international law.

[104] See inter alia, Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 110.
[105] Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, paras 52 and 57.
[106] Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia OJ L 315 (15 November 1991) (no longer in force).
[107] ibid, para 56.
[108] Lenaerts (n 70).

While the respect for international law and the principles of the UN Charter will be *prima facie* safeguarded within the EU system and in the context of EU external relations and foreign policy (as 'founding principles' of the EU legal order itself), this measure of respect or compliance is conditional. 'Strict observance' of international law is a nuanced obligation which requires a measure of compromise and coordination.[109]

The Court has been unwilling to accord international rules full force within the EU legal order, or to surrender the interpretation of EU law to external bodies, where it anticipates the risk, however remote, that EU autonomy may be called into question. The preservation of EU autonomy thus remains the main driving rationale behind the manner in which the Court understands the effects that international law may have on the EU legal order, and the Union's obligations vis-à-vis international law. Klabbers, in particular, has drawn attention to the hold that autonomy has on the judicial definition of the relationship between the EU and international law:

> the EU has always been highly ambivalent towards international law and has carved out an ethos to justify this: what matters – and has always mattered – is the protection of the integrity of the EU legal order and the autonomy of EU law.[110]

It is submitted that this understanding also informs the reading of EU foreign policy objectives. The next section therefore turns specifically to the EU's obligation to contribute to the development of international law, arguing that the Court's primary focus on the protection of EU autonomy supports a reading of this EU foreign policy objective as one whose outer limits are also framed by this principle.

## 4. Projection: the EU and the development of international law

> The EU is committed to a global order based on international law, which ensures human rights, sustainable development and lasting access to the

[109] Violeta Moreno-Lax, 'Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 295, 340-341.

[110] Jan Klabbers, 'Straddling the Fence. The EU and International Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Law* (OUP 2014) 52, 55.

> global commons. This commitment translates into an aspiration to transform rather than to simply preserve the existing system.[111]

The EU's foreign policy objective to contribute to the development of international law was inherited from the draft Constitutional Treaty and the EU's political discourse which emerged well in advance of Lisbon.[112] The rhetoric of the EU institutions often refers to the EU as an emerging global rule maker with an ambition to 'transform rather than to simply preserve the existing [international] system',[113] to 'shape the global future' and to defend and extend international norms.[114] This rhetoric reflects the idea that the EU, as an international actor, is committed not only to abiding by and strengthening the rules of the game, but that it is also legitimately capable of transforming and advancing these same rules. This ambition is reflected in a legal command: article 3(5) TEU imposes on the EU an obligation to orient its international action towards the development of international law. Unlike other foreign policy objectives inscribed into the EU treaties, this overt ambition to contribute to the development of international law, while not absent from the constitutive instruments of other international organizations, is far from common within the constitutions of EU member states.[115]

The ways in which the EU influences, shapes or contributes to international law have been interpreted by political scientists as a combined process of direct and indirect, intended and unintended consequences or 'externalities' of EU actions and policies. In their assessment of the external effects of EU immigration policies, for instance, Lavenex and Uçarer speak of

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[111] European External Action Service, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016) ('EUGS 2016') 10 <https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf>

[112] See arts I-3(4) and III-292, Treaty Establishing a Constitution for Europe OJ C310 (16 December 2004); Council of the European Union, 'European Security Strategy' 15895/03-PESC 787 (8 December 2003) 11 <https://data.consilium.europa.eu/doc/document/ST-15895-2003-INIT/en/pdf>

[113] EUGS 2016, 10. See also, European Commission, 'The External Dimension of the Single Market Review. Commission Staff Working Document Accompanying the Communication on a Single Market for the 21st Century' SEC (2007)1519 final (20 November 2007).

[114] European Council, 'A New Strategic Agenda 2019–2024', 6 <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf>; Council of the European Union, '2009 Annual Report from the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament on the main aspects and basic choices of the CFSP' (June 2010) 25 <https://data.europa.eu/doi/10.2860/3093>

[115] Larik (n 13) 100-103 and 123-124.

a continuum that runs from fully voluntary to more constrained forms of adaptation, and includes a variety of modes such as unilateral emulation, adaptation by externality, and policy transfer through conditionality.[116] A growing body of legal scholarship has likewise begun to look at the different ways in which the EU contributes to the formation or development of international rules in fields as diverse as migration, trade, the environment, state recognition, jurisdiction and standing, and the larger collective system of international peace and security.[117] Nevill and Wessel approach the matter by examining whether international courts and tribunals refer to EU law and practices, and whether these may thus be seen as subsidiary sources of international law.[118] Odermatt speaks of 'active engagement' (reserved for situations in which the EU consciously and intentionally 'exports its own regulatory system or its own "values" to the international level') and of 'indirect shaping', where the international order adapts to the EU's behaviour.[119] Similarly, Kochenov and Amtenbrink distinguish between the EU's passive and active roles in 'the formation of international law', noting that the very existence of a supranational organization like the EU can as such be seen as a development of international (institutional) law.[120]

[116] Sandra Lavenex and Emek M Uçarer, 'The External Dimension of Europeanization: The Case of Immigration Policies' (2004) 39 Cooperation and Conflict 417, 420-421.

[117] See inter alia, Jochen A. Frowein, 'The Contribution of the European Union to Public International Law' in Petros C. Mavroidis, Yves Mény, Armin Von Bogdandy (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International 2002) 171; Frank Hoffmeister, 'The Contribution of EU Practice under International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008); Inge Govaere and Sacha Garben (eds), *The Interface Between EU and International Law. Contemporary Reflections* (Hart 2019); Dimitris Kochenov and Fabien Amtenbrink (eds) *The European Union's Shaping of the International Legal Order* (CUP 2014); Támas Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar 2021). See also, Esa Paasivirta, 'Four Contributions of the European Union to the Law of the Sea' in Jenő Czuczai and Frederik Naert (eds), *The EU as a Global Actor - Bridging Legal Theory and Practice. Liber Amicorum in honour of Ricardo Gosalbo Bono* (Brill | Nijhoff 2017) 241.

[118] Penelope Nevill, 'The European Union as a Source of Public International Law Part IV: Developments in European Law' (2013) Hungarian Yearbook of International Law and European Law 281; Ramses A. Wessel, 'The Meso Level: Means of Interaction between EU and International Law - Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35 Yearbook of European Law 533.

[119] Odermatt (n 34) 6.

[120] Dimitris Kochenov and Fabien Amtenbrink, 'Introduction: the active paradigm of the study of the EU's pace in the world' in Dimitris Kochenov and Fabien Amtenbrink (eds) *The European Union's Shaping of the International Legal Order* (CUP 2014) 2. See also Marc

Yet, one would be hard pressed to pinpoint what the *development* of international law might be. Instinctively, development implies advancement, betterment, and progress: this idea seems to permeate international legal discourse. When discussing the discursive function of the notion of progress in international law, Skouteris notes that 'the language of progress is also a language of authority, to legitimize and de-legitimize'.[121] Invoking or evoking progress, advancement or development is a common and perfectly acceptable rhetorical move – it sets aside competing claims about what is just or unjust.

Importantly, progress, advancement, or development, are concepts that are defined within a specific epistemic system. They presuppose the existence of a commonly shared set of values, principles and objectives that guide this sense of development. Within the EU system, the relevant values are those defined in article 2 TEU, namely: the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights. In the Court's view, these are the values that 'define the very identity of the European Union as a common legal order'.[122] Thus, while article 21(1) TEU dictates that the Union's external action is to be 'guided by the principles which have inspired its own creation, development and enlargement', including the 'respect for the principles of the United Nations Charter and international law', it is the Union's own internal values and interests that the Union safeguards and promotes abroad.

Article 21(2)(a) TEU, in particular, tasks the Union with pursuing common polices and actions which safeguard these values and interests as well as the Union's 'security, independence and integrity'. In unpacking this objective, it is important to note that EU values and interests are interdependent concepts. EU interests are 'construed in a discursive process' proper to the dynamic nature of foreign policy itself; they may evolve over time but they do not go against EU values.[123] The concepts of 'independence' and 'integrity', in turn, are often associated with the ontology of statehood in public international law.[124] Applied to the EU, independence and integrity seem best

Weller, 'The Struggle for an International Constitutional Order' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009).

[121] Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 5.

[122] Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98, para 145.

[123] Cremona (n 3) 68.

[124] Oeter (n 12) 853-854.

understood as part of a broader commitment to safeguarding the autonomy of the Union's institutional and legal system. They express an obligation that binds the EU and its member states to pursuing external policies which do not undermine EU autonomy and the integrity of EU law, in line with the Court's case law discussed in the previous section. Read in this way, article 21(1)(a) TEU creates for the Union and its member states an obligation of best efforts to actively pursue policies which defend EU values, interests, and autonomy not only *from* international law but also *through* it. By actively participating in international organizations and making use of international instruments to achieve its goals, the EU both exercises and protects this autonomy.

This reading is supported by the way in which the Court has justified the expansion of EU external competences. The CJEU's application of the doctrine of implied powers to EU external competences, in particular, was justified by the need to protect the autonomy and integrity of the EU legal system.[125] In *ERTA*, the Court found not only that the EU had the power to conclude international agreements on matters of transport in lieu of its member states, in the absence of an express competence to this effect, but also that the exercise of this competence by the Union 'exclude[d] the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law'.[126] This ruling reflects how the EU's ability to participate in international affairs 'in its own right', and its ability to negotiate and co-create international rules (in this case through the conclusion of international agreements in the field of transport), are construed as a necessary condition for – and an instrument to control – the homogeneity of its legal order.[127] This reflects the idea that the autonomy of the EU legal order is to be protected by controlling the effects of international law within the EU and *through* an active EU participation in the co-creation of international rules.

This understanding permeates article 3(5) TEU, including the EU's ambition to develop international law. While the Court's case law specifically addressing the EU's contribution to the development of international law is limited, it often betrays an understanding of EU law as either part of a larger

[125] Klabbers (n 4) 31.
[126] Case C-22/70 *Commission v Council* [1971] ECLI:EU:C:1971:32, para 31.
[127] See also Case *Opinion 1/91* [1991] ECLI:EU:C:1991:490.

trend towards a progressive development of international rules or as a more developed form of these rules. In the first set of cases, international law is used to legitimise EU law; in the second, to protect it. In both cases, as in the Court's rulings discussed in the previous section, the underlying assumption is that the EU legal order is, in itself, a development of (international) law – a supra-national law.

These cases largely emerged in the early 1980s and addressed the interpretation of article 234 EEC Treaty (now article 351 TFEU) as regards the application of Community regulations on the conservation of maritime resources to Spanish vessels, at a time when Spain was not a Community member state.[128] In *Crujeiras*, for instance, the Court (largely driven by the arguments raised by the parties) referred to the Community's scheme for the conservation of sea resources as part of the 'progressive creation of new reciprocal relations' at a 'time when international law in relation to fishing was undergoing profound changes'.[129] A similar understanding underlies the Court's ruling in *Levy*, a case concerning the potential conflict between member states' obligations under EU law and their prior obligations under the International Labour Organization (ILO) Convention to respect the prohibition of nightwork for women as a protected category of workers.[130] In line with the arguments advanced by the European Commission, the Court indicated that the principle of non-discrimination gradually implemented at the EU level was in line with a progressive development of international law towards the elimination of gender-based distinctions on access to employment.[131]

In cases where the Union's obligation to contribute to the development of international law is referred to only in passing, the Court's reasoning has likewise often been based on a more or less explicit understanding of EU law as offering a higher level of protection than that

[128] Art 234, Treaty Establishing the European Economic Community (Treaty of Rome) (25 March 1957) OJ C 325 (24 December 2002), entered into force 1 January 1958: 'Les droits et obligations résultant de conventions conclues antérieurement à l'entrée en vigueur du présent Traité, entre un ou plusieurs États membres d'une part, et un ou plusieurs États tiers d'autre part, ne sont pas affectée par lee dispositions du présent Traité'.

[129] Joined Cases 180 and 266/80 *Crujeiras* [1981] ECLI:EU:C:1981:294, paras 8 and 19. See also Case C-812/79 *Burgoa* [1980] ECLI:EU:C:1980:231, para 24; Case C-181/80 *Arbelaiz-Emazabel* [1981] ECLI:EU:C:1981:295, para 30; Joined Cases 13 to 28/82 *Arantzamendi-Osa* [1982] ECLI:EU:C:1982:376, paras 9-10.

[130] Case C-158/91 *Levy* [1993] ECLI:EU:C:1993:332.

[131] ibid., paras 15 and 18-20.

accorded by international norms, or as strengthening international commitments. Perhaps most manifestly, the Court's ruling in *Kadi I* effectively opposed (and protected) the higher level of fundamental rights' protection accorded by EU law against that offered by the UN system.[132] In *Air Transport Association of America and Others*,[133] in turn, the Court grounded the validity of an EU directive imposing greenhouse gas emission limits on all flights departing from or arriving in the territory of EU member states on the fact that these EU rules were a legal expression of the higher standards of environmental protection endorsed by the EU and an implementation of its international commitments. After confirming that the contested directive had to be 'interpreted, and its scope delimited, in the light of the relevant rules of the international law of the sea and . . . of the air',[134] the Court also noted that:

> ... [as] European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.[135]

These cases exemplify how the Court's references to the development of international law tend to position the EU system as a more advanced form of legal development or as better reflecting the 'ethos' of international rules. International law becomes a legitimating authority wherever – and to the extent that – it is normatively aligned with EU rules and values. While the initial case law used international law to position the EU as part of a larger trend, later cases express the view that EU rules often no longer run in parallel with international developments, but rather ahead of them.

The singularity of this foreign policy objective, however, lies in the fact that it refers to the development of *international* law. It is directed at a legal

[132] See supra section 3.1.
[133] Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864.
[134] ibid, para 123.
[135] ibid, para 128.

order which the EU (if one is to follow the CJEU's narrative) perceives as ontologically distinct from its own. Yet, the EU's ability to participate actively on the international plane as an actor in its own right, and to influence international developments in line with its own interests, principles and values, begets the recognition of this relevance and capacity by external actors, and international law. It presupposes that the EU is not only a subject of international law capable of holding rights and obligations – a feature of international organizations long recognised by the ICJ[136] – but also that its practices are recognised by this legal system as potentially (trans)forming its substance. The following section therefore turns to the concept of recognition and to its relevance in the pursuit of the EU's objective to contribute to the development of international law.

## 5. The role of recognition in the projection of EU autonomy

> While the existence of states is not generally called into question, the Union's existence or at least legitimacy is.[137]

Recognition is not a concept foreign to debates about statehood. International legal scholarship has long debated whether recognition by other states is a requirement of statehood, notably, whether the act of recognition is constitutive or merely declarative of the existence of a state.[138] The dominant view sides with the dispensability of recognition as a constitutive element of states – recognition does not bring a state into existence. Yet, being 'treated like a State' remains an essential condition for the effective exercise of international capacity.[139] On this basis, Wheaton distinguished between internal and external sovereignty, whereby the former dispensed with recognition, while the latter required it. This recognition would render external sovereignty 'perfect and complete'; it

[136] *Reparation for injuries incurred in the service of the United Nations*, Advisory Opinion [1949] ICJ Reports 174, 185.
[137] Christina Eckes, 'EU climate change policy: can the Union be just (and) green?' in Dimitris Kochenov and Fabien Amtenbrink (eds) *The European Union's Shaping of the International Legal Order* (CUP 2014) 191, 214.
[138] Crawford (n 38) 135.
[139] James R. Crawford, *The Creation of States in International Law* (2nd edn, OUP 2010) 23: '[i]n [the case of recognition of a 'new State'] it might be argued that recognition, at least in the non-formal sense of "treating like a State", is central rather than peripheral to international capacity'.

would allow states to participate in the community of nations, and it was open to recognition or misrecognition by other states.[140]

Wheaton's conception of external sovereignty is connected to what Hegel referred to as a 'struggle for recognition'. In Hegel's view '[w]ithout relations with other States, the State can no more be an actual individual than an individual can be an actual person without a relationship with other persons'.[141] Here, recognition assumes a subjective dimension of definition of one's identity. The identity of a state, much like the identity of an individual, is defined in relation to others, and in compromise with them; it is shaped by a claim and desire for recognition and reacts to misrecognition from others. As Nijman notes, Hegel's understanding of recognition represents a departure from a Hobbesian struggle for self-preservation.[142] Unlike the latter, recognition implies reciprocity; it implies the mutual recognition of the other.

> The substitution of the struggle for self-preservation and survival with the struggle for recognition and "the inclusion of the struggle for survival in the dialectic between self-assertion and intersubjectivity" determine Hegel's theory of natural law. Like the individual Self, the collective Self – such as a state or a people – desires to be recognized ... Contrary to the fear of a violent death, which produces violent behaviour to survive in the state of war, the desire to be recognized is a motive which produces moral conduct: recognition and respect can only be received if they are given.[143]

A similar dynamic applies to international organizations. In this context, recognition is often linked to debates about whether the legal personality of international organizations is objective or subjective in nature. In other words, whether international organizations are legal persons under a general rule of international law or must otherwise be *apriori* recognised by third parties.[144] The dominant view since the ICJ's ruling in *Reparation for Injuries* has been that international organizations are subjects of international

[140] ibid, 8-9; Henry Weathon, *Elements of International Law* (3rd edn, 1846) chapter II, para 6.
[141] Georg WF Hegel, *Elements of the Philosophy of Right* (CUP 1991) 66–67.
[142] Janne E. Nijman, 'Paul Ricoeur and International Law: Beyond "The End of the Subject" - Towards a Reconceptualization of International Legal Personality' (2007) 20 Leiden Journal of International Law 25, 55.
[143] ibid 58-59.
[144] Crawford (n 38) 158-159. See also, Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2018) 52.

law to which specific rights and duties apply regardless of third-party recognition.

The claim for recognition discussed in this chapter and those that follow, however, should be distinguished from this debate. The claim made here is not a claim to external recognition of international legal personality or of capacity.[145] The argument, instead, is that much like being 'treated like a State' is an important condition for the exercise of external sovereignty by states, the recognition of EU powers by actors outside of its community is an essential condition for the EU to yield international influence and to actively shape international law. The EU must be recognised as an actor capable of (trans)forming international law. By exercising its powers on the international plane, the EU both exercises a measure of its autonomy and seeks recognition by external partners. The concept of recognition is, therefore, relevant for understanding why EU autonomy forms an important feature of the EU's dialogue with other actors, and the dynamics that condition the EU's ability to contribute to the development of international law.

Beyond the Court's narrative, the pursuit of the EU's ambition to contribute to the development of international law is based on two orders of conditions. First, that in the exercise of its powers the EU is recognised as an autonomous actor whose practices are legally relevant to the formation and development of international norms. In other words, that the EU is recognised as an actor capable of operating as a 'shaper or generator of international rules', and of having a 'formative influence' on international rule-making.[146] Second, that the EU is able to persuade others of its own understanding of development, of its preferred direction for the advancement of international law.

Externally, the pursuit of the foreign policy objectives which this autonomy informs and enables, is conditioned by what Larik has called an 'accentuated caveat of possibility'.[147] This caveat includes the receptiveness of

[145] Otherwise foreseen in the EU Treaties. See art 47 TEU and declaration 24 ('Declaration concerning the legal personality of the European Union') TEU; art 335 TFEU.
[146] Marise Cremona, 'The Union as a Global Actor: Roles, Models, and Identity' (2004) 41 Common Market Law Review 553, 557; Violeta Moreno-Lax and Paul Gragl, 'Beyond Monism, Dualism, Pluralism, The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law' (2016) 35 Yearbook of European Law 455, 457.
[147] Larik (n 13) 55.

other actors to the pursuit of EU objectives. It entails not only that other actors share the EU's values or interests, but also that they acknowledge the autonomy of the EU and its legal relevance. This legal relevance goes beyond the recognition of the EU's international legal personality or capacity; it is an acknowledgment of the EU's ability to exercise this personality and capacity in a way which transforms international law.

At its origins, these caveats are conditioned by the EU's very identity. Unlike states, which Hegel himself understood as 'completely autonomous totalities in themselves',[148] the EU is the proverbial 'legal experiment' of international legal subjects.[149] The singularity of the EU rests on the very fact that it has a 'vocation and aspiration to be something else: neither a state nor an international organization, but a third genus'.[150] As the previous sections demonstrate, the EU grounds its autonomy on this singularity.

But the EU's autonomy, unlike a state's claim to (external) sovereignty, is 'contested and contestable'.[151] As noted by Eckes:

> The inherent contestability of its nature is what distinguishes the EU from other international actors, be they (federal) States, whose sovereignty is accepted, or international organisations, whose institutions or organs do not make the same essential claim to autonomy.[152]

The meta-narrative of EU autonomy therefore requires not only a continuous affirmation (a struggle for acceptance) vis-a-vis its member states but also, as a condition for the pursuit of its foreign policy objectives, affirmation vis-a-vis external actors. The affirmation of the EU's 'self' against the 'other' implies this claim for recognition. Internally, this struggle is governed by structural principles such as conferral, loyalty, and subsidiarity.[153] These principles define the distribution of external competences between the

[148] Hegel (n 141) para 330.
[149] Bruno de Witte, 'The European Union as an International Legal Experiment' in Grain de Búrca and Joseph H.H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 19.
[150] Joxerramon Bengoetxea, 'The EU as (more than) an international organization' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 450.
[151] Eckes (n 1) 11.
[152] ibid.
[153] See Marise Cremona, 'Structural Principles and Their Role in EU External Relations Law' (2016) 69 Current Legal Problems 35.

Union and its member states and impose on the latter a duty to respect and promote the autonomy of the organization on the international plane.[154] The internal contestation of the EU's exercise of external powers, and member states' struggle to remain visible on the international scene, explain the intergovernmental elements that still mark EU foreign policy. EU primary law is populated by 'containment clauses' which secure member states' hold on the exercise of their external competences. Most emblematically, Declarations 13 and 14 to the EU Treaties note that the conferral of external powers on the EU shall not 'affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organizations'.[155]

Unlike this internal struggle, however, the quest for recognition referenced here is fought externally, vis-à-vis states and other actors exogenous to the EU legal system. When operating externally, the EU, much like states as historical political communities, is an international legal person 'involved in a struggle for recognition mediated by international law and international institutions'.[156] Examples of the EU's struggle for the recognition of its (external) autonomy are not uncommon in the EU Court's practice. In *International Fruit Company and Others*, for instance, the Court concluded that the EU had functionally succeeded its member states on all matters pertaining to international trade, anchoring its reasoning in the recognition of this succession by the international community at large.[157] Conversely, the Court's refusal to grant WTO law direct effect within the EU legal order has likewise been a reaction to the 'lack of reciprocity' offered by other trading partners.[158]

Beyond the Court, an emblematic example of this claim for recognition are the EU's diplomatic efforts to attain enhanced observer status at the UN General Assembly, which we discuss further in chapter 2,[159] or the EU-specific clauses that mark its treaty-making practices. To name but two examples of the latter, the inclusion of disconnection clauses (which exclude

[154] See Chapter 2, section 4.2.
[155] Declarations 13 and 14 concerning the common foreign and security policy, TFEU.
[156] Nijman (n 142) 60.
[157] Joined Cases 21 to 25/72 *International Fruit Company and Others* [1972] EU:C:1972:115, para 16.
[158] Case C-377/02 *Van Parys v BRIB* [2005] ECLI:EU:C:2005:121, para 53.
[159] Chapter 2, section 4.1. See Pedro A. Serrano de Haro, 'Participation of the EU in the work of the UN: General Assembly Resolution 65/276' (CLEER Working Papers 2012/4).

the application of the treaty regime to which the EU and its member states are parties in the relations *inter se*) involve a (request for) recognition by other treaty parties of the self-governing nature of the EU legal order.[160] Declarations of competence, in turn, involve a request for the recognition of the external relevance of the internal distribution of competences between the Union and its member states.[161]

In this struggle for recognition, international organizations assume a particular role. They operate as forums for the EU to both explain and assert its autonomy and relevance, and to influence international developments.[162] They also accord the EU with a space to contest any interferences with what it perceives to be the essential characteristics of its legal order (negative external autonomy) or with its ability to participate on the international plane in conditions of equality with other actors (positive external autonomy). These are spaces where the EU can seek recognition of its essential characteristics and of its powers, and make the claim to be 'treated like a State'. They are spaces where the EU asserts and simultaneously defines its autonomy not simply in opposition to but also *through* international structures. This explains the attention that the EU accords to the operation of member states' duty of loyalty in the context of international organizations, which not only has constitutional expression in the EU Treaties but has also been amply developed in the case law of the EU Court, as further discussed in chapter 2.[163]

The EU's ability to tell its story of autonomy in dialogue with other actors becomes as essential as its ability to tell it to its member states. Autonomy, much like sovereignty, has an important discursive dimension.[164]

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[160] Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christoph Hillion and Panos Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 160-186.

[161] Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base' (2012) 17 European Foreign Affairs Review 491.

[162] On the different reasons, of not only a legal but also a political order, explaining the importance of an active participation of the EU in international organizations see, generally and more recently, Ramses A. Wessel and Jed Odermatt, 'The European Union's engagement with other international institutions. Emerging questions of EU and international law' in Ramses A. Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar 2019) 6-9.

[163] See Chapter 2, section 4.2.

[164] In this sense, see Walker (n 49) 6 (defining sovereignty as involving 'a speech act'; as a 'discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed'.).

The importance of this public narrative dimension is particularly well illustrated by Nijman's discussion of Ricoeur's concept of narrative identity, which connects the construction of the 'self' with a dialogue with the 'other':

> The collective self's primary means of self-constitution is through the narrative process of public appearance (public representation and participation) and submission to peer and public scrutiny, followed by either recognition or misrecognition. The self-identification and self-recognition of collective agents occurs when these agents participate by narration in public debates, nationally as well as internationally, but also when they interact by other means, for example, in the case of states, in the negative situation of diplomacy having failed and interaction becoming military.[165]

In Ricouer's definition of narrative identity, the recognition or misrecognition of collective agents, the formation and affirmation of the collective 'self', occurs when these agents participate by narration in public debates.[166] Dialogue, the ability to speak and to be heard, and to be seen speaking, become essential features of this recognition, *sine qua non* conditions of the affirmation of the 'self', the recognition by 'the other'. International organizations are spaces where this narration and dialogue occur.

The EU's rhetoric therein is conditioned by the Court's own background story of autonomy that it carries to these fora. However, the dialogue here is one conducted through 'shared symbolic mediators'[167] – international law and diplomacy – that are not dictated by the EU. In these spaces, the EU's autonomy, and its relevance as a subject whose practices are relevant to the (trans)formation of international norms, are often contested. Diplomacy, and international law, remain state sovereignty-dominated realities. Unlike states, however, the EU cannot make a valid claim to sovereignty.[168] The most it can do is to project and protect a sovereign-like understanding of its own autonomy.

This accords a strategic dimension to the EU's international discourse that is at times absent from the background narrative of autonomy weaved by

[165] Nijman (n 142) 49.
[166] ibid.
[167] ibid, 51.
[168] Case *Opinion 2/13* [2014] EU:C:2014:2454, para 156: 'the EU is, under international law, precluded by its very nature from being considered a State.'; Eckes (n 1).

the EU Court and examined in this chapter. To convince others of its ability to (trans)form international rules (of its autonomy) in line with its conception of development (of its values, interests, principles) the EU will have to negotiate its preferences with those of others actors and to dialogue in a language that is not its own. As noted by Carta, the EU's international discourse has varied significantly depending on context: it ranges from an ethical-benevolent one, to a morally superior or dominating one, to a pragmatic tone which acknowledges the limits of 'what the EU — as one actor in a thousand — can do'.[169] Invariably, however, and as the next chapters will show, this discourse carries (and tells) the background story of EU autonomy.

## 6. Concluding remarks

The EU's ambition to contribute to the development of international law remains enveloped in a measure of mystery, notwithstanding the constitutional expression accorded to it in article 3(5) TEU. This chapter argued that understanding this EU foreign policy objective requires contextualising it against (and within) the broader narrative developed by the CJEU concerning the EU and its autonomy, as a legal entity and as a legal order. We must understand this objective from the perspective of an actor who perceives itself as fundamentally distinct from other subjects of international law and as governed by an 'original' and largely self-sufficient legal regime. At the same time, the EU is an eager participant in international affairs, certainly not lacking in ambition. The EU Treaties task the Union with contributing to everything from the eradication of poverty to international peace and security. This contribution is conditioned by the structural principles of the EU legal order, including that of autonomy, but also by principles and structures that are not the EU's own.

While the Court's case law addressing the development of international law is far from vast, it betrays an understanding of the EU as a more developed legal order the essential features of which should be, if not

[169] Carta has illustrated these variations in EU external discourse by relating them rather beautifully to three literary characters: Candide and Pangloss from Voltaire's *Candide*, and Don Giovanni, from Mozart's opera with the same name. Caterina Carta, 'From the "Magnificent Castle" to the Brutish State of Nature: Use of Metaphors and the Analysis of the EU's International Discourse' in Caterina Carta and Jean-Frédéric Morin (eds), *EU Foreign Policy through the Lens of Discourse Analysis: Making Sense of Diversity* (Ashgate 2014) 191.

emulated by the international legal system, then certainly protected by (and at times from) it. The EU is positioned as part of a larger trend towards the progressive development of international law or as a legal order which strengthens or advances commitments that are more imperfectly expressed in international norms. In essence, the EU's contribution to international law is not only part of the EU's projection as a global actor but also of the protection of its 'essential characteristics' through international law. Thus, the Court's definition of the interaction between EU and international law based on the principle of autonomy shapes the EU's obligation not only to strictly observe international law but also to contribute to its development.

This commitment, however, presupposes (and implies a claim for) the recognition of the EU as a subject whose practices are relevant to the development of the international legal order. The affirmation of this dimension of external autonomy, as a capacity to transform, is dialectic. It is carried out externally by EU actors – its internal judicial affirmation does not suffice. When participating in debates on the existence or development of international rules and their relation to the EU and its legal order, EU actors transport to the international plane the background story of EU autonomy crafted by the CJEU. This narrative informs EU actors' rhetoric and renders visible the choices behind the EU's views, as expressed in international fora. It is to these fora, and to the discourse of these actors, that the following chapters turn.

# 2 | The Scene
## The UN International Law Commission and the drafting of EU statements

### 1. Introduction

For an organization such as the EU, which aims to contribute to 'the strict observance and the development of international law',[1] it is particularly valuable to have the opportunity to comment on the draft articles, conclusions or guidelines codifying or clarifying international rules prepared by the United Nations (UN) International Law Commission (ILC). As a subsidiary body of the UN General Assembly (UNGA), the ILC has been specifically entrusted with giving substance to the Assembly's mandate of 'encouraging the progressive development of international law and its codification'.[2] By virtue of its UN observer status, the EU has the right to participate in UNGA Sixth Committee debates where the ILC annual report is discussed.[3] This status therefore accords the EU a space to articulate its own views about the relationship between EU practices and international rules, and to advance its own vision of the development of international law. In other words, it provides the EU with a space to affirm (and seek recognition for) its relevance as an international actor that (trans)forms international law, and to co-construct the narrative about what international law is, what it should be, and where the EU is placed in relation to it.

This chapter examines the institutional rules, principles and practices that govern the EU's engagement with the ILC and introduces the main actors that shape this engagement. In doing so, it travels between the three cities where this engagement takes shape: Geneva (where the college of ILC members meets), Brussels (where EU and member states' legal advisers discuss their statements on the ILC's drafts), and New York (where these statements are

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[1] Art 3(5), Consolidated Version of the Treaty on European Union OJ C115/13 (9 May 2008) ('TEU').

[2] Art 13, Charter of the United Nations, 24 October 1945, 1 UNTS XVI ('UN Charter'). See Arnold. N. Pronto, 'Codification and Progressive Development of International Law: A Legislative History of Article 13(1)(a) of the Charter of the United Nations' (2019) 13(6) FIU Law Review 1103.

[3] UNGA Res. 65/276, 'Participation of the European Union in the work of the United Nations' (3 May 2011). See also infra, section 4.1.

delivered). This chapter demonstrates how the EU's engagement with the ILC has been led by the European Commission – specifically, its Legal Service (LS) – and how this engagement has evolved since the delivery of the first 'Community' statement on an ILC project in 1975 to the present decade. The analysis combines an examination of the EU rules, processes and principles governing this engagement with an examination of UN rules and practices governing the participation of international organizations in these debates, in general, and the participation of the EU, in particular.

The chapter is structured as follows: after this short introduction, section 2 begins in Geneva. This section introduces the ILC and its methods of work and examines two ways in which international organizations are relevant to ILC projects. We distinguish between the relevance of international organizations as direct or indirect addressees of the rules proposed by the ILC, and their relevance as participants in the ILC's draft law-making process. The former concerns situations where ILC draft rules regulate the legal position of international organizations as subjects of international law. The latter relates to the participation of international organizations in the work of the ILC – through formal statements, meetings, or consultations – and the ILC's evolving views on how the practice of international organizations may contribute to the expression or formation of international rules.[4] In section 3, our focus shifts to Brussels. This section examines how statements on the work of the ILC are drafted by the Commission LS and discussed with legal advisers from other EU institutions and EU member states at the working party on public international law (COJUR) of the Council of the EU. It examines the factors that inform the LS's decision to deliver statements on ILC projects, the topics covered by these statements in the nearly fifty years of EU participation in Sixth Committee debates, and the structure of these statements. In section 4, our focus then moves to New York, where these statements are delivered. This section outlines the rules that govern the EU's participation at the UNGA Sixth Committee. These rules originate both from within the EU – regulating the external representation of the EU and its member states in international organizations – and from the UN – governing the EU's status within this

[4] Some of the arguments in section 2 were developed in a previous publication. See Teresa Cabrita, 'The Integration Paradox: an ILC view on the EU contribution to the codification and development of rules of general International law' (2021) 5(1) Europe and the World: A Law Review 1.

organization. Section 4 examines how these two sets of rules inform the EU's visibility and voice on this stage, and how they condition the EU's ability to persuade an international audience of its own views about international law and its relationship with the EU and its legal order. Section 5 offers some concluding remarks on the principles, processes, and practices governing the EU's engagement with the ILC.

## 2. Geneva: The ILC and international organizations

### 2.1. The ILC and the authority of its work

Let us begin in Geneva, where the ILC has its seat. As an integral part of the UN system, the ILC was established in 1947 as a successor to the League of Nations Committee on the Progressive Development of International Law and its Codification.[5] The ILC emerged from a historical context of perceived failure of the law of nations to regulate the behaviour of states and is an institutional expression of the belief that 'written international law will remove the uncertainties of customary international law'.[6]

While functionally a subsidiary organ of the UNGA reporting to its Sixth Committee, the ILC was established as a body of independent experts 'of recognized competence in international law'.[7] Initially consisting of 15 members, it now brings together 34 scholars, diplomats and practitioners representing 'the main forms of civilization and of the principal legal systems of the world'.[8] ILC members are nominated by their national governments and elected by the UNGA for a renewable period of five years.[9] This is a body that has been populated by leading international jurists, a number of whom later served as judges at the International Court of Justice (ICJ), from Sir Hersch

[5] UNGA Resolution 174 (II), Statute of the International Law Commission (21 November 1947) last amended by UNGA Res 36/39 of 18 November 1981 ('ILC statute'); United Nations, *The work of the International Law Commission, vol 1* (9th edn, United Nations Publication 2017) 1-6.

[6] Miguel de Serpa Soares, 'Keynote Address UN70 - Contributions of the United Nations to the Development of International Law' (Fordham University School of Law, 6 November 2015) 3 <http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_Oxford_2015_Fordham-6-Nov-2015.pdf >

[7] Arts 2(1) and 8 ILC statute.

[8] Art 8 ILC statute.

[9] Arts 3-7 and 10 ILC statute.

Lauterpacht to Roberto Ago to James Crawford, to name but a few.[10] Female jurists, albeit overwhelmingly absent, have slowly entered this space, with members such as Paula Escarameia and Patrícia Galvão Teles (Portugal), Xue Hanqin (China), Marie Jacobsson (Sweden), Marja Lehto (Finland), Nilüfer Oral (Turkey), and Concepción Escobar Hernández (Spain).[11] This group of internationalists meets once a year, between May and August, in room XXI of the UN Office in Geneva, for a total period of approximately 11 weeks.[12]

The ILC's task is to bring 'a degree of consistency to international law' by 'codifying custom' or proposing rules which advance or develop this legal system, including its vocabulary.[13] ILC members are, in their own words, 'generalists'.[14] Their work consists of gathering, filtering and drafting texts of proposed conventions, conclusions, guidelines, and reports on the status of public international law as it is – or as it should be – guided by a 'resolute universalism'.[15] The ILC's work on both codification and on the progressive

[10] Hersch Lauterpacht was a member of the ILC between 1952 and 1954, and later served as a judge at the ICJ between 1955 and 1960. The same holds true for Roberto Ago, who was a member of the ILC between 1957 and 1978 and a judge at the ICJ between 1979 and 1995. James Crawford, in turn, was a member of the ILC between 1992 to 2001 and a judge at the ICJ up 2015 and, most recently, Georg Nolte, ILC member between 2007 to 2021, was officially sworn in as judge at the ICJ on 8 February 2021. See, ILC, 'Membership. Present and Former Members of the International Law Commission (1949–present)' <https://legal.un.org/ilc/guide/annex2.shtml>

[11] Up to 2021, only 7 women had been elected to the ILC since its creation (hence the ease, and choice, of listing all of them in the body of the text). In the 2021 elections, three more women were elected to the ILC – Phoebe Okowa (Kenya), Vilawan Mangklatanakul (Thailand), and Penelope Ridings (New Zealand) – bringing the number of female jurists in ILC history to ten. See Priya Pillai, 'Symposium on Gender Representation: Representation of Women at the International Law Commission' (*OpinioJuris*, 7 October 2021) <https://opiniojuris.org/2021/10/07/symposium-on-gender-representation-representation-of-women-at-the-international-law-commission/>

[12] With the exception of its first (1949) and sixth (1954) sessions, the second part of its seventeenth session (1966) and the second part of its fiftieth session (1998), which were held in New York (Lake Success), Paris (UNESCO headquarters), Monaco, and New York. Due to the Covid19 pandemic, the ILC's seventy-second session (2020) was postponed to 2021. See United Nations (n 5) 69; UNGA, Draft decision submitted by the President of the General Assembly. Seventy-second session of the International Law Commission, A/74/L.45 (27 March 2020); UNGA Dec 74/545, 'Seventy-second session of the International Law Commission' (2 April 2020).

[13] Interviews 1 (4 June 9), and 9 (30-31 July 2019).

[14] Interviews 1 (4 June 9), 3 (9 July 2019) and 5 (19 July 2019).

[15] James R. Crawford, 'Universalism and Regionalism from the Perspective of the International Law Commission' in UN International Law Commission (ed), *International Law in the Eve of the Twentieth Century: Views from the International Law Commission* (United Nations Publications 1997) 113.

development of international law follows a relatively similar methodology: surveying existing practice – namely 'the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic'[16] – and distilling from these texts a set of rules which reflect an established international practice (codification) or an evolving and emerging one (development). Corten and Klein therefore describe the ILC through the image of an 'artisan', weaving a formal unity into international law:

> Cela n'enlève cependant rien au constat selon lequel, plus fondamentalement, la Commission, en formalisant *a posteriori* et de manière anachronique certains précédents, agit comme un artisan de ce que Pierre-Marie Dupuy a désigné comme l' «unité formelle du droit international». ... Ainsi présentée, la codification favorise l'image d'un droit international qui résulte, non pas de décisions contingentes – que l'on pourrait assimiler à une forme d'arbitraire –, mais d'une pratique ancienne qu'il ne s'agirait que de traduire dans les textes. En d'autres termes, la technique se comprend comme une forme de légitimation d'un ordre juridique international en formation.[17]

While qualifying a topic as codification or progressive development may have an impact on the procedure to be followed or the form of a final ILC text,[18] it is generally agreed that each act of codification is by nature a-neutral

[16] Arts 19(2) and 24 ILC statute.

[17] 'This does not, however, undermine the more fundamental observation that the Commission, by formalising *a posteriori* and anachronistically certain precedents, is acting as the maker of what Pierre-Marie Dupuy has termed the "formal unity of international law". ... Thus presented, codification favours the image of an international law that is not the result of contingent decisions – which may suggest a sense of arbitrariness – but of a long-standing practice that merely needs to be translated into texts. In other words, technicality is to be understood as a form of legitimisation of an international legal order in the making'. (author tr). Olivier Corten and Pierre Klein, 'La Commission du droit international comme agent de formalisation du droit de la responsabilité: Modalités et significations de l'utilisation d'arbitrages partiellement détachés du droit positif' in Denis Alland, Vincent Chetail, Olivier de Frouville, and Jorge E. Viñuales (eds), *Unité et diversité du droit international/Unity and Diversity of International Law: Ecrits en l'honneur du Professeur Pierre-Marie Dupuy/Essays in Honour of Professor Pierre-Marie Dupuy* (Brill Nijhoff 2014) 418-419.

[18] Formally, the ILC statute establishes that the identification of topics for progressive development results from a proposal by the General Assembly or another UN principal organ, UN members, specialised agencies or official bodies established by intergovernmental agreements to encourage the progressive development and codification of international law (arts 16 and 17 ILC statute). By contrast, the selection of topics for codification is entrusted to the ILC, who is tasked with surveying 'the whole field of international law' to that effect and with identifying topics therein the codification of which 'is considered necessary and desirable' (art 18 ILC statute). Established practice, however, has rendered this procedural distinction largely moot, with ILC members often proposing topics which *prima facie* fall closer to legal areas in

and composite – part scientific restatement, part legal development.[19] The distinction has been largely abandoned and the ILC seldom indicates whether a text or a provision corresponds to either definition.[20] Some ILC members have nonetheless cautioned that, in developing rules, the ILC may at times come closer to arrogating to itself a legislative-like function of creating 'new law'.[21]

Topics are selected for inclusion in the ILC's programme of work either based on a recommendation by the UNGA or a proposal by the ILC itself, endorsed by the former.[22] In practice, most topics are proposed by the ILC itself, and only occasionally by states.[23] Within the ILC, a working group on the long-term programme of work proposes topics on the basis of pre-defined criteria, including a decision as to whether the topic 'reflects the needs of states', and whether it is at a 'sufficiently advanced stage' of development to be 'ripe' for codification.[24] At the time of its establishment, the list of topics to be studied by the ILC was first drawn up from an extensive 1949 UNGA Secretariat survey of international law.[25] In the seven decades of this body's existence, this listing and selection have led to the discussion of over fifty distinct topics of public international law.[26]

development. See Patrícia Galvão Teles, 'The ILC's Past Practice on Progressive Development and Codification of International Law - An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility' (2019) 13(6) FIU Law Review 1027.

[19] United Nations (n 5) 45; Shabtai Rosenne, *The Perplexities of Modern International Law* (Brill Nijhoff 2003) 56.

[20] cf General Commentary, para 5 ILC, Draft articles on the responsibility of international organizations, 2011 ILC Report (A/66/10) chapter V, para 87 ('ARIO').

[21] See Dire Tladi, 'Codification, Progressive Development, New Law, Doctrine, and the Work of the International Law Commission on Peremptory Norms of General International Law (Jus Cogens): Personal Reflections of the Special Rapporteur' (2019) 13(6) FIU Law Review 1137, 1138.

[22] Arts 17, 18 ILC statute.

[23] A notable example of a topic suggested by a state is that of the 'Legal Implication of Sea-level Rise' which was proposed by the government of the Federate States of Micronesia This proposal was taken on board by the ILC and included in its long-term programme of work in 2018. See 2018 ILC Report (A/73/10) Annex B, 327 and note 5; 2019 ILC Report (A/74/10) paras 263-265.

[24] See 1997 YBILC vol II (Part 2) (A/CN.4/SER.A/1997/Add.l (Part 2)) para 238.

[25] ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory Work Within the Purview of Article 18, Paragraph 1, of the International Law Commission', 1949 YBILC (A/CN.4/1/Rev.1).

[26] For an overview of the topics that have integrated the ILC programme of work see ILC, 'Analytical Guide to the Work of the International law Commission' (last updated 8 October 2021) <http://legal.un.org/ilc/guide/gfra.shtml>

The nature of these topics has ranged from the classic building blocks of international law – such as the law of treaties or diplomatic protection – to forays into environmental law and the protection of the global commons. Debates abound as to whether the ILC should tackle or shy away from 'less traditional', more 'politicised' or urgent questions of international law, such as internet privacy or cybersecurity. Critics question whether the ILC has the required expertise, resources or even mandate to consider such topics.[27] Yet, the inclusion of the topic of 'protection of personal data in transborder flow of information' seems to at least indicate that the ILC is willing to do so.[28]

Once selected, a topic is first placed in the ILC's long-term programme of work. At the time of writing,[29] this list includes topics as diverse as the 'ownership and protection of wrecks beyond the limits of national maritime jurisdiction' or 'evidence before international courts and tribunals'.[30] In and of itself, mere inclusion does not mean that the ILC will study a topic. The decision to take up the study of the topic is contingent upon other factors, such as: whether the ILC's views on the need for the topic's study are shared by states and non-state observers at the Sixth Committee; whether one or several ILC members are available to undertake its study; and whether greater priority is granted to other topics. If the ILC *does* decide to undertake a study, the topic will be moved to its programme of work, which marks the start of the topic's consideration. A study group may then be established to outline the topic's precise scope, under the coordination of an ILC member. The UNGA Secretariat, which operates simultaneously as the ILC Secretariat, will often be tasked with preparing one or several memoranda on the topic, the length and the depth of which often resemble a publishable monograph.[31] The established

[27] See Siegfried Wiessner and Christian L González, 'The ILC at its 70th Anniversary: Its Role in International Law and Its Impact on U.S. Jurisprudence' (2019) 13(6) FIU Law Review 1151, 1161-1163.
[28] 2006 ILC Annual Report (A/61/10) Annex IV, 217ff.
[29] As noted in the Introduction, this study examines EU statements delivered up to, and including, the Sixth Committee's seventy-sixth session, held between 4 October to 18 November 2021. Introduction, section 3.4.
[30] See 1996 ILC Report (A/51/10) Annex II (Add 2) 139; 2017 ILC Report (A/72/10) Annex B, 242ff.
[31] See inter alia, ILC, 'Codification of the International Law Relating to Diplomatic Intercourse and Immunities. Memorandum prepared by the Secretariat', 1956 (A/CN.4/98).

practice is to eventually appoint a Special Rapporteur to the project who in practice will often be the member who proposed the topic in the first place.[32]

Special Rapporteurs are entrusted with submitting a yearly report on the progress of their work, including the draft rules, principles, or conclusions that will make up the project's output. Following the discussion of these reports in plenary – structured around a succession of pre-prepared interventions lasting twenty minutes, at times interspersed by more-or-less spontaneous exchanges of views[33] – the rules proposed in the report are forwarded to a Drafting Committee. Drafting Committees are sub-sets of the ILC plenary, and are composed of a smaller number of ILC members who volunteer to undertake the task of redrafting the proposed rules in a compromise between the different views voiced in plenary. In addition to a varying number of ILC members, the committee also includes the Special Rapporteur and one or two members from the Secretariat.[34] Initially rather small, over the years Drafting Committees have grown larger in size due to a more active ILC membership.

Once the full draft of a set of articles, conclusions or of guidelines is finalised, it is adopted by the ILC on 'first reading', together with a detailed commentary on each proposed rule, conclusion, or guideline. On first reading, the commentary may include minority positions expressed within the ILC or the identification of alternative solutions or approaches to a legal question. The outcome of the debates on each topic informs separate chapters of the ILC annual report, which is then discussed at the Sixth Committee session starting two months later (in October) in New York. This report is also circulated to UN member states and observers for review; statements are then drafted in response, and views on the status of rules of international law are expressed. Based on the comments received during the Sixth Committee debates, the different draft rules, conclusions or guidelines are then amended, its commentaries are finetuned to reflect the positions adopted by the ILC as a

[32] See inter alia, 2008 ILC Report (A/63/10) Annex I, 152ff ('Treaties over time in particular: subsequent agreement and practice' by Mr Georg Nolte); ILC, Summary record of the 3136th meeting, 31 May 2012 (A/CN.4/SER.A/2012) 50, para 4 (appointing Georg Nolte as Special Rapporteur for the topic 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties'); 2012 ILC Report (A/67/10) para 269.

[33] Interview 3 (9 July 2019) (noting that this method of pre-prepared interventions contributes to the quality of these statements but also often means that ILC members end up 'talking *at* each other rather than *to* each other'.).

[34] United Nations (n 5) 33.

whole, and the final draft is adopted on 'second reading', marking the completion of the process, as far as the ILC is concerned.

Depending on the complexity of a topic, its more or less controversial aspects, and the Special Rapporteur's direction of the work, a matter may remain under consideration by the ILC for years or even decades, with interruptions and revivals. The topic of state responsibility, for instance, was one discussed under the leadership of five successive Special Rapporteurs, starting with Francisco García Amador in 1955 and ending with James Crawford in 2001.[35] Overall, the topic was under consideration by the ILC for nearly five decades, culminating in 2001, with the adoption of the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).[36] Discussions of other topics have been discontinued on account of states' resistance to their study or codification, a lack of 'maturity' of the subject-matter, or the conclusion that the topic might best be addressed by other bodies.[37]

The final form of ILC projects has been varied. The decision as to whether a project should result in a set of conclusions, guidelines, or in draft articles set out to inform a multilateral treaty is an inescapable point of discussion from the outset of the debates on a topic. A number of ILC drafts have served as the basis for the negotiation and adoption of international treaties and conventions, including the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Vienna Convention on the Law of Treaties, the 1998 Rome Statute of the International Criminal Court, and the 2004 UN Convention on Jurisdictional Immunities of States and their Property.[38] By contrast, in the last

[35] The ILC's study of state responsibility was led by five remarkable jurists, namely, Francisco García Amador (ILC member between 1954 and 1961), Roberto Ago (ILC member between 1957 and 1978), Willem Riphagen (ILC member between 1977 and 1986), Gaetano Arangio-Ruiz (ILC member between 1985–1996), and James R. Crawford (ILC member between 1992 and 2001). For an overview of the ILC's work on this topic see ILC, 'Summaries of the Work of the International Law Commission. State responsibility' <https://legal.un.org/ilc/guide/9_6.shtml> (last updated 10 March 2022).

[36] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 ILC Report (A/56/10) chapter IV, para 76 ('ASR').

[37] This was the case, for instance, of the ILC work on the 'status, privileges and immunities of international organizations, their officials, experts'. See 1992 ILC Report (A/47/10) paras 359–362.

[38] 1961 Vienna Convention on Diplomatic Relations 500 UNTS 95; 1963 Vienna Convention on Consular Relations 596 UNTS 261; 1969 Vienna Convention on the Law of Treaties 1155

decade, a number of ILC projects have instead been framed as conclusions, guidelines, or reports.[39] Some see this change as proof of a gradual decline of conventional law, symptomatic of a de-formalisation of international law which may or may not presage the demise of the ILC or of its very purpose.[40] Others adopt a less fatalistic view and instead see this change as proof that the ILC has been able to move with the times, and adapt to states' needs.[41]

Seeing this as the end of the 'golden age' of draft conventions within the ILC may also be too damning a conclusion. For one, the choice for draft articles has not been fully discarded by the ILC, as attested by the draft articles on the protection of persons in the event of disasters or the draft articles on crimes against humanity, both adopted in the last decade.[42] Conversely, earlier projects were ab initio cast as studies or guidelines, by force of their subject or purpose. The Report on the Fragmentation of International Law (2006) is an example of this choice.[43] Form, in addition, has not affected force. Even where the ILC opted for reports, conclusions or guidelines, or where its draft articles remained but that – a draft – these texts retained their status of authoritative sources for the interpretation and application of international law. The ASR are a case in point – this set of ILC draft articles is generally considered to codify rules of customary international law and is routinely referenced by both international and regional courts and tribunals, from the European Court of

UNTS 331; 1998 Rome Statute of the International Criminal Court 2187 UNTS 38544; 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (A/59/38), adopted of 2 December 2004 (not yet in force).

[39] See inter alia, ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 2006 ILC Report (A/61/10) chapter XII, para 241; ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018 ILC Report (A/73/10) chapter IV, para 51; ILC, Draft guidelines on the protection of the atmosphere, 2021 ILC Report (A/76/10) chapter IV, para 39.

[40] See Christian Tomuschat, 'The International Law Commission – An Outdated Institution?' (2006) 49 German Y.B. Int'l L. 77.

[41] Pavel Šturma, 'The International Law Commission Between Codification, Progressive Development, or a Search for a New Role' (2019) 13(6) FIU Law Review 1125, 1128-9; Yejoon Rim, 'Reflections on the Role of the International Law Commission in Consideration of the Final Form of Its Work' (2020) 10 Asian Journal of International Law 23.

[42] ILC, Draft articles on the protection of persons in the event of disasters, 2016 ILC Report (A/71/10) chapter IV, para 48; ILC, Draft articles on crimes against humanity, 2019 ILC Report (A/74/10) chapter IV, para 45.

[43] ILC Fragmentation Report (n 39) para 241.

Human Rights to the Court of Justice of the European Union (CJEU).[44] The ASR remains, in fact, one of the ILC texts most cited by the CJEU and its Advocate-Generals (AG), alongside the 1969 Vienna Convention on the Law of Treaties, the draft of which also originated from the ILC.[45]

The ILC is not the only UNGA subsidiary body that is entrusted with the codification or progressive development of international law, nor the only forum where the preparatory work of codification of international rules takes place.[46] Yet within the juridical community of international lawyers, it remains an authoritative body as far as identifying rules of public international law is concerned. This authority results from a combination of factors, or distinct 'deference entitling properties'. In his discussion of the authority 'to say what the law is', Zarbiyev identifies four 'marks of authority': socially-sanctioned knowledge, process, authorship, and reputation.[47] Applied to the ILC, these properties explain how the 'pre-normative' or 'pre-legislative' output of this

[44] David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 American Journal of International Law 857. See, Chapter 4, section 5.

[45] See Chapter 4, section 5 and Chapter 3, section 3.2.1. See also, Paz Andrés Sáenz De Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship' (2019) 30(3) European Journal of International Law 721; Jed Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 Cambridge Yearbook of European Legal Studies 121.

[46] Within the UN system alone, the UN Commission on International Trade Law (UNCITRAL) is specifically tasked with 'the promotion of the progressive harmonization and unification of the law of international trade'. Alongside the ILC annual report, UNCITRAL's annual report is also a permanent agenda item of the UNGA Sixth Committee. See UNGA Res 2205(XXI) of 17 December 1966; UNGA, 'Sixth Committee (Legal) – 76th session, Agenda items allocated to the Sixth Committee, Item 80: Report of the United Nations Commission on International Trade Law on the work of its fifty-fourth session' <https://www.un.org/en/ga/sixth/76/76_session.shtml>. Private bodies, such as the *Institut de Droit International* (IDI) or the International Law Association (ILA), also contribute to the codification and progressive development of international rules. The same holds true for codification conferences. Projects initiated by the IDI and the ILA, in particular, have often served as the starting basis for ILC projects and have, therefore, significantly informed the ILC's work at the outset. See generally, ILA, 'History of the International Law Association' in Report of the Seventieth Conference (New Delhi, 2–6 April 2002) 76–77; Nico Schrijver, 'Keynote address by Nico Schrijver, President of the *Institut de Droit International*' in United Nations (ed) *Seventy years of the International Law Commission: drawing a balance for the future* (Brill Nijhoff 2020).

[47] Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9(2) Journal of International Dispute Settlement 291. See also, Laurence Boisson de Chazournes, 'The International Law Commission in a Mirror—Forms, Impact and Authority' in United Nations (ed), *Seventy years of the International Law Commission: drawing a balance for the future* (Brill Nijhoff 2020) 27.

body retains a force independent from the final form of its texts, or this body's position in the pecking order of institutional hierarchy.

The authority of the ILC's work results, first, from its composition (membership) as a body of independent experts with 'recognised competence in international law'.[48] It represents the prototype of a model of international law-making by government-appointed or elected experts. Even though these are 'generalist international lawyers', the knowledge of the institution as a whole is socially recognised and sanctioned by the epistemic community to which they belong and which they serve.[49] Second, the ILC follows working methods that are recognised by this legal community as leading to just or normatively-justified outcomes: the grounding of rules on state practice, the collective validation of their content by the body of Commissioners and, importantly, by states, as the main addressees of these rules, at the UNGA Sixth Committee. The dialogic interaction between the ILC and UN members and observers at the Sixth Committee remains a unique property that distinguishes the ILC's work from that of other regional or private codification bodies.[50] Third, the validation of the ILC's output by institutions enjoying a high degree of recognised authority within the same epistemic community contributes to reputation-building. References to the ILC's work by the ICJ and other international dispute settlement bodies are an example of this.[51] CJEU references to the ILC, in turn, confirm an acceptance of this authority also by the EU legal community, at least as far as the identification and interpretation of public international law is concerned.[52] Finally, the recognition of this authority is also formally enshrined in article 38(1)(d) of the ICJ statute as a subsidiary source of the very same system it aims to clarify and advance – it is an expression of 'the teachings of the most highly qualified publicists' in international law.[53]

[48] Art 2(1) ILC statute.
[49] Zarbiyev (n 47) 304.
[50] Franklin Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' (2006) 49 German Y.B. Int'l L. 107.
[51] See Jean d'Aspremont, 'Canonical Cross-Referencing in the Making of the Law of International Responsibility' in Serena Forlati and Makane Mbengue (eds), *The Gabčíkovo-Nagymaros Judgment and its Contribution to the Development of International Law* (Brill Nijhoff 2020) 22.
[52] See inter alia, case C-63/09 *Walz* [2010] ECLI:EU:C:2010:25, paras 27.
[53] Statute of the International Court of Justice 33 UNTS 993 (18 April 1946) ('ICJ statute'), art 38(1)(d). Questioning this classification cf, Sondre Torp, *The Application of Teachings by the International Court of Justice* (CUP 2021), chapter 2.

There is an inherently selective and interpretative dimension to the ILC's work.[54] This dimension is present in the act of surveying 'the whole field of international law' and selecting from it topics for which codification is 'necessary and desirable';[55] in the identification of practice that is not only available but also interpreted as relevant (or legally significant) both by the system and by those making the selection; in organizing this evidence in a manner which proves or disproves the 'extent of agreement on each point in the practice of States and in doctrine';[56] and at times in the very purpose of a project, which can be focused on the interpretation and clarification of existing rules rather than their codification or development sensu proprio.[57] The ILC statute outlines a number of ways in which to conduct this process, including: consultations with UN organs, official or non-official international or national organizations, scientific institutions, and individual experts;[58] the gathering of information from governments, organs, specialised agencies, and official bodies;[59] and the obligation to 'take into consideration' the comments received.[60] In weighing these different comments, ILC members have noted that the views first considered in the ILC's work remain, first and foremost, those of states.[61]

International organizations, however, have not been silent spectators in this process. As set out above, international organizations' relevance in the context of ILC projects is layered. Two levels can be distinguished: the first refers to instances where international organizations are direct or indirect addressees of the rules codified by the ILC; the second concerns the institutionalized processes by which international organizations participate in the ILC's work and how international organizations' practice is accounted for

[54] Azaria, for instance, has argued that between its working methods and the deference it enjoys, the ILC has come to operate as an interpreter of international law. See Danae Azaria, '"Codification by Interpretation": The International Law Commission as an Interpreter of International Law' (2020) 31(1) EJIL 171.
[55] Art 18 ILC statute.
[56] Art 20(b)(i) ILC statute.
[57] This is arguably the case, for instance, of the ILC's second study on most-favoured-nation clauses, discussed in Chapter 3, section 3.1.2. See ILC, 'Most-favoured-nation clause—Final Report of the Study Group on the Most-Favoured-Nation clause', 2015 ILC Report (A/70/10) Annex.
[58] Art 16(e), art 24 and art 26 ILC statute.
[59] Art 16(c) and art 17(2)(b) ILC statute.
[60] Art 16(i) and art 22 ILC statute.
[61] Interview 5 (19 July 2019), and 6 (19 July 2019).

in ILC projects. The next sections will address each of these levels of relevance. With respect to the second level, particular attention is paid to the outcome of the ILC debates on the identification of customary international law, in so far as these debates included lengthy discussions about the relevance of international organizations' practice for the formation or expression of rules of custom – the codification of which forms a substantial part of the ILC's mandate. These two levels or dimensions shape the participation of international organizations in ILC law-making, including that of the EU. This is therefore the context against which the EU's engagement with the ILC must be assessed.

## 2.2. International organizations as addressees of international rules

International organizations may be direct or indirect addressees of the rules advanced by the ILC. While the inclusion of international organization-focused topics in the ILC's programme has at times been met with mixed reviews,[62] international organizations, as subjects of international law, have been an ever-present feature in the ILC's work.[63]

Granted, ILC projects focusing on international rules that are expressly applicable to international organizations have been few and far between. The most notable examples remain the 1982 draft articles on the law of treaties between states and international organizations or between international organizations, and the 2011 draft articles on the responsibility of international organizations (ARIO).[64] The first of these served as the basis for the adoption of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

[62] With respect to the inclusion of the topic 'jurisdictional immunities of international organizations' see ILC, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat, 2007 (A/CN.4/577) para 126(c).

[63] Georg Nolte, '2018 AIIB Law Lecture: International Organizations in the Recent Work of the International Law Commission' in Peter Quayle and Xuan Gao (eds), *International Organizations and the Promotion of Effective Dispute Resolution. AIIB Yearbook of International Law 2019* (Brill Nijhoff 2019) 225.

[64] ILC, Draft articles on the law of treaties between states and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63; ARIO, supra note 20.

(VCLT-IO)[65] – not yet in force –while the ARIO remained in draft form. Earlier projects also had mixed results. The draft articles on the representation of states in their relations with international organizations formed the basis of a 1975 Vienna Convention with a similar name (which never came into force),[66] and the second part of this topic (devoted to the status, privileges and immunities of international organizations) was discontinued in 1992, based on the understanding that the matter was not 'a pressing one'.[67] Yet, the ILC witnessed a revival of topics related to international organizations in 2006 with the reintroduction in its long-term programme of work of the topic of 'jurisdictional immunities of international organizations', following a report by Giorgio Gaja.[68] In 2016, Sir Michael Wood likewise proposed the inclusion of the topic 'settlement of disputes to which international organizations are parties'.[69]

Other ILC projects refer to international organizations indirectly or in combination with states. That is, they codify rules addressed to states where states' obligations are discharged partly *through* international organizations, or rules that simply regulate a specific field of international activity without distinguishing between the rules' application to states or to international organizations. An example of the first case is the ILC draft articles on the protection of persons in the event of disasters, where states have an obligation to cooperate 'with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors' in the discharge of their obligations.[70] An example of the second is the ILC guide to the provisional application of treaties, which addresses provisional application

[65] 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 25 ILM 543 (not yet in force). For the convention's ratification status see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en>

[66] ILC, Draft articles on the representation of States in their relations with international organizations, 1971 ILC Report (A/26/10) chapter II(B) para 57; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (14 March 1975) A/CONF.67/16, not yet in force. For the convention's ratification status see <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-11&chapter=3&clang=_en>

[67] 1992 ILC Report (A/47/10) paras 359–362.

[68] 2006 ILC Report (A/61/10), Annex B, 455.

[69] 2016 ILC Report (A/71/10) 387.

[70] Art 3(d) and art 7, ILC Draft articles on the protection of persons in the event of disasters, 2016 ILC Report (A/71/10) chapter IV, para 48. See Chapter 5, section 3.

regardless of whether this is carried out in the context of treaties between states or between states and international organizations.[71] Each of these projects will be examined in greater detail in chapters 3 and 5.

## 2.3. International organizations as sources of evidence of international rules

Moving on from the issue of the addressee of international rules, the question arises of how international organizations effectively participate in the ILC's work and how their practice is accounted for in this process.

Concerning the first part of this question, it is important to recall that, to perform its work, the ILC relies in large part on information supplied by states, international organizations, scientific institutions, independent experts, or others. This information serves as evidence for the ILC to develop its draft rules, guidelines or conclusions. This evidence may include 'laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic.'[72] The ILC has, therefore, invested significantly in calling for this evidence to be made more readily available to the Commission.[73]

International organizations play an important role in this context. They serve as sources of information on the practice of states, and of international organizations. International organizations' engagement with the ILC has therefore been formalised through institutional arrangements that allow organizations to transmit information to the Commission. As argued below, this engagement not only informs the ILC's work but also has a transformative effect on the work of these same organizations.

The participation of international organizations in Sixth Committee debates is formalised through the granting of observer status.[74] This status is

[71] Guideline 3, ILC Draft guide to provisional application of treaties, 2021 ILC Report (A/76/10) chapter V, para 50. See Chapter 3, section 4.2.
[72] Art 19(2) ILC statute.
[73] With respect to customary international law, the availability of evidence has been part of the ILC's work from the outset. See ILC, Ways and means of making the evidence of customary international law more readily available. Preparatory work within the purview of article 24 of the Statute of the International Law Commission. Memorandum submitted by the Secretary-General, 1949 (A/CN.4/6 and Corr.1).
[74] The status of observer is not, however, expressly regulated by the UN Charter or the UNGA Rules of Procedure, resulting instead from institutional practice. UNGA Decision 49/426 of 9 December 1994 stipulates that states and intergovernmental organizations whose activities cover matters of interest to the Assembly shall be granted observer status. The process by which an international organization may request – and be granted – observer status was further described

open to all international organizations that share the values and principles of the UN. Much like the EU did back in the 1970s, international organizations can submit an application for UNGA observer status which, if granted, accords them the right to partake in UNGA general debates as well as in those of its committees.[75] With participation at the Sixth Committee comes the right to deliver statements on the ILC's annual report. These statements can cover any aspect of the report and allow international organizations to voice their views on the rules that are codified therein, as well as to relay their practice which they believe might be of relevance to an ILC project. In 2019, for instance, statements addressing the ILC annual report were delivered at the Sixth Committee by the EU, the Holy See, the Permanent Court of Arbitration, and the Council of Europe.[76] In addition, international organizations active in relevant fields to the rules codified by the ILC (such as migration, disaster relief, or environmental protection) may be expressly asked to submit information on specific questions. The selection of the organizations to be contacted is done by the competent Special Rapporteur, in consultation with the UNGA Secretariat.[77] As direct addressees of requests for information, international organizations submit written observations which are then translated and made publicly available on the ILC's website. Any responses received from organizations that are not included in a request will be transmitted to the Special Rapporteur by the Secretariat but will not be

in a legal opinion on the status of the International Conference on the Great Lakes Region. United Nations, 'Note to Department of Political Affairs regarding the status of the International Conference on the Great Lakes Region (ICGLR)' in United Nations Juridical Yearbook 2008 (ST/LEG/SER.C/46) (New York, 2010) 438. Frank Hoffmeister and Pieter-Jan Kuijper, 'The status of the European Union at the United Nations: institutional ambiguities and political realities' in Frank Hoffmesiter, Tom Ruys, and Jan Wouters (eds) *The United Nations and the European Union: an ever stronger partnership* (TMC Asser Press 2006) 9, 14-15. Cf Rules 98 and 100, Rules of Procedure of the General Assembly, 2008 (A/520/Rev.17).

[75] The Legal Committee (Sixth Committee) is responsible for preparing a legal opinion on requests for UNGA observer status. In 2020, the Sixth Committee reviewed 12 requests for observer status, including that of the Global Environment Facility and the International Organization of Employers. See UNGA, 'Sixth Committee (Legal) — 75th session. Agenda items allocated to the Sixth Committee', items 172-183 <https://www.un.org/en/ga/sixth/75/75_session.shtml>

[76] See inter alia, Statement by Mr Lucio Gusetti (European Commission Legal Service), Sixth Committee, Agenda item 79 (28 October 2019); Statement by H.E. Archbishop Bernardito Auza Apostolic Nuncio, Permanent Observer of the Holy, Sixth Committee, Agenda item 79 (5 November 2019).

[77] Interview 16 (31 July 2019).

displayed online.[78] In turn, general requests for information feature in chapter III of the ILC annual report. In 2019, this chapter included requests for information on the topics of 'immunity of state officials from foreign criminal jurisdiction', 'general principles of law', and 'sea-level rise in relation to international law'.[79] Regarding the latter, the ILC sought (rather broadly) information from 'States, international organizations and the International Red Cross and Red Crescent Movement ... on their practice and other relevant information concerning sea-level rise in relation to international law.'[80]

Yet, UN observer status does not accord international organizations, nor states for that matter, the right to make statements during the sessions of UNGA subsidiary bodies, such as the ILC. The ILC, however, has instituted a long-standing practice of formal cooperation with juridical bodies of mostly regional intergovernmental organizations, on the basis of article 26 of its Statute. This provision stresses 'the advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law'.[81] On this basis, the ILC has gradually formed its own internal 'observership' system aimed at better grasping regional developments in state practice and *opinio juris*. These arrangements grant representatives from selected organizations the possibility to address the ILC for one hour during its annual session, in Geneva, followed by a short debate. Initiated in 1954, when the first resolution on ILC 'cooperation with other bodies' was adopted,[82] these consultative arrangements have gradually been extended to include bodies such as the Inter-American Juridical Committee (IAJC),[83] the Asian-African Legal Consultative Organization (AALCO),[84] the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI),[85] the African Union Commission on International Law[86] and, for a

[78] ibid.
[79] 2019 ILC Report (A/74/10 and Corr.1) chapter III, paras 26-33.
[80] ibid, para 31. See also 2008 ILC Report (A/63/10) paras 32-33.
[81] Art 26(4) ILC statute. See also, art 25(1) ILC statute.
[82] Previously Inter-American Council of Jurists. See 1954 ILC Report (A/CN.4/88) para 77.
[83] ibid.
[84] 1957 ILC Report (A/3623) 144, paras 21-24.
[85] 1997 ILC Report (A/52/10) paras 239-243. The cooperation between the Council of Europe and the ILC was previously carried out by the European Committee on Legal Co-operation. See 1966 ILC Report, Suppl. 9 (A/CN.4/191) paras 16-17.
[86] 2010 ILC Report (A/65/10) para 404. The AUCIL participated in ILC sessions in 2012-2015 and 2017.

brief period, the Arab Commission for International Law.[87] In addition, the President of the ICJ, as the principal judicial organ of the UN, also addresses the ILC at its annual sessions, relaying aspects of the Court's case law that are relevant to ILC projects and allowing ILC members to seek clarification on points of law and practice.[88] Special Rapporteurs themselves can also invite expert groups for presentations on specific aspects of a topic during the side events held throughout the ILC annual session. This practice was followed, for instance, by Special Rapporteur Shinya Murase when drafting the guidelines on the protection of the atmosphere, discussed in chapter 5.[89]

This institutional practice has a transformative effect that extends beyond the exchange of views held in room XXI of the UN offices in Geneva. Some of these bodies have gradually become forums for intra-regional coordination of governments' views on the topics discussed at the ILC. Addressing the ILC on behalf of the European Committee on Legal Cooperation (now CAHDI) in 1970, the Director for Legal Affairs of the Council of Europe noted, for instance, that the Committee had started organizing special meetings to discuss the work of the ILC and stressed 'the ever-increasing interest which the Committee was taking in the work of the Commission'.[90] The Asian Legal Consultative Committee (later AALCO), in addition, was established in 1956 with a view to, inter alia, studying issues addressed by the ILC and communicating the views of its members to the ILC.[91] In 1970, the Committee included 'state succession' in its programme of work in anticipation of the ILC's discussion of the topic.[92]

The cross-fertilisation inherent to this engagement can be seen in two different lights. On the one hand, it can be said to contribute to a gradual fragmentation of international law. As argued by one ILC member, by arrogating to themselves the competence to codify rules of international law, regional organizations promote regional understandings of this system of

[87] 1978 ILC Report (A/33/10) paras 204-207. The Arab Commission for International Law participated in ILC sessions in 1980-1981, 1983-1985.
[88] See inter alia, ILC, Summary record of the 3478th meeting, 11 July 2019 (A/CN.4/SR.3478); 2019 ILC Report (A/74/10 and Corr.1) paras 24 and 314.
[89] See Chapter 5, section 5.
[90] 1970 ILC Report (A/CN.4/237) para 97.
[91] Art 4, Statutes of the Asian-African Legal Consultative Committee (12 January 1987). Ko Swan Sik Pinto, and J.J.G. Syatauw, 'Statutes of the Asian-African Legal Consultative Committee' in Asian Yearbook of International Law (Brill Nijhoff 1992).
[92] 1970 ILC Report (A/CN.4/237) para 94.

rules.[93] On the other hand, these organizations simultaneously inform and are informed by the ILC's work. They react to the codification priorities identified by the ILC and carry out the task of identifying and at times codifying regional practice which feeds into ILC projects. Thus, while they may be seen as a cause or consequence of the fragmentation of international law, this decentralised process of codification is reined in by the institutionalised dialogue between these organizations and the ILC. Overall, it is difficult not to see this symbiotic relationship as a positive one, notably from an ILC perspective. For instance, while certain ILC projects – such as the draft articles on crimes against humanity[94] – have attracted an unprecedented amount of interest from civil society, governmental, and non-governmental organizations, more often than not, the ILC has regretted the lack of engagement by states and other actors with its work.[95] This engagement, therefore, facilitates rather than fragments the clarification and development of international law.

A distinct level of analysis, and relevance, concerns the second question outlined at the start of this section. This refers to the extent to which the ILC relies on the practice of international organizations when identifying and advancing rules of international law. This will necessarily be the case where ILC projects specifically regulate the legal position of international organizations, such as in the VCLT-IO or the ARIO, mentioned above. Where a project instead adopts a 'combined' codification method, proposing rules that are potentially relevant to both states and international organizations,[96] the reliance on the practice of states in the context of international organizations, or of international organizations 'as such' in the exercise of their competences in the field subject to regulation, can also be marked. For instance, in drafting rules on the protection of persons in the event of disasters, Valencia-Ospina, Special Rapporteur on the project, relied significantly on the practice of the International Federation of the Red Cross and Red Crescent Societies (IFRC) in the provision of international disaster

[93] Interview 3 (9 July 2019).
[94] ILC, 'Fourth report on crimes against humanity by Sean D. Murphy, Special Rapporteur', 2019 (A/CN.4/725) para 7.
[95] Concepción Escobar-Hernández, 'The Relationship between the International Law Commission and the Sixth Committee of the General Assembly: Some Methodological Reflections and Proposals' in United Nations (ed), *Seventy years of the International Law Commission: drawing a balance for the future* (Brill Nijhoff 2021) 86.
[96] Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66(2) International & Comparative Law Quarterly 491, 493-4.

relief and assistance.[97] When drafting rules on the expulsion of aliens, Maurice Kamto likewise turned to EU directives as a source of 'inspiration' to formulate rules governing the conduct of states in this field.[98]

The exact weight and legal relevance accorded to the practice of international organizations in this process, however, is difficult to gauge. While it is generally agreed that the practice of international organizations is relevant to the identification of rules of international law concerning organizations' immunities, treaty-making processes, or responsibility, opinions are less clear when it comes to non-organization-specific rules. The practice of the International Organization for Migration (IOM) may be relevant for the codification of rules on the expulsion of aliens, while that of the UN Environment Programme (UNEP) may help in developing guidelines on the protection of the atmosphere. But should the ILC's work in surveying the texts of treaties, legislation, case-law, diplomatic correspondence, official statements, and other sources of practice always extend to the acts of international organizations? If so, which organizations, and which acts, should be considered? And what legal relevance do they hold? Should a resolution adopted by the parliamentary assembly of an organization be regarded as the expression of the practice and will of the participating states, or as an autonomous act of the organization, or both? Does the quorum and legal force of the act, as defined by the relevant rules of the organization, affect this assessment?

These questions came to the fore in the ILC debates surrounding the identification of customary international law (CIL).[99] The conclusions that were reached are of particular importance for an understanding of how international organizations' practice may be relevant for the work of a body which, to a large

[97] ILC, Draft articles on the protection of persons in the event of disasters, 2016 ILC Report (A/71/10) chapter IV, para 48 ('PPED articles'), commentary to art 3, para 3 and 13; Commentary to art 4, para 3; Commentary to art 6, paras 6-7; Commentary to article 15, para 3; Commentary to article 17, para 5. See also, Chapter 5, section 3.1.

[98] ILC, Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur, 2010 (A/CN.4/625, Add.1 and Add.2), paras 103-116. See also, Tamás Mólnar, 'EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back' (2017) Pécs Journal of International and European Law 40; Chapter 5, section 2.4.

[99] See ILC, 'Summaries of the Work of the International Law Commission. Identification of customary international law' (last updated 7 June 2020) <https://legal.un.org/ilc/summaries/1_13.shtml>; ILC, Draft conclusions on the identification of customary international law, 2018 ILC Report (A/73/10) chapter V, para 65 ('CIL conclusions').

extent, busies itself with the codification of custom. Similar questions have also arisen, more indirectly, in the context of ILC debates on other topics, including the debates on 'peremptory norms of general international law (*jus cogens*)' and the preliminary debates on 'general principles of law'.[100] The projects on 'subsequent agreements and subsequent practice in relation to the interpretation of treaties' and on the 'provisional application of treaties', discussed in chapter 3, likewise approach the issue indirectly.[101] Taken together, the ILC's work on these topics reflects a particular understanding within the ILC (and arguably international law) at large about the role that international organizations in general – and the EU in particular – might play in the co-creation and development of rules or principles of international law.

## 2.4. International organizations as contributors to customary international law

Of this constellation of projects, the doctrinal debate on the relevance of international organizations' practice for the formation or expression of international rules was most prominent in the project on the identification of CIL. In 2018, the ILC adopted on second reading a set of 16 conclusions on the identification of rules of custom. This included conclusion 4(2), which stipulates that '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'. Despite – or perhaps because of – its simplicity, this conclusion has engendered much debate. This debate pitted two visions about the role of international organizations within the fabric of international law against each other: one which denies international organizations a role in the formation of rules of international law, and thus views them mostly as 'objects to be regulated by general international rules developed by states';[102] and one opposing view

[100] See 2019 ILC Report (A/74/10 and Corr.1), chapter V (peremptory norms of general international law (*jus cogens*)) para 46 ('Jus Cogens conclusions (first reading)'); ibid, chapter IX (General principles of law) paras 202, 235 and 523; 2021 ILC Report (A/76/10, 2019) chapter VIII (General principles of law) paras 165–239.

[101] See Chapter 3, sections 4.1. and 4.2. See also, ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018 ILC Report (A/73/10) chapter IV, para 51; ILC, Draft guide to provisional application of treaties, 2021 ILC Report (A/76/10) chapter V, para 50.

[102] See Statement by Mr. Egan (United States of America), Sixth Committee, Summary record of the 20th meeting, 24 October 2016 (A/C.6/71/SR.20) paras 56–8; Kristina Daugirdas, 'International Organizations and the Creation of Customary International Law' (2019) University of Michigan Public Law Research Paper No. 597, 21.

that asserts that international organizations 'can and do play' a role in this process.[103]

The opinions shared at the Sixth Committee varied from those who saw conclusion 4(2) as 'too limited' to 'sufficiently reflect the growing participation of universal as well as regional [international organizations] in the international relations',[104] to the belief that this was a progressive development of international law focused on the 'limited experience' of the EU.[105] Within the ILC, a similarly wide range of views were expressed:

> Some members ... were of the view that the practice of international organizations was not to be taken into account in the process of identification of rules of customary international law. Other members considered that the practice of international organizations was only pertinent to the extent it reflected the practice of States. Some other members, however, agreed with the Special Rapporteur that the practice of international organizations as such could be relevant to the establishment of customary rules, particularly in regards to certain fields of activity within the mandates of those organizations.[106]

What the resulting conclusions tell us about the ILC views, as informed by the views of states and the limited number of international organizations which commented on this project, is that a consensus is forming around the idea that the practice of international organizations may be legally significant to the formation or expression of custom either (i) indirectly (when the organization's conduct reflects the collective 'practice and convictions' of states or 'catalyses' or 'prompts' state practice)[107] or (ii) in 'certain cases' directly (as autonomous and independent 'actors in their own right').[108]

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[103] ILC, 'Fifth Report on identification of customary international law by Michael Wood, Special Rapporteur', 2018 (A/CN.4/717) para 37.
[104] ibid.
[105] ibid, para 39. See also 2014 ILC Report (A/69/10) para 159.
[106] ibid; 2015 ILC Report (A/70/10) para 89.
[107] ILC, 'Third Report on identification of customary international law by Michael Wood, Special Rapporteur', 2015 (A/CN.4/682) ('Wood Third Report') paras 74-75; Conclusions 6(2), 10(2) and 12 CIL conclusions.
[108] Understood as 'practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them'. Commentary to art 4 CIL conclusions, para 4. See also, ILC, Fifth report on identification of customary international law by Michael Wood, Special Rapporteur, 2018 (A/CN.4/717) para 44.

Both cases are seen through the lens of the state as the primary unit. In the first model, international organizations are fully transparent and are thus relevant as structures for the expression of the views of states. In the second, they are seemingly opaque but only in the 'certain cases' where their conduct corresponds to the exercise of state-transferred or state-like powers.[109] The universe of international organizations that can contribute directly to the formation or expression of rules of custom is, therefore, significantly smaller than the existing number of international organizations.[110] Importantly, in this second (opaque) model, the significance of the practice of international organizations is justified by refence to the corresponding decreased significance of the practice of their constitutive states, operated by the transfer of powers to the organization. In the words of Sir Michael Wood, the Special Rapporteur for this project:

> ... if one were not to equate the practice of such international organisations with that of States, this would mean not only that the international organisations' practice would not be taken into account, but also that its Member States would themselves be deprived of or reduced in their ability to contribute to State practice.[111]

Evidence of the practice of international organizations is analogous to that of states.[112] It may take the form of diplomatic-like acts and correspondence; conduct in connection with resolutions adopted by an international organization to which it is a party; conduct in connection with treaties; executive, legislative and administrative acts; or judicial decisions.[113] The decisions of courts and tribunals (presumably including those established as organs of an international organization) also serve as subsidiary means 'for the determination of rules of customary international law when they themselves examine the existence and content of such rules.'[114] Unsurprisingly, to be

[109] Examples of powers functionally equivalent to those of states include the conclusion of treaties, serving as treaty depositaries, deploying military forces (e.g. for peacekeeping) or administering territories. Commentary to art 4 CIL conclusions, para 6. See also, Catherine Brölmann, *The Institutional Veil in Public International Law* (Hart 2007) 29-33.

[110] Daugirdas (n 102) 39–40.

[111] ILC, Second Report on identification of customary international law by Michael Wood, Special Rapporteur, 2014 (A/CN.4/672) para 44.

[112] Commentary to conclusion 4 CIL conclusions, para 4.

[113] Commentary to conclusion 6 CIL conclusions, para 7.

[114] Commentary to conclusion 13 CIL conclusions, para. 1. The relevance of judicial decisions in this process is nevertheless approached with 'some caution'. 2015 ILC Report (A/70/10) paras

'accounted for', this practice must be publicly available or at least known either to a large community of actors or to a smaller group (for particular custom).[115] The legal relevance of international organizations' practice, however, will also depend on additional criteria, including the size of an international organizations' membership, 'the nature of the organization' and 'whether the conduct is consonant with that of the member States of the organization'.[116] This last requirement, in particular, reflects states' reservations about the idea of full autonomy of international organizations, and the precedence accorded to states' conduct in shaping international law, regardless of their collective decision to transfer powers to an international organization.

Blokker has summarised the outcome of the ILC's conclusions on custom as symptomatic of international law's ambivalence towards international organizations and of its inability to 'take international organizations seriously'.[117] Barkholdt has argued that states' reservations to recognizing the custom-generating power of international organizations is more the result of a lack of conceptual clarity as to which forms of organizational practice are relevant to this process, rather than an objection of principle.[118] Brölmann ascribes these reservations to the ambivalence with which international organizations' juridical will is still approached.[119]

This approach is arguably transversal to the ILC projects that followed the CIL conclusions, notably those dealing with *jus cogens* norms or general principles of international law. If the ILC concluded that international organizations might contribute to the formation or expression of rules of

70 and 86. See also ILC, 'Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat', 2016 (A/CN.4/691).

[115] Commentary to conclusion 5 CIL conclusions, para 5 and note 701.

[116] 2016 ILC Report (A/71/10) para 8. See also, commentary to conclusion 4 CIL conclusions, para 7.

[117] Niels Blokker, 'International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?' (2017) 14(1) International Organizations Law Review 1, 5.

[118] Janina Barkholdt, 'The Contribution of International Organizations to the Formation, Interpretation and Identification of International Law. Questions Arising from the Work of the International Law Commission' (2020) 18(1) International Organizations Law Review 1.

[119] Catherine Brölmann, 'Capturing the Juridical Will' in Sufyan Droubi and Jean d'Aspremont (eds), *International Organisations, Non-State Actors, and the Formation of Customary International Law* (Manchester University Press 2020).

custom in 2018, a year later, in 2019, it indicated the contrary as far as peremptory norms of general international law are concerned.[120] Conclusion 7 of the ILC's work on *jus cogens*, in particular, notes that '[w]hile the positions of [actors other than States] may be relevant in providing context and for assessing acceptance and recognition [of *jus cogens* norms] ... these positions cannot, in and of themselves, form part of such acceptance and recognition'.[121] The commentary on the text clarifies that, notwithstanding minority views to the contrary, 'the current state of international law retains States as the entities whose acceptance and recognition is relevant'.[122] In the ILC's work on general principles of law, ongoing at the time of writing, Special Rapporteur Vázquez-Bermúdez has also drawn the ILC's attention to the need to discuss 'whether international organizations could also contribute to the formation of general principles of law'.[123] While the commentary on draft conclusion 3, addressing the notion of recognition of a general principle of law by the 'community of nations', indicates that 'in certain circumstances, international organizations may also contribute to the formation of general principles of law', the debates in 2021 expressed some reservation towards opening up this legal space to international organizations.[124] As a result, the Special Rapporteur found it pertinent to stress that rules emanating from international organizations remain 'complementary and not alternative' to states' domestic laws in the identification of general principles of law.[125]

Ultimately, these ILC projects show a growing, if modest, recognition of the relevance of international organizations in the fabric of international law, combined with a repeated confirmation that this recognition should not be seen as supplanting the relevance of states. While discussions have shifted from debates on whether international organizations might contribute to the formation or development of rules of (customary) international law to debates

[120] Pointing out this inconsistency see, Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019) 124-126.
[121] Commentary to conclusion 7 Jus Cogens conclusions (first reading) para 3.
[122] ibid, para 2.
[123] 2019 ILC Report (A/74/10) paras 220, 242; 2021 ILC Report (A/76/10, 2019) para 184.
[124] 2021 ILC Report (A/76/10) para 205: 'While several members supported the inclusion of the practice of international organizations in the analysis in cases where those organizations were given the power to issue rules that were binding on their member States and directly applicable in the legal systems of the latter, some members expressed caution in that regard. The view was expressed that such inclusion would require justification, as Article 38, paragraph 1 (c), of the Statute of the International Court of Justice did not refer to international organizations.'
[125] ibid, para 230.

on how or when they do so, the participation of international organizations in this system remains secondary to that of states. For the purposes of the present research, the state of play of these debates is relevant in so far as it reflects how international organizations are conceptualised as *jus generative* forces in international law and how the ILC might rely on their practice. From the EU's perspective, this doctrinal debate defines the background against which the EU's engagement with the ILC and its contribution to the development of international law (article 3(5) TEU) are understood.

This debate positions the Union at a particular advantage. If relevance is gauged by the transfer of powers to an organization, then the EU is particularly well placed to contribute to the development of rules in a growing number of fields, from the conclusion of international agreements to the protection of persons from natural or manmade disasters.[126] With regard to customary international law, specifically, Wood expressly noted that 'the relevance of [EU] practice is difficult to deny'.[127] Unsurprisingly, the European Commission welcomed this conclusion. In its statements at the Sixth Committee concerning this project, the Commission expressed a preference for a distinction between different organizations and repeatedly stressed that, in the EU's view, EU practice was indisputably contributing to the formation and development of rules of custom, namely through its growing participation in international agreements.[128]

The EU's statements on the customary law conclusions are part of a larger institutional practice of EU engagement with the ILC. This practice is grounded, first and foremost, in official statements by the organization delivered at the UNGA Sixth Committee. Before delving into how the Commission LS has used these statements to convey, through confirmation and contestation, its own understanding of how EU practices contribute to the development of international law, it is important to consider how these

[126] See Chapter 3 and chapter 5, section 3.

[127] ILC, 'Fourth Report on the identification of customary international law by Sir Michael Wood, Special Rapporteur', 2016 (A/CN.4/695 and Add.1) para 20. See also, commentary to conclusion 4 CIL conclusions, para 6.

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

statements are prepared and delivered. In the next section, our focus therefore moves to Brussels, where these statements are prepared.

## 3. Brussels: Drafting EU statements on ILC projects

In the 1970s, international lawyers were not a strange sight at the European Commission. Familiar with the work of the ILC and perhaps eager to exercise the full set of rights arising from the UN observer status granted to the EEC in 1974, these lawyers began early on engaging with the work of this UNGA subsidiary body. The first statement prepared by the LS on an ILC project was delivered on 27 October 1975 by Mr Hardy, Observer for the EEC, addressing the ILC's codification of rules on the operation of most-favoured-nation (MFN) clauses in trade agreements.[129] Since then, the LS has prepared statements concerning at least twelve other ILC projects, ranging from topics specifically addressing international organizations (most notably, the ARIO) to topics otherwise relevant to the exercise of EU external powers (for instance, rules on the protection of persons in the event of disasters).[130]

By the 1990s and early 2000s, when the ILC turned its attention to the codification of rules on the responsibility of international organizations, European Commission lawyers such as Esa Paasivirta, Pieter-Jan Kuijper, and Frank Hoffmeister, began combining formal statements at the Sixth Committee with academic publications expanding on the EU's views on the existence or emergence of rules of international law and their relationship with the EU and its practices.[131] Between 1990 and 1997, a section devoted to a

[129] Statement by Mr. Hardy (Observer for the European Economic Community), Sixth Committee, Summary Record of 1549th meeting, 27 October 1975 (A/C.6/SR.1549) para 47. See also Chapter 3, section 3.1.

[130] See Introduction, section 3.4.

[131] Pieter-Jan Kuijper joined the European Commission Legal Service (LS) in 1979 and served as Principal Legal Adviser and Director of the LS' External Relations and International Trade team between 2002-2007. Esa Paasivirta, in turn, first joined this LS in 1997 and served as First Counsellor and Legal Advisor in the Delegation of the European Commission to the United Nations in New York between 2004 and 2008. Finally, Frank Hoffmeister was a member of the European Commission LS between 2002 and 2010 specialising in EU external relations and public international law. To these three names one should add that of (now) Judge Allan Rosas, who served as Principal Legal Adviser and Director of the European Commission LS between 1995-2001 and as Director-General of the same LS between 2001-2002. It would be impossible to list all the relevant academic contributions by these four authors. A number are referenced throughout this thesis, in particular, in Chapter 4. See also, Päivi Leino-Sandberg, *The Politics*

survey of the principal decisions of the CJEU addressing questions of international law was a fixed feature of the European Journal of International Law, and was relied on by international lawyers later elected to the ILC.[132]

The investment of the LS in scrutinising the ILC annual report and selecting issues on which the EU might form a position has not been a linear one. If we map out the distribution of EU statements addressing the Sixth Committee agenda item 'Report of the International Law Commission', a pattern emerges which includes an initial period of regular statements (1975–83) focused on the ILC's draft articles on MFN clauses and the draft rules at the origins of the 1986 VLCT-IO. This is followed by an interregnum (between 1984–2002) interrupted only by statements on the establishment of the International Criminal Court (1992–5). EU statements on ILC topics resumed in 2003, addressing the ARIO, and have since remained a permanent feature of the EU's participation in Sixth Committee debates.

The preparation and delivery of these statements is the result of a carefully orchestrated institutional coordination – part legal acumen, part diplomatic groundwork – which follows a relatively fixed structure. Each year, at the end of the UNGA session, the programme of work for the next session is discussed and adopted in the form of resolutions. On the basis of this programme, notably the list of items allocated to the Sixth Committee, the EU defines the degree of its involvement with respect to each agenda item.[133] Depending on the topics to be discussed, the EU can decide to simply assist in the coordination of the position of its member states, to make its own statement on a specific topic, to do neither, or to do both.[134] Within the topics included in the Sixth Committee's agenda, for instance, there is an established practice that the EU neither coordinates nor makes statements on requests for UN membership or observer status –these are political decisions regarding which

*of Legal Expertise in EU Policy-Making* (CUP 2021) chapter 5 ('The Commission Legal Service') 158.

[132] Interview 1 (4 June 2019). A section entitled 'International Practice of the European Communities: Current Survey', including the main CJEU decisions relevant to international law, featured in the European Journal of International Law between 1990 and 1997. See inter alia, Christoph Vedder, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law' (1990) 1 EJIL International Law 365.

[133] See Sixth Committee, 'Allocation of agenda items to the Sixth Committee. Note by the Secretariat', 2021 (A/C.6/76/1); UNGA Res 76/111 of 9 December 2021.

[134] Interview 20 (27 March 2020) and 21 (9 April 2020).

the EU reserves judgment.[135] For items where the EU might make a statement, some are prepared in New York, and some in Brussels. The European External Action Service (EEAS) and, specifically, the EU Delegation to the UN in New York, are assigned the preparation of statements on agenda items such as terrorism, the rule of law, or the administration of justice at the UN.[136] These are topics requiring a diplomatic touch, and proximity to foreign partners and to the international forums where these questions are discussed. The statements on the agenda item 'Report of the International Law Commission' are, in turn, prepared by the Commission LS, in Brussels.

In Brussels, several actors are directly and indirectly involved in coordinating the EU's relationship with the UN. The Council of the EU Working Party on the United Nations (CONUN), for instance, was established by the Political Cooperation Committee in 1975 and is entrusted with designing the larger policy objectives and strategic goals to be pursued by the EU at the UN.[137] UN coordination begins in the first half of the year, with the circulation by the Presidency of the Council of a draft list of EU priorities for that year's UNGA session, based on a draft prepared by the EEAS.[138] This text is circulated for comments by member states through the COREU closed communication system.[139] Once all comments are registered, the document is

[135] Interview 21 (9 April 2020) and 22 (3 December 2020).

[136] See inter alia, European Union, Statement on behalf of the European Union and its Member States at the Sixth Committee on the Agenda item 86: "The Rule of law at national and international level" Subtopic: "Measures to prevent and combat corruption" (19 October 2020) <https://www.un.org/en/ga/sixth/75/pdfs/statements/rule_of_law/07mtg_eu.pdf>

[137] The CONUN's mandate is described in the Council's website as comprising the development of 'common EU policy on UN issues of common interest to EU member states' by means of 'recommendations and guidance on strategic EU policy objectives and thematic issues at the UN' including the coordination of EU member states' priorities therein. See Council of the European Union, 'United Nations Working Party (CONUN)' <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/united-nations-working-party/>; Maximilian B Rasch, *The European Union at the United Nations: The Functioning and Coherence of EU External Representation in a State-centric Environment* (Brill Nijhoff 2008) 130.

[138] See Council Conclusions of 13 July 2020, 'EU priorities at the United Nations and the 75th United Nations General Assembly, September 2020 - September 2021' (9401/20). See also, Esa Paasivirta and Thomas Ramopoulos, 'UN General Assembly, UN Security Council, and UN Human Rights Council: The EU in State-Centred Multilateral Frameworks' in Ramses A Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar 2018) 61-62.

[139] COREU (from the French 'Correspondance Européenne') is a closed and secured communication system accessible only to EU member states, the Council and the Commission. It has been used since 1973 for communications on all foreign policy matters among EU

sent to the CONUN for discussion. Once a consensus is reached, the position goes to the Council's Political and Security Committee (PSC) for finalisation and, lastly, to the Council for approval. In addition to the CONUN, questions of international law are also discussed within different Council working groups. Depending on the subject matter, they can be addressed by the Council's working party on human rights (COHOM), on law of the sea (COMAR), or the working party on public international law, best known by its French designation as Comité Juridique (COJUR).[140] Since the Lisbon amendment of the EU Treaties, most of these Council working group meetings are chaired by the High Representative of the Union for Foreign Affairs and Security Policy or by EEAS delegates in the High Representative's behalf.[141] This does not apply, however, to the COJUR.

The COJUR is the body entrusted with the discussion and approval of EU statements on the ILC annual report.[142] This working group meets four times a year and comprises representatives from the EU member states (usually the legal advisers of the ministries of foreign affairs), a representative from the Commission (usually the Legal Service Director for External Relations), a representative from the Council (usually a senior member of its Legal Service), and a representative from the EEAS's own legal service.[143] The function of the Council Legal Service at these meetings is twofold: it operates as the Secretariat for the working party and also provides direct assistance to the Presidency of the Council. Unlike CONUN meetings, COJUR meetings are still chaired by the state holding the Presidency of the Council.

During COJUR debates, ILC members from the state holding the rotating Presidency of the Council may be invited to address member states'

institutions and its member states. See Federica Bicchi, 'The EU as a community of practice: foreign policy communications in the COREU network' (2011) 18(8) Journal of European Public Policy 1115.

[140] See Council of the European Union, 'Note from the General Secretariat of the Council to Delegations - List of Council preparatory bodies' (10075/17 - POLGEN 87) (19 June 2017).

[141] Geert De Baere and Esa Paasivirta, 'Identity and difference: The EU and the UN as part of each other' in Henri de Waele and Jan-Jaap Kuijpers (eds), *The European Union's Emerging International Identity: Views from the Global Arena* (Brill Nijhoff 2013) 35.

[142] Frank Hoffmeister, 'Comité Juridique (COJUR)' in *Max Plank Encyclopaedia of Public International Law* (Oxford Public International Law, last updated September 2019).

[143] See Jan Wouters and Marta Hermez, 'The EU's Contribution to "the Strict Observance and the Development of International Law" at the UNGA Sixth Committee' in Spyros Blavoukos and Dimitrios Bourantonis (eds), *The EU in UN Politics: Actors, Processes and Performances* (Palgrave Macmillan 2017) 147, 150-151.

delegates at COJUR meetings.[144] This exchange of views is part of a practice of 'informal consultations'. The input from ILC members is delivered in a personal capacity and solely on an information-basis. The invited ILC member will essentially summarise the content of the discussions held at the ILC during its May to August session, in Geneva, and draw the attention of member states to specific points or requests for information. In addition, informal talks between EU delegates and ILC members will also occur during the Sixth Committee debates on the ILC report, in New York.[145]

In the two months separating the launch of the ILC annual report from Geneva (August) and the start of the Sixth Committee session in New York (November), the LS of the European Commission, the EEAS and the Council, identify the topics of concern to the EU from within the ILC report on the basis of a draft version of the report circulated shortly after the end of the ILC's session in August. Notwithstanding the input from the different legal services, the established practice within the EU is that the drafting of the statements on the ILC report is led by the Commission LS.[146] This has remained the case even after the adoption of the Treaty of Lisbon and the establishment of the EEAS. An exchange of views on the statements prepared by the LS takes place within the COJUR, but there is no formal vote on the statements as such. During the preparation of these statements, there is also limited interaction either between the COJUR and the CONUN, or between these two working parties and the EU delegation in New York.[147] Within the COJUR, legal advisers from the EU member states, the Council and the EEAS may submit comments on the statement prepared by the LS but this is not a recurring practice. The process in itself has been described more as a 'conversation', an 'exchange of views' or a soft form of coordination.[148] This soft coordination is part of an established institutional balance wherein member states largely welcome or 'tolerate' EU statements on ILC topics, while the Commission LS also refrains from delving too far into more sensitive subjects. Importantly, an EU statement does not prevent member states from making their own

[144] Interviews 9 (30-31 July 2019) and 10 (30 July 2019); Council Communication, Draft agenda: Meeting of the Public International Law Working Group of 3 October 2019, CM 3911/19 (9 September 2019).
[145] Interviews 9 (30-31 July 2019), 10 (30 July 2019), 18 (6 July 2018), and 21 (9 April 2020).
[146] Interviews 18 (6 July 2018), 19 (17 March 2020), 20 (27 March 2020), 21 (9 April 2020), 22 (3 December 2020), and 23 (4 December 2020).
[147] Interview 20 (27 March 2020).
[148] Interview 10 (30 July 2019) and 21 (9 April 2020).

statements on the ILC's report at the Sixth Committee. Unlike the EU statements, however, national statements on ILC topics are not circulated among member states through the COREU or otherwise, unless a delegation wants to exchange views on a particular point.[149]

The origins of this practice, whereby statements on ILC topics are prepared and delivered by staff of the Commission LS, are not entirely self-evident, but different reasons seem to have contributed to (and to militate in favour of) this allocation of tasks between EU institutions' legal advisers. For one, the first EU engagement with an ILC project concerned the draft articles on most-favoured-nation clauses, a matter which, as underscored by the Observer for the (then) EEC in his 1975 statement at the Sixth Committee, fell squarely within the Community's competence and should therefore be explained and externally defended by the European Commission.[150] This initial allocation of tasks created a measure of path dependency aided and reinforced by the fact that the ILC then turned its attention to yet another topic of particular interest to the European Commission, the conclusion of treaties with or by international organizations, followed two decades later by the ARIO.[151]

Second, this division of work is also based on reasons of a practical order. On the one hand, the process of drafting EU statements is identical whether the statements are prepared in Brussels or in New York: legal advisers will first consider whether there is a common position among EU member states on the topic, whether the EU has general competence and has itself already made statements on the topic, and will review the different EU acts or positions relevant for the topic (in the form of decisions, resolution, regulations, directives or soft law instruments such as communications, declarations, or positions).[152] On the other hand, the nature of the topics studied by the ILC is distinct from those discussed under other Sixth Committee agenda items, such as terrorism, the rule of law, or the criminal accountability of UN officials. Unlike these latter topics, changes warranting fast diplomatic reaction, exchanges, and negotiation will seldom occur with respect to topics such as the law of treaties or the identification of rules of customary

[149] Interview 20 (27 March 2020) and 21 (9 April 2020).
[150] Statement by Mr. Hardy (Observer for the European Economic Community), Sixth Committee, Summary Record of 1549th meeting, 27 October 1975 (A/C.6/SR.1549) para 47. See also Chapter 3, section 3.1.
[151] See Chapter 3, section 3.2 and Chapter 4.
[152] Interviews 20 (27 March 2020), 21 (9 April 2020) and 23 (4 December 2020).

international law. Even if the discussions in Brussels often assume a fast pace, with members states' delegates being sent to the Belgian capital and back on the same day, they form a continuum. The ILC will often discuss the same topic for a number of years. These discussions will involve an extensive review of state practice and in-depth doctrinal debates about foundational questions of public international law. The lengthier and more technical-legal substance of these debates is therefore considered best suited for COJUR-based coordination. Importantly, COJUR meetings essentially bring together the same ministerial legal advisers that prepare the national statements on the ILC annual report later delivered by member states' delegations in New York. They are also often the same people attending CAHDI meetings in Strasbourg where the same ILC-related questions are discussed.[153] There is, therefore, a complementarity and convergence in these efforts.

Finally, the allocation of the preparation of ILC statements to the Commission LS is also based on the understanding that, in the words of one EU official, these statements convey EU policies, they do not establish them.[154] This understanding is important when one considers the different topics discussed by the ILC and the fact that the EU is an entity based on conferred powers and an at-times-delicate institutional balance. While the EU enjoys a seemingly broad competence on 'all areas of foreign policy and all questions relating to the Union's security', there is a well-known (if often nebulous) distinction between Common Foreign and Security Policy (CFSP) and non-CFSP competences, the former falling outside of the remit of European Commission powers of external representation of the EU.[155] The topics studied by the ILC, however, are diverse. They have included not only projects contending directly with the exercise of traditionally 'Community' competences (such as the granting of MFN treatment in trade agreements)[156] or with the EU *qua* international organization (such as the ARIO),[157] but also with the prosecution of international crimes or the protection of persons in the event

[153] Interview 24 (6 March 2020).
[154] Interview 23 (4 December 2020).
[155] See generally, Andrea Ott, 'EU External Competence' in Ramses A. Wessel and Joris Larik *EU External Relations Law: Text, Cases and Materials* (2nd edn, Hart 2020); arts 24, 31 and 40 TEU.
[156] See Chapter 3, section 3.1.
[157] See Chapter 4.

of disasters. As discussed in the previous sections, the ILC's work is also primarily centred on states' practice.

In engaging with the ILC, therefore, the Commission LS does not comment on the entirety of the ILC annual report – instead, it selects specific topics within the report which it believes warrant an EU statement. This selection follows, in the words of one EU official, more of a 'fingertip feel' than a formal strategy.[158] It is a process best understood as the result of legal and social-institutional factors which, combined, inform a normative judgment as to whether, all things considered, there is a shared perception among the EU institutions and EU member states that the organization *should* speak on a particular topic.[159] From the perspective of the EU member states, tolerance towards the preparation of EU statements on a broad range of ILC topics also follows considerations distinct from the strict internal division of competence between the EU and its members or between different EU institutions. Overall, these statements are helpful to EU member states themselves – either because they relieve member states of the task of explaining the specificities connected EU practices or recent developments within the EU legal order, or because they draw additional attention to joint concerns of all EU member states.

Conversely, the choice for an EU statement is also based on the LS's own perception of the authority and implications of the ILC's work, and its perception of the added value of an EU participation in this process. For instance, Sixth Committee debates might offer a good opportunity for the Commission to showcase the relevance of the EU as an external actor. They also provide a forum to explain how EU rules or external actions contribute to 'the strict observance and the development of international law'.[160] The LS will be able to draw attention to the relevance of EU external competence in, for instance, international disaster relief and assistance, or in the protection of the Earth's atmosphere.[161] Or it might explain the specificities of provisional application of EU mixed agreements, or of EU rules on procedural safeguards against expulsion.[162] Moreover, EU statements on the ILC draft articles on crimes against humanity, for instance, were prepared by the LS not only

[158] Interview 19 (17 March 2020). See also, Wouters & Hermez (n 143) 154.
[159] Interviews 19 (17 March 2020) and 21 (9 April 2020).
[160] Art 3(5) TEU.
[161] Chapter 5, sections 3 and 5.
[162] Chapter 3, section 4.2; Chapter 5, section 2.

because of the EU's long-standing institutional practice of making statements on the fight against impunity for international crimes,[163] but also because, considering the overwhelming number of governmental and non-governmental organizations making statements on the topic, the EU's silence on the project would, in the words of one EU official, 'look odd'.[164]

Importantly, these debates also allow the Commission LS to contest ILC draft rules, guidelines, or conclusions which, in its view, misinterpret EU rules, which potentially create deterrents to EU integration, or which interfere with the EU's internal legal order or its external relations practice. This explains, for instance, the LS's investment in making detailed statements on the ARIO, which the European Commission believed misrepresented the agreed competence-based distribution of responsibility between the EU and its member states.[165] It also explains the existence of EU statements on the ILC draft articles on the expulsion of aliens, which in the LS's view misconstrued the distinction between the protections accorded by the EU to third-country and the legal regime it applies to its own citizens.[166] Both dimensions of EU external autonomy are vividly expressed in this participation – the LS confirms the autonomy of the EU as a relevant actor on the international stage, and protects the integrity and autonomy of the rules governing the relationship between the organization and its members, on the institutional plane.

Sixth Committee debates are, in the words of one EU official, 'diplomatic discussions about legal matters'.[167] The language of these statements will, therefore, usually carry the vagueness characteristic of diplomatic discourse. Their structure follows a relatively unaltered discursive pattern, starting with praise for the ILC or the Special Rapporteur's work on a specific topic, followed by the affirmation of EU competence and practice relevant to the subject matter, and then by comments on the specific draft articles, conclusions, or guidelines proposed by the ILC. We will visit this structure, and these statements, in the next chapters.

[163] See Chapter 5, section 4; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 28 October 2019 (A/C.6/74/SR.23) para 42.
[164] Interview 19 (17 March 2020).
[165] See Chapter 4, section 4.3.1.
[166] See Chapter 5, section 2.4.
[167] Interview 19 (27 March 2020).

## 4. New York: Delivering EU statements on ILC projects

The EU does not participate at ILC sessions in Geneva. The possibility of extending EU observer rights to subsidiary UNGA bodies was explored as a matter of policy but not of practice.[168] The representation of EU interests by the EU permanent delegation to the UN and other international organizations in Geneva has focused on the EU's relations with UN agencies and specialised bodies such as the Human Rights Council, the UN High Commissioner for Refugees (UNHCR), or the UN Conference on Trade and Development (UNCTAD),[169] although some EU officials have conceded that, in theory, a member of one of the EU institutions' Legal Services, or from the EU delegation in Geneva, could attend ILC sessions and present EU legal developments directly relevant to the ILC's work.[170] This is a practice maintained by other regional organizations, including the Council of Europe, as we saw in the previous section.[171]

Yet there seems to be a general impression that a decision to this effect would create more inter-institutional disagreement than consensus.[172] It would require, first, reaching an agreement about which institution should represent the Union. Members from the LS of the EEAS or from the Geneva Delegation would seem obvious candidates for this task; but the preparation of these statements has long been led by the Commission LS. In addition, this move would also likely be met with reservations by EU member states concerning the propriety of an EU presence in Geneva debates, where states themselves are absent. The EU's participation at CAHDI meetings in Strasbourg and at UNGA meetings in New York seems to fulfil the degree of engagement deemed appropriate by EU institutions and its member states as far as the ILC's work is concerned. Investing in an EU presence at the ILC session in

[168] UN observer status does not extend to UNGA subsidiary bodies. Yet, the possibility of extending EU observer rights to UN subsidiary bodies was included in the 2012 'Barroso-Ashton strategy' but never pursued. See European Commission, 'Communication from the Commission by the President in Agreement with Vice-President Ashton. Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon' C(2012)9420 final (20 December 2012) 3.

[169] A general overview of the mandate and work of this EU delegation can be found on its website <https://www.eeas.europa.eu/delegations/un-geneva_en?s=62 >

[170] Interviews 19 (17 March 2020) and 20 (27 March 2020).

[171] See supra, section 2.3.

[172] Except for one respondent – interview19 (17 March 2020) – most ILC and EU officials interviewed expressed some reservations about this possibility.

Geneva, therefore, is far from a likely scenario at present, even if this might arguably facilitate, more than hinder, the EU's dialogue with this international body.

Instead, the EU engages with the ILC primarily through statements delivered at UNGA Sixth Committee meetings, in New York. The EU delegation to the UN in New York is entrusted with the 'day-to-day coordination of the EU common position, including the final drafting of EU statements and the refinement of EU positions on resolutions and other draft texts'.[173] Coordination is done both electronically (through the AGORA system) and through face-to-face meetings at the Delegation's premises. It can lead to first, second, and third drafts of the same statement, ironing out the language before the statement is circulated for alignment or coordination with third states.[174] In practice, coordination on UN-related matters translates into over 600 meetings between representatives of EU member states, Council and Commission representatives at the EU delegation during the first part of the UNGA session (September to December), and over 1300 meetings annually.[175] Reflecting on their own experience as legal advisers for the European Commission delegation to the United Nations in New York, Esa Paasivirta and Dominic Porter captured this interaction as a continuum of meetings spread throughout the GA Hall, basements, and lounges:

> Understanding the functioning of the UNGA requires an insight into the day-to-day conduct of proceedings, from the formal sessions to the most informal of "consultations", from the august meetings in the GA Hall, with its complex rules of procedure and six-language interpretation, to the numerous gatherings in basement meeting rooms and delegates' lounges. The physical location and degree of informality which characterize meetings can play as big a role as the official procedures and terms of participation.[176]

[173] Wouters & Hermez (n 143) 152.
[174] Interview 19 (27 March 2020).
[175] Paasivirta & Ramopoulos (n 138) 62; Jan Wouters and Anna-Louise Chané, 'Brussels Meets Westphalia: The European Union and the United Nations' in Piet Eeckhout and Manuek Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2016) 314.
[176] Esa Paasivirta and Dominic Porter, 'EU Coordination at the UN General Assembly and ECOSOC: A View From Brussels, a View From New York' in Jan Wouters, Frank Hoffmeister and Tom Ruys (eds), *The United Nations and the European Union: And Ever Stronger Partnership* (TMC Asser Press 2006) 36.

However, the UN delegation does not usually make any changes to the statements on the ILC annual report prepared in Brussels. Coordination and alignment may take place, but the substance of the statements is left largely untouched. Brussels therefore remains the main capital where EU positions are formed on the questions of public international law studied by the ILC. New York is, however, the setting in which this position is expressed. The Sixth Committee is a stage the EU shares with different actors, including other UN observers and its own member states, and the EU's visibility therein, as well as the coordination of this visibility with that of its members, is framed both by UN and EU rules. It is to the rules and principles governing this coordination that we turn our attention in the next subsections.

### 4.1. EU representation at the UN General Assembly Sixth Committee

As a preparatory body of the UNGA, the Sixth Committee meets for approximately six weeks during the course of the UNGA's 'regular session', which begins on the Tuesday of the first week of September.[177] The Committee starts its work immediately after the conclusion of the UNGA plenary debate at the end of September and convenes until the end of November.[178] The start of the discussions on the ILC annual report marks the start of the so-called 'International Law Week' in New York, which gathers legal advisers from the different UN member states, delegates from observer organizations and non-state observers, as well as the ILC Special Rapporteurs. The ensuing dialogue includes statements, formal and informal talks, side events and informal consultations – a set of concentrated exchanges that was described by at least one ILC member as 'ILC 24/7'.[179]

[177] The UNGA meets in both regular and special sessions. Regular sessions are divided between a more intense session held between mid-September to mid-December (including the two-weeks general plenary debate), and a 'resumed part of the session' between January and September (addressing a variety of topics aligned with the work of its six preparatory committees). In addition, 'special sessions' are convened to deal with more 'high-level' or pressing matters. An example of this is the special session on the Covid-19 health pandemic convened in 2020. See Paul Luif, 'EU Cohesion in the UN General Assembly' (2003) EU Institute for Security Studies, Occasional Papers 49, 12-13; art 20 UN Charter.

[178] See Sixth Committee, Revised Programme of work: 76th Session of the General Assembly, 5 October to 18 November 2021 (6 October 2021) < https://www.un.org/en/ga/sixth/76/programme_of_work.pdf>

[179] Interview 9 (30-31 July 2019).

Discussions on the ILC report are held in 'clusters' based on the different topics of the report.[180] The debate begins with an introduction of the report by the Chair of the ILC for the relevant session.[181] The Special Rapporteurs for the topics discussed at that year's session usually also attend the debates, at their own expense.[182] Statements by states, observers, and UN organs follow these introductory remarks. Delegations summarise the main points of the statement they circulated in advance of the session, or otherwise add to it – for instance, by replying to a point raised during the debates. In addition to these statements, 'informal consultations' are convened by different delegations at the margins of the plenary sessions to discuss specific items within the ILC report, and side events are held on the different Sixth Committee agenda items.[183] At the end of each session, the Sixth Committee's views on the ILC report are transmitted to the UNGA in the form of draft resolutions which are later adopted in plenary.[184] These resolutions usually praise the ILC for its work, draw states' attention to the importance of submitting information to the ILC, and express a position on the specific projects. They are the formal expression of the continuous dialogue between the UNGA and the ILC.

The EU's visibility in this forum is part of a larger and not always smooth historical process of external affirmation of the positive dimension of EU external autonomy; that is, of its ability to participate actively in foreign affairs on equal terms with other actors.[185] The establishment of relations with

[180] See Proposed Cluster Distribution for Debate on the Report of the International Law Commission, 72nd session, A/76/10) Sixth Committee – 76th Session (2021) < https://www.un.org/en/ga/sixth/76/ilc_cluster_distribution.pdf>

[181] See Statement by Mr Hmoud (Chair of the International Law Commission), Sixth Committee, Summary record of the 16th meeting, 25 October 2021 (A/C.6/76/SR.16) paras 2-31.

[182] Interview 9 (30-31 July 2019). See Sixth Committee, 'Sixth Committee 74th session 2019. Attendance of ILC members' <https://www.un.org/en/ga/sixth/74/attending_ilc_members.pdf>

[183] See Sixth Committee, 'UNGA Sixth Committee (legal) 74th session. Schedule of informal consultations' (2021) <https://www.un.org/en/ga/sixth/76/informals.shtml>; Sixth Committee, 'UNGA Sixth Committee (legal) 74th session, Information on briefings and side events related to the work of the Sixth Committee' (2021) <https://www.un.org/en/ga/sixth/76/side_events.shtml>

[184] See Sixth Committee, 'Draft resolution: Report of the International Law Commission on the work of its seventy-second session' (A/C.6/76/L.16) 11 November 2021; UNGA Res A/RES/76/111, 'Report of the International Law Commission on the work of its seventy-second session. Resolution adopted by the General Assembly on 9 December 2021' (17 December 2021).

[185] See Chapter 1, section 3.

international organizations has for a long time been a key aspect of EU foreign policy and the subject of scholarly attention.[186] Within this strategy, the UN was prioritised early on as the elected multilateral forum for the projection of the EU's image as a 'leading global actor'. The special place that the UN occupies within the EU's legal and political imaginary is a long and lasting one. EU primary law is populated with references to this relationship.[187] The EU's commitment to effective multilateralism (as a method for the pursuit of EU foreign policy objectives) has the United Nations at its core. In the political discourse of EU institutions, the UN remains 'the main global forum for improving global governance, and as such represents the best forum in which to promote the EU's values and interest'.[188] The Union has also been granted express powers to establish 'all appropriate forms of cooperation' with the UN, its agencies and bodies.[189] In addition, the pursuit of specific EU foreign policy objectives, such as the promotion of international peace and security or humanitarian aid, are expressly grounded on their development through and within the UN framework.[190]

Although the EU was first invited to join the UNGA in 1974, coordination of its member states' views on UN topics preceded this formal status. This coordination emerged first at the fringes of the organization, through political consensus-building within the mechanism of the European Political Cooperation (EPC), and gradually made its way into the Community's institutional structures.[191] The 1973 Declaration on European Identity represented the first political commitment among EU member states to adopt, as far as possible, common positions in the context of all UN bodies and agencies, in order to maximise member states' 'influence in international affairs

[186] See generally and more recently, Ramses A Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar 2018).
[187] See arts 3(5), 21, 34(2), 41(1), 42(7) TEU; arts 208(2), 214(7) and 220(1), Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 (26 October 2012) ('TFEU'); Protocol 10 on the Permanent Structured Cooperation Established by Article 42 of the Treaty on the European Union, and Declarations 13 and 14 on Common Foreign and Security Policy, TEU.
[188] European Parliament, Resolution of 24 November 2015 'Role of the EU within the UN: How to better achieve EU foreign policy goals' OJ C 366/44 (27 October 2017), point U.
[189] Arts 21(1) TEU and 220(1) TFEU.
[190] Art 42(1) TEU and 214(7) TFEU.
[191] Coordination began initially between the Benelux countries in the 1940s and later evolved, in line with EU membership and its institutional structures. See De Baere & Paasivirta (n 141) 28; Luif (n 177) 9.

through a single coherent European approach'.[192] Ministers of foreign affairs of the then nine EU member states therefore began to coordinate their individual positions on UN matters.

The invitation extended to the EEC to join the UNGA in the role of observer organization did not fundamentally change how its member states coordinated their views on UN matters, but it rendered the Community visible in this forum. The EEC delegation to the UN in New York was set up, and it gained a blue observer seat and nameplate at formal UN meetings.[193] The Community's observer status allowed it to participate at UNGA plenary meetings, UNGA committees and sub-committees (although not its subsidiary bodies), to be represented by a delegate, and to make observations on matters falling within its competence.[194] The EEC was represented by a delegate from the European Commission and by a delegate from the Council's Presidency, a practice followed for all Community delegations to UN bodies in the 1970s and 1980s.[195] This split identity was largely tolerated at the UN – the UNGA Secretariat kept the names of the different representatives in a continuously-updated directory and at times representatives would simply switch seats in the middle of meetings to speak on matters of their respective competence.[196] Statements on CFSP matters were entrusted to the representative of the member state holding the six-month rotating Presidency of the Council of the EU, assisted by the Secretary-General of the Council. In New York, the Presidency was assisted in the coordination of member states' positions by a Council liaison office established in 1994.[197] The European Commission delegate, in turn, would speak on traditionally Community or 'first-pillar' matters, such as fisheries or trade. In practice, however, representation at plenary meetings was mostly ensured by the Council Presidency, including on

[192] European Union, Declaration on European Identity (Copenhagen, 14 December 1973) para 21 <http://www.cvce.eu/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c694b7d-b2c9-f03a8db7da32.html>

[193] This delegation was formally established in 1974 but it essentially corresponded to a continuation of the European Commission's information office, set up in New York already in 1964. Luif (n 177) 13.

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

[195] Luif (n 177) 13-14.

[196] Pedro A Serrano de Haro, 'Participation of the EU in the work of the UN: General Assembly Resolution 65/276' (CLEER Working Papers 2012/4) 8.

[197] ibid, 14.

aspects that in principle fell within the Community's competence. The Commission delegation assisted in drafting EU statements and in crafting an EU position on draft resolutions and related texts, but it was more a 'visible spectator' rather than an active participant as far as the plenary was concerned.[198] The first statement delivered at a UNGA general debate on behalf of the 'nine foreign ministers of the Community' was thus delivered by the Italian foreign minister (holding the Council Presidency) on 23 September 1975.[199]

At the Sixth Committee, however, both the Council Presidency and the Commission spoke early on as distinct but complementary participants. The first statement delivered at the Sixth Committee by Mr. Cassese, from Italy (then holding the Council's Presidency), was delivered 'on behalf of the European Economic Community (EEC) and its nine member States' on 21 October 1975.[200] At the same session, Mr. Hardy, Observer for the EEC, addressed the Sixth Committee, 'speaking at the invitation of the Chairman', to explain the EEC's exclusive competence to accord or refuse MFN treatment to third countries, a matter included in the ILC annual report and squarely falling within the Community's competence:

> [he] recalled that in the statement by the representative of Italy on behalf of the EEC and it member States concerning the text of the ILC on the most-favored-nation clause, it has been mentioned that the issues raised were under study at that time by EEC. As a body engaged in regional integration, EEC had sought to remove barriers with respect to trade between its members. Besides the internal aspects of integration, EEC maintained a common external tariff and operated a common commercial policy. Therefore, matters relating to the application of the most-favoured-nation clause or preferential treatment in the field of trade came within the competence of EEC.[201]

In addition to these two statements, a number of statements were made by individual member states.[202] This complex (but rich) pluralism between the

[198] ibid, 8; Luif (n 177) 14; Hoffmeister & Kuijper (n 74) 13.
[199] Rasch (n 137) 40-43.
[200] Statement by Mr Cassese (Italy) speaking on behalf of the European Economic Community and its nine member states, Sixth Committee, Summary record of the 1544th meeting, 21 October 1975 (A/C.6/SR.1544) paras 17-28.
[201] Statement Hardy (n 129) para 47.
[202] See inter alia, Statement by Mr. Alting Von Geusau (Netherlands), Sixth Committee, Summary Record of 1544h meeting, 21 October 1975 (A/C.6/SR.1544) para 29.

Council's Presidency, the Commission, and EEC member states, remained in force until the 2009 Lisbon amendment to the EU Treaties. In a joint contribution on the status of the EU at the UN, Hoffmeister and Kuijper illustrate this pluralism by means of an anecdote that deserves transcription in this context. The authors begin by asking the reader to imagine they are the legal adviser to Brazil (or any other non-EU member state for that matter) at the Sixth Committee, taking part in the discussions about the ILC's annual report on the topic of responsibility of international organizations, back in the early 2000s. They set the scene as follows:

> [t]he chair gives the floor to the United Kingdom, whose representative says: 'Mr. Chairman, I have the honour to speak on behalf of the [EC] and the acceding countries Bulgaria and Romania'. The person welcomes the progress made by the ILC, and then announces a change behind the name plate. He states: 'With your consent, I would like the remainder of the Statement to be delivered by the representative of the European Commission, (...). He will express the view of the European Community on the points which are directly relevant to the Community.' You see someone descending from the row of observers above the British delegation's place. He takes the place of the UK delegate and continues to speak. You suddenly realize there's a change in the accent and it is probably no longer an Englishman speaking, but you concentrate on the substance, and you provisionally conclude for yourself that the speaker must be European. Later on, you look at the distributed printout of the statement, which is entitled: 'Responsibility of international organizations – Statement on behalf of the European Union and the European Community', indicating the names of the UK and Commission Legal Advisers who spoke.[203]

Following the Treaty of Lisbon, the Commission and Council delegations in New York were merged into one single EU delegation. The EU delegation is now coordinated by the EEAS under the authority of the High Representative.[204] The Commission, however, still retains powers of instruction over non-CFSP matters, and EU delegations are often composed of legal advisers formerly linked to the European Commission. Sixth Committee statements on the ILC report, specifically, while now indexed as statements by the Observer for the European Union, are still delivered by the Principal Legal Adviser of the Commission Legal Service RELEX team (external relations),

[203] Hoffmeister & Kuijper (n 74) 9.
[204] Art 221(2) TFEU.

and only occasionally by a legal adviser from the EU delegation to the UN in New York.[205] In addition, and importantly, these statements are also delivered on behalf of EU candidate countries, countries that form part of a stabilisation and association process with the Union, and additional states that align themselves with these statements.[206] At the UN, therefore, the EU operates as a political force, not only amplifying the voices of its members but also of other states.

This political force, however, was not one easily wielded by the EU. At the UN, the recognition of the institutional changes following the Treaty of Lisbon was far from uneventful – to the contrary; it is often referred to as a 'saga' or 'debacle'.[207] UN rules on representation and speaking orders privilege states as the main actors in the organization (and the international legal order). For the EU, removing the cloak of statehood that it wore when its views were voiced by member state holding the Council Presidency came with a 'downgrade' in visibility. The Presidency spoke as a representative of a political (rather than geographic) group, and it was accorded priority in the list of speakers in most formal meetings, which allowed it to shape 'the main parameters of the discussion' and to influence individual states in determining their own positions on key issues.[208] In a state-dominated environment, this representation yielded a political clout that is not shared by 'mere' observers, who speak only after the major groups have spoken. EU representation through its delegation, by contrast, rendered it an observer among many; it had

[205] See inter alia, Statement by Mr Gussetti (Representative of the European Union, in its capacity as observer), Sixth Committee, Summary record of the 16th meeting, 25 October 2021 (A/C.6/76/SR.16) paras 36-39; Statement by Ms Gauci (European Union), Sixth Committee, Summary record of the 19th meeting, 28 October 2021 (A/C.6/76/SR.19) para 72. See also, Preamble para 13 and art 5(3), Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service OJ L 201 (3 August 2010).

[206] See inter alia, the statement delivered by Mr Gussetti on the ILC topic 'protection of the atmosphere' at the Sixth Committee meeting of 3 December 2019, which was delivered on behalf of the EU as well as the candidate countries Albania, Montenegro, Serbia and the former Yugoslav Republic of Macedonia, the stabilization and association process country Bosnia and Herzegovina, and Armenia, the Republic of Moldova and Ukraine. Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 24th meeting, 3 December 2018 (A/C.6/73/SR.24) para 103.

[207] Bart Van Vooren and Ramses A. Wessel, 'External Representation of the Union and the European External Action Service: Selected Legal Challenges' in Steven Blockmans and Ramses A. Wessel (eds), *Principles and practices of EU external representation* (CLEER Working Papers 2012/5) 65; De Baere & Paasivirta (n 141) 37.

[208] Serrano de Haro (n 196) 9.

the opposite effect of that sought through the enhancement of EU foreign policy competences by the Lisbon Treaty.

To reverse the unintended consequence imposed by UN rules, the EU tabled a draft resolution seeking an 'enhanced' observer status, which would essentially allow it to retain the same rights as when its position was voiced by a state. The recognition of this status did not come easily, nor without concessions. The status resolution first proposed by the EU in 2010 met with strong resistance by several UN member states, which expressed reservations about an international organization being granted special status.[209] Intense negotiations followed, resulting in a revised and less ambitious draft, which was adopted by the UNGA in 2011 with 180 votes in favour, none against and two abstentions (Syria and Zimbabwe).[210] The right to raise points of order was removed from the initial text. Under the 2011 status resolution, however, the EU exercises rights akin to those of full-member states except for the right to vote. It has the right to participate in the UNGA general debate and to make observations on behalf of its member states, as well as the right to have its communications circulated as official documents of the relevant meeting. The EU is invited to all meetings and can also act as chair or rapporteur of these meetings, and when it speaks it does so without time restrictions. Importantly, this status also grants the EU the ability to be inscribed in the list of speakers in representation of a major group (retaining its priority in the speaking order), and to present proposals and amendments, as well as to reply to statements addressing the Union's position. This last right, however, is conditioned by the agreement of its member states, and EU proposals can only be put to a vote 'at the request of a member state'.[211]

The emancipation of the EU to the status of an 'enhanced observer' has been labelled as everything from a diplomatic feat and a 'recognition of the EU's singularity as an international actor',[212] to a watered-down version of the EU's aspirations.[213] Addressing the UNGA general debate on 22 September

[209] ibid, 17-18.
[210] UNGA, GAOR 65th session, 88th plenary meeting, 3 May 2011 (A/65/PV.88).
[211] UNGA Res 65/276, 'Participation of the European Union in the work of the United Nations' (3 May 2011) para 1(d).
[212] Serrano de Haro (n 196) 7.
[213] Jan Wouters, Jed Odermatt and Thomas Ramopoulos 'The status of the European Union at the United Nations after the General Assembly Resolution of 3 May 2011' in Inge Govaere, Erwan Lannon, Peter van Elsuwege, and Stanislas Adam (eds), *The European Union in the*

2011, Herman Van Rompuy, at the time President of the European Council, nevertheless underscored the symbolic importance of the international recognition of this 'institutional innovation' for EU autonomy and unity:

> I am not the first President of the European Council to address the General Assembly to share the experiences and vision of Europe. However, I am the first to discharge this duty who is not, at the same time, the head of State or Government of his country; the first whose full-time position is to work for unity among our 27 countries. That institutional innovation gives our union greater continuity and coherence, including with respect to other leaders worldwide. I therefore wish to thank the Assembly for recognizing this innovation, by giving me an opportunity to speak.[214]

The status enjoyed by the EU at the UN remains a model which the EU strives to replicate in other forums – as attested by the 2012 Barroso-Ashton 'Strategy for the progressive improvement of the EU status in international organizations and other fora in line with the objectives of the Treaty of Lisbon'[215] – but which has so far yielded little results.[216] Blavoukos and others have nevertheless argued that, as far as UNGA participation is concerned, these institutional changes have improved not only the EU's visibility but also its coherence as a UN actor.[217] Empirical data shows that, after the transition period between 2009 (when the EU Delegation was formed) and 2011 (when the EU acquired enhanced observer status), statements 'on behalf of' the EU have been gradually replaced by those of the EU delegation proper at UNGA plenary meetings.[218]

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*World. Essays in Honour of Marc Maresceau* (Brill Nijhoff 2014); Michael Emerson and Jan Wouters, 'The EU's Diplomatic Debacle at the UN What else and what next?' (CEPS Commentary, 1 October 2010).

[214] UNGA, Address by Mr. Herman Van Rompuy, President of the European Council, GAOR 66th session, 15th plenary meeting, A/66/PV.15 (22 September 2011).

[215] European Commission, 'Communication from the Commission by the President in Agreement with Vice-President Ashton. Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon' C(2012)9420 final (20 December 2012).

[216] Jed Odermatt, *International Law and the European Union* (CUP 2021) 162-163.

[217] Spyros Blavoukos, Dimitris Bourantonis, Ioannis Galariotis and Maria Gianniou, 'The European Union's Visibility and Coherence at the United Nations General Assembly' (2016) 2(1) Global Affairs 35, 38. cf Karen E. Smith, 'EU Member States at the UN: A Case of Europeanization Arrested?' (2017) 55 Journal of Common Market Studies 628.

[218] ibid (Blavoukos et al), 38-39.

### 4.2. EU coordination at the UN General Assembly Sixth Committee

Most of the statements made at the UNGA and its committees, however, still originate from EU member states. This pluralism is not problematic – it can instead be strategic. Provided there is a degree of coherence – understood as 'the ability to reach a common position and to present it with a single voice'[219] – the reaffirmation of the EU's position by the chorus of its members, notably in a state-dominated environment, may be seen as a plus more than a peril. Although this view is not shared by all EU officials,[220] this strategy seems to hold some weight at the international level. For instance, while most ILC members and EU officials interviewed in the context of this research shared the view that the position voiced by the EU delegation corresponds to the commonly agreed distillation of member states' views on a particular topic, some ILC members also noted that the EU's voice alone holds little weight.[221] At the Sixth Committee level, and the UNGA in general, states' views are still those accounted for first.[222] There is, therefore, an added value, at least as far as the EU's engagement with the ILC is concerned, in the alignment and repetition of the EU's position by its member states.

This coherence, in turn, is framed by a structural principle of EU external relations, notably, the duty of loyal or sincere cooperation in EU external relations. Under the Lisbon Treaty, member states have an obligation to support the Union's external policy 'actively and unreservedly in a spirit of loyalty and mutual solidarity'.[223] This includes an obligation to 'coordinate their actions in international organizations' and 'uphold the Union's positions in such forums'; to consult one another within the European Council and the Council, with a view to defining a common approach before 'undertaking any action on the international scene' which might affect the Union's interests; to 'ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene' and to 'coordinate their activities' once a common approach has been defined at the European Council or Council levels.[224] This coordination extends to member states and to Union

[219] Ibid, 36.
[220] Interview 22 (3 December 2020).
[221] Interviews 1 (4 June 2019), 2 (4 June 2019) and 3 (9 July 2020).
[222] Interviews 2 (4 June 2019) and 6 (19 July 2019).
[223] Art 24(3) TEU.
[224] Arts 32 and 34(1) TEU.

delegations to third countries and international organizations, including the EU delegation to the UN.[225]

This duty of loyalty in external relations has been gradually developed in the EU Court's case law.[226] The Court has made clear that this duty applies not only where member states have transferred exclusive powers to the EU – in which case they can only act if authorized by the organization, as holder of the relevant competence[227] – but also in contexts where powers are shared between the EU and its members. On matters of shared competence, EU member states have agreed to cooperate closely to reach common positions.[228] This obligation has been interpreted rather broadly by the Court as meaning that, from the moment there is a 'common concerted strategy' at the EU level, however embryonic in its formulation, member states must refrain from any action which may compromise this strategy or otherwise imperil the unity, effectiveness or coherence of the EU's external representation.[229] In addition, where international organizations do not recognise the EU as a full member but nevertheless address issues within EU competence, member states most hold EU interests into account.[230]

In essence, loyalty in EU external relations ensures that member states respect their commitment to further joint EU interests, and that they do not compromise the positive dimension of EU external autonomy – i.e., its ability to participate effectively on the internal plane. Thus, in the *IMO* case, the EU Court found Greece to be in breach of the loyalty it owed to the Union and its members where it submitted a proposal to the International Maritime Organization's 'Maritime Safety Committee' on a matter of ship and transport security covered by an EU regulation, without concerting its action at the EU

[225] Arts 32 and 35 TEU.

[226] See inter alia, Joris Larik, 'Pars Pro Toto: The Member States' Obligations of Sincere Cooperation, Solidarity and Unity', in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart 2018) 175; Peter Van Elsuwege, 'The duty of sincere cooperation and its implications for autonomous Member State action in the field of external relations' in Marton Varju (ed), *Between compliance and particularism: Member State interests and European Union law* (Springer 2019) 283.

[227] Case 22-70 *Commission v Council* [1971] ECLI:EU:C:1971:32; Case C-45/07 *Commission v Greece* [2009] ECLI:EU:C:2009:81.

[228] Case C-433/03 *Commission v Germany* [2005] ECLI:EU:C:2005:462 para 66.

[229] Case C-246/07 *Commission v Sweden* [2010] ECLI:EU:C:2010:203 para 73.

[230] Case *Opinion 2/91* [1993] ECLI:EU:C:1993:106 para 5; Case C-45/07, *Commission v Greece* [2009] ECLI:EU:C:2009:8 para 31.

level.[231] The Court stressed that any action which might potentially create rules binding on the EU and affect the integrity of its legal system or the pursuit of its Treaty objectives, was contrary to the loyalty to which Greece was bound under article 4(3) TEU.[232]

Disputes between the EU and its member states – as well as between EU institutions – concerning the delivery of EU statements in international fora, have formed an important part of the delimitation of this duty of loyalty. In *Commission* v *Germany (OTIF)*, the Court found Germany to be in breach of its duty of loyalty to the Union where it voted, and publicly declared itself to be against, the agreed EU position at the 25th session of the Intergovernmental Organization for International Carriage by Rail (OTIF) Revision Committee.[233] The Court stressed that, by its actions, Germany 'allowed doubts to exist as to the EU's ability to express a position and represent its Member States' and thus 'harmed the effectiveness of the international action of the EU, as well as the latter's credibility and reputation on the international stage'.[234] In *Council* v *Commission (ITLOS)*, in turn, the Council sought the annulment of a European Commission decision to submit a written statement 'by the European Commission on behalf of the European Union' concerning an advisory opinion of the International Tribunal of the Law of the Sea (ITLOS).[235] It argued that this tribunal had adopted acts with legal effects and that an EU position on the matter should therefore be first established at the Council level, among EU member states, pursuant to article 218(9) TFEU. The Court dismissed this plea and ruled in favour of the Commission. In doing so, it distinguished between statements delivered 'in' international organizations from those delivered 'before' them and concluded that the statement in question did not constitute the formulation of a 'policy' and thus did not encroach on a Council competence.[236]

[231] Case C-45/07, *Commission v Greece* [2009] ECLI:EU:C:2009:81.
[232] ibid, para 31.
[233] Case C-620/16, *Commission v Germany* [2019] ECLI:EU:C:2019:256..
[234] ibid, paras 95 and 98.
[235] Case C-73/14 *Council v Commission* [2015] ECLI:EU:C:2015:663.
[236] ibid, paras 63, 68-76. This allowed the Court to distinguish this case from its earlier *OIV* ruling where Germany questioned the competence of the Council to establish 'the position to be adopted on behalf of the European Union with regard to certain regulations to be voted in the framework of the International Organisation for Vine and Wine'. Case C-399/12 *Germany v Council* [2014] ECLI:EU:C:2014:2258.

At the UN level, specifically, the distribution of the right to make statements between the EU and its member states follows the 'arrangements' agreed by the Council in 2011. These arrangements emerged in the wake of the EU's push for an enhanced observer status at the UNGA, and EU member states' fear of losing their visibility and competences in this forum. The 'General Arrangements for EU Statements in Multilateral Organizations' seek to ensure the 'coherent, comprehensive and unified external representation' of the Union, whilst acknowledging the 'sensitivity of representation and potential expectations of third parties'.[237] On the one hand, these arrangements confirm that 'the EU can only make a statement in those cases where it is competent and there is a position which has been agreed in accordance with the relevant Treaty provisions'.[238] Where these statements refer to EU actions or matters falling within the EU's competence, the arrangement dictates that they should be delivered 'on behalf of the EU'. When they refer to a common position of the EU and its member states, they can be delivered 'on behalf of the EU and its member states'. Importantly, the arrangement makes clear that the decision on who delivers these statements does not affect the distribution of competences and responsibilities as recognised by the Treaties.[239] This includes Declarations 13 and 14 therein, which make clear that the conferral of external powers on the EU does not 'affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organizations'.[240] Member states therefore retain their right as full UN members to deliver their own statements at Sixth Committee meetings.

On the other hand, when exercising their visibility and voice within the UN system, EU member states are under an obligation to 'coordinate their action ... to the fullest extent possible', to ensure 'timely prior consultation on statements reflecting EU positions' and to 'promote possibilities for the EU actors to deliver statements on behalf of the EU'.[241] The arrangement makes clear that member states 'may complement statements made on behalf of the

[237] Council of the European Union, 'EU Statements in multilateral organisations - General Arrangements' (1690/11) 24 October 2011 ('2011 General Arrangements') para 2.
[238] ibid, para 3.
[239] ibid.
[240] Declarations 13 and 14 to the TFEU concerning the common foreign and security policy. See also art 191 (4) TFEU on environmental policy.
[241] 2011 General Arrangements, para 3.

EU *whilst respecting* the principle of sincere cooperation'.[242] This coordination extends to the discussion of any issues touching upon EU competences at the UN Security Council (UNSC) level. EU member states with a seat at the UNSC, notably those with a permanent seat (now limited to France, following the United Kingdom's withdrawal from the EU), have an obligation to uphold the positions agreed at the EU level and to request that the High Representative be invited to present the EU's position at these sessions.[243] In essence, when operating externally, alongside or independently of the Union, EU member states must not forget the larger political unit of which they are a part. They have 'a strengthened obligation to act in good faith'[244]; to render this collective visible and to accord the common interests of the Union precedence, at times over their own individual preferences, and visibility.

The statements made by delegates of an international organization are often delivered on behalf of the organization and its member states and can bind both in relation to a certain policy of the organization.[245] When made in the name of the organization alone with the intention of legally committing the organization, they can likewise bind the organization to a certain conduct or result.[246] EU statements on the work of the ILC, however, carry a content and a language which do not support their binding effect. As noted above, these statements convey EU policies, they do not establish them.[247] While these statements are coordinated at the Council level, they are prepared and delivered by Commission legal advisers, resembling what the Court might call statements 'before' an international organization rather than 'in' one.[248] Yet they are no less relevant, for at least the following reasons:

First, from an institutional EU law perspective, EU statements on the ILC's work are an expression of the EU's ability to form a position on questions of public international law and of its ability to coordinate this position with its member states within the internal structures of the organization. COJUR-level

[242] ibid (emphasis added).
[243] Art 34(2) TEU.
[244] Opinion of Advocate-General Mazák in case C-203/07 P *Greece v Commission* [2008] ECLI:EU:C:2008:270, para 33.
[245] Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (6th edn, Brill Nijhoff 2018) para 343.
[246] Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 387.
[247] Interview 23 (4 December 2020).
[248] Case C-73/14 *Council v Commission* [2015] ECLI:EU:C:2015:663, para 63.

coordination ascribes a shared importance to international law topics and can lead to the convergence of EU member states' views on important international legal issues, such as reservations to human rights treaties.[249]

Second, from an international law perspective, these statements count as relevant practice of the organization and, moreover, they can serve as useful sources of information concerning the practice of its member states.[250] Even if these statements may be deemed largely irrelevant in appraising the organization's 'juridical will' (if one sides with the CIL conclusions in this respect),[251] they remain relevant expressions of the organization's views on distinct topics of public international law. As argued in this thesis, they provide relevant evidence of how the EU itself understands its contribution to the development of international law and are, as such, expressions of the EU's foreign policy ambition enshrined in article 3(5) TEU.

There are, however, disparate opinions among the ILC's membership concerning the visibility and weight of the EU as a Sixth Committee participant. When asked about their views concerning the EU's engagement with the ILC, some ILC members interviewed in the context of this research were either surprised or intrigued by the question. The substance of EU statements, in particular, received rather mixed reviews. While there was a general agreement amongst those interviewed that EU statements were the well-crafted outcome of intensely negotiated views at the internal level of the organization, these statements were also described as everything ranging from 'extremely useful'[252] or 'very constructive... not just formalistic but also substantive',[253] to generally 'useful',[254] yet also 'of an extraordinary emptiness' reflecting a 'pathetic input' at

[249] Frank Hoffmeister, 'The Contribution of EU Practice under International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 69-71 (arguing that COJUR-level coordination has led to a positive change in EU member states' approach to reservations to international treaties). See also, Ramses A. Wessel, 'The Meso Level: Means of Interaction between EU and International Law: Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35(1) Yearbook of European Law 533, 547-549.

[250] With respect to the identification of custom, it should be recalled that, under the CIL conclusions, official statements by international organizations are seen as relevant for the identification of rules of custom, not for the expression or formation or rules of customary international law. See commentary to conclusion 4 CIL conclusions, para 9.

[251] See Brölmann (n 119).

[252] Interview 15 (8 August 2019).

[253] Interview 12 (7 August 2019).

[254] Interview 14 (8 August 2019).

times left unnoticed.[255] While some ILC members noted that they did not experience particular difficulties in understanding the intricacies of EU practice relevant to a particular project, others remarked that the complexity of the EU legal system is far from helpful.[256] At least two ILC members noted that the EU could invest more in making its practice relevant for the ILC work more readily 'available', recalling the habit in the 1990s of publishing surveys of relevant CJEU decisions addressing questions of international law in academic publications.[257]

## 5. Concluding remarks

This chapter travelled between three cities to offer a complete picture of the spaces and actors involved in shaping the EU's engagement with the ILC, and the rules and principles that inform this engagement.

The chapter began in Geneva. It demonstrated that even though the ILC's work has been, and remains, primarily centred on the review of state practice, international organizations have not been absent from the work of this body of 'generalist' international lawyers. International organizations are relevant to ILC draft law-making not only where ILC drafts regulate the legal position of an international organization, but also as sources of evidence of international practice, of states, or of international organizations as such. In the last decade alone, ILC projects such as the conclusions on customary international law, on general principles of law, and on *jus cogens*, have examined the relevance of the practice of international organizations in the (trans)formation of the international legal system. While the image that emerges from the debates within these projects is one of 'ambivalence' concerning the role played by international organizations in the fabric of international law, it is also an image rather favourable to the EU. If relevance is gauged by reference to states' transfer of powers to international organizations, then EU integration renders the Union particularly well placed to (trans)form international law.

How the claim that the EU *does* in fact transform international law is advanced by EU actors brought us to Brussels. Here, an examination of how

[255] Interview 1 (4 June 2019).
[256] Interviews 1 (4 June 2019) and 12 (7 August 2019).
[257] Interviews 1 (4 June 2019) and 5 (19 July 2019). See supra section 3 and note 132.

EU statements are prepared shed light on the role of the Commission LS in this process. This chapter argued that this LS's decision over whether to engage with the ILC is based on an assessment of the added value of an EU presence in these debates, a value which is measured by reference to both legal and social institutional factors. EU statements can assist in projecting an image of the EU as a relevant actor in an increasing number of fields, in explaining specificities of EU law or international practice, and in drawing attention to joint concerns of EU member states. Importantly, these statements allow the European Commission to both confirm and project an image of the EU as an actor contributing to the development of public international law and to contest ILC rules which, in its view, misinterpret EU law, do not account for the EU, or interfere with EU autonomy.

This chapter ended in New York, specifically, at the UNGA Sixth Committee, where the statements prepared by the LS are ultimately delivered. This section demonstrated how the EU's visibility in this forum has evolved and drew attention to the principle of loyalty in the context of the EU and its member states' joint participation at the UN. It was argued that, notwithstanding their non-binding nature, EU statements at the UNGA Sixth Committee are relevant both as evidence of how attuned the LS is to developments in public international law, and as expressions of its views on the relationship between EU practices and the evolution of the international legal order. As such, they are a manifestation of the EU's foreign policy objective to contribute to the development of international law, with legal expression in article 3(5) TEU.

The next chapters move from the preparation and delivery of these statements to their substance. They examine the story that these statements tell about the EU's relationship with international law and the EU's development of the international legal order with respect to three thematic areas: the law of treaties (chapter 3); the responsibility of international organizations (chapter 4); and different 'substantive' (as opposed to procedural) topics of international law (chapter 5) from disaster relief, to migration, to atmospheric protection, and the prevention and punishment of international crimes.

# 3 | The Law of Treaties

## 1. Introduction

The main way international law is made in the modern world is by
treaty,
specifically multilateral treaty.[1]

Treaties – understood as agreements 'governed by international law and concluded in written form ... whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation'[2] – remain an important, if not the most important, legal instrument expressing the formation and development of rules of international law.[3] It is therefore unsurprising that, from its inception until the present day, the United Nations (UN) International Law Commission (ILC) has been occupied with identifying rules of general application governing the conclusion, implementation, interpretation, suspension and termination of treaties – in broad terms, with the codification and development of the 'law of treaties'.[4]

This chapter examines the statements prepared by the European Commission Legal Service (LS) concerning five ILC projects addressing different aspects of the law of treaties: the ILC draft articles on the operation of most-favoured-nation (MFN) clauses,[5] on the rules governing treaties between states and international organizations or between international

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[1] James R. Crawford, *Chance, Order, Change: The Course of International Law*, *General Course on Public International Law* (Brill Nijhoff 2014) 115.

[2] Art 2(1)(a), Vienna Convention on the Law of Treaties 1155 UNTS 331 (23 May 1969) entered into force 27 January 1980 ('VCLT'); art 2(1)(a), 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 25 ILM 543 (21 March 1986) not yet in force ('1986 VCLT-IO').

[3] James R. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 28.

[4] The term 'law of treaties' is used here to refer to the set of rules of general international law on the conclusion, implementation, suspension, and termination of treaties, as codified in the 1969 Vienna Convention on the Law of Treaties. This term should be distinguished from 'treaty law', which refers to rules enshrined in treaties. The 'law of treaties' was selected as a topic the codification of which should be prioritized by the ILC at its first session, in 1949. See Anthony Aust, 'Vienna Convention on the Law of Treaties (1969)' in Max *Planck Encyclopaedia of Public International Law* (last updated June 2016); ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission. Memorandum submitted by the Secretary-General', 1949 (A/CN.4/1/Rev.1) 51.

[5] ILC, Draft articles on most-favoured-nation clauses, 1978 ILC Report (A/33/10) chapter II, para 74 ('MFN').

organizations (at the origins of the 1986 Vienna Convention of the same name, hereinafter, VCLT-IO),[6] on the effects of armed conflicts on treaties,[7] on the relevance of subsequent agreements and subsequent practice (SASP) in relation to the interpretation of treaties,[8] and on the provisional application (PA) of treaties.[9] While fundamentally distinct, all these projects share some common characteristics. They all build on the legal framework of the 1969 Vienna Convention on the Law of Treaties (VCLT) and they all address the legal position of international organizations as treaty parties, to varying degrees. At the same time, these projects were carried out at two distinct points in time: the first two topics were studied by the ILC in the 1970s and 1980s, the latter three between 2008 and 2021.

The analysis of the European Union's (EU) statements on these five topics, therefore, accompanies the evolution of legal thinking concerning international organizations as subjects of international law. This has implications for the doctrinal debates held within each project and, therefore, for the legal questions considered by the EU when participating in these debates. Rather than delving into the myriad of doctrinal issues surrounding these topics, however, this chapter focuses on the statements prepared by the Commission LS with respect to each of these ILC projects which, taken together, offer an insight into the EU's position on the law of treaties. The chapter examines the LS's views, as articulated in these statements, regarding the EU's contribution to these rules of public international law and the relationship between these rules and the EU legal order. The analysis contextualises these statements within the EU's growing treaty practice and critically examines the LS's confirmation and contestation of the rules proposed by the ILC.

Confirmation and contestation are the concepts used in this chapter, and those that follow, to systematise the different positions expressed by the

[6] ILC, Draft articles on the law of treaties between states and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63 ('1982 VCLT-IO' or 'draft VCLT-IO'); 1986 VCLT-IO.
[7] ILC, Draft articles on the effect of armed conflicts on treaties, 2011 ILC Report (A/66/10) chapter VI, para 89 ('EACT').
[8] ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018 ILC Report (A/73/10) chapter IV, para 51 ('SASP').
[9] ILC, Draft guide to provisional application of treaties, 2021 ILC Report (A/76/10) chapter V, para 50 ('PA').

LS in relation to ILC draft rules, guidelines, and conclusions. Confirmation is a term reserved for cases where the LS agreed with ILC draft rules and presented EU practices either as evidence of these same rules, or as evidence of international practice strengthening (or developing) them. For instance, confirmation applies to cases where EU statements refer to the EU Treaties as evidence of a rule recognising the treaty-making capacity of an international organization.[10] These statements project an image of the EU as an actor which, in the words of article 3(5) of the Treaty on European Union (TEU), contributes to 'the strict observance and the development of international law'.[11] Contestation, in turn, is a term reserved for instances where the LS objected to the existence, the absence or the scope of a rule, or objected to its application to the EU. This is the case, for instance, where the LS relies on the case law of the Court of Justice of the European Union (CJEU) to contest a general rule whereby the practice of an organization's member states is necessarily relevant to the interpretation of the organization's constitutive instruments.[12] In line with the argument developed in chapter 1, this chapter argues that the LS's confirmation and contestation of ILC draft rules must be understood as expressions of its understanding of EU external autonomy. In other words, that confirmation and contestation are often best explained by the EU's desire to project and protect its autonomy — its ability to operate on the international plane in conditions of equality with other actors, and its ability to retain full control over the rules regulating the relationship between itself and its members on the institutional plane.[13] This chapter demonstrates how the LS resorted to international law arguments and language to advance its views.

The chapter is structured as follows: section 2 provides a brief overview of EU treaty practices and its specificities, drawing on legal scholarship which argues that, by concluding bilateral and multilateral treaties, the EU actively co-contributes to the formation (and development) of rules of international law. This overview provides the background for the analysis of

[10] See infra, section 3.2.1.
[11] Art 3(5), Consolidated Version of the Treaty on European Union OJ C115/13 (9 May 2008) ('TEU').
[12] See infra, section 4.1.2.
[13] The distinction between the international and the institutional plane is one adopted by Bordin to differentiate between 'the realm of relations between self-governing entities where the rules of public international law apply' and 'the realm constituted and delimited by the international law of international organizations.' Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019) 8-9.

the views of the Commission LS with respect to the draft rules and conclusions proposed by the ILC. Section 3 examines EU statements on ILC projects carried out in the 1970s and 1980s, notably the draft articles on MFN clauses in trade agreements, and on the conclusion of treaties with – or by – international organizations (VCLT-IO). It argues that these statements reflect the importance that the international recognition of the EU as a treaty making actor held for the Community in these early projects. These statements draw on specific examples of EU participation in bilateral and multilateral agreements to advance the claim that EU practices are relevant for the development of international rules on the conclusion of treaties by international organizations, and for the codification of rules on the operation of MFN clauses in international trade agreements. These statements also contest ILC proposals which might limit this autonomy, or which are perceived, from an EU perspective, as deterrents to integration. In section 4 our focus moves to the projects carried out in the last decade, notably the ILC articles and conclusions on SASP in the interpretation of treaties, the PA of treaties, and the effects of armed conflicts on treaties. This section demonstrates how the by now well-established recognition of the EU as an international treaty actor has had an impact on the position of the Commission LS concerning the codification of the law of treaties. The analysis also shows how the CJEU's consistent distinction between 'ordinary international treaties' and the EU Treaties, discussed in chapter 1, permeates the LS's occasional contestation of ILC texts.[14] Section 5, in turn, examines the references to the EU and its practices in the context of these projects. It does not delve into whether, or to what degree, the LS was able to persuade the ILC of its own views on the formulation of these rules. Instead, it examines how some of the specificities surrounding the conclusion and implementation of international agreements by the EU, discussed in section 2, were approached in these ILC debates and in the texts adopted by the ILC on second reading. On this basis, section 6 offers some concluding remarks about the different EU statements on these projects and the Commission LS understanding of the EU's contribution to the strict observance and to the development of the international law of treaties.

[14] See Chapter 1, section 3.

## 2. EU treaty-making and its specificities

International agreements – an expression reserved by the CJEU for treaties the EU concludes with third states and international organizations – are the 'tool par excellence' of the EU's external relations arsenal.[15] They are an essential feature of the exercise of EU external autonomy. As recognised sources of international law, treaties are the prime instrument through which the EU can shape, contribute to, and develop the international legal order.[16]

By the time the European Economic Community (EEC) became an observer to the United Nations General Assembly (UNGA) in 1974,[17] it was an economic block of nine industrialised states, including Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Denmark, Ireland, and the United Kingdom.[18] The 1957 Treaty of Rome establishing the EEC (EEC Treaty) already foresaw the Community's competence to conclude international agreements with third states, unions of states, and international organizations, including the UN, the Council of Europe and the Organization for European Economic Cooperation.[19] In the exercise of these powers, by the mid 1970s the EEC had concluded bilateral agreements with Switzerland, the United States (US), Canada, Israel, Norway, and Iceland under the framework of the General Agreement on Trade and Tariffs (GATT) or on the trade of specific products such as cheese and clocks.[20] It had likewise concluded an

[15] In the EU's discourse, the term 'treaty' is reserved for the constitutive instruments of the EU. The term 'international agreement' is understood, in turn, 'in a general sense to indicate any understanding entered into by entities subject to international law which has binding force, whatever its formal designation'. Case *Opinion1/75* [1975] ECLI:EU:C:1975:145.

[16] Art 38(1)(a), Statute of the International Court of Justice, 18 April 1946 ('ICJ Statute'): 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states...'. See also, Ramses A. Wessel, 'The Meso Level: Means of Interaction between EU and International Law - Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35 *Yearbook of European Law* 533, 538-540.

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

[18] Denmark, Ireland, and the United Kingdom having joined the first six founding States on 1 January 1973. See Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland OJ L 73 (27 March 1972).

[19] Arts 3(b), 210, 228, 229, 239 and 238, Treaty Establishing the European Economic Community (Treaty of Rome) (25 March 1957) <http://data.europa.eu/eli/treaty/teec/sign>

[20] See Agreement with Israel negotiated under Article XXVIII (4) of the GATT, signed in Geneva on 15 January 1970 and adopted on the basis of articles 114 and 111 of the EEC Treaty,

association agreement with Turkey,[21] and was a party to different multilateral instruments such as the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention), signed on 26 June 1974 under the auspices of the World Customs Organization.[22] Some of these agreements, such as the 1975 Lomé (I) Convention between the EEC and 46 African, Caribbean, and Pacific (ACP) countries, regulated the granting of MFN treatment.[23] Others, such the 1978 Cooperation Agreement between the EEC and the Lebanese Republic, granted the contracting parties preferential treatment on matters of trade. [24]

The CJEU, in turn, had begun to form a line of case law on the effects of international law within the Community's legal order and on the Community's external powers. By 1971, the Court clarified that the provisions of an association agreement concluded between the Community and Greece formed 'an integral part of EU law'.[25] The following year, it confirmed that the Community was bound by the GATT, having succeeded its member states in the international trade obligations assumed by them therein, although it rejected the possibility of this agreement being invoked by individuals as a source of rights or obligations against EU law.[26] Importantly, the Court extended the Community's treaty making powers beyond the confines of the express provisions of its Treaties and secondary law. In *ERTA*, a ruling handed

OJ L 218 (3 October 1970); Tariff agreement with Switzerland, negotiated under Article XXVIII of GATT, concerning certain cheeses falling within heading ex 04.04 of the Common Customs Tariff, signed at Geneva on 29 June 1967, OJ L 257 (13 October 1969); Additional Agreement to the Agreement concerning products of the clock and watch industry between the European Economic Community and its Member States and the Swiss Confederation, OJ L 118 (30 April 1974).

[21] Agreement creating an association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963, OJ L361/29 (31 December 1977) and Council Decision of 23 December 1963 on the conclusion of the agreement, OJ P 217/3685 (29 December 1964) (French only).

[22] International convention on the simplification and harmonization of customs procedures (18 May 1973) in force on 25 September 1975, and Council Decision of 18 March 1975 on the conclusion of the agreement, OJ L100 (21 April 1975).

[23] See Secretariat General Council of the European Communities, *ACP-EEC Convention of Lomé signed on 28 February 1975 and related documents* (Publications Office of the European Union 1996) <https://publications.europa.eu/en/publication-detail/-/publication/c973175b-9e22-4909-b109-b0ebf1c26328>

[24] Art 22, Cooperation Agreement between the European Economic Community and the Lebanese Republic, OJ L 267 (27 September 1978) no longer in force.

[25] Case C-181/73 *Haegeman v Belgium* [1974] ECLI:EU:C:1974:41.

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

down in 1971 and concerning member states' loss of competence to conclude an international agreement on the regulation of road transport, the Court established that the Community held exclusive competence to conclude international agreements not only where this competence was expressly provided for in its Treaties and secondary law or where it was a logical consequence of the exercise of its internal competences, but also where the integrity of the Community's legal order would be affected by the conclusion of agreements by its member states, without the EEC.[27] In *Kramer and others* (1976), a case originating from a request for a preliminary ruling in the context of criminal proceedings instituted against Dutch fishermen for overfishing sole and plaice, the Court applied the same logic of implied external competences to the conservation of maritime resources.[28] In *Opinion 1/76* (1977),[29] a case concerning a draft agreement establishing a European Laying-Up Fund for Inland Waterway Vessels, the Court clarified, in turn, that the Community had an implied power to conclude international agreements on all matters pertaining to its Treaty objectives, even if it had yet to exercise its competence internally:

> ... whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality.[30]

At the time of writing, the EU has concluded over 950 bilateral and multilateral agreements.[31] At least fifty-seven of these agreements contain a clause according MFN treatment to third states, and 146 contain clauses

[27] Case C-22-70 *Commission v Council* [1971] ECLI:EU:C:1971:32 ('ERTA'), para 17. This was confirmed by the Court in subsequent cases. See inter alia, Case *Opinion 1/03* [2006] ECLI:EU:C:2006:81, para 114: 'whenever Community law created for the [EU] institutions powers within its internal system for the purpose of attaining a specific objective, the Community has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect'.
[28] Joined Cases 3, 4 and 6-76 *Cornelis Kramer and others* [1976] ECLI:EU:C:1976:114, para 33.
[29] Case *Opinion 1/76* [1977] ECLI:EU:C:1977:63.
[30] ibid, paras 3–4.
[31] Based on the information available in the Treaties Office Database of the European External Action Service <http://ec.europa.eu/world/agreements/default.home.do>

providing for their provisional application. The EU's competence and procedure to conclude – as well as to provisionally apply – international agreements, in turn, is also now regulated in great detail in its Treaties.[32] The EU's treaty-making powers cover both sector-specific fields such as environmental policy (article 191(4) of the Treaty on the Functioning of the European Union (TFEU)), common commercial policy (article 207 TFEU), or development cooperation (article 209(2) TFEU), and a horizontal competence to conclude agreements with third states or international organizations (article 216 TFEU) on matters of its competence.[33] The wealth of EU treaty practice has grounded the claim within legal scholarship that the EU has become an important co-creator of international rules.[34] The claim that, through the conclusion of international agreements, the EU operates, in Cremona's words, as a 'rule generator' or a 'norm entrepreneur'.[35]

A distinction should nevertheless be made between the different ways in which – and degrees to which – this process of rule creation takes place. First, by co-setting the terms of an international agreement, the EU co-creates rules that apply to itself and to its treaty parties, as well as to its member states (by force of article 216(2) TFEU). These agreements often 'export' EU norms – they 'project the EU *acquis*'.[36] This has occurred in areas ranging from food safety to environmental protection to criminal law.[37] Clauses included in agreements concluded by the EU with third states or other actors, in turn, have also been used by EU contracting parties in their agreements with other states.

[32] Arts 216 and 218, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 (26 October 2012) ('TFEU').

[33] Additional fields include the readmission of illegal immigrants (art 79(3) TFEU); cooperation in research and technological development (art 186 TFEU); economic, financial, and technical cooperation with third countries (art 212(2) TFEU), humanitarian aid (art 214(4) TFEU), the conclusion of association agreements (art 217 TFEU); the monetary union (art 219(1) and (3) TFEU); and common foreign, security and defence policy (art 37 TEU).

[34] Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 56; Jan Klabbers, 'Straddling the Fence: The EU and International Law' in Damian Chalmers and Anthony Arnull (eds) *The Oxford Handbook of European Union Law* (OUP 2015) 52; Wessel (n 16) 538.

[35] Marise Cremona, 'The Union as a Global Actor: Roles, Models, and Identity' (2004) 41 Common Market Law Review 553, 557; Ester Herlin-Karnell, 'EU Values and the Shaping of the International Legal Context', in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013) 89, 103.

[36] Loïc Azoulai, 'The Acquis of the European Union and International Organisations' (2005) 11 European Law Journal 196, 199.

[37] Bruno de Witte, 'International Law as a Tool for the European Union' (2009) 5(2) European Constitutional Law Review 265, 278-279.

An example of this, recently alluded to in the ILC's work on SASP, is the use of treaty clauses in air transport agreements concluded between the United States (US) and the United Kingdom in 1946 and 1977 (later incorporated into the 2007 Open Skies Agreements between the US, the European Community and its member states) as standards for third states when developing their own model agreements.[38] In the field of migration, Delcour has noted that the conclusion of readmission agreements between the EU and its neighbouring countries has also prompted the latter to include similar clauses in agreements that they conclude with their own neighbours, effectively transforming 'migration flows and governance not only in the neighbourhood but also in adjacent regions'.[39] In addition to 'contract treaties', which set out a legal regime applicable to its parties alone, the EU is also one of the few international organizations that participates in 'law-making treaties' – that is, 'treaties concluded for the purpose of laying down general rules of conduct among a considerable number of states'.[40] This category includes treaties such as the treaty establishing the World Trade Organization (WTO) or the UN Convention on the Law of the Sea (UNCLOS).[41] Through its treaty practices, therefore, the EU actively participates in the making and shaping of international law.

At a different level, the EU's participation in international agreements has also led to the development of practices which account specifically for the unique features of the EU. Some legal scholars have argued that, combined,

[38] ILC, Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur, 2015 (A/CN.4/683) para 39 and accompanying notes; EU-US Air Transport Agreement OJ L 134/4 2007 (25 May 2007).

[39] Laure Delcour, 'The EU: Shaping migration patterns in its neighbourhood and beyond' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013) 263.

[40] Robert Jennings and Arthur Watts KCMG QC (eds), *Oppenheim's International Law: Volume 1 Peace* (9th edn, OUP 2008) 1204ff. See also, Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic Journal of International Law 383.

[41] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154 and 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 L 336 (23 December 1994); United Nations Convention on the Law of the Sea 1833 UNTS 397 (10 December 1982) ('UNCLOS') and Council Decision 98/392 of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179 (23 June 1998).

these practices have given rise to a separate legal regime governing the treaties concluded by the EU.[42] Without wishing to delve into their intricacies, otherwise examined by legal scholarship elsewhere,[43] a few examples are in order. The most emblematic of these is that of mixed agreements: agreements concluded by the EU and its member states and third states or other subjects of international law, wherein the EU and its members assume responsibility for the parts of the agreement corresponding to their respective competences, as defined by the EU Treaties and the case law of the EU Court.[44] Mixed agreements involve an accommodation by EU treaty parties of the internal (and evolving) distribution of competences between the EU and its members, as governed by EU law.

These agreements, in turn, are usually accompanied by declarations of competence, which explain the terms under which the EU and its member states participate in the agreement. While these declarations are meant to accord third parties with a measure of legal certainty as to the treaty's implementation, they are also drafted in general terms.[45] They will often simply state that the EU is competent to conclude the agreement and that the EU and its member states 'are internationally responsible for the fulfilment of the obligations contained within [the agreement] in accordance with their respective competences'.[46] EU member states, in turn, often attach to international agreements a declaration clarifying that any obligations they assume under the agreement which fall within the EU's competence will be implemented in accordance with EU law.[47] By accepting these declarations, EU

[42] Delano RubenVerwey, *The European Community, the European Union and the international law of treaties: a comparative legal analysis of the Community and Union's external treaty-making practice* (TMC Asser Press 2004).

[43] See inter alia, Jed Odermatt, *International Law and the European Union* (CUP 2021) 59ff.

[44] Joni Heliskoski, 'Mixed Agreements: The EU Law Fundamentals' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (OUP 2018) 1174.

[45] See Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base' (2012) 17 European Foreign Affairs Review 491.

[46] Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities OJ L 115/1 (2 May 2019) para 2. See also, Declaration by the Union made in accordance with Article 20(3) of the Paris Agreement, OJ L282 (19 October 2016) 4.

[47] Reservation of Ireland to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations 2296 UNTS 5 (18 June 1998): 'Whereas to the extent to which certain provisions of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations ('the

treaty parties recognise the distribution of competences between the organization and its member states as relevant not only in the internal order of the organization but also on the international plane.

Another classic example of international actors (and international law) 'adapting' to the specificities of the EU is the inclusion of clauses allowing for the participation of regional economic integration organizations (REIO) or regional integration organizations (RIO) in international agreements.[48] This legal category is broadly defined as any organization 'constituted solely by sovereign States [which] has competence over some or all of the matters governed by [the relevant treaty regime]'[49] It accommodates, in principle, all international legal subjects which potentially fall within the 'type', such as Mercosur, the North Atlantic Free Trade Association (NAFTA), or the Association of Southeast Asian Nations (ASEAN).[50] In practice, however, this remains a one-organization-only taxonomy – 'a code-name' for the EU.[51] The inclusion of this clause in international agreements is therefore an expression of the EU's external autonomy and international law's acceptance of the specificities of the EU. Other legal constructions include 'disconnection clauses' (which exclude the application of a treaty regime to which the EU and its member states' are parties in the relations *inter se*) in multilateral treaties, notably in the context of Council of Europe conventions.[52] As a whole, these treaty practices are legal manifestations of the EU's ability to operate as an

Convention') fall within the responsibility of the European Community, the full implementation of the Convention by Ireland has to be done in accordance with the procedures of this international organization'.

[48] See Odermatt (n 43) 69-74.

[49] Art 44, Convention on the Rights of Persons with Disabilities (13 December 2006) 2514 UNTS 3; art 59, Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (22 July 2011) OJ L192.

[50] Jed Odermatt, 'Unidentified Legal Object: Conceptualising the European Union in International Law' (2018) 33(2) Connecticut Journal of International Law 215, 237-242.

[51] Esa Paasivirta and Pieter-Jan Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) 36 Netherlands Yearbook of International Law 169, 211.

[52] Art 26(3), Council of Europe Convention on the Prevention of Terrorism (16 June 2005) CETS 196: 'Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules insofar as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties'. See Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christopher Hillion and Panos Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 160.

external actor by virtue (and in spite) of its specificities (e.g. in terms of competence), whilst ensuring the protection of its autonomy (by limiting the effects of this external participation on the rules governing the relationship between its member states and the organization).

The question, however, is whether the practices emerging from the EU's participation in treaty making, and the acceptance or 'accommodation' of these practices by the EU's treaty parties, serve as relevant evidence for the formulation of rules of public international law, applicable beyond EU-specific treaty relations. The relevance of these practices will depend on the extent to which they are also followed (or deemed desirable) by states or other organizations in non-EU-specific cases. Alternatively, these practices may serve as evidence of the existence of special rules governing international relations involving the EU and its member states.

These are some of the considerations addressed by the ILC in the context of its work, and by the Commission LS in preparing its statements on different ILC projects. The sections that follow address the EU's own views regarding this question, as reflected in the statements prepared by the LS with respect to five distinct ILC projects on the law of treaties. The analysis focuses on statements delivered at two distinct points in time – the 1970s-1980s, and the last decade – and examines how the LS wielded the wealth of EU treaty practice to persuade the ILC of the EU's relevance as an international treaty actor capable of (trans)forming international law.

## 3. EU statements on the law of treaties in the 1970s and 1980s

During the 1970s and 1980s, two projects stemming from the ILC's foundational work on the law of treaties between states caught the attention of the LS: the identification of rules governing the granting of MFN treatment in the context of trade agreements, and the rules governing treaties to which international organizations were parties (VCLT-IO). Both projects discussed the legal consequences, as a matter of general international law, of regional (economic) integration and the implications of the growing role of international organizations as parties to international agreements. This section focuses on the main points raised by the EEC in its statements concerning the identification and formulation of general rules on these two topics, and their relation to the Community's legal order.

### 3.1. Most-favoured-nation clauses in trade agreements

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 in trade agreements was first advanced in 1964 by Commissioner Jiménez de Aréchaga (Uruguay).[53] 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.[54] This study began instead in earnest in 1967, two years before the adoption of the 1969 VLCT, and was steered by two successive Special Rapporteurs (both diplomats): Endre Ustor (Hungary) and Nikolai Ushakov (USSR).[55]

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 trade agreements.[56] The draft codifies rules on the scope, definition, and sources of MFN obligations (draft articles 1-8), the application of MFN treaty clauses (articles 9-22), and exceptions to their application (draft 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'.[57]

Although the failure of the first MFN project was ascribed to its 'complexity',[58] the wider political context also contributed to the international community's reservations about these draft rules. The legal debates on MFN

[53] ILC, Summary records of the sixteenth session (11 May–24 July 1964) 752nd meeting, 25 June 1964, YBILC 1964 vol 1(A/CN.4/SERA/1964) 185, paras 2-11.
[54] 1964 ILC Report (A/5809) para 21; 1978 ILC Report (A/33/10) 8, para 15.
[55] 1967 ILC Report (A/CN.4/199) para 46; 1977 ILC Report (A/32/10) para 77.
[56] ILC, Draft articles on most-favoured-nation clauses, 1978 ILC Report (A/33/10) chapter II, para 74.
[57] UNGA Dec A/DEC/46/416, Consideration of the draft articles on most-favoured-nation clauses (9 December 1991).
[58] UNGA Dec A/DEC/43/429, Consideration of the draft articles on most-favoured-nation clauses (9 December 1988).

clauses were couched against the emergence of the New International Economic Order movement, the developments in regional economic integration brought about by the GATT, and the differences in political and economic organization between Eastern and Western European states.[59] 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 European Economic Community to socialist States without any kind of reciprocity'.[60] It is therefore in this broader context that some of the Community's statements, as well as the ILC and Sixth Committee debates, should be understood.

### *3.1.1. Confirmation: 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.[61] Each dealt with exceptions to MFN obligations aimed at safeguarding the position of developing states. 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 (GSP).[62] Article 24 prevented developed states from claiming concessions accorded between developing states in the context of

[59] For a review of academic publications addressing the NEIO around the time of consideration of this project by the ILC see John White, 'The New International Economic Order: What is It?' (1978) 54(4) International Affairs 626.

[60] Christian Tomuschat, 'The International Law Commission—An Outdated Institution?' (2006) 49 German Yearbook of International Law 77, 91.

[61] ILC 1978 Report (A/33/10) 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 in that area in the future'.

[62] Art 23 MFN: '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.'

international organizations.[63] 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'.[64] Most states commenting on these articles were generally satisfied with the ILC's approach, as were the international organizations that pronounced themselves on the draft.[65]

For the EEC, these debates provided a space for the organization to profile itself as an international actor contributing to the emergence of rules in this field. The statements prepared by the Commission LS stressed that the organization shared the ILC's concerns regarding the 'specific interests of developing countries in their relations with industrialized countries'.[66] They notably presented the Community's treaty practice as aligned with, and thus confirming, draft articles 23 and 24. In the LS' view, this alignment was evidenced by the EEC's participation in the GATT, the adoption of the Lomé Convention (wherein the EEC accorded 46 ACP 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 EEC to 77 developing countries within the framework of the United Nations Conference on Trade and Development (UNCTAD).[67]

The LS nevertheless sought two changes to this section of the draft. First, it requested a 'clarification' to Article 23 (former 21) so as to also exclude from MFN obligations the preferential non-reciprocal treatment that was specifically agreed upon between a developed and a developing state. The LS argued that

[63] Art 24 MFN: '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 organization of which the States concerned are members.'
[64] Art 30 MFN: 'The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.'
[65] ILC, Report on the most-favoured-nation clause by Mr Nikolai A. Ushakov, Special Rapporteur, 1978 (A/CN.4/309 and Add 1 and 2) paras 20-32.
[66] ILC, 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, 1978 (A/CN.4/308 & Corr.1 and Add.1 & Corr.1 and Add.2) ('MFN Comments by governments and IOs (1978)'), Comments by the European Economic Community, 181.
[67] ibid.

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.[68]

Second, the LS 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.[69] The LS advanced the formulation of a draft 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.[70]

In advancing this formulation, the LS 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] to socialist States without any kind of reciprocity.'[71] In essence, the LS sought to preserve the trading position of EEC member states and the economic incentives towards Community integration.

### *3.1.2. Contestation: the recognition of Community powers and the customs unions issue*

To protect this integration model, however, the EEC's own views and legal relevance in this process first warranted recognition. The scope of the ILC's first study on MFN clauses was limited to trade agreements concluded between

[68] ibid.
[69] ibid, 183-184.
[70] ibid, 181.
[71] Tomuschat (n 60) 91.

*states*.[72] For the EEC, this was problematic. This state-centred approach expressly disregarded the permanent transfer of competences on matters of trade from EEC member states to the organization, and the autonomous relevance of the EEC as an international (trade) actor. The request that the draft expressly recognise the EEC's 'advanced stage of regional integration' and its exclusive competence on MFN matters was, therefore, articulated from the outset by Mr Dubois, Observer for the EEC addressing the Sixth Committee in 1976:

> ... 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 particular, 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.[73]

In virtually all statements delivered at the Sixth Committee by the EEC concerning this project (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 the EEC was 'the sole competent authority' for matters governing the application of MFN treatment foreseen in the draft.[74] In their statements, delegates objected to the ILC's limitation of the draft's scope to states, disregarding what they saw as a growing trend towards

[72] Art 1 MFN: 'The present articles apply to most-favoured-nation clauses contained in treaties between States.'

[73] 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.

[74] ibid, 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 (Observer for the European Economic Community), Sixth Committee, Summary record of the 1549th meeting, 27 October 1975 (A/C.6/SR.1549) paras 48 and 52; Statement by Mr Buhl (Observer European Economic Community), Sixth Committee, Summary record of the 32nd meeting, 27 October 1978 (A/C.6/33/SR.32) para 4; Statement by Mr Lau (Observer European Economic Community), Sixth Committee, Summary record of the 65th meeting, 28 November 1980 (A/C.6/35/SR.65) para 22; Comments by the European Economic Community, MFN Comments by governments and IOs (1978), 180, para 3.

regional economic integration. In the EEC's view, the ILC's approach 'would greatly restrict [the draft's] value'.[75] The Netherlands likewise 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'.[76] The government of Luxembourg echoed this reproach, 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.[77]

For the EEC (and its member states) this recognition was essential for the affirmation of the Community's external autonomy and of the decision by its member states to transfer powers to the organization. As evidence of 'the manner in which the Community's existence ha[d] been accepted at the international level', the LS referred to the EEC's participation in multilateral negotiations in the framework of the GATT, attesting to states' acceptance of the organization as succeeding its member states in their international trade obligations.[78]

This transfer of powers, and its external recognition, grounded the LS's proposal that the draft's definition of 'State' should 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.[79]

[75] ibid. (Statement Lau) 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.
[76] Comments by the Netherlands, MFN Comments by governments and IOs (1978) 169, paras 2 and 3.
[77] ibid, Comments by Luxembourg, 166.
[78] ibid, Comments by the European Economic Community, 180.
[79] ibid, 182.

This claim for state assimilation, however, did not receive overwhelming support at the ILC. While this was the first project regarding which the EEC made statements, it was not the first in which the Community's classification as a subject of international law was discussed. During the 1974 debates on the ILC project on 'state succession in respect of treaties', held before the EEC became a UNGA observer, the question arose of whether the EEC was 'a uniting of states' that effectively succeeded its individual states as regards their treaty obligations.[80] The dominant view within the ILC at the time was that the Community was akin to 'hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new State'.[81] Therefore, under general international law, and unless provided for otherwise in the EEC Treaty, Community member states remained fully responsible for the fulfilment of their international treaty obligations and could not claim secession by virtue of Community integration. Despite its level of integration, therefore, the EEC remained closer to an intergovernmental organization.[82]

Endre Ustor, the first Special Rapporteur on the MFN project, was more open to the idea of recognising the autonomous relevance of a 'hybrid' entity like the EEC. In his last report, he suggested that the draft might extend to the case of treaties concluded by hybrid unions.[83] 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 treaty law might not apply, and in whose image they should not be developed.[84] He stressed the impossibility – and thus the inadvisability – of listing all possible exceptions to a rule.[85]

[80] Commentary to art 31, ILC, Draft articles on the succession of states in respect of treaties, 1974 ILC Report (A/9610/Rev.1) chapter II, para 85, 253.
[81] ILC, 'Sixth Report on the most-favoured-nation clause by Mr Endre Ustor, Special Rapporteur', 1975 (A/CN.4/286 and Corr.1 (English only)) 16, para 48.
[82] Commentary to art 31, para 4, Draft articles on the succession of states in respect of treaties: 'One example of such a hybrid is EEC, as to the precise legal character of which opinions differ. For the present purpose, it suffices to say that, from the point of view of succession in respect of treaties, EEC appears to keep on the plane of intergovernmental organizations'.
[83] ILC, 'Seventh Report on the most-favoured-nation clause by Mr. Endre Ustor, Special Rapporteur', 1976 (A/CN.4/293 and Add.1) 115, para 20.
[84] ILC, 'Report on the most-favoured-nation clause, by Mr Nikolai A. Ushakov, Special Rapporteur', 1978 (A/CN.4/309, Add.1 and Add.2) para 66.
[85] ibid, paras 211-212.

Ultimately, draft article 3 of the MFN draft articles and the commentary thereto concede that the rules proposed in the draft might apply to MFN clauses included in treaties concluded by entities *other* than states, even if not developed expressly for this purpose.[86] The text adopted on second reading recognises the relevance of 'groupings of states or similar associations' and in the commentaries, adds 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.[87]

Beyond these debates on scope, this ambivalence concerning the effects of regional economic integration on the operation of MFN clauses became particularly salient when the debate turned to the so-called 'customs unions issue'. Customs unions are, by nature, departures from MFN treatment. As juridical categories, MFN clauses create an obligation for the granting state to treat a beneficiary state no less favourably than a third state. While they do not preclude the granting of additional concessions to a beneficiary independently of the clause, MFN clauses create a guarantee of non-discrimination on trade conditions and exclude the preferential treatment of third states.[88] Customs unions, by contrast, create a regime of exception to non-preferential treatment. They establish a preferential regime among union members, based on

[86] Commentary to art 3 MFN, 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'.

[87] ibid, para 4.

[88] Akbar Rasulov, Robin Geiß and Meinhard Hilf, 'Most-Favoured-Nation Clause' in *Max Planck Encyclopaedia of Public International Law* (Oxford Public International Law, last updated February 2021); Jacob Viner, 'The Compatibility of Customs Union with the Most-Favored-Nation Principle' in Jacob Viner and Paul Oslington, *The Customs Union Issue* (OUP 2014) chapter 2.

economic or geographic considerations, together with a common customs tariff for products originating from 'third states'.[89]

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 a bilateral or multilateral agreements. Article 17 read as follows:

> Article 17
> Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement
>
> 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.

The question that arose was two-fold: whether the concessions accorded by members of customs unions inter se were *ipso iure* excluded from the scope of MFN benefits; and, if so, whether this exclusion was 'desirable' or instead led to the devaluation of the MFN doctrine.[90]

The fact that intra-customs union benefits were regularly excluded as a matter of treaty practice was not disputed as such.[91] 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, which established that:

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[89] Christine Kaufmann, 'Customs Unions' in *Max Planck Encyclopaedia of Public International Law* (Oxford Public International Law, last updated August 2014) paras 1-6.

[90] ILC, Sixth report on the Most-Favoured-Nation Clause by Mr Endre Ustor, Special Rapporteur, 1975 (A/CN.4/286 and Corr.1) 15-20; ILC, Seventh report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur, 1976 (A/CN.4/293 and Add.1) 120, para 42.

[91] ibid (Ustor Sixth Report) 13, para 28.

> (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...[92]

By 1978, the GATT numbered 83 contracting parties.[93] While the Community only became a member of the (by then) WTO in 1995,[94] the CJEU's 1973 ruling in *International Fruit Company and Others* 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 its competence.[95] 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.[96]

The question, rather, was whether these exceptions now formed a new rule of 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 (considering the nuisance of adding exemptions to all international

[92] Art XXIV, General Agreement on Tariffs and Trade 55 UNTS 187.

[93] Further to Suriname's accession to the GATT that same year <https://www.wto.org/english/thewto_e/gattmem_e.htm>

[94] 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 L 336 (23 December 1994).

[95] 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.

[96] The GATT/WTO has not, however, fully endorsed the European Commission's view that it the sole respondent for WTO obligations. See Emilija Leinarte, 'The Principle of Independent Responsibility of the European Union and its Member States in the International Economic Context' (2018) 21 Journal of International Economic Law 171, 184-187. See also, Chapter 4, section 4.3.

agreements), but also for reasons of principle. In the LS's view, the nonrecognition that a rule had emerged in international practice to the effect that intra-customs unions benefits were automatically excluded from the reach of MFN clauses was not only contrary to the evidence provided by the Community's very existence, it would also have a 'disruptive' effect by dissuading states from further economic integration.[97] One of the main purposes of the EEC statements was, therefore, to ensure that the automatic exemption of customs unions was recognised as a rule of international law. 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.[98]

The legal reasoning of the LS in support of the existence of this rule, as articulated in EEC statements, was built on two main arguments.

First, that the concessions accorded between EEC member states inter se 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 CJEU.[99] In the LS's view, this position was confirmed by article 234(3) of the EEC Treaty (now 351 TFEU), governing the relationship between member states' international obligations and Community law. This article mandates member states to 'take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby

[97] Statement by Mr Cassese (Italy), speaking on behalf of the European Economic Community (EEC) and its nine member states), Sixth Committee, Summary record of the 1544th meeting, 21 October 1975 (A/C.6/SR.1544) para 43.
[98] Comments by the European Economic Community, MFN Comments by governments and IOs (1978) 183.
[99] See Statement Dubois (n 73) para 7; Comments by the European Economic Community, MFN Comments by governments and IOs (1978) 182.

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.'[100] The 'special nature of the regional integration process' initiated within the EEC could not, therefore, be understood as being covered by the proposed general rule, where it extended to third states intra-Community advantages.[101] Through its statements, the Commission LS essentially transported to the international level a narrative developed since the 1960s by the EU Court concerning the unique nature of the EU legal order.[102] Addressing the Sixth Committee in the 1970s, the EEC delegate argued that extending the trade advantages agreed between EEC member states to third parties would, in absurdum, mean opening up membership of the organization to third states against the organization's own rules.[103] It would likewise run counter to the ILC's ultimate goal of promoting greater equality between developing and developed states on matters of trade, by creating a disincentive towards MFN treatment by industrialised nations, 'for fear of compromising the future of their international commitments'.[104]

The second argument advanced concerned the broader implementation of European economic integration. In the LS's view, while the EEC was at an 'advanced' stage of integration, its practice was part of a larger trend towards regional integration:

> The existence and functioning of the Community are only *one example among many* of the growing tendency throughout the world to establish regionally integrated areas, while the internationalization of economies has been accelerated by many factors besides the most-favoured-nation clause. As they now stand, the draft articles do not seem to take this trend fully into account.[105]

This trend was attested by the establishment of the Economic Community of West African Countries (ECOWAS), the Caribbean Community (CARICOM), the Arab Common Market (ACM), and the

[100] Art 234(3) EEC Treaty.
[101] Comments by the European Economic Community, MFN Comments by governments and IOs (1978) 180.
[102] See chapter 1, section 3.1.
[103] Comments by the European Economic Community, MFN Comments by governments and IOs (1978) 182, para 9.
[104] ibid, 181, para 7.
[105] ibid (emphasis added).

Andean Community of Nations (CAN), as well as free-trade areas such as the European Free Trade Association (EFTA) or the Central American Common Market (CACM). An ILC text which did not recognise a customs unions exception would therefore disregard the direction of state practice. In the Community's view, even if the ILC disagreed with its 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.[106]

In addition, article XXIV of the GATT recognised both the exception and the clause itself which, in the LS's view 'confirmed the status of the exception as a customary rule, so that in practice the exception largely replaces the clause':[107]

> 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 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.[108]

The LS's rhetoric not only confirmed and transported to the international level the narrative of the EU Court, it also articulated its reasoning in the language of (customary) international law. These statements are akin to evidence of the organization's *opinion juris* concerning the existence of a rule of custom. They 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 developing MFN treatment in favour of developing states whilst ignoring economic integration amongst industrialised nations. In the words of the EEC delegate:

[106] ibid, 182, para 10.
[107] ibid.
[108] ibid, 183, para 10.

> 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.[109]

Notwithstanding the proposal tabled by Vallat, the British ILC member, who advanced a formulation essentially aligned with that suggested by the EEC,[110] the ILC as a whole did not reach a consensus regarding the existence of this rule, or lack thereof. Much like the ILC's position on whether the draft's rules extended to entities other than states, the ILC 'solved' this 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'.[111] Article 29 of the draft, in turn, safeguarded the possibility of alternative arrangements between the granting and the beneficiary states.[112]

The reception of other EEC proposals by the ILC was likewise mixed, as discussed in greater detail in section 5 of this chapter. 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, for instance, in exchange for special preferences, was seen as a 'rather exceptional phenomenon' of unilateral MFN treatment.[113] 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'.[114] On the other hand, the Community's

[109] UNGA, Report of the Secretary-General, Consideration of the Draft articles on most-favoured-nation clauses, 1980 (A/35/203 & Add.1, 2, 3) 32, para 8.
[110] 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'. ILC, Draft articles on the most-favoured-nation clause: article 23 bis proposed by Sir Francis Vallat, 1978 (A/CN.4/L.267) 13, para 57.
[111] 1978 ILC Report (A/33/10) para 58.
[112] Art 29 MFN: 'The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree'.
[113] Commentary to art 4 MFN, paras 5-6.
[114] Commentary to art 23 MFN, para 3.

practice under the 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 (draft article 24) exempting from the scope of MFN benefits accorded between developed states the preferential treatment extended by developing states to each other.[115]

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 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.[116]

EEC member states likewise 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.[117] 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.[118]

[115] Commentary to art 24 MFN, paras 11-13.
[116] Statement Buhl (n 74) para. 17.
[117] See Statement by Mr Hilger (Federal Republic of Germany) speaking on behalf of the Acting President of the European Economic Community, Sixth Committee, Summary record of the 33rd meeting, 27 October 1978 (A/C.6/33/SR.33) para 30.
[118] Statement by Mr Anderson (United Kingdom) speaking on behalf of the member States of the European Community, Sixth Committee, Summary record of the 35th meeting, 28 November 1980 (A/C.6/35/SR.66) 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.'

Three decades later, the ILC returned to the topic under a different light.[119] 'Part two' of the ILC's MFN project did not propose a new convention; it was from the outset cast as a study intended to provide 'guidance to States in their negotiation of agreements with MFN clauses and to arbitrators interpreting investment agreements'.[120] 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 (BITs) and the growing (and often contradictory) case law of international adjudicative bodies.[121] The project resulted in a report and five summary conclusions adopted by the ILC in 2015.[122] The framing of the ILC's second take on the topic facilitated its general acceptance by most states, including EU member states.[123]

The EU, specifically, did not submit statements on this project, which explains why it is not examined in greater detail in this research. The absence of an EU statement is nevertheless worthy of notice, notably in view of the LS's engagement with the first part of 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 EU submitted several statements.[124] The

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

[120] ILC, 'Most-favoured-nation clause. Report of the Study Group', 2007 (A/CN.4/L.719) para 38.

[121] ibid, para 16.

[122] ILC, 'Most-favoured-nation clause. Summary Conclusions on the Most-Favoured-Nation clause', 2015 ILC Report (A/70/10) chapter 4, para 42.; ILC, 'Most-favoured-nation clause. Final Report of the Study Group on the Most-Favoured-Nation clause', 2015 ILC Report (A/70/10) Annex.

[123] 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 Statement by Mr Macleod (United Kingdom), Sixth Committee, Summary record of the 18th meeting, 18 November 2015 (A/C.6/70/SR.18) para 9; Statement by Ms Faden (Portugal), Sixth Committee, Summary record of the 19th meeting, 20 November 2015 (A/C.6/70/SR.19), para 23; cf Statememt by Mr Alabrune (France), Sixth Committee, Summary record of the 20th meeting, 13 November 2015 (A/C.6/70/SR.20), para 14.

[124] These statements, and projects, are examined in Chapter 4 and Chapter 5 (sections 2 and 3), respectively.

ILC's decision to frame 'part two' of its study on MFN clauses as a report may have also contributed to the LS's 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.[125] These factors, possibly also influenced by the limited success of EU claims in the MFN debates of the 1970s, might explain why the LS refrained from further commenting on this topic.

### 3.2. Treaties with or between international organizations

One topic which did receive considerable attention from the Commission LS was the drafting of rules on the conclusion of international agreements by international organizations. The draft articles on the treaties between states and international organizations or between international organizations were adopted by the ILC in 1982 and formed the basis of the 1986 Vienna convention of the same name (VCLT-IO).[126]

The growing relevance of international organizations in treaty making was acknowledged early on in the ILC debates on the law of treaties. In 1950, James Leslie Brierly, former Oxford chair of international law and diplomacy and the first Special Rapporteur on the ILC project later converted into the VCLT, noted that it would be 'impossible' to regard the existence of treaties concluded by international organizations as 'an abnormal feature of international relations'.[127] The same sentiment was shared by the three subsequent Special Rapporteurs that worked on the project.[128] Hersch Lauterpacht, in particular, was particularly adamant that a codification of the

[125] With the entry into force of the Treaty of Lisbon, the EU acquired exclusive competence regarding matters of foreign direct investment (art 207 TFEU). With respect to indirect investments, the EU's competence is shared with its member states. See Case *Opinion 2/15* [2017] ECLI:EU:C:2017:376, paras 82,238, 242; Angelos Bimopoulos, *EU Foreign Investment Law* (OUP 2012) 18.

[126] ILC, Draft articles on the law of treaties between states and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63 ('ILC 1982 VCLT-IO' or 'draft VCLT-IO').

[127] ILC, Report on the Law of Treaties by J.L. Brierly, Special Rapporteur, 1950 (A/CN.4/23) para 26.

[128] These included Sir Hersch Lauterpacht (between 1953 and 54), Sir Gerald Fitzmaurice (between 1955 and 1960), and Sir Humphrey Waldock (between 1961 and 1966). See ILC, Analytical Guide on the Work of the International Law Commission. Law of treaties <https://legal.un.org/ilc/guide/1_1.shtml#srapprep>

law of treaties which did not account for international organizations would be fundamentally incomplete:

> There appears to be no decisive reason why... the rules otherwise applicable to treaties should not apply to those concluded by or between international organizations created by and composed of States. On the contrary, it would seem desirable to direct political and juristic effort to making available, in the interest of the progressive integration of international society on a functional basis, the experience of the law of treaties to the collective activities of States in their manifold manifestations.[129]

Brierly and Lauterpacht, however, were said to hold a 'progressive conception of international law' that was not necessarily shared by other ILC members or UN member states at the time.[130] The ILC's initial work on the law of treaties was thus gradually circumscribed to treaties concluded between states.[131] The 'special' position of international organizations as treaty parties was to be addressed at a later stage.

This decision was grounded on one of international law's great 'truths': that 'States can *all,* without any exception, perform the same legal acts: a sovereign equality prevails among them. Organizations are, on the contrary, fundamentally unequal'.[132] States' sovereign equality is thus contrasted with international organizations' speciality.[133] When it came to the law of treaties,

[129] ILC, Report on the Law of Treaties by Mr H Lauterpacht, Special Rapporteur, 1953 (A/CN.4/63) 96.

[130] Richard Collins, 'The Progressive Conception of International Law: Brierly and Lauterpacht in the Interbellum Period' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law 1915-2015* (Brill Nijhoff 2016).

[131] The ILC reiterated at different points in time (1951, 1959, 1962 and 1965) its intention to limit the scope of the draft articles to States. See ILC, Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, 1965 (A/CN.4/177 and Add.1 and 2) 11-12, para 4. See however, art 5 VCLT.

[132] ILC, Third report on treaties concluded between States and International Organizations or between two or more International Organizations, by Mr Paul Reuter, Special Rapporteur, 1974 (A/CN.4/279 and Corr.1 (English only)) 146, para 5.

[133] A principle later articulated by the ICJ in, inter alia, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78-9, para 25: 'The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.

there was therefore much hesitation about subjecting treaties concluded by international organizations to the same general rules as those applied to states.

> Treaties are based essentially on the equality of the contracting parties and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States... However, ... [w]hile all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States.[134]

Resolution 2501 (XXIV) of 12 November 1969, adopted at the end of the Vienna Conference on the Law of Treaties, referred the question of treaties concluded with or by international organizations back to the ILC for further study.[135] The ILC's work on the topic would be led by Paul Reuter, Professor of public international and humanitarian law, former jurisconsult of the French government, a pioneer 'in the founding of the European Coal and Steel Community and, more profoundly, in developing the idea of a united Europe'.[136]

Unsurprisingly, given the project's focus on international organizations, the EEC was rather active in making statements on this project. In the words of Economides, delegate for Greece speaking on behalf of the EEC at the Sixth Committee, the ILC's work on this topic was one 'of enormous importance for international co-operation and ... a contribution to

[134] 1975 ILC Report (A/10010/Rev.1), 169, paras 124-125. See also ILC, 'The question of treaties concluded between States and international organizations or between two or more international organizations. Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations Treaty Series', 1971 (A/CN.4/L.161 and Add.1–2) ('ILC Working paper on treaties with or between IOs 1971') para 38.
[135] UNGA Res 2501 (XXIV) of 12 November 1969. See also, ILC Working paper on treaties with or between IOs 1971, para 56.
[136] 1971 ILC Report (A/8410/Rev.1) para 118(a). See Stephen C. McCaffrey, 'Paul Reuter (1911-1990)' (1991) 85 AJIL 150.

the development of law relating to international organizations'.[137] At the Sixth Committee level, the EEC made statements on seven distinct articles as well as more general remarks on specific sections of the draft and on the final form of the project.[138] It was 'one of the most active participants' among the approximately 27 organizations present at the 1986 VCLT-IO codification conference that followed, delivering 14 statements at the Committee of the Whole and attending meetings of all the bodies set up at the conference to discuss the draft.[139]

### *3.2.1. Confirmation: treaty-making capacity and the autonomy of international organizations*

One of the first hurdles facing this ILC on this topic was a rather fundamental one: that of determining whether the treaty-making capacity of international organizations was a product of general international law – resulting from the recognition of international organizations as subjects of international law[140] – or instead entirely a product of their internal law (their constitutive instruments) and thus firmly shaped by the will of its member states.

Reuter was hesitant on this point.[141] In his Third Report, he referred to the case of the European Communities as indicative of the absence of a general rule to this effect. In the Special Rapporteur's view, the Treaties' distinction between the different powers of the three European Communities confirmed that an organization's treaty-making capacity had to be expressly defined in the

[137] Statement by Mr Economides (Greece), speaking on behalf of the European Economic Community, Sixth Committee, Summary record of the 33rd meeting, 2 November 1983 (A/C.6/38/SR.33) para 3.

[138] See Annex I. The EEC made comments on, inter alia, the following draft articles: art 2 (use of terms), art 9 (adoption of the text of a treaty), art 36bis (obligations and rights arising for states members of an international organization from a treaty to which it is a party), art 63 (severance of diplomatic and consular relations), Art 66 (procedures for arbitration and conciliation), art 73 (cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization), art 74 (diplomatic and consular relations and the conclusion of treaties), 1982 draft VCLT-IO.

[139] Philippe Manin, 'The European Communities and the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations' (1987) 24 Common Market Law Review 457, 459, 461 and note 13.

[140] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

[141] See Bordin (n 13) 57.

internal rules of the organization.[142] Reuter was nevertheless favourable to a rule which recognised the 'radical – and to some extent a structural – change in the international community' brought about by the recognition of international organizations as subjects of international law.[143] The diametrically distinct views on this issue within the ILC itself were aptly summarized in the ILC's 1973 annual report:

> On certain questions, widely differing views were expressed. For example, on the question of the capacity of international organizations to conclude international agreements, some members of the Commission consider that this capacity is inherent in an international organization, others that it does not come within the subject of the report, while others, though anxious that the draft should include one or more provisions on the matter, consider that the question is governed essentially by the law peculiar to each organization.[144]

The lengthy debates on this point concluded with the adoption of article 6 VCLT-IO, which states that 'the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization'. Reuter's suggestion to include the phrase 'a capacity acknowledged in principle by international law' was removed from the final wording.[145] While the eleventh recital to the convention's preamble might be interpreted as broadening this reading, by linking international organizations' treaty-making capacity to what is 'necessary' for the fulfilment of their functions and purpose,[146] the commentary to the text also makes clear that article 6 does not have

> the purpose or the effect of deciding the question of the status of international organizations in international law; that question remains open and the proposed wording is compatible both with the concept of

[142] ILC, Third report on treaties concluded between States and International Organizations or between two or more International Organizations, by Mr Paul Reuter, Special Rapporteur, 1974 (A/CN.4/279 and Corr.1) ('Reuter Third Report') 146, para 6, note 88.
[143] ibid, 150-151, paras 19-20.
[144] 1973 ILC Report (A/9010/Rev.1) 224, para 131.
[145] Reuter Third Report, 151, para 20. For an analysis of the debates on this article, which cannot be carried out in-depth in this chapter, see Catherine Brölmann, *The Institutional Veil in Public International Law: International Organizations & the Law of Treaties* (Hart 2007) 203-205; Bordin (n 13) 55-57.
[146] Preamble, recital 11 VCLT-IO (not in force): '*Noting* that international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'.

> general international law as the basis of international organization's capacity and with the opposite concept.[147]

The European Commission LS refrained from taking a position on the origins of international organizations' treaty-making powers. In its statements, the LS limited itself to asserting that the Community had, by virtue of its Treaties and the case law of the EU Court, both express and implied powers to conclude international agreements, including the power to do so *in lieu of* its member states in the fields of fisheries, common commercial policy or the environment.[148] Cognisant of the EEC's special features as far as international organizations were concerned (a fact otherwise attested by the debates in the 1970s), the statements prepared by the LS instead make two claims directly connected with the projection of EU autonomy. First, that international organizations should be placed on equal footing with States as far as the conclusion of international agreements was concerned and, second, that notwithstanding its special features, the Community was 'entitled to treatment no less favourable than that given to international organizations'.[149]

One of the main aims of these statements was to ensure that the rules proposed by the ILC did not shift the level playing field by placing international organizations at a disadvantage with states in negotiating and implementing international agreements. While the EEC acknowledged that states and international organizations were distinct subjects of international law, it cautioned the ILC against 'too zealous a pursuit of distinctions between States and international organizations in each and every instance' with the risk of inadequately reflecting 'established and developing practice'.[150] Addressing the Sixth Committee in 1981, the British delegate speaking on behalf of the member states of the European Community stressed that a fundamental departure from the rules of the 1969 VCLT would undo the evolution in the international community's acceptance of international organizations as competent treaty parties:

[147] Commentary to art 6 VCLT-IO, para 2.
[148] Statement by Mr Peters (Luxembourg), speaking on behalf of the European Economic Community, Sixth Committee, Summary record of the 44th meeting, 11 November 1980 (A/C.6/35/SR.44) para 13.
[149] ibid.
[150] Comments by the European Economic Community, 1981 ILC Report (A/36/10) 202, para 3.

> Mr. Anderson (United Kingdom), speaking on behalf of the member States of the European Community, emphasized the importance, as already reflected in the Community's observations, of keeping the articles on the question of treaties concluded between States and international organizations or between two or more international organizations as close as possible to the text of the Vienna Convention on the Law of Treaties. Even when it was not possible to transpose provisions directly, it must be made clear that the new international instrument being prepared could not have the effect of undermining the principles codified in the Vienna Convention or of excluding application of those principles to international organizations. Such an effect would hinder the evolution which had taken place over a number of years towards accepting competent international organizations, such as the one which he was representing, as parties to treaties with States and other entities.[151]

This position is likewise illustrated by the points raised by the LS concerning the draft's variations compared to the 1969 VCLT.[152] Pursuant to the draft, the term ratification was reserved for a state's expression of consent to be bound by a treaty, 'as an act emanating from [its] highest organs', while organizations expressed this consent through an 'act of formal confirmation'.[153] Similarly, state representatives produced 'full powers' for the purpose of adopting or authenticating the text of a treaty or expressing a state's consent to be bound by a treaty; organizations, by contrast, had powers or 'credentials', conveying the idea that organizations, unlike states, did not possess unlimited capacity.[154] In the same vein, the term 'internal law' was largely reserved for states, while international organizations were governed by a set of 'rules';[155] states alone had 'territory', organizations had none.[156]

EEC statements challenged the ILC's understanding of the position of international organizations as treaty parties. The LS drew on evidence from Community treaty-making practice to object to some of the ILC's assumptions.

[151] Statement by Mr Anderson (United Kingdom) speaking on behalf of the member States of the European Community, Sixth Committee, Summary record of the 36th meeting, 6 November 1981 (A/C.6/36/SR.42) para 39.
[152] On these variations see Brölmann (n 145) chapter 10 and annex IV.
[153] Commentary to art 11, paras 3 and 4, 1975 ILC Report (A/10010/Rev.1) 179.
[154] ibid, 170, paras 127-128. This distinction was dropped in the final draft of the VCLT-IO. As noted by Brölmann, this was a 'cosmetic distinction [but] also a doctrinal statement about the functional basis of organisations.' Brölmann (n 145) 232. See art 2(1)(c) VCLT-IO.
[155] Commentary to art 2 VCLT, para 25, draft VCLT.
[156] Commentary to art 29 1982 VCLT-IO, para 2.

These included, notably, the conviction that while states enjoy a general freedom to formulate reservations and objections to reservations, organizations do not;[157] that the full powers of a state are fundamentally distinct from the 'credentials' of an organization;[158] that a different dispute settlement mechanism should apply to treaties concluded by or with international organizations;[159] or that different condition should govern international organizations' participation in international conferences.[160] EEC practice contradicted a number of these dominant assumptions. By the time these debates were being held, the EEC had formulated a joint objection, together with its member states, to the declarations of Bulgaria and the German Democratic Republic with respect to article 52(3) of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention) of 14 November 1975.[161] Like most international organizations, the EEC referred to the credentials it accorded to its negotiators as 'full powers'.[162] The Community had also participated in the codification conference of the Fourth International Tin Agreement and thus argued that any international organization to which the VCLT-IO might apply should be able to participate in negotiating the final text.[163] Other equality claims, such as the diplomatic-like nature of the relations established between the EEC with third states by setting up permanent

[157] Comments by the European Economic Community, 1981 ILC Report (A/36/10) 202, paras 9-10. Further to protracted discussions within the ILC and at the Sixth Committee, this distinction was removed from the 1982 draft. See Commentary to section 2 1982 VCLT-IO, 34, paras 13-14. cf ILC, Fifth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr Paul Reuter, Special Rapporteur, 1976 (A/CN.4/290 and Add.1) ('Reuter Fifth Report') para 12.

[158] Commentary to art 2, para 10, and commentary to art 7, para 9, 1981 ILC Report (A/36/10) 122 and 129.

[159] Art 66 VCLT-IO. See Brölmann (n 145) 234-235.

[160] Comments by the European Economic Community, 1981 ILC Report (A/36/10) 202, para 8; 1975 ILC Report (A/10010/Rev.1) 170, para 130, and 176, para 5.

[161] 1975 Customs Convention on the International Transport of Goods under Cover of TIR Carnets 1079 UNTS 89, Objection by the European Union in respect of the declaration made by Bulgaria (16 August 1978) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-A-16&chapter=11&clang=_en> The EU's treaty practice on the formulation of (joint) reservations and objections to reservations was later discussed at some length in the ILC's 2011 Guide to Practice on Reservations to Treaties, which cites to EU in the commentary to 20 guidelines. See inter alia, commentary to guideline 1.2.1, para 3, ILC, Guide to Practice on Reservations to Treaties, 2011 ILC Report (A/66/10 and Add.1) chapter IV, para 75 and Addendum.

[162] Manin (n 139) 467.

[163] Comments by the European Economic Community, 1981 ILC Report (A/36/10) 202, para 8; Statement Peters (n 148) para 18.

delegations, were very much based on the Community's *sui generis* nature and practices, a fact otherwise acknowledged by the delegates speaking on the EEC's behalf.[164]

The recognition of this measure of equality on the international plane, in turn, was accompanied by a claim of broad recognition of organization's autonomy on the institutional or internal plane. EEC statements argued for the inclusion in the draft of an express reference to the principle of autonomy of international organizations (what Reuter called the 'constitutional autonomy of each organization') and for a broad definition of the term 'rules of the organization'.[165] Allowing each organization to have, in Reuter's words, the 'right ... [to] its own legal image' was particularly useful to the EEC.[166] After all, the Community did not fit in the classic tradition of intergovernmental organizations and, importantly, its treaty-making capacity was not limited to the letter of its Treaties. This had by then been confirmed by the EU Court in rulings such as *Costa* (concerning the unique nature of the EU Treaties), *ERTA* and *Opinion 1/76*, (concerning the broad nature of the EU's external powers).[167]

Reuter was particularly favourable to the notion of international organizations' autonomy. In his reports, he stressed that the codification exercise did not aim to encroach on the internal rules of the organization.[168] The EEC's proposal to have the principle included in the draft, therefore, made it into the preamble of the 1986 VCLT-IO, with the support of the Community's member states and not without credit to the Special Rapporteur. Recital thirteen to the convention's preamble notes that 'nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members which are regulated by the rules of

[164] Comments by the European Economic Community, ILC, Question of treaties concluded between States and international organizations or between two or more international organizations. Comments and observations of Governments and principal international organizations on draft articles 61 to 80 and annex, 1982 (A/CN.4/350 and Add.1-6 & Add.6/Corr.1 and Add.7-11) ('VCLT-IO Comments by governments and IOs (1982)') 146.
[165] Reuter Third Report, 148, para 8; Manin (n 139) 464-466.
[166] 1974 ILC Report (A/9610/Rev.1) 299, paras 3 and 6 (commentary to art 6 (capacity of international organizations to conclude treaties)).
[167] Case C-6/62 *Costa v ENEL* [1964] EU:C:1964:66; Case C-22-70 *Commission v Council* [1971] ECLI:EU:C:1971:32; Case *Opinion 1/76* [1977] ECLI:EU:C:1977:63.
[168] 1973 ILC Report (A/9010/Rev.1) 224, para 131; 1974 ILC Report (A/9610/Rev.1) 299; Manin (n 139) 463.

the organization'.[169] Reuter's broad formulation of the concept of 'rules of the organization', in turn, was welcomed by the EEC and retained in article 2(1)(j) of the Convention, which states that 'rules of the organization' means '*in particular*, the constituent instruments, relevant decisions and resolutions, and established practice of the organization'.[170] At the Codification Conference, and against the objections of the Soviet delegation, the EEC also argued for the deletion of the term 'relevant' from the phrase 'relevant rules of the organization'.[171] In the Community's view, including this word might allow third-parties to decide which of the organization's rules were or not relevant, an approach which would run counter to the Community's autonomy and the jurisdictional monopoly of the CJEU.[172] The reference was ultimately dropped at the conference on the basis that it was impossible to define what 'relevant' rules might be.[173]

### *3.2.2. Contestation: member states and treaties concluded by international organizations*

The most significant aspect of the Community's 'singular' character, however, emerged in the context of the debates on article 36*bis*, concerning the position of member states in relation to treaties concluded by an international organization. Much like the debates on the 'customs union issue' within the MFN project, those on article 36*bis* soon assumed a political character. The question was whether member states of an organization were 'third states' in relation to the agreements concluded by the organization or were instead, under certain conditions, bound by the rights and obligations emerging from these agreements. This was the question which 'aroused most comment, controversy and difficulty, both in and outside the Commission',[174] touching upon 'the archetypal power balance, or struggle, between organizations and

[169] Preamble, recital 13, 1986 VCLT-IO (not in force): '*Affirming* that nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members which are regulated by the rules of the organization'.
[170] Art 2(1)(j) 1986 VCLT-IO (not in force) (emphasis added).
[171] Manin (n 139) 466.
[172] See Chapter 1, section 3.
[173] Manin (n 139) 464.
[174] Brölmann (n 145) 216.

their member states'.[175] As noted by Manin, this was probably 'the only problem that was specific to treaties concluded by international organizations.'[176]

Under EU law, member states are bound by the Treaties concluded by the organization. Article 216(2) TFEU (at the time article 228(2) EEC Treaty) determines that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its member states'.[177] This rule accounts for the 'executive federalism' characteristic of the performance of EU obligations, a singularity which featured most prominently in the debates on the ARIO examined in chapter 4.[178] Even where the EU concludes an agreement squarely falling within its exclusive competence (regulating, for instance, fishing stocks), the material execution of the obligations that it assumes are largely carried out by the domestic authorities of its member states. The performance of the agreement results from member states' obligations under EU law, not international law. Under international law, in the absence of a rule binding member states to the obligations assumed by the organization, the principle of relative effect of treaties (*pacta tertiis nec nocent nec prosunt*) dictates that a treaty cannot create rights nor obligations for third states without their consent, which includes member states of an organization.[179] States cannot therefore invoke rights derived from an agreement concluded with an organization against the organization's member states, nor can these member states do so against the organization, or against the organization's treaty parties.

Reuter, however, had early on expressed his preference for a rule which recognised the fact that, even in the absence of an express provision binding member states to the contractual obligations assumed by the organization, they could not be fully seen as 'third states' in relation to these obligations. This was particularly the case where the material performance of the obligations assumed by the organization necessitated the participation of its member states. Reuter derived this legal construction from 'the very principle

[175] Catherine Brölmann, 'International Organizations and Treaties: Contractual Freedom and Institutional Constraint', in Jan Klabbers (ed), *Research Handbook on International Organizations* (Edward Elgar 2009) 17.
[176] Manin (n 139) 468.
[177] Art 216(2) TFEU.
[178] See Chapter 4, section 4.3.1. See also art 291(1) TFEU: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'; Robert Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) 47(5) Common Market Law Review 1385, 1400-1401.
[179] Art 34 VCLT.

of good faith' and the need for legal certainty.[180] Article 36*bis* foresaw two situations where this 'association' would take place:

> 1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such affects to the treaty.
>
> 2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of areas of competence involved in that subject-matter between the organization and its member states, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member States to:
>
> (i) rights, which the member State is presumed to accept, in the absence of any indication of intention to the contrary;
> (ii) obligations when the member State accepts them, even implicitly.[181]

The first of these situations essentially reflects article 216(2) TFEU – the express provision for a binding effect in the organization's own internal rules. Notwithstanding Reuter's contention that the rule did not codify EEC-only practice but instead a 'fact peculiar to the development of international organizations',[182] this formulation was met with significant objections. The Soviet delegation was particularly vocal in objecting to any wording which might even hypothetically subvert the principle of state consent.[183] Other non-EU member states either raised doubts that the issue was 'ripe for codification' or outright accused the ILC of codifying a rule modelled on the EEC alone.[184] The Hungarian delegation noted, in particular, that:

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[180] ILC, Second report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr Paul Reuter, Special Rapporteur, 1973 (A/CN.4/271) 93, paras 106-107.

[181] ILC, Sixth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr Paul Reuter, Special Rapporteur, 1977 (A/CN.4/298) ('Reuter Sixth Report') 130-131, paras 5 and 11.

[182] ibid., 133, para 14: 'No doubt the most typical examples are those involving ECSC and EEC. However, if it is considered that these facts originate, essentially, in the still uncertain contours of the personality of international organizations, in the shaky distinction between the powers exercised by States and those proper to the organization itself, and in the fact that an organization and member States often see their legally distinct spheres of competence severally and even sometimes jointly involved, it must be recognized that it is already possible to distinguish some of these characteristics elsewhere than in Western Europe'.

[183] Manin (n 139) 469.

[184] Statement by Mr Nyamdo (Mongolia), Sixth Committee, Summary record of the 53rd meeting, 19 November 1980 (A/C.6/35/SR.53) para 33.

> The provisions of paragraph (a) were modelled on the features of a single organization, the European Economic Community ... The International Law Commission's draft consisted of general rules on the conclusion of treaties to which international organizations were parties. From the legal standpoint there was no justification for an attempt to formulate provisions valid for only one organization, whose character was basically different from that of the great majority of international organizations.[185]

The EEC itself was not particularly fond of the formulation. Although one might think that the proximity of Reuter's initial suggestion to Community law would be welcomed by the EEC (and its statements did in fact note that a rule aligned with the Community Treaties would foster 'good faith' in the implementation of treaties)[186] the proposed rule also deviated from Community practice in two respects, which can be summarized as follows.

First, the idea that the conclusion of a treaty by an organization could give 'rise directly' to rights and obligations in the legal sphere of its member states could be read as binding the EEC to recognise its member states' ability to claim rights against parties to a treaty to which the EEC alone was a party. Conversely, it could also be seen as a way for third states engaged in contractual relations with the EEC to claim rights or demand the fulfilment of obligations directly to EEC member states.[187] Under Community practice, and as later asserted in the EEC statements concerning the ILC's work on international responsibility (examined in chapter 4), an essential element of the organization's autonomy is its ability to operate as the sole respondent for the obligations that it assumes on the international plane. This is a claim made repeatedly by the European Commission, for instance, in the context of WTO dispute settlement proceedings.[188] This claim forms part of the Community's attempts to see its autonomy recognised on the international plane. The

[185] Statement by Mrs Konrad (Hungary), Sixth Committee, Summary record of the 55th meeting, 20 November 1980 (A/C.6/35/SR.55) para 48.

[186] ILC, Comments by the European Economic Community, ILC Comments and observations of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations, or between international organizations, adopted by the Commission, 1981 (A/CN.4/339 and Add.1-8) ('VCLT-IO Comments by governments and IOs (1981)') 202, para 14.

[187] Manin (n 139) 470.

[188] See inter alia, European Commission, First Written Submission by the European Communities, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, DS316 (7 April 2007) <https://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134551.pdf>

Community's contestation of Reuter's proposal should thus also be understood in light of the broader narrative of autonomy developed by the EU Court. CJEU case law, most notably in later years with *Opinion 2/13*, has repeatedly established that the conclusion of an international agreement by the EU or its member states must not affect the distribution of responsibilities between the organization and its members, as defined in the EU Treaties and by the Court itself.[189]

Second, the rule proposed by Reuter referred to treaties concluded by an international organization. EEC treaty practice, however, includes mixed agreements – that is, agreements concluded by the organization together with its member states.[190] The LS therefore suggested that the text of the rule or the accompanying commentary clarify that the rule was broad enough to capture this specific type of agreements.[191] The Community's practice of mixed agreements had been discussed by Reuter in his Sixth Report as one possible solution for associating member states with the agreements concluded by international organizations.[192] But while Reuter noted that 'this type of agreement has entered into general practice with regard to economic issues involving the European Communities and all international organizations, from UNCTAD commodity agreements to the OECD agreements',[193] he also stressed that it was not his intention to 'embody certain practices in draft articles', indicating that either the complexity of this treaty practice, or its Community-specific features, did not warrant autonomous codification as a rule of international law.[194]

Ultimately, the final version of article 36*bis* adopted in the 1982 draft was considerably different from the formulation Reuter had started out with.[195]

[189] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, paras 224-225. See Chapter 1, section 3.1.
[190] See supra section 2 and note 44.
[191] VCLT-IO Comments by governments and IOs (1981) 202, para 16.
[192] Reuter Sixth Report, 126, paras 36-37.
[193] ibid.
[194] ibid, para 37.
[195] In its 1982 version, as adopted by the ILC on second reading, art 36*bis* read as follows:

> Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

In the ILC's view, the differences between organizations precluded the codification of a single general rule.[196] The ILC opted instead for a formulation which relied heavily on the principle of state consent, reiterated through express requirements of intent and knowledge: that the treaty parties intended to accord the organization's member states with rights and obligations, that the member states 'unanimously agreed' to be bound by treaties concluded by the organization, and that the parties to the treaty were made aware of this measure of consent.[197] The commentary to the article refers to the organization's and member states' duty to inform the other treaty parties not only of the substance but also of the legal status or effects of these rights at the treaty negotiation stage, insofar as these 'may alter their intentions on their position during negotiations'.[198] The commentary notes, in particular, that the Commission 'did not accept certain suggestions which were made to it and which either weakened the requirement of express consent or seemed to refer in too exclusive a manner to a case as special as that of the European Communities'.[199] A footnote to the draft further refers to the precarious position of third parties entering into agreements with the Community:

> The States which conclude treaties with EEC have several times pointed out that serious doubts exist as to the effects of the relationships formed in this way, whether it is the implementation of responsibility, the exercise of diplomatic protection or any other matter that is involved.[200]

The changes to the text that finally made it to the Codification Conference left the issue of association of member states with international organizations treaty obligations largely unresolved. At the Conference, the article was reduced to the draft clause included in article 74(3) VCLT-IO:

> (a) the States members of that organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty, and
> (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been brought to the knowledge of the negotiating States and negotiating organizations.'

[196] Commentary to art 36*bis*, para 9, 1982 VCLT-IO: 'In view of the wide variety of situations, it is not possible to lay down a general rule, even on a residual basis'. See also, 1978 ILC Report (A/33/10) 124, paras 133-134.
[197] Art 36*bis*, 1982 VCLT-IO.
[198] Commentary to art 36bis, 1982 VCLT-IO, paras 9 and 16.
[199] ibid, para 10.
[200] ibid, para 9 and note 111.

> The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.

This largely meant that the EEC no longer considered itself to be concerned by this rule. The LS opted therefore simply to emphasise the fact that article 74 had no effect on the internal rules of its organization and that the EEC alone remained responsible before its contracting parties, not its member states. Its statements pre-empted, in particular, any illusions that the ECC might join the Convention if its member states did so:

> As the Community was an entity with its own legal personality, the question whether or not it should become a party was of course separate from that of the position taken by individual member States. Participation by some or all of the member States would not imply that the Community was itself bound to become a party.[201]

By the time of the Codification Conference, therefore, the Community's interest in the VLCT-IO had waned. As noted by Manin:

> The Community arrived at the Conference somewhat on the defensive. Not convinced of the need for the exercise and long hesitant about the wisdom of taking part, it finally decided to participate, mainly so that it could prevent the Conference becoming, as has often happened, the source of rules of practice that could later be used against it.[202]

Ultimately, the 1986 VCLT-IO did not gather the necessary number of ratifications for it to come into force. To date, only twelve international organizations have expressed their consent to be bound by the convention and five others have simply signed it. While eighteen EU member states have ratified this instrument, the EU has not.[203] It is also telling that Bulgaria, upon

[201] Statement Hardy (n 395) para 25.
[202] Manin (n 139) 461.
[203] Pursuant to art 85 VCLT-IO, the entry into force of the convention requires its ratification by 35 states. Although the convention is open for signature and 'formal confirmation' or 'accession' by international organizations, their expression of consent to be bound by the convention does not count for the purposes of its entry into force. By March 2022, the VCLT-IO counted with 45 parties, including 17 EU Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Malta, the Netherlands, Slovakia, Spain, and Sweden) and 11 intergovernmental organizations or UN specialized agencies. Neither the EU nor the Council of Europe are among them. See UNTC, 'Ratification status. Vienna Convention on the Law of Treaties between States and International

ratifying, added a reservation to article 74(3) of the VCLT-IO to the effect that '[t]he People's Republic of Bulgaria considers that a treaty which an International Organization is a party to, may establish obligations for Members States of this Organization only if the Member States have expressed their consent in advance in each individual case'.[204]

The diplomatic failure of this process has been ascribed to the reluctance of states to join a text where international organizations are placed nearly on a par with states, on the one hand, and to international organizations' reluctance to consent to a text which might hinder their treaty-making practice, on the other.[205] Yet, although the 'bifurcation' of the ILC's study was based on the inequality between international law's 'primary subjects' (states) and its 'derivate subjects' (international organizations), the 1986 VCLT-IO essentially mirrors the 1969 VCLT. Aside from the draft's final clauses and those on dispute settlement, only three articles are substantively different from those of the 1969 VCLT (articles 6, 7 and 74), and a number of others include 'cosmetic distinctions'.[206]

The Community's gradual shift away from the Convention has been further confirmed by the CJEU's consistent recourse to the 1969 VCLT over its 1986 counterpart. While the Court has repeatedly confirmed the customary law status of different provisions of the 1969 VCLT and at times it refers to both the 1969 and the 1986 conventions, it seldom refers exclusively to the latter.[207] Notable exceptions are the Court's reliance on the 1986 VCLT-IO when establishing that a 1991 EC-US Agreement concerning the application of

Organizations or between International Organizations' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en#1>

[204] ibid, Bulgaria: Declaration on article 2, paragraph 1, sub-paragraph j.

[205] Manin (n 139) 476. See also, Brölmann (n 145) 193: 'Why the project resulted in a diplomatic failure is undocumented. The reference to *jus cogens* in Articles 53 and 64 of the two Conventions has been a known obstacle for states, such as France, which has a political culture that is strongly sovereignty-oriented. Reportedly, this was also a ground for the European Community, a prominent presence in the drafting process, not to become a party to the 1986 Convention'.

[206] ibid (Brölmann), chapter 10 and annex IV; Giorgio Gaja, 'A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary' (1987) 58 British Yearbook of International Law 253.

[207] Paz Andrés Sáenz de Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship' (2019) 30(3) European Journal of International Law 721, 723-724. See also, See also Pieter-Jan Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties' (1998) 25 Legal Studies of European Integration 1.

competition laws was binding on the Community insofar as it fell squarely within the definition of international agreement included in article 2(1)(a)(i) of the 1986 Convention.[208] Another example is the *IATA* case, where the Court relied on article 31 of the 1986 VCLT-IO (general rule of interpretation) when ruling on the compatibility of an EU Regulation on air passengers rights with the Montreal Convention.[209] The majority of the Court's references to the law of treaties, however, remain centred on the 1969 VCLT.[210]

The EU Court, thus, has an established practice of distinguishing between the applicability of the VCLT rules to international agreements concluded by the EU with third states, on the one hand, and their non-applicability to the EU founding Treaties, on the other. This distinction is also at the heart of EU statements on ILC projects on the law of treaties carried out in the last decade, to which the next section turns. This distinction permeates the statements prepared by the LS and is anchored on the long-established premise of autonomy of the EU legal order, wherein the Treaties at its centre are a constitutional charter hierarchically superior and distinct from international law.[211]

## 4. EU statements on ILC projects revisiting the law of treaties

The law of treaties has remained a constant feature of the ILC's programme of work. In the last decade, at least four projects have addressed 'sectoral' aspects of the law of treaties, providing further guidance, in view of developing practice, on the scope and application of VCLT rules. These projects include the ILC study on reservations to treaties, SASP in relation to the interpretation of treaties, the PA of treaties, and the effects of armed conflicts on treaties.[212] Of these, only the last one was developed in the form of draft articles intended to inform a binding international agreement, while the remainder have been cast as guidelines or conclusions. None of these projects is expressly addressed to international organizations, but each proposes a particular interpretation of the rules governing treaty practice of relevance to international organizations

[208] Case C-327/91 *France v Commission* [1994] EU:C:1994:305, para 25.
[209] Case C-344/04 *IATA and ELFAA* [2006] ECLI:EU:C:2006:10. See also, Case C-224/16 *AEBTRI* [2017] EU:C:2017:880, para 62.
[210] For a review of the most recent case law see Odermatt (n 43) chapter 3, 59ff.
[211] Case C-294/83, *Parti écologiste "Les Verts" v. Parliament* [1986] ECLI:EU:C:1986:166, para 23.
[212] See supra notes 7-9 and 161.

participating in international agreements.

The Commission LS prepared statements on all these projects except for the one on reservations to treaties. Neither the summary records of Sixth Committee debates nor the review of the comments by governments on the ILC's text refer to observations by the EU. Information exchange between EU member states at the COJUR level concerning reservations, notably, to human rights treaties, has nevertheless been credited as shaping EU member states' practice on treaty reservations.[213] It is therefore unclear why the LS opted not to submit observations on this project.

The analysis that follows is thus centred on the EU's statements concerning the ILC's conclusions on SASP in relation to the interpretation of treaties, the guide on the PA of treaties, and the draft articles on the effects of armed conflicts on treaties. It demonstrates how the by-now established practice of the organization as a treaty party has had an impact on how the EU positions itself vis-à-vis the codification of international law, the formation of which it now arguably significantly shapes. A number of particularities of the EU's treaty practice are discussed in the context of these projects. How – and to what extent – the LS sought the integration of these specificities into the rules proposed by the ILC is addressed under each sub-section.

### 4.1. Subsequent agreements and practice in relation to the interpretation of treaties

The study of the effects of SASP on the interpretation of treaties was introduced in the ILC's programme of work in 2008 under the broader title of 'treaties over time'.[214] The study was predicated on the understanding that treaties 'are not just dry parchments', requiring instead a 'balance between stability and change in the law of treaties through the codification and progressive development of international law on the matter'.[215] The project expands on the requirements of article 31(3)(a) and (b) of the 1969 VCLT (reproduced in article 31 of the 1986 VCLT-IO) with the aim of facilitating 'the work of those who are called upon to interpret treaties', be these international

[213] See Hoffmeister (n 34) 56, 69-71.
[214] 2008 ILC Report (A/63/10) para 353 and annex A.
[215] ibid, paras 1 and 46.

or domestic adjudicative bodies, states, or international organizations.[216] Article 31(3) VCLT reads as follows:

> Article 31
> General rule of interpretation
> (...)
>
> 3.There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

Georg Nolte, Professor of Public International Law at Humboldt University and now judge at the ICJ, chaired the working group that was initially constituted to address this topic, and was later appointed Special Rapporteur for the project.[217] Further to the discussions held between 2009 and 2018, a set of 13 Conclusions on SASP were adopted by the ILC on second reading. The conclusions apply to treaties at large, including treaties which are the constituent instruments of an international organization (conclusion 12).[218] While the commentaries to the conclusions state that the text does not generally address the legal relevance of SASP in respect of treaties with or between international organizations,[219] it recognises the legal relevance of international organizations for the purpose of treaty interpretation at four distinct levels: (i) as treaty parties,[220] (ii) as forums for the negotiation and the

[216] Commentary to conclusion 1 SASP, para 4.
[217] 2008 ILC Report (A/63/10) paras 351, 353 and annex A; UNGA Res 63/123 of 11 December 2008; 2012 ILC Report (A/67/10) chapter XII, para 269.
[218] Conclusion 12 SASP, para 1: 'Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties'.
[219] Commentary to conclusion 1 SASP, para 3.
[220] Georg Nolte, '2018 AIIB Law Lecture: International Organizations in the Recent Work of the International Law Commission' (2019) 2 International Organizations and the Promotion of Effective Dispute Resolution 225, 233.

adoption of treaties,[221] (iii) in the application of their constitutive instruments,[222] and (iv) as 'indicative of relevant practice by States parties to a treaty'.[223] The conclusions were generally welcomed by the 46 states and international organizations which made written and oral statements on the project.[224]

The EU delivered a written statement on this project in 2015,[225] as did eight EU member states.[226] The statement addresses the ILC's request for information concerning (a) examples where 'the practice of an international organization has contributed to the interpretation of a treaty', and (b) examples 'where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty'.[227] At the Sixth Committee level, the Observer for the European Union delivered three statements, between 2015 and 2018, wherein he indicated that, in the Union's view, the project could 'provide important guidance on treaty interpretation and enhance the understanding of the rules of international law on the matter'.[228] These statements addressed selected issues within the ILC's draft and, specifically, 3 draft conclusions: conclusion 1 on the project's scope, conclusion 11 on the decisions adopted within the framework of a Conference of States Parties, and conclusion 12 on the relevance of SASP in the interpretation of the constituent instruments of international organizations. As noted above, the statements prepared by the Commission LS were predicated

[221] Conclusion 11 SASP.
[222] Conclusion 12 SASP, para 3: 'Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32'.
[223] Commentary to conclusion 5 SASP, paras 14, 2016 ILC Report (A/71/10).
[224] ILC, 'Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Georg Nolte, Special Rapporteur', 2018 (A/CN.4/715) ('Nolte Fifth Report').
[225] EU, 'Contribution of the European Union on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation' (2015) <http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/sasp_eu.pdf&lang=E> ('EU written submission SASP (2015)').
[226] Austria (2015), Finland (2015), Germany (2015, 2016, 2018), The Netherlands (2015, 2018), the Czech Republic (2016, 2018), Spain (2016, 2018), and Sweden (2018). See ILC, 'Analytical Guide to the Work of the International Law Commission. Subsequent agreements and subsequent practice in relation to interpretation of treaties. Comments by Governments' <https://legal.un.org/ilc/guide/1_11.shtml#govcoms>
[227] 2014 ILC Report (A/69/10) chapter III, para 26.
[228] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 20th meeting, 24 October 2016 (A/C.6/71/SR.20) para 46.

on one fundamental dynamic: they focused on confirming the relevance of international law in the interpretation of international agreements concluded by the Union, and contesting its application to the autonomous legal system formed by the EU Treaties.

#### *4.1.1. Confirmation: the interpretation of international agreements concluded by the EU*

In a relatively well-established line of case law, the CJEU has repeatedly confirmed that, when exercising its external competence, the EU must 'observe international law in its entirety, including ... the rules and principles of general and customary international law'.[229] Specifically, in *Brita*, the Court noted that, to the extent that the rules of the VCLT form part of customary international law, they are 'binding on the Community institutions and form part of the Community legal order'.[230] In the interpretation of international agreements concluded by the EU, therefore, the CJEU has recurrently relied on VCLT rules.[231] The LS's statements on this project, therefore, began by positioning the EU as an organization which adheres to the rules of custom agreed by the international community when operating on the international plane.

These statements rely on CJEU case law applying article 31(3) (a) and (b) VCLT to international agreements concluded by the Union with third states, as well as to the constitutive instruments of other organizations. This case law supports the EU's claim that, notwithstanding the ILC's decision not to extend its conclusions to the specific case of agreements concluded by or between international organizations, distinct rules do not apply to the interpretation of these agreements. In line with the LS's statements in the 1980s concerning the VCLT-IO, therefore, the statements on SASP reiterate the EU's view that, as far as international agreements are concerned, no fundamental distinctions should be made between the rules applicable to states and those applicable to international organizations, as confirmed by EU practice. Lucio Gussetti, Observer for the European Union and Principal Legal Adviser of the European Commission for Foreign and Security Policy and

[229] See inter alia, Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para 47 and cases cited therein.
[230] Case C-386/08 *Brita* [2010] ECLI:EU:C:2010:91 para 42. See also, Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, paras 24, 45 and 46.
[231] See inter alia, De Santa María (n 207).

External Relations, made this clear in his address to the Sixth Committee in 2016:

> The European Union, in exercising its treaty-making powers, adhered to the rules of international law, including customary international law. It was its understanding that the Commission's stipulation in paragraph (2) of the commentary to draft conclusion 1 [1a] that 'one aspect not dealt with specifically in the draft conclusions was the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations' was not intended to and would not have an impact on the relevance of the Commission's conclusions in cases where the rules of articles 31 and 32 of the Vienna Convention were applied as a matter of customary international law.[232]

As regards international agreements, this position is anchored, in particular, in the Court's 1977 ruling in *Cayrol* concerning the interpretation of the 1970 agreement between the EEC and Spain (at the time not yet an EU member state),[233] and on its 1994 ruling in *Anastasiou and Others* concerning the interpretation of the 1972 association agreement between the EEC and Cyprus.[234] In the first case, the Court took into account 'the settled practice of the parties to the Agreement' in reaching the conclusion that member states were allowed to continue imposing quantitative restrictions on the import of fresh table grapes originating from Spain.[235] In the second, the Court reviewed the conflicting practice of the European Commission, of the Cypriot government, and of EU member states following the establishment of the self-proclaimed Turkish Republic of Northern Cyprus (TRNC) to conclude that the relevant association agreement only allowed for the import of citrus fruit and potatoes bearing a certificate of origin issued by the government of Cyprus, not the TRNC.[236]

As regards the constitutive instruments of international organizations, in *Europäische Schule München*, a case concerning the interpretation of the 1994 Convention defining the Statute of the European Schools, the EU Court concluded that the case law of the Complaints Board of the European Schools

[232] Statement Gussetti (n 228) paras 46-47.
[233] Case C-52/77 *Cayrol v Rivoira* [1977] ECLI:EU:C:1977:196.
[234] Case C-432/92 *Anastasiou and Others* [1994] ECLI:EU:C:1994:277.
[235] Case C-52/77 *Cayrol v Rivoira* [1977] ECLI:EU:C:1977:196, 2277, para 18 and 2278, para 23.
[236] Case C-432/92 *Anastasiou and Others* [1994] ECLI:EU:C:1994:277, paras 43, 50-55.

could be relied on as subsequent practice in the application of this Convention.[237] The Court noted, in particular, that:

> ... the Convention defining the Statute of the European Schools must be interpreted, in particular, in accordance with Article 31 of the Vienna Convention, under which it is appropriate to take into account any relevant rules of international law applicable in the relations between the parties and to attach great importance to any subsequent practice in the application of the Convention defining the Statute of the European Schools.
>
> In that regard, as is clear from the case-law of the International Court of Justice, the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties' agreement ...[238]

In addition, the EU's written statement relied extensively on the criteria developed within the WTO system to determine the existence of a subsequent practice relevant to the interpretation of WTO covered agreements, referring to eleven distinct cases.[239] This choice reflects the LS's endorsement of WTO criteria in the interpretation of article 31(3) VCLT, a choice which holds at least two advantages for the EU. First, these criteria are aligned with, and arguably stricter than, those found in CJEU case law. As noted in the second report by Georg Nolte, WTO case law is 'more restrictive' than that of other adjudicative bodies, requiring the verification of 'a concordant, common and consistent' conduct from which a discernible pattern emerges attesting to the existence of an agreement between the parties.[240] This language mirrors that of the CJEU, which refers to 'the settled practice of the treaty parties' or to the 'unequivocal' agreement or 'uniform approach' by the parties.[241] Second, WTO panels and the WTO Appellate Body recognise EU practice as subsequent practice.[242]

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[237] Joined Cases C-464/13 and C-465/13 *Europäische Schule München* [2015] ECLI:EU:C:2015:163, para 65.
[238] ibid, paras. 60-61.
[239] Section 2, EU written submission SASP (2015).
[240] ILC, 'Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur', 2014 (A/CN.4/671) para 44 and notes 6 and 121. See also, ILC, 'First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur', 2013 (A/CN.4/660) para 106.
[241] Case C-52/77 *Cayrol v Rivoira* [1977] ECLI:EU:C:1977:196, 2277, para 18; Case C-432/92 *Anastasiou and Others* [1994] ECLI:EU:C:1994:277, paras 42 and 52.
[242] EU written submission SASP (2015), 9-10 (referring to the WTO Appellate Body reports in *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/R; WT/DS67/R; WT/DS68/R (22 June 1998); *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/16 (27 September 2005).

Therefore, relying on these precedents is advantageous for the EU in so far as WTO case law in part confirms the interpretative criteria applied by the CJEU, recognises the relevance of the EU as a treaty party, and allows the EU itself to participate in the development of (or influence) these criteria through WTO litigation.

#### *4.1.2. Contestation: the interpretation of the EU Treaties*

In projecting an image of the EU as an actor which abides by rules of custom on the international plane, the LS's statements contend (for the first time in Sixth Committee debates on ILC projects), that the autonomy of the EU legal order is far from absolute or impermeable:

> ... despite its autonomous character, the Union law is not an absolutely closed or impermeable legal order; quite to the contrary, it is open to other order, to which it refers to fill its own lacunae, one of those legal orders being international law.[243]

This permeability, however, does not extend to the EU Treaties. While conclusion 12 of the ILC's draft established that '[a]rticle 31 and 32 [VCLT] apply to a treaty which is the constituent instrument of an international organization',[244] the CJEU has repeatedly rejected the proposition that the rules of the VCLT apply, by and large, to the EU Treaties. EU treaties are, in the EU Court's view, 'unlike ordinary international treaties'.[245] The order of priority accorded to the different rules of treaty interpretation included in the VCLT follows a different logic when applied to EU law. Beck has argued, for instance, that as far as the EU Treaties are concerned, the Court has effectively broken loose of the methodological constraints imposed by the VCLT for the benefit of 'meta-teleological' considerations oriented towards integrationist results.[246] The CJEU's interpretation of EU law has followed a predominantly teleological approach which places a greater emphasis on 'the object and

[243] ibid, 2.

[244] Conclusion 12 SASP, para 1: 'Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties'.

[245] Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66, 593.

[246] Gunnar Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties (2016) 35(1) Yearbook of European Law 484, 494. See also, Jed Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 Cambridge Yearbook of European Legal Studies 121, 122.

purpose' of a provision rather the 'ordinary meaning' of its terms.[247] With regard to the effects of member states' practice or agreements in the interpretation of EU primary law, in particular, the Court's ruling in *France v Commission* established, rather curtly, that 'the mere practice [of EU member states or EU institutions] cannot override the provisions of the Treaty'.[248]

In line with the narrative of the EU Court (and echoing the Community's 1980s statements on the VCLT-IO), Gussetti recalled that the application of the law of treaties to the constitutive instruments of an international organization was conditioned by the internal rules of the organization.[249] In view of the EU's special and autonomous nature, Gussetti noted that distinct rules of interpretation applied to the EU Treaties. Without referring to the absence of express rules of interpretation in the EU treaties, the EU written statement explains the Court's case law establishing the irrelevance of member states and EU institutions' practice in the interpretation of EU primary law.[250] Pursuant to this case law, not even a subsequent agreement between all EU member states can be interpreted as modifying the provisions of the EU Treaties.[251] In the same sense, the subsequent practice of EU institutions does not create a binding precedent concerning the interpretation or implementation of EU primary law.[252] Moreover, the European Commission's inaction concerning member states' infringement of EU law cannot be read as a tacit acceptance of member states' conduct;[253] and the conduct of EU member states or institutions

[247] Art 31(1) VCLT/VCLT-IO.
[248] Case C-327/91 *France v Commission* [1994] ECLI:EU:C:1994:305, para 36.
[249] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 19th meeting, 20 November 2015 (A/C.6/70/SR.19) para 87; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 20th meeting, 11 November 2018 (A/C.6/73/SR.20) para 46.
[250] EU written submission SASP (2015) 4-5.
[251] Case C-43/75 *Deffrenne v SABENA* [1976] ECLI:EU:C:1976:56, paras 57-58: 'Without prejudice to its possible effects as regards encouraging and accelerating the full implementation of article 119, the resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty. In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with article 236'.
[252] Case C-68/86 *United Kingdom v Council* [1988] ECLI:EU:C:1988:85, para 24: 'A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty'.
[253] Case C-81/13 *United Kingdom v Council* [2014] ECLI:EU:C:2014:2449, paras 36-37.

in contravention of unambiguous provisions of the EU Treaties does not give rise to legitimate expectations of third parties subject to judicial protection.[254]

EU statements also rely on *Opinion 2/13*, where the CJEU rejected the draft accession agreement of the EU to the European Convention on Human Rights, and on *Achmea*, where the Court found a BIT concluded between the Netherlands and Slovakia incompatible with member states' obligations under EU law.[255] Both rulings are emblematic for the broad way in which they defined the autonomy of the EU legal order and the jurisdictional monopoly of the EU Court in its interpretation, to justify the incompatibility of the relevant international agreements with EU law.[256] Both are arguably diametrically opposed to the idea that the EU 'is not an absolutely closed or impermeable legal order'.[257]

Much like in the VCLT-IO statements, however, the Commission LS refrained from general claims about the transferability of this narrative, and of the interpretative canons applied to the EU Treaties, to the constitutive instruments of international organizations at large. Instead, the LS welcomed the reference in draft conclusion 12 to the 'rules of the organization' and the reference in the commentary and in the Special Rapporteur's reports to the special nature of the EU Treaties.[258] A different position would otherwise contradict the very uniqueness of the EU legal order, and the CJEU's practice of applying these same VCLT rules to the interpretation of the constitutive instruments of other international organizations. EU member states commenting on the draft likewise referred to the EU as an example of an organization with a *lex specialis* concerning the role of subsequent agreements and practice for the interpretation of its constituent treaty.[259]

In his Third Report, Georg Nolte indicated that conclusion 12 took into account the CJEU's view concerning the irrelevance of the practice of its member states and organs for the interpretation of its founding treaties:

[254] Case C-153/10 *Sony Supply Chain Solutions (Europe)* [2011] ECLI:EU:C:2011:224, para 47 and case law cited therein.
[255] EU written submission SASP (2015) 2. See Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158; Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454.
[256] See Chapter 1, section 3.1.
[257] EU written submission SASP (2015) 2.
[258] Statement Gussetti (n 249) para 46.
[259] See Statement by Mr Hennig (Germany), Sixth Committee, Summary record of the 22nd meeting, 23 November 2015 (A/C.6/70/SR.22) para 16.

> The interpretation of treaties which are constituent instruments of international organizations may also be affected by subsequent agreements under article 31 (3) (a). It should be noted, however, that the possible significance of agreements between the parties must be evaluated, in the first place, under the provisions of the constituent instrument itself and of other rules of the organization. ... In addition, the rules of the organization and its established practice may exclude taking into account agreements between the parties regarding the interpretation of its constituent instruments, as is the case for the European Union in areas in which the Court of Justice of the European Union exercises jurisdiction.[260]

The commentary to conclusion 12 confirms this. It notes that 'even if it is difficult to make general statements' the term 'established practice of the organization' usually encompasses a specific form of practice, one which has generally been accepted by the members of the organization, albeit sometimes tacitly'.[261] As an exception to this general rule, the CJEU's position on the special nature of the EU Treaties is expressly referred to as one covered by the 'without prejudice' clause of conclusion 12(4).[262]

The EU's reaction to the completion of the ILC's work in 2018 was a relatively detached one. It did not endorse the work as such, but instead reiterated its position that, notwithstanding the scope of the Conclusions, articles 31 and 32 of the VCLT applied to treaties concluded by international organizations as a matter of customary international law (including those concluded by the EU with third states) whilst they were largely irrelevant for the EU founding treaties.[263]

### 4.2. The provisional application of treaties

The VCLT rules on treaty interpretation are not the only ones that the EU applies to its international agreements; article 25 VCLT on the provisional application (PA) of treaties also has pride of place. PA forms part of the EU's

[260] ILC, 'Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur', 2015 (A/CN.4/683) para 57.
[261] Commentary to conclusion 12 SASP, para 42.
[262] ibid. See Conclusion 12(4) SASP: 'Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.'
[263] Statement Gussetti (n 249) para 45.

established treaty practice.[264] In the conclusion of bilateral agreements together with its member states, the EU has a longstanding practice of PA of agreements in the field of fisheries or other commodities, as illustrated by the 1976 Fifth International Tin Agreement.[265] By now, the EU is one of the largest generators of relevant practice concerning the PA of international agreements – nearly 150 agreements concluded by the EU contain clauses providing for their provisional application.[266] As noted by Chamon, '[w]here provisional application remains the exception in state practice, it has become the rule for the EU's mixed bilateral agreements.'[267]

The predominance of EU treaty practice on PA is a direct consequence of EU mixity. Insofar as most of the international agreements concluded by the EU are mixed agreements, concluded jointly by the EU and its member states, PA is an attractive technique for both the EU and its members. It accords member states with the necessary time to comply with their domestic constitutional requirements of ratification while allowing the parts of the agreement falling within the EU's competence to be implemented in the meantime, thus minimising delays. It thus 'facilitates the decision in favour of "mixity" [while also allowing] the EU and its member states (as a meta-party) to remain an attractive partner to the outside world even when agreements are concluded as mixed agreements'.[268] PA of the parts of a mixed agreement falling within the EU's competence has by now become the standard practice for all mixed bilateral agreements concluded by (and with) the EU and its member states.[269]

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[264] Merijn Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law' (2020) 31(3) European Journal of International Law 883; Catherine Brölmann and Guido Den Dekker, 'Treaties, Provisional Application' in *Max Planck Encyclopaedia of Public International Law* (Oxford Public International Law, last updated February 2020) para 4.

[265] Council Decision 76/626/EEC of 21 June 1976 on the provisional application of the Fifth International Tin Agreement OJ L 222 (14 August 1976) (no longer in force).

[266] Based on the information available in the Treaties Office Database of the European External Action Service <http://ec.europa.eu/world/agreements/default.home.do>

[267] Chamon (n 264) 892-893. See also, Danae Azaria, 'Provisional Application of Treaties' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, OUP 2020) 229.

[268] Merijn Chamon, 'Provisional Application's Novel Rationale: Facilitating Mixity in the EU's Treaty Practice' in Wybe Th. Douma, Christina Eckes, Peter Van Elsuwege, Eva Kassoti, Andrea Ott, Ramses A. Wessel (eds), *The Evolving Nature of EU External Relations Law* (Springer 2021) 131.

[269] Andrei Suse and Jan Wouters, 'Exploring the Boundaries of Provisional Application: The EU's Mixed Trade and Investment Agreements' (2019) 53(3) Journal of World Trade 395.

The legal basis for PA is found in article 218(5) TFEU. The procedure is relatively fixed: the European Commission usually provides for PA in the agreement's entry-into-force clause and the Council decides on the terms for PA in its decision authorising the signature of the agreement.[270] A clause on PA will usually be worded as follows:

> the Union and [third state] agree to provisionally apply this Agreement in part, as specified by the Union ... and in accordance with their respective internal procedures and legislation as applicable.[271]

In 2012, the ILC decided to include the topic of PA in its programme of work,[272] and appointed Juan Manuel Gómez-Robledo, an ambassador for Mexico elected to the ILC that same year, as Special Rapporteur on the topic.[273] The aim of the project from the outset was 'to provide guidance regarding the law and practice' on PA, not to formulate draft rules to inform an independent convention on the topic.[274] The project's scope addressed several issues left untouched by article 25 VCLT.[275] These issues included the legal effects of PA, the source of the obligation of PA, and the rules applicable to its termination or suspension.[276] Between 2013 and 2021, six reports were debated within the

[270] Art 218(5) TFEU: 'The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force'. See inter alia, Council Decision (EU) 2017/434 of 13 February 2017 on the signing, on behalf of the Union, and provisional application of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, OJ L 67 (14 March 2017).

[271] Art 486, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161 (29 May 2014).

[272] 2012 ILC Report (A/67/10) chapter VII, para 141. See also, 2011 ILC Report (A/66/10) Annex III.

[273] ibid.

[274] Guideline 2 PA.

[275] Which reads as follows:

> Art 25 (Provisional application)
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
> (a) the treaty itself so provides; or
> (b) the negotiating States have in some other manner so agreed.
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[276] See Juan Manuel Gómez-Robledo, 'The Provisional Application of Treaties' (2018) 2(2) University of Vienna Law Review 182.

ILC and the Sixth Committee and a number of states and international organizations (including the EU) submitted information and statements on this project.[277]

In 2021, a set of twelve guidelines reflecting 'best practices' in PA were adopted by the ILC on second reading. The guidelines apply to the PA of treaties, whether these are concluded between states or by or with international organizations.[278] Gómez-Robledo's Third and Fourth reports, specifically, address questions of PA in relation to international organizations. These range from the depositary functions of international organizations to 'the provisional application of treaties under which international organizations or regimes are created; the application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations; and provisional application of treaties to which an international organization is a party'.[279]

#### 4.2.1. Confirmation: EU provisional application practice as evidence of international rules

In view of its extensive practice of PA, the delivery of an EU statement on this project was to a certain degree expected. According to the Commission LS, the project was of 'particular interest' to the Union and had the potential to 'enhance legal certainty in that important area of international law', 'the integrity and coherence of the international legal order', and to hold 'authoritative value and practical usefulness'.[280] In fact, the LS prepared twice as many statements on the topic of PA as on the SASP.[281] The statements provide evidence of EU practice in the PA of international agreements, stressing the importance of PA for the EU specifically, and offering drafting

[277] See ILC, Sixth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur, 2020 (A/CN.4/738).
[278] Guideline 1 PA.
[279] ILC, 'Third report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur', 2015 (A/CN.4/687) paras 71-129 ('Gómez-Robledo Third Report'); ILC, 'Fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur', 2016 (A/CN.4/699 and Add.1) ('Gómez-Robledo Fourth Report') para 102-174.
[280] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 18th meeting, 27 October 2017 (A/C.6/72/SR.18), paras 39 and 42; Statement by Mr. Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 24th meeting, 25 October 2018 (A/C.6/73/SR.24) para 110.
[281] See Annex I.

suggestions on six of the ILC's proposed guidelines.[282] The substance of these statements focused on the overall scope and methodology of the project, the source of the obligation of PA, the effects of PA, the effects of reservations on PA, and the regime for termination and suspension of PA. These were considered to be 'the core questions on which the EU could have unanimity'.[283]

The particularity of this topic when compared to other aspects of the law of treaties, however, is that the EU is one of the main actors resorting to PA. Statements by states at the Sixth Committee confirmed that the majority if not all of their treaty practice concerning PA related to agreements concluded with the EU.[284] EU statements, therefore, positioned the organization as an 'active contributor to shaping practice in this area' and noted that the ILC would 'find ample material for analysis in [EU] practice'.[285]

The Commission LS seems to have approached the project more as an academic exercise of clarification of core rules rather than a codification exercise proper. It took the opportunity, for instance, to draw the ILC's attention to a number of issues which, in the EU's view, could be studied in this context:

> Matters worth studying included the extent to which provisions involving institutional elements, such as provisions establishing joint bodies, might be subject to provisional application or whether there were limitations in that respect; whether provisional application should extend to provisions adopted in implementation of a provisionally applied treaty by a body of States parties established under the treaty; whether there were limitations with regard to the duration of provisional application of a treaty; and how article 25 of the Vienna Convention related to the

[282] Notably, Guideline 3 (general rule), Guideline 4 (forms of agreement), guideline 5 (commencement of provisional application), Guideline 6 (legal effect of provisional application), Guideline 7 (reservations) and Guideline 9 (termination and suspension of provisional application).

[283] Interview 20 (27 March 2020).

[284] See Gómez-Robledo Fourth Report, para 11: 'With regard to practice, Paraguay notes that in recent years it has signed only one bilateral treaty that provides for provisional application, namely the Agreement between the European Community and the Republic of Paraguay on certain aspects of air services'. See also, Chamon (n 264) 896.

[285] Statement by Ms Cujo (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 9 November 2015 (A/C.6/70/SR.23) para 119; Statement by Ms Cujo (Observer for the European Union), Sixth Committee, Summary record of the 25th meeting, 3 November 2014 (A/C.6/69/SR.25) para 75.

> Convention's other provisions and to other rules of international law, including responsibility for breach of international obligations.[286]

Much like the EU's statements on previous ILC projects addressing the law of treaties, the statements on PA noted that the legal relevance of EU practices to the identification or formulation of international rules in this field was on a par with that of states.[287] At the Sixth Committee, Gussetti welcomed the Guide's consideration of the practice of international organizations and recalled the EU's position that the practice of both states and of international organizations should be closely examined in this respect.[288] EU member states, in turn, at times referred to EU practices in PA as examples of a 'best practice', reconciling the respect for member states' constitutional specificities with the demands for speedy treaty implementation.[289]

#### *4.2.2. Contestation: the specificities of the provisional application of treaties by the EU*

The PA of treaties by the EU, however, carries a number of special features whose elevation to the level of general 'guidelines' raised some concerns within the ILC. Arguably the most problematic among these was the relevance that the internal rules of the Union might have for the PA of international agreements. This is far from a novel issue. Concerns about the effects of EU treaty practices on legal certainty and the position of third parties were recurring in earlier ILC discussions on the law of treaties, and the commentary to the VCLT-IO makes a passing reference to these concerns, as noted above.[290]

Pursuant to the EU's established practice, the scope of PA is 'specified by the Union'.[291] Importantly, this scope is usually not defined in the agreement

[286] Statement by Ms Cujo (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 4 November 2013 (A/C.6/68/SR.23) para 34.
[287] Statement Cujo (n 285) para 119.
[288] Statement by Mr Gussetti (Representative of the European Union, in its capacity as observer), Sixth Committee, Summary record of the 16th meeting, 25 October 2021 (A/C.6/76/SR.16) para 39.
[289] See Statement by Susana Vaz Patto (Portugal), 71st Session of the General Assembly. Item 79: Report of the International Law Commission on the work of its sixty-eight session (October/November 2016) 5 <https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/portugal_3.pdf>
[290] See Commentary to article 36bis 1982 VCLT-IO, para 9 and note 111.
[291] See art 486(3), Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJEU L 161 (29 May 2014): 'Notwithstanding

as such but in the Council decision authorising the signature of the agreement, which is not subject to negotiation with the other contracting parties. The Council, in turn, usually adopts a broad formulation, simply stating that the agreement will be provisionally applied to the extent that it 'covers matters falling within the Union's competence'.[292] This has implications for the formation of third states' consent to be bound by these agreements.

From the point of view of international law, formulations of this kind sit uncomfortably with articles 27 and 46 VCLT/VCLT-IO, which generally bar states and international organizations from invoking their internal law (notably their internal rules on competence) in the context of treaty relations, save where their lack of consent to be bound was manifest and affected a rule of fundamental importance. Chamon, in particular, notes rather critically that in practice 'the EU's partners tolerate this "European exceptionalism" as an acceptable trade-off, the EU's economic clout and its attractiveness as a treaty partner'.[293] In its statements, the LS does not address these criticisms. It simply notes that '[r]eferences to internal law in the context of provisional application were not unusual; they often touched on sensitive aspects relating to constitutional law and were frequently used by the European Union in its own bilateral treaty practice'.[294]

The relationship between the 'internal law' of a state or the rules of an organization and PA was raised in the debates by a number of states, including EU member states. These debates had implications for whether this EU practice should be sanctioned by the ILC. Guideline 12 struck a compromise in this respect. It is preceded by two guidelines which essentially reflect the requirements of the VCLT, precluding the use of internal law to justify the non-observance of treaty obligations unless the breach of internal law is 'manifest

paragraph 2, the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable'.

[292] See Chamon (n 264) 897-899 (arguing that Council decisions should either restrict themselves to indicating exactly which provisions of the agreement will be provisionally applied or otherwise provide a more detailed explanation of the EU's exact competences concerning the treaty's implementation).

[293] ibid, 908-909.

[294] Statement by Mr Gussetti Observer for the European Union, Sixth Committee, Summary record of the 18th meeting, 14 November 2017, paras 47 and 48.

and concerned a rule of fundamental importance'.[295] Guideline 12, in turn, notes that the foregoing is without prejudice to the right of states or international organizations to agree on PA 'with limitations deriving from the internal law of States or from the rules of international organizations', provided that these limitations are 'sufficiently clear' to the parties.[296] This has been interpreted as a reaction to EU practice in the PA of treaties.[297]

Another feature concerns the fact that, even among EU member states, PA is distinct depending on whether it takes place within or outside the context of EU mixed agreements. The delegates from Italy and Romania, for instance, noted that their domestic constitutions provide for stricter constitutional limits to PA, but that agreements concluded jointly with the EU are exempt from these constitutional constraints,[298] while the delegate from Spain referred to the EU's practice as 'a special international regime'.[299] This has implications for the formulation of an international rule, insofar as practice varies depending on whether states participate in agreements alongside the EU or not. In the former case, EU member states' obligations of PA result from EU law, rather than international law as such. In the latter, their domestic laws do not necessarily support the existence of a general rule. Beyond the EU membership, in addition, some states' domestic laws are silent on PA.[300] These states' practice of PA is often the result of their relations with the Union alone.[301] By virtue of these particularities, both the EU and Germany requested that the matter be

[295] Guideline 10 PA, para 2; Guideline 11 PA, para 2: 'An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance'.

[296] Commentary to guideline 12 PA, para 4.

[297] Chamon (n 264) 900-901.

[298] See Statement by Ms Badea (Romania), Sixth Committee, Summary record of the 26th meeting, 3 November 2014 (A/C.6/69/SR.26) para 88; Statement by Mr Tiriticco (Italy), Sixth Committee, Summary record of the 20th meeting, 24 October 2016 (A/C.6/71/SR.20), para 91: 'Within Italy, there was little doctrinal convergence on the applicability prior to ratification of treaties entered into outside the European Union context. The Italian Constitution set strict requirements for the application of treaties that needed parliamentary approval to gain legal force'. See also, Gómez-Robledo Third Report, para. 25.

[299] Statement by Mr Pérez de Nanclares (Spain), Sixth Committee, Summary record of the 22nd meeting, 6 November 2012 (A/C.6/67/SR.22) para 77.

[300] See Brölmann & Den Dekker (n 264) para 10.

[301] See Statement by Mr Meza-Cuadra (Peru), Sixth Committee, Summary record of the 19th meeting, 24 October 2017 (A/C.6/72/SR.19) para 10.

expressly addressed in the commentary to guideline 3 (general rule).[302] This seems to indicate that states, both within and outside of the EU, approach EU practices largely as forming a special regime, not as contributing to the development of a general rule of international law.

A final particularity of EU practice concerns the delimitation of PA by means of unilateral declaration of one of the treaty parties. While the EU's established practice is to provide for PA in the entry-into-force clause of mixed bilateral agreements, the EU has also done so by means of unliteral declaration. In *Commission and Parliament v Council*, the Court found that Venezuela's conduct in reaction to a Council declaration granting fishing opportunities to vessels flying the Venezuelan flag in the exclusive economic zone off the coast of French Guiana, amounted to an acceptance of an offer by the EU to make use of the surplus of catch in that zone.[303] By contrast, guideline 3 (general rule) of the ILC's draft notes that PA requires the agreement of both parties, and guideline 4 (form of agreement) requires that, where the intention to provisionally apply a treaty is included in a unilateral declaration, it must be 'accepted by the other States or international organizations concerned'.[304] The LS did not object to this formulation as such, but it requested that the ILC 'elaborate in the commentaries as to why the regime of unilateral acts of States could not be applied with respect to the [PA] of treaties, and why acceptance and even express acceptance, was always required'.[305] In his final statement on this project, in 2021, Lucio Gussetti welcomed the ILC's 'flexible' approach to the forms of acceptance of a (unilateral) declaration of PA but still showed

[302] See inter alia, ILC, 'Provisional application of treaties. Comments and observations received from Governments and international organizations', 2021 (A/CN.4/737) 14.

[303] Joined Cases C-103/12 and C-165/12 *Commission and Parliament v Council* [2014] ECLI:EU:C:2014:2400, paras 69-72. The Court found that the Council declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of third countries constituted an 'international agreement'. However, it annulled the Council Decision approving it based on the incorrect choice of legal basis. See also, Statement Gussetti 2018 (n 280) para 113.

[304] Guideline 3 PA: 'A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.'; Guideline 4 PA: 'In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through: ... (b) any other means or arrangements, including: ... (ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned'. See also, ibid, commentary to guideline 4 PA, para 7.

[305] Statement Gussetti 2018 (n 280), para 113.

some concerns that the matter might not be settled in international law and can, therefore, still cause some problems for EU treaty practice in the future.[306]

Overall, this ILC project has brought to the fore the implications of EU treaty practices for the codification of the law of treaties. PA is one area where relations with the EU have shaped states' treaty practice more broadly. Most of the evidence concerning the application of article 25 VCLT is connected with EU international agreements. However, not only do EU member states themselves consider their obligations of PA in the context of mixed agreements to amount to a special regime, the unilateral determination of the scope of PA by the EU (by now an established practice) also raises concerns under core principles of the international law of treaties. The ILC has favoured rules firmly based on states' full and informed consent, a standard which EU treaty practice arguably does not always meet. The ILC's decision to combine its reliance on EU practice of PA with the affirmation of the vitality of consent in international treaty relations indicates that the guidelines that the ILC wishes to promote are sensitive to states' concerns regarding certain EU practices in the implementation of international agreements.

### 4.3. The effects of armed conflicts on treaties

A final project that must addressed when discussing the EU's position on the ILC work on the law of treaties is the project on the effects of armed conflicts on treaties.[307] It should be noted that the study of this topic did not extend to an examination of the implications of armed conflict on international organizations' treaty relations. Article 1 (scope) of the 2011 draft makes clear that the proposed rules address exclusively the effects of armed conflict on the relations between states.[308] While these rules also cover treaties to which international organizations are parties and consider the possibility that international organizations might be affected by armed conflict in their treaty

[306] Statement Gussetti (n 288) para 40.

[307] ILC, Draft articles on the effect of armed conflicts on treaties, 2011 ILC Report (A/66/10) chapter VI, para 89 ('EACT').

[308] Art 1 EACT: 'The present draft articles apply to the effects of armed conflict on the relations of States under a treaty'. See also ibid, commentary, para 4: 'The Commission decided not to include within the scope of the draft articles relations arising under treaties between international organizations or between States and international organizations, owing to the complexity of giving such an additional dimension to the draft articles, which would likely outweigh the possible benefits of doing so, since international organizations rarely, if ever, engage in armed conflict to the extent that their treaty relations may be affected'.

relations, the position of international organizations as 'affected parties' is largely secondary to the scope of the topic. Specifically, their position is equated to that of a third state in relation to an international agreement.[309] The draft further notes that, in principle, the constitutive instruments of international organizations remain in operation during the course of armed conflicts.[310]

The enlargement of the project to relations between international organizations was, however, initially discussed at the ILC and Sixth Committee levels.[311] This possibility was considered by the working group set up in 2007 to address this and other issues raised by the Special Rapporteur, Sir Ian Brownlie, in his Third Report.[312] At the time, international organizations were asked to submit information concerning 'their respective practice, regarding the effects of armed conflicts on treaties involving them'.[313] The EU, the International Maritime Organization (IMO) and the International Monetary Fund (IMF) were the only organizations to do so.[314]

The preparation of an EU written statement on this project is perhaps more surprising than the LS's decision to contribute to other ILC topics related to the law of treaties. As noted at the outset of the EU written statement itself, the EU has 'limited practice' in this regard.[315] Yet, the examination of this project in the context of this research satisfies more than a desire for completeness. As discussed below, the EU's written statement confirms the LS's understanding of the relationship between EU and international law and of the autonomy of the EU legal order as far as the application of the VLCT

[309] See commentary to art 2 EACT, para 2: '...the concluding phrase cited above was included to forestall an interpretation of the scope which would have excluded multilateral treaties that include international organizations among their parties'.
[310] See art 7 and annex, point (j), EACT.
[311] 2005 ILC Report (A/60/10) para 129. See also, inter alia, Statement by Mr Hmoud (Jordan), Sixth Committee, Summary record of the 19th meeting, 2 November 2005 (A/C.6/60/SR.19) para 32; Statement by Mr Hafner (Austria), Sixth Committee, Summary record of the 18th meeting, 1 November 2006 (A/C.6/61/ SR.18) para 25; ibid, Statement by Ms Popova (Bulgaria) para 20; ibid, Statement by Mr Wang (China), para 8.
[312] ILC, 'Third report on the effects of armed conflicts on treaties, by Mr Ian Brownlie, Special Rapporteur', 2007 (A/CN.4/578 and Corr.1) paras 8-10.
[313] ILC, 'Effects of armed conflicts on treaties: Report of the Working Group', 2007 (A/CN.4/L.718) para 4(1)(a)(ii) and (iii). See also, ILC, 'Effects of armed conflicts on treaties: Report of the Working Group', 2008 (A/CN.4/L.726) 5, para 5.
[314] ILC, 'Effects of armed conflicts on treaties: Comments and observations received from international organizations', 2008 (A/CN.4/592 and Add.1) ('EACT Comments by IOs (2008)').
[315] ibid, 95, para 10.

to its Treaties is concerned. It likewise offers an important insight into the LS's views on the application of the VCLT rules to international agreements concluded by the EU in times of armed conflict: it clarifies the EU's position in a way distinct from that espoused by the CJEU in its case law. It thus illustrates how these statements can be used to develop or refine EU views on international law and its relationship with the EU legal order.

#### *4.3.1. Confirmation: the use of customary rules in the interpretation of international agreements*

Article 62 VCLT codifies an exception to the rule of *pacta sunt servanda*. It allows, in exceptional cases, for the unilateral termination of a treaty by one of the parties based on a fundamental change of circumstances 'with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties'.[316] This exception has been construed narrowly by the ICJ in *Gabčíkovo-Nagymaros* and has remained more of a theoretical possibility than a reality in the international Court's jurisprudence.[317] This case concerned the unilateral suspension and abandonment by Hungary of an agreement with (at the time) Czechoslovakia regarding a hydroelectric project on the Danube river. One of the arguments advanced by Hungary was that the growing environmental concerns surrounding the project allowed it to suspend and later terminate the treaty.[318] In this context, the Court began by noting that the VCLT rules governing the suspension and termination of international agreements corresponded largely to a codification of customary international law.[319] With respect to Hungary's unilateral termination, specifically, the ICJ stressed that the circumstances invoked by the respondent were not sufficiently

[316] The first paragraph of art 62 VCLT reads as follows:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

[317] *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) [1997] ICJ Rep 7, para 104. See Malgosia Fitzmaurice, 'Exceptional Circumstances and Treaty Commitments' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 618.

[318] ibid, (*Gabčíkovo*), para 111.

[319] ibid, para 46.

connected with the object and purpose of the treaty to form an essential part of the parties' consent to be bound by the agreement, nor did they radically change the extent of the obligations still to be performed by the parties.[320]

Under EU law, article 218(9) TFEU expressly regulates the procedure for suspension of international agreements by the Union requiring, at the internal level, that a decision on suspension be adopted by the Council, further to a recommendation by the Commission or the High Representative (for agreements addressing exclusively or primarily CFPS matters). While this internal rule does not produce effect for third parties,[321] the EU often includes suspension clauses in the agreements it concludes with third states, indicating the 'essential elements' the violation of which justify the suspension or termination of the agreement.[322]

With respect to the effects of the outbreak of conflict on the operation of international agreements, specifically, the CJEU had to address this issue in *Racke*.[323] This case concerned a request for a preliminary ruling on the validity, in light of the relevant rules of public international law, of a Council Regulation suspending an EEC-Yugoslavia cooperation agreement by virtue of the outbreak of hostilities in the region which amounted, in the EU's view, to 'a radical change in circumstances' affecting the viability of trade relations between the parties.[324] This suspension resulted in the reimposition of higher import customs duties which were then challenged before German fiscal courts by a company importing wines from Kosovo to Germany. While the *Bundesfinanzhof* considered that the suspension was justified by the outbreak of hostilities, it had concerns about the procedure followed in this respect.[325] In its ruling, the CJEU first recalled, as it had previously established in *Poulsen*, that the Community is bound by customary international law,[326] including article 62 VCLT. In the Court's view, however, this customary law status did not

[320] ibid, para 104.
[321] Art 27(2) VCLT-IO.
[322] See inter alia, art 121, Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part OJ 204/20 (31 July 2012).
[323] Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293.
[324] Council Regulation (EEC) 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia OJ L 315 (15 November 1991) (no longer in force).
[325] Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293 paras 21-23.
[326] ibid, para 45.

extend to the procedural requirements set forth in article 65 VCLT (including prior notification and waiting period).[327] In addition, in view of the 'imprecision' of these rules, the Court concluded that it judicial review of EU institutions' conduct should be to verifying whether these institutions 'manifestly erred' in their assessment of the rule's conditions,[328] errors which it did not find in the present case.

Odermatt, for instance, has noted that the Court's reasoning may reflect more its deference to the Council's political decision to suspend trade relations in retaliation for the outbreak of conflict in the former Socialist Federal Republic of Yugoslavia (SFRY), rather than a broader statement on the customary status of VCLT rules.[329] Yet, this ruling has also been criticised for the margin it accords EU institutions in the unilateral suspension or termination of their international commitments. Klabbers, for instance, has noted that the Court's reading of article 62 VCLT runs the risk of justifying the suspension or termination of a treaty simply on account of an outbreak of hostilities, a reading markedly distinct from international law's understanding of the exceptional character of this rule.[330] At the Sixth Committee, the delegate from Argentina, for instance, stressed her delegation's 'reservations concerning the comments on the topic received from the European Union'.[331]

The statement prepared by the LS on this project, however, indicates that the European Commission, at least, does not view the outbreak of hostilities as an automatic justification for the suspension or termination of an agreement.[332] The LS relied on two instances of EU practice as evidence of the

[327] ibid, para 58.
[328] ibid, paras 7 and 52.
[329] See Odermatt (n 246) 142-143.
[330] Jan Klabbers, 'Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, judgment of 16 June 1998, nyr' (1999) 36(1) Common Market Law Review 179, 186.
[331] Statement by Ms Millicay (Argentina), Sixth Committee, Summary record of the 25th meeting, 31 October 2011 (A/C.6/66/SR.25), para 8.
[332] See EACT Comments by IOs (2008), 93. In addition to its written statement, the EU forwarded to the ILC two additional documents, a Communication by the Commission and a Study Group Report, intended to aid the ILC in its work whilst expressly not binding the organization as to the positions expressed therein. See EACT Comments by IOs (2008), note 2; European Commission, Communication from the Commission to the Council, 'Co-operation with ACP Countries Involved in Armed Conflicts' (COM(1999)240 final); Commission of the European Communities, Protection of the Environment in Times of Armed Conflict, Report established by a study group composed of Professors Michael Bothe, Antonio Cassese, Frits Kalshoven, Alexandre Kiss, Jean Salmon, and Kenneth R. Simmonds (SJ/110/85).

EU's observance of the general principle (included in the ILC draft) that the outbreak of hostilities does not automatically result in the suspension or termination of a treaty.[333] The statement refers, for instance, to article 96 of the EU-ACP (Cotonou) Partnership Agreement, which sets out a consultation procedure between the parties, should either wish to take measures concerning the non-fulfilment of contractual obligations by the other party, including in cases of violent conflict.[334] By drawing attention to the conciliation and consultation procedures included in EU international agreements, the Commission LS offers a clarification to the EU's understanding of the scope and operation of article 62 VCLT which responds in part to some of the concerns raised following the CJEU's application of this rule. It is interesting to note that in more recent cases concerning the judicial review of restrictive measures imposed by the EU on the Russian Federation with respect to the situation in Ukraine, the Court has instead relied on specific provisions of EU international agreements – notably, the EU-Russia Partnership Agreement – and on article 21 TEU (including the EU's obligation to observe international law and to contribute to the maintenance of international peace and security) to justify the recourse to measures with implications on the fulfilment of international obligations by the EU, signalling a decreasing reliance on rules of custom and a growing EU practice of accounting for the effects of armed conflicts in its treaty relations.[335]

#### *4.3.2. Contestation: the special regime of the EU Treaties*

Much in line with the EU statements on SASP discussed in section 4.1, the EU's written contribution to the topic of effect of armed conflicts on treaties also made clear that Article 25 VCLT does not apply to the EU Treaties. The statement confirms EU lawyers' understanding of the EU Treaties as a self-sufficient, autonomous legal regime, the suspension and termination of which are regulated by EU law, excluding the application of general international law:

[333] Art 3 EACT.
[334] EACT Comments by IOs (2008), 94. See also, Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 OJ L 317 (15 December 2000).
[335] Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236, paras 111-112.

> ... the constituent instrument of the European Community could theoretically fall within the scope of the present study as a treaty concluded between member States (article 5 of the Vienna Convention on the Law of Treaties). However, as it contains specific provisions on the effect of armed conflict on the internal market, and given the specific legal nature of the Community, member States would apply these Community rules rather than general international law rules, as codified in the project.[336]

The EU statement advances article 347 TFEU and its interpretation by the CJEU as evidence to this effect. This article regulates the right of EU member states to adopt measures which may exceptionally distort the functioning of the internal market in situations of war, threat of war, or the fulfilment of related obligations in the maintenance of international peace and security. It requires that member states 'consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected'.[337] This article was invoked, in particular, by the United Kingdom in the context of the Falklands wars, as well as by Greece to justify its trade embargo against the (then) Yugoslav Republic of Macedonia in the 1990s. In the latter case, the European Commission instituted proceedings against Greece for abuse of the rights conferred by this provision.[338] The article has otherwise been interpreted by the Court mostly in cases involving non-discrimination in the armed forces, which limits its interpretation to aspects connected with the maintenance of internal law and order, rather than (international) armed conflict. These cases include that of *Alfredo Abore* (concerning the operation of the principle of non-discrimination on the basis of nationality in the acquisition of real property in areas designated by states as militarily important), and of *Angela Maria Sirdar* (a case concerning gender discrimination on access to employment in the armed forces).[339]

[336] EACT Comments by IOs (2008), 95, para 11.

[337] Art 347 TFEU: 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

[338] Case C-120/94 *Commission v Greece* [1994] ECLI:EU:C:1996:116.

[339] Case C-423/98 *Alfredo Albore* [2000] ECLI:EU:C:2000:401, para 21; Case C-273/97 *Angela Maria Sirdar* [1999] ECLI:EU:C:1999:523.

While the LS decided to prepare an EU statement on this project, it also welcomed the ILC's decision not to enlarge the scope of the draft articles to treaties concluded by or with international organizations.[340] Doing so might arguably reopen the debate on whether distinct rules apply to treaties concluded by international organizations or to the constitutive instruments of international organizations, a theme which dominated the discussions on the VLCT-IO in the 1970s and 1980s.[341] For staff at the LS, this would again require an effort of asserting the EU's autonomy to operate on conditions of equality with states in the conclusion of international agreements, while protecting the autonomy and integrity of the EU Treaties. Perhaps to avoid this, the EU statement simply reiterates what it already had in previous projects – notably, that the EU will continue to have recourse to the 1969 VCLT in the interpretation of its international agreements 'even if [the draft articles' scope] were not formally extended to international treaties concluded by international organizations'[342] – using this opportunity to restate the EU's commitment to international law.

Within the ILC and at the Sixth Committee, the extension of this project's scope to international organizations also gave rise to very distinct views on the matter. Some ILC members referred to regional integration treaties as instruments potentially affected by armed conflict and noted that it was 'not uncommon for international organizations to be involved in some capacity in armed conflicts.'[343] While some states shared this view (e.g. Ghana, China), the majority showed some reservations, including EU member states (e.g. Portugal and the Czech Republic).[344] The idea of extending the project's scope was eventually discarded on the grounds that the complexity of delving into this additional dimension 'would likely outweigh the possible benefits of doing so, since international organizations rarely, if ever, engage in armed conflict to the extent that their treaty relations may be affected.'[345] The draft makes no

[340] EACT Comments by IOs, 95, para 15: '... it appears that there is little need to broaden the scope of the study and to adapt the present draft to the specific situation of the European Community'.
[341] See supra section 3.2.
[342] EACT Comments by IOs, 95, para 15.
[343] 2010 ILC Report (A/65/10) para 200. See also, 2005 ILC Report (A/60/10) para 129.
[344] See ILC, 'First report on the effects of armed conflicts on treaties, by Mr Lucius Caflisch, Special Rapporteur', 2010 (A/CN.4/627 and Add.1) ('Caflisch First Report') 93, para 8 and notes 9-10.
[345] Commentary to art 1 EACT, para 4. See also, ibid., 93, para 8 and 94, para 14.

references to the EU or its practice, either in the final draft or in the reports that preceded it.

## 5. Accounting for the EU in the codification and development of the law of treaties

This chapter has so far provided an overview of the EU's statements on five ILC projects that codify and 'progressively develop' international law governing the conclusion, provisional application, interpretation, suspension, and termination of treaties. This section, in turn, discusses how the EU's treaty practices and views were 'accounted for' in the formulation of these rules. The aim is not to establish a degree of EU influence in this law-drafting process but instead to examine how EU treaty practices have been discussed within these projects, and the extent to which some of the EU's specificities were reflected or 'accommodated' in the ILC's texts.

It should first be recalled that, in each of these projects, the ILC's aim was to distil from the practice of states and other relevant actors a common set of default rules and principles which might guide international treaty-making and judicial decisions on the operation of treaties. Like all rules of general application, their content is based on a legal decision for or against generalisation, at times grounded on the established practice of states, other times grounded on a normative justification of a preferred direction for the development of international law.

The position of international organizations in this process is one that has long animated legal scholarship. The debates held within the ILC since its inception, and more thoroughly in the preparation of the 1986 VCLT-IO, address the status of international organizations to varying degrees. The differences in legal thinking expressed in the context of these debates – notably concerning the origins of international organizations' treaty-making capacity or the relationship between member states and the treaties concluded by international organizations – shed light on what Brölmann has called international law's difficulty in fitting complex or 'layered' international subjects into the 'one-dimensional set-up of the law of treaties.'[346] Determining whether, and in which circumstances, international organizations should be viewed as 'opaque' or 'transparent' realities for the purposes of these rules, has been a

[346] Brölmann (n 175) 17.

permanent struggle in the process of determining which rules (should) govern organizations participation in international agreements. On the international plane, organizations seem to operate essentially pursuant to the same rules of conduct as the states with which they interact – a fact otherwise confirmed by the similarities between the 1969 and the 1986 Vienna Conventions. As noted by Bordin, however, this analogy breaks at the level of institutional design of international organizations' powers and purposes.[347]

At the level of institutional design, the EU has long been a particular case, forming a category of its own. The particularities of the EU 'case' have been distinguished by the ILC from those of other organizations – in its debates on 'state succession in respect of treaties' to the debates on law of treaties-related projects that have followed. While the EU's growing participation in international agreements provides the ILC with a useful source of practice for its work, the anchoring of general rules in evidence from EU treaty-making practices is addressed with reservations, both by the ILC and by the international community of states. One need only recall the objections to article 36*bis* of the draft VCLT-IO examined above.[348] This unique institutional design or degree of integration have allowed the EU to become an active participant in the conclusion of international agreements in a growing number of fields. At the same time, the external consequences of this internal design – manifested in EU mixity and third parties' confusion as to the implementation of EU agreements – are also cause for some concern.

References to EU practices can nevertheless be found in all the projects examined in this chapter. Within the MFN project, references to the EEC are included in six out of the total of eight reports of the successive Special Rapporteurs on this project. The nature of the references varies significantly, ranging from a handful of bibliographic references to academic literature on the operation of MFN clauses within the European Common Market,[349] to more substantial references to the EEC's treaty practice and to the Community's very nature. Ustor's reports refer to various aspects, including: other international organizations' views on the EEC's practices and legal nature

[347] Bordin (n 13) 241-242.
[348] See supra, section 3.2.2.
[349] ILC, 'First report on the most-favoured-nation clause, by Mr Endre Ustor, Special Rapporteur', 1969 (A/CN.4/213), Annex III, 181ff.

when discussing the 'problems raised by article XXIV' of the GATT;[350] to the European Coal and Steal Community (ECSC) and the EEC founding treaties (notably, article 234 EEC Treaty);[351] to the EEC's treaty practice both as a grantor and as a beneficiary of MFN treatment;[352] and, in more general terms, to the EEC's very legal nature.[353] Ushakov, in turn, focused primarily on rebuking the EEC's arguments in favour of the customary law status of customs union exceptions.[354] Ultimately, the final set of draft articles adopted in 1978 refer to the EEC and its practices in the commentary to 4 articles.[355]

Within the VCLT-IO, in turn, the EEC is referred to in 7 out of the 11 reports submitted by Reuter[356] and, understandably, dominated the ILC debates on article 36*bis*.[357] The forms of practice listed in Reuter's reports include, in particular, references to the following: the EEC Treaty (article 228 and article 5 EEC treaty)[358] and mixed agreements (including the declarations

[350] ILC, 'Second report on the most-favoured-nation clause, by Mr Endre Ustor, Special Rapporteur', 1970 (A/CN.4/228 and Add.1) 227-228, 234 and 237 (referring to UNCTAD reservations about the EEC's system of 'vertical preferences', and the European Commission for Europe view that the EEC 'is a customs union and is therefore a legitimate exception to the most-favoured-nation undertaking').

[351] ILC, 'Fourth report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur', 1973 (A/CN.4/266) 109-110 and 116.

[352] ILC, 'Seventh report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur', 1976 (A/CN.4/293 and Add.1) 115 and note 20 (referring, inter alia, to art 7 of the Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community OJ 93 1431 (Yaounde, 20 July 1963)).

[353] ILC, 'Sixth report on the most-favoured-nation clause, by Mr Endre Ustor, Special Rapporteur', 1975 (A/CN.4/286 and Corr.1) 8, para 12, 16, para 48, and 17, para 49.

[354] ILC, 'Report on the most-favoured-nation clause, by Mr Nikolai A Ushakov, Special Rapporteur', 1978 (A/CN.4/309, Add.1 and Add.2) 8-9, paras 63-67 and 72-75.

[355] Commentary to art 4 MFN, para. 6; Commentary to art 23 MFN, paras 4 and 10; Commentary to art 24 MFN, paras 11-13; Commentary to art 29 MFN, para 3.

[356] Namely, in the Second (1973) to Sixth (1977) and in the Tenth (1981) and Eleventh (1982) reports by Reuter.

[357] See supra section 3.2.

[358] Art 228 EEC Treaty is referred to as 'at least one known example' of the constituent instrument of an international organization providing for the binding effect of treaties concluded by the organization on its member states. EEC member states' duty of loyal cooperation under article 5 EEC Treaty, in turn, is mentioned as supporting the existence of a general obligation of cooperation of member states vis-a-vis the agreements concluded by the organization which thus runs counter to their qualification as 'third parties' to such agreements. See ILC, 'Sixth Report Sixth report on the question of treaties concluded between States and international organizations or between two or more international organizations by Mr Paul Reuter, Special Rapporteur', 1977 (A/CN.4/298) ('Reuter Sixth Report') 129 (commentary to art 36bis, para 1). See also, ILC, 'Second report on the question of treaties concluded between States and international

of competence therein);[359] case law of the CJEU and its interpretation of the Communities' treaty-making capacity or its use of the concept of 'territory of the Community';[360] a Council decision exemplifying the procedure followed within the EEC for the production of full powers;[361] bilateral agreements concluded by the Community as an example of different formalities followed by international organizations regarding the moment at which their consent to be bound by a treaty is established;[362] the formulation of reservations regarding international treaties by the EEC in support, together with the practice of the UN and its specialised agencies, of a growing practice of organizations in formulating reservations or objections to reservations;[363] the EEC's participation in other international organizations as an example of different configurations of international organizations and the status of participants therein;[364] and to the difficulties which may arise in the future from the complexification of the

organizations or between two or more international organizations, by Mr Paul Reuter', 1973 (A/CN.4/271) ('Reuter Second Report') para 104 and note 80, and paras 106-107.

[359] See Reuter Sixth Report, 126, para 37, 130, para 5, and 132-133, para 11 and note 87.

[360] Reference is made, notably, to Case C-36-74 *Walrave and Koch* [1974] ECLI:EU:C:1974:140, to note that the CJEU's use of the concept 'territory of the Community' is best understood as a reference to the spatial application of a rule, not a claim for territorial sovereignty. See ILC Reuter Third Report, 146, para 6 and note 88; ibid., 149, para 17 and note 70; ILC, 'Fourth report on the question of Treaties concluded between States and international organizations or between two or more international organizations by Mr Paul Reuter, Special Rapporteur', 1975 (A/CN.4/285) ('Reuter Fourth Report') 41, para 5 and note 65 (commentary to art 29 (territorial scope of treaties)).

[361] Council Decision of 9 August 1974 concerning an Agreement between the European Economic Community and the World Food Programme, OJ L307 (18 November 1974) 10. See Reuter Fourth Report, 29, note 10.

[362] For instance, the Agreement between the European Economic Community and the People's Republic of Bangladesh, OJ L323 (3 December 1974) 18ff. ibid, 35, note 40.

[363] For instance, the EEC reservation to the 1975 TIR Convention. Reuter notes that, while 'a number of precedents relate to the EEC' and one may have doubts as to whether the existing practice amounts to 'genuine reservations, genuine objections or even genuine international organizations', the fact of the matter is that 'it is not unknow in current practice for international organizations to formulate reservations objections'. See ILC, 'Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur', 1981 (A/CN.4/341 and Add.1/Corr.1) 56-58, paras 54, 56-58 (Commentary to section 2: reservations). See supra (n 161).

[364] Reference is made to the participation of the EEC in organizations originating in commodity agreements when discussing the different possible compositions of international organizations and the possibility of international organizations participating in both inter-state organizations and in organizations composed, themselves, of organizations. Reuter notes, however, that 'it is premature to say than an organization becomes a member of another organization on the same footing as states'. Reuter Fifth Report, 145, para 2 and note 30.

distribution of competences between an organization and its member states.[365] The draft adopted by the ILC in 1982 refers to the EEC in three footnotes and in the general commentary to the section on reservations.[366]

References to the EU's participation in international agreements have also been a regular feature of the ILC's work on the law of treaties over the last decade. In the debates on SASP, EU treaty practice is referred to in each of the Nolte's five reports, either directly or while addressing the statements made by states and international organizations at the Sixth Committee.[367] The reports include references to CJEU case law in support of the customary law status of article 31 VCLT[368] or, conversely, affirming the special nature of the EU legal order.[369] They also refer to WTO Appellate Body reports wherein the EU's practice was accounted for as relevant subsequent practice,[370] to Council Conclusions,[371] and to opinions by CJEU Advocates-General resorting to expert reports in the interpretation of treaties.[372] The final set of conclusions on SASP refer to the EU's practice in the commentary to four conclusions and in five footnotes.[373] In the PA project, in turn, Gómez-Robledo's Third Report

[365] Reuter Sixth Report, 131, para 10 and note 86.

[366] Commentary to section 2 (reservations) para 5, 1982 VLCT-IO; ibid, notes 43, 98 and 111.

[367] See, ILC, 'First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr Georg Nolte, Special Rapporteur', 2013 (A/CN.4/660) ('Nolte First Report') para 26; ILC, 'Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur', 2014 (A/CN.4/671) ('Nolte Second Report') para 136; Nolte Third Report, para 28; Nolte Fourth Report, para 5; ILC, 'Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur', 2018 (A/CN.4/715) ('Nolte Fifth Report'), para 117.

[368] For instance, case C-386/08 *Brita* [2010] ECLI:EU:C:2010:91. See Nolte First Report, para 26.

[369] See Nolte Third Report, para 28 and accompanying notes.

[370] For instance, to *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/16 (27 September 2005)*. See Nolte First Report, para 33, note 78.

[371] For instance, the Madrid European Council Conclusions of 1995, modifying the EU currency's designation from ECU to Euro, as a possible example of EU member states' subsequent agreement in modification of the EU treaties. See Nolte Third Report, paras 59 and note 88.

[372] For instance, Opinion of Advocate General Jääskinen in Joined Cases C-401/12 P to C-403/12 P *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* [2014] ECLI:EU:C:2014:310, as an example of the reliance by AGs on the recommendations of expert bodies, recommendations of the expert bodies, in casu, the Compliance Committee under the Aarhus Convention. See Nolte Fourth Report, para 89, note 196.

[373] Commentary to conclusions 2, 8 and 10 SASP; ibid, notes 36, 82, 410, 426, and 438.

includes an annex of 24 EU agreements subject to PA[374] and each report refers to the EU to varying degrees, be it by mentioning EU primary law,[375] the wording of PA clauses included in bilateral mixed agreements concluded by the EU with third states,[376] the terms for PA set forth in Council Decisions,[377] or the practice of third states regarding PA when concluding treaties with the EU.[378] EU-level discussions on withdrawing from PA to pressure third states into completing their internal ratification procedures are also addressed as a case of 'interest'.[379] The final set of guidelines on the PA, adopted by the ILC on second reading in 2021, refers to EU practices in 4 of its footnotes as well as in the annex to the text, which includes examples of PA clauses aimed at assisting 'States and international organizations in drafting an agreement to apply provisionally a treaty or a part of a treaty'.[380]

The manner in which the EU's participation in international agreements has been accounted for in the design of rules of international law, however, reflects both the ILC's recognition of the singularity of the EU and this body's reservations concerning specific features of EU treaty-making. On the one hand, within the MFN project, the debates refer to the permanent transfer of competences to the EEC as a unique phenomenon, part of an

[374] Annex, Gómez-Robledo Third Report.

[375] See inter alia, ILC, 'Second report on the provisional application of treaties by Juan Manuel Gómez-Robledo, Special Rapporteur', 2014 (A/CN.4/675) ('Gómez-Robledo Second Report'), para 35.

[376] For instance, art 30.7(3), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11 (14 January 2017). See Gómez-Robledo Fourth Report, para 156; ILC, 'Fifth report on the provisional application of treaties by Juan Manuel Gómez-Robledo, Special Rapporteur', 2018 (A/CN.4/718 and Add.1) ('Gómez-Robledo Fifth Report'), paras 24, 28-29.

[377] For instance, Council Decision (EU) 2017/434 of 13 February 2018 on the signing and provisional application of the EU-Afghanistan cooperation and partnership agreement OJ L 67 (14 March 2017) 1. See Gómez-Robledo Fifth Report, para 24.

[378] See Gómez-Robledo Fourth Report, para. 11; Gómez-Robledo Fifth Report, para 18 (El Salvador) and para 31 (Peru).

[379] Gómez-Robledo First Report, para 35 and note 48; ILC Fourth SR PA, para 160.

[380] EU-related examples include clauses on the commencement of PA from the date of signature of an international agreement or from its conclusion or notification, clauses imposing limitation to PA deriving from the internal law of states or the rules of an international organization, and the termination of PA upon notification not to become a party to a treaty. Footnotes to the Guide, in turn, refer to PA in the context of the withdrawal of the United Kingdom from the EU (as an example of the 'flexibility' of PA by means of an exchange of notes), the consistent recourse to PA in EU mixed agreements, and the PA of international agreements based on a clause inserted into the agreement as such. See Annex, paras 9, 15, 30, 44, and 47-48 PA; notes 260, 267 and 271, PA.

emerging but as yet uncrystallized practice. Several aspects linked to the EEC's application of MFN treatment were considered not worthy of reflection in general rules, either as *lex lata* or *lex ferenda*.[381] Within the VLCT-OI draft, the commentary to article 36*bis* referred expressly to the ILC's rejection of suggestions which referred 'in too exclusive a manner to a case as special as that of the European Communities'.[382] And in the drafting of guidelines on PA, a number of peculiarities of the EU practice have prompted concerns regarding the position of EU contracting parties.[383]

On the other hand, EU practice has also been used to confirm or support the formulation of general rules. The EEC's conclusion of the Lomé Convention, for instance, was used to support the inclusion in the draft MFN articles of a rule (draft article 24) excluding the preferential treatment extended by developing states inter se from the scope of MFN benefits between developed states.[384] Within the 1982 draft VCLT-IO, article 19 supported the freedom of international organizations to formulate reservations on EEC precedents, together with those of UN specialized agencies.[385] A loose reference to the use of the term 'territory of the Community' by the CJEU is likewise used to clarify that, while a simplified version of article 29 (territorial scope of treaties) was adopted, the ILC found it 'preferable to avoid a formula which was too rigid or too narrow' with respect to the use of the term 'territory' by international organizations, a flexibility grounded on its use by the CJEU.[386] In the SASP project, the practice of EU member states in establishing the European Stability Mechanism (ESM) is referred to as evidence of the relevance of the practice of parties to an agreement between the date of its conclusion and the date of its entry into force;[387] CJEU case law, in turn, is used as subsidiary evidence confirming the view of 'international courts and tribunals' on the customary law status of articles 31 and 32 VCLT.[388] Finally, the Guide on PA of treaties makes ample reference to treaties concluded by

[381] See supra notes 113-115 and accompanying text.
[382] Commentary to art 36bis 1982 VCLT-IO, para 10.
[383] See Chamon (n 264) 900-901.
[384] Commentary to art 24 MFN, para 11.
[385] General commentary to section 2 1982 VCLT-IO, 32-33, paras 3-4.
[386] Commentary to art 29, 1982 VCLT-IO, para 2.
[387] Commentary to conclusion 4 SASP, para 2.
[388] Commentary to conclusion 2 SASP, paras 41-43.

the EU as an illustration of clauses and practice of PA which may guide international treaty-making.[389]

Ultimately, as draft codifications of general rules, most of these projects included clauses recognising that more specific rules may govern the situations regulated therein. In Nolte's project on SASP, for instance, the special regime of the EU Treaties is expressly referred to as falling within the 'without prejudice' clause of conclusion 12.[390] In addition, the ILC has largely refrained from taking a position on what one might call 'issues of doctrine' – that is, issues that relate to 'the system of prevailing legal ideas and the system of existing legal rules'.[391] MFN rules reserve their judgment on 'the existence or non-existence' of a customs union exemption.[392] And the ILC's 1982 draft VCLT-IO opted to leave open the status of organization in international law and 'not to prejudge any question that may arise' concerning member states' association with the agreements concluded by international organizations.[393] In doing so, the ILC seems to have struck a balance between drawing attention to some of the international community's concerns regarding EU treaty practices and 'accommodating' the EU as a relevant co-contributor to the development of international law by means of treaties – at times by relying on EU practices to support the existence of international rules, and other times by referring to these practices as clear exceptions to these general rules, covered by a text's 'without prejudice clauses'.

EU reactions to these projects have varied significantly. In the late 1970s, the Community delegation noted that the draft articles on MFN clauses 'would not be accepted by [the] EEC' nor would the organization contemplate being party to any international instrument that did not recognise Community competences and the special nature of the customs union it formed.[394] In the 1980s, the EEC made clear before the Sixth Committee that the ratification of the 1986 VCLT-IO by any of its member states should not in any way be read as an endorsement or acceptance of the Convention by the Community, a detachment otherwise followed by the generalized non-recognition of this

[389] See supra notes 374-380 and accompanying text.
[390] Commentary to conclusion 12 SASP, para 42. See also, art 29 MFN; art 5 1982 VLCT-IO.
[391] Brölmann (n 145) 199.
[392] 1978 ILC Report (A/33/10) para 58.
[393] Commentary to art 6 VCLT-IO; art 74(3) VCLT-IO.
[394] Statement Buhl (n 74) para 17.

instrument by the CJEU.[395] In the last decade, by contrast, the EU has welcomed ILC codification exercises cast as conclusion or guidelines. It has referred to these instruments as authoritative or important contributions to the clarity and legal certainty of international treaty law.[396] This change in attitude is best understood as the result of a combination of factors, including: the fact that these projects revisit rules that are otherwise well established under customary international law and recognised as such by the CJEU; the generalised acceptance in ILC drafts of the special nature of the EU legal order; and perhaps the EU's greater confidence in the international community's recognition of its presence as a relevant treaty actor.

## 6. Concluding remarks

Treaties remain the main instrument through which the EU contributes to the formation and development of international law. By revisiting the statements on the law of treaties prepared by the European Commission LS on ILC projects, we gain a broader view of the EU's own understanding of how its practices contribute to the development of these rules, and how these rules interact with the EU legal order. The LS's continued interest in engaging with these ILC projects, in turn, reflects an internal awareness of the relevance of these rules for EU external autonomy.

A review of the statements prepared on these five topics illustrates how the LS has relied on EU practices to explain how, in its view, treaty-making by the organization, often alongside its member states, contributes to the development of international rules governing the conclusion and operation of treaties. Commenting on the MFN project, the LS argued that EU practices advanced international rules concerning the economic integration of developing countries, and that they reflected a 'trend' in regional economic integration justifying the recognition, in international law, of an automatic customs-unions exception to MFN treatment. In the VCLT-IO debates, the LS likewise relied on EU treaty practice to contest rules which might distinguish the position of international organizations from that of states in the conclusion

[395] See supra, section 3.2.2. See also, Statement by Mr Hardy (European Economic Community), Sixth Committee, Summary record of the 45th meeting, 14 November 1986 (A/C.6/41/SR.45) para 45.

[396] See Statement Gussetti (n 228) para 46; Statement Gussetti 2017 (n 280) paras 39 and 42; Statement Gussetti 2018 (n 280) para 110.

of treaties. In the projects carried out in the last decade, in turn, the LS has argued that EU treaty practices are relevant for the assessment of VLCT rules, notably concerning provisional application.

Confirmation – understood in this context as an expression of agreement with the rules advanced by the ILC – has been mostly used by the LS to project an image of the EU as a reliable treaty partner which, in the words of article 3(5) TEU, 'strictly observes' established rules of international law. This is particularly illustrated by the LS's reliance on CJEU case law, as well as on that of WTO dispute settlement, as evidence of the observance by the EU of VCLT rules in the interpretation, suspension, or termination of international agreements to which it is a party. Beyond portraying the EU as a 'strict observer' of custom, these statements have also been used by the Commission LS to clarify the reading of international law supported by the organization. This is illustrated by the statements on the effects of armed conflicts on treaties offers and the conditions for unilateral termination or suspension of international agreements by the EU.

With respect to contestation, this has centred primarily on rules which can be understood, from an EU perspective, as a misrecognition of, or interference with, the specificities of EU practices or the autonomy of its legal order. By way of example, the absence of a rule on customs unions exemptions (article 16*bis* of the MFN project), or the potential codification of a rule on the 'direct' association of member states with the agreements concluded by the organization (article 36*bis* of the VLCT-IO), were contested by the LS for disregarding the unique nature of EU integration. A similar emphasis on the 'specific legal nature of the Community' has supported the LS's reiteration, in the EU statements delivered in the last decade, that international rules on the interpretation, suspension, or termination of international agreements do not apply to the EU Treaties. In doing so, the LS has transported to the international level a narrative akin to that of the CJEU examined in chapter 1.[397] In fact, the greater the misalignment or perceived interference of ILC draft rules or conclusions with the 'essential characteristics' of the EU legal order, as identified by the CJEU, the more the LS has invested in persuading the ILC that EU practices are aligned with the established practice of states or other actors, that they are the expression of an emerging trend in international law

[397] See Chapter 1, section 3.

or, conversely, that they are a justified exception to rules of general international law.

However, except for the MFN project, the LS has not insisted that EU practices or views should be reflected in rules of general application. EU statements have mostly endorsed a broad understanding of the concept of 'rules of the organization' and of the principle of autonomy of international organizations – or, in Reuter's words, of the organization's right to 'its own legal image'.[398] The LS has notably avoided engaging in broader doctrinal debates about the legal origins of international organizations' treaty-making capacity. Instead, these statements seem to have been primarily used by the Commission LS as an opportunity to project the relevance of the EU as a treaty actor, and to have it recognised in ILC texts, notably in their commentaries, or otherwise registered (if not endorsed) in these debates.

From the ILC's side, the review of these five projects attests to a consistent reliance on, and recognition of, EU treaty practices by this body of 'generalist' international lawyers. All the projects surveyed in this chapter include references to the EU. In more recent projects, notably that on the PA of treaties, the wealth of EU practice has served as a particularly useful source of evidence for the formulation of guidelines by the ILC. Yet, while reliance on EU practices may have become an inevitability, it is also approached with caution. References to the EU are at times perceived as attempts at progressively developing international law which are not always welcomed by ILC members or by states at the Sixth Committee for that matter. States' reactions to draft article 36*bis* in the context of the 1982 draft VCLT-IO are an apt expression of this sentiment. At other times, references to the EU reflect concerns about the negative effects that the 'special treatment' extended to the EU by its treaty partners might have on the latter's legal position, a point made both in the commentaries to the 1982 draft VCLT-IO and in the ILC's more recent work on the PA of treaties. Faced with diverging views among its membership and states at the Sixth Committee, the ILC has often opted to leave thornier questions of international law open, capturing the EU's 'diversity' in safeguard clauses.

[398] 1974 ILC Report (A/9610/Rev.1) 299, paras 3 and 6 (Commentary to art 6 (capacity of international organizations to conclude treaties)).

# 4 | The Responsibility of International Organizations

## 1. Introduction

> Some scholars describe the question of the responsibility of international organizations as simply 'a mess'. The case of the European Union ... is no different. Rather, it embodies perhaps the most complex conundrum in the law of responsibility of international organizations.[1]

Throughout the nine years during which the United Nations (UN) International Law Commission (ILC) toiled over the draft articles on the responsibility of international organizations (ARIO), the European Union (EU) was one of the most active organizations in the debates.[2] The Legal Service of the European Commission (LS) prepared eight statements on the different drafts submitted by the ILC to the UN General Assembly (UNGA) Sixth Committee.[3] It also commented on 30 of the 59 draft articles and expressed its views on the larger implications of this work for the legal position of the EU and its member states. The project's subject-matter and its direct implications for EU external competence and autonomy were advanced as justifications for the Commission LS' active engagement with this project.[4] At the Sixth Committee, the statements by the Observer for the European Commission indicated from the outset that the EU perceived itself as one of the organizations that was most impacted by the ILC's work. These statements underscored the EU's 'vital' interest in the topic, in view of the 'special repercussions' or 'considerable implications' of these rules for the EU.[5]

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[1] Emilija Leinarte, 'The Principle of Independent Responsibility of the European Union and its Member States in the International Economic Context' (2018) 21(1) Journal of International Economic Law 171.

[2] ILC, Draft articles on the responsibility of international organizations, 2011 ILC Annual Report (A/66/10) chapter V, para 87 ('ARIO').

[3] See Annex I.

[4] Interviews 18 (6 July 2018) and 21 (17 March 2020).

[5] Statement by Mr Kuijper (European Commission), Sixth Committee, Summary record of the 14th meeting, 27 October 2003 (A/C.6/58/SR.14) para 13; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 18th meeting, 24 October 2011 (A/C.6/66/SR.18) para 38. See also, Pieter-Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 37, 183.

This chapter revisits these statements. It examines the Commission LS views about how EU practices contribute to the development of international rules on the responsibility of international organizations or of member states in connection with acts of an international organization, and about how these international rules interact with the EU legal order. It demonstrates how these statements, as discursive acts of confirmation and contestation of (draft) rules of public international law, are part of a larger narrative effort of projection and protection of EU autonomy, aligned with the case law of the Court of Justice of the European Union (CJEU).[6]

The chapter is structured as follows: section 2 offers a brief overview of the ARIO's structure and scope, and of the conditions under which these rules were drafted; notably, the absence of sufficient practice and precedent concerning the attribution of responsibility to international organizations. As will be seen, this circumstance – which implies that the ARIO mostly develops rather than codifies existing rules of public international law – also conditioned the EU's position on this project (discussed in sections 3 to 5) and the ILC's reliance on EU-related practices (discussed in section 6). The LS's views on the different rules advanced by the ILC are systematised into acts of confirmation and contestation. Section 3 addresses instances of confirmation – in other words, statements where the LS agreed with rules proposed by the ILC or otherwise referred to EU practices as relevant evidence for the formulation of these rules. These statements project an image of the EU as an active participant in international dispute settlement and as a reliable international partner that redresses and responds to its wrongs. Section 4 turns to the LS's contestation of the regime of international responsibility formulated by the ILC. It first addresses how the EU distinguished itself from other subjects of international law, and then examines the arguments advanced by the LS concerning two main sets of rules. Section 4.3 examines the LS's claim that conduct-based attribution does not account for the specificities of the EU, and its contestation of what the LS viewed as the 'overinclusive' scope of the draft rules on member states' responsibility for circumvention (article 61 ARIO), and on their subsidiary responsibility for the organization's wrongs (article 62 ARIO). It is submitted that these instances of contestation are best understood as reactions to perceived deterrents to EU integration and to interferences with the 'essential characteristics' of the EU legal order, much in

[6] See Introduction, section 3.3. and Chapter 1, section 3.

line with the case law of the EU Court. Section 4.4., in turn, addresses the LS's reservations over the draft rules recognising the right of an international organization to adopt countermeasures, and to invoke defences under international law. This section argues that these statements reflect the delicate balance struck by the LS between projecting and protecting EU autonomy and attending to its own member states' reservations about international organizations' rights under international law. Section 5 addresses the EU's final statements on the ARIO and the application – or lack thereof – of this legal regime by the CJEU. It illustrates how the European Commission's detachment from the ARIO, as expressed in Sixth Committee statements, has been followed by a limited reliance on these rules by the EU Court. Section 6 turns to the ILC's own references to EU practices in the context of the ARIO debates. It examines how the ILC relied on EU practices or accounted for its specificities in the design of this legal regime, and the arguments advanced by the ILC in this context. It argues that, more than the EU's 'exceptionalism', policy reasons often militated against progressively developing international law in line with EU practices. Section 7 offers some concluding remarks about the LS's statements on the ARIO and its views on the relationship between these rules and EU law, and the EU's contribution to the development of international law on responsibility.

## 2. The ILC articles on the responsibility of international organizations

During the 1960s debates at the ILC on the rules governing the representation of states in their relations with international organizations, Abdullah El-Erian, Special Rapporteur on the topic, drew the attention of ILC members to the fact that 'the continuous increase of the scope of activities of international organizations [was] likely to give new dimensions to the problem of responsibility of international organizations'.[7] This 'problem' was not addressed in that project, but remained in the background of the ILC's work and that of other codification bodies.

By the 1990s, the Institut de Droit International began to address the issue of international organizations' responsibility from a state perspective,

[7] ILC, 'First report on relations between States and inter-governmental organizations, by Mr Abdullah El-Erian', 1963 (A/CN.4/161 and Add.1) 184, para 172. See also ILC, Draft articles on the representation of States in their relations with international organizations, 1971 ILC Report (A/26/10) para 57.

adopting a resolution on 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties'.[8] By the end of the same decade, the International Court of Justice's (ICJ) ruling in *Cumaraswamy* indicated that the UN 'may be required to bear responsibility for damage' resulting from acts of its organs or agents.[9] This responsibility was seen as a logical counterpart of the recognition, first articulated in *Reparation for Injuries Suffered in the Service of the United Nations*, of the UN's converse right to invoke the responsibility of a state for damages resulting from injury against its agents.[10] In the early 2000s, the International Law Association likewise turned to the question of the responsibility of international organizations under international law, predicating its work on the seemingly intuitive idea that if states transfer powers to international organizations '[p]ower entails accountability, that is the duty to account for its exercise'.[11] Meanwhile at the ILC, the debate on states' responsibility was coming to an end with the adoption, in 2001, of the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).[12] Article 57 ASR, specifically, left open two questions: which rules govern the responsibility of international organizations, and when can a state be held responsible for the conduct of an international organization.[13]

It was against this background that, in 2002, the ILC turned its attention to the topic of responsibility of international organizations. At a meeting held on the eight of May in that year, this body decided, with the approval of the UN General Assembly (UNGA), to include the topic in its programme of work and to establish a working group to carry out its study.[14]

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[8] IDI, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties' (Fifth Commission, Mrs Rosalyn Higgins) in *Annuaire de l'Institut de droit international* (1995) 66-I, 444-53 <https://www.idi-iil.org/app/uploads/2017/06/1995_lis_02_en.pdf>

[9] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 89.

[10] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179 and 184-185.

[11] ILA, Accountability of International Organisations: Final Report, Report of the Seventy-first Conference (Berlin, 2004).

[12] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 ILC Report (A/56/10) chapter IV, para 76 ('ASR').

[13] Art 57 ASR: 'These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'. See also, General commentary ARIO, paras 1-2.

[14] 2000 ILC Report (A/55/10) chapter IX, paras 726–728 and 729.

The chosen Special Rapporteur for this topic was Giorgio Gaia, an Italian jurist elected to the ILC in 1999 and later appointed judge at the ICJ.[15]

The ARIO emerged from a legal landscape that was largely bare of practice and precedent. By the time the ILC busied itself with this project, evidence supporting a legal regime on the responsibility of international organizations similar to that just developed for states was scarce, at best. As noted by Alvarez, 'with the exception of a few pockets of specialized international organization practice [such as UN peacekeeping or the responsibility of EU institutions], there are relatively few instances of claims against international organizations or against states based on their international organization activities'.[16] The ARIO was, therefore, a project largely aimed at the progressive development of international law instead of a *stricto sensu* codification of rules of emerging or crystallised customary international law status. This was made clear in the opening commentary to the text:

> The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the articles on State responsibility, their authority will depend upon their reception by those to whom they are addressed.[17]

To address this lack of practice, analogies were drawn between the rules developed for states and those which might apply to international organizations' responsibility. Much like the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT-IO) which was modelled on the regime of the Vienna Convention on the Law of Treaties (1969 VCLT), the

[15] 2002 ILC Report (A/57/10) chapter VIII, paras 461-463.
[16] José E Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility' (2011) 105 Proceedings of the Annual Meeting (American Society of International Law) 344, 345. See also, Gerhard Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 695, 700.
[17] General Commentary ARIO, para 5.

ARIO was modelled on its state counterpart – the ASR. This analogy assisted the ILC in developing rules in conditions of uncertainty.[18] It also ensured a measure of coherence between both legal regimes. The ARIO was seen as the 'logical and probably necessary counterpart' to the ASR, lest the law on responsibility be left 'incomplete and unfinished.'[19] Therefore, the logic dominating the codification exercise privileged the extension of ASR rules to international organizations unless 'objective distinctions in nature' or 'policy reasons' justified the contrary.[20] What these 'objective distinctions in nature' might be, however, soon became a point of contention. Could the rules developed for states truly capture the legal and institutional complexity of layered subjects of international law like international organizations? If so, could organizations such as the Council of Europe and the International Hydrographic Organization nevertheless be covered by the same set of rules, or should different rules be developed for different types of organizations?

Special Rapporteur Gaja initially entertained the idea of limiting the draft to a more 'homogenous' category of organizations – those exercising 'governmental functions'.[21] The ILC had already followed a similar approach in the 1970s when drafting rules on the representation of states in their relations with international organizations of a universal character.[22] But the difficulties in defining what these functions might be and which organizations would fit the category soon rendered this option moot.[23] The ILC therefore refrained from distinguishing between different subsets of organization and did not develop different rules for different categories of organization, an approach which has been regretted by some legal scholars.[24] In the ILC's view, it was not only

[18] See Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019); Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste Approach"' (2012) 9 International Organizations Law Review 53.

[19] 2000 ILC Report (A/55/10) Annex, 135.

[20] ILC, 'Second report on responsibility of international organizations, by Mr Giorgio Gaja, Special Rapporteur', 2004 (A/CN.4/541) ('Gaja Second Report') para 5.

[21] ILC, 'First report on the responsibility of international organizations, by Mr Giorgio Gaja, Special Rapporteur', 2003 (A/CN.4/532) ('Gaja First Report') 115.

[22] Art 1, ILC, Draft articles on the representation of states in their relations with international organizations of a universal character, 1971 ILC Report (A/26/10) chapter II(B), para 57.

[23] See Jed Odermatt, *International Law and the European Union* (CUP 2011) 201-204.

[24] See inter alia, Bordin (n 18)116; José Manuel Cortés Martín, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility' in Maurizio Ragazzi (ed) *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 189, 192.

questionable whether practice existed to support this approach – pursuing it would render the exercise ungovernable.[25]

The definition of 'international organization' adopted under the ARIO, therefore, is purposely broad. Unless otherwise agreed in special rules, this legal regime governs the responsibility of 'any organization established by a treaty or other instrument governed by international law and possessing its own international legal personality', whether it is comprised of states or of states and other entities.[26] Even if an international organization does not fulfil one or more of the elements of the definition, this 'does not imply', as the commentary notes, 'that certain principles and rules stated in the following articles do not apply' in the determination of its international responsibility.[27] Importantly, the ARIO forms a system of default or subsidiary rules. In other words, this legal regime governs the responsibility of international organizations in situations where more precise rules have not been agreed upon to regulate a specific case. This is confirmed by articles 64 and 65 of the ARIO: the draft rules apply to international organizations 'where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are [not] governed by special rules of international law'.[28]

As a mirror image of the ASR, the ARIO sets out general principles governing the responsibility of international organizations (articles 3-5), rules on the attribution of conduct to an international organization (articles 6-9), and on the determination of a breach of an international obligation of an organization (articles 10-13). It governs an organization's responsibility in connection with acts of states or other organizations (articles 14-18), the circumstances precluding the wrongfulness of the conduct of an international organization (articles 20-25), the legal consequences arising from a

[25] ibid. (Bordin) 116.
[26] Art 2(a) ARIO.
[27] Commentary to art 2 ARIO, para 2.
[28] Art 64 ARIO (*Lex specialis*): 'These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.' See also, art 65 ARIO.

determination of responsibility (articles 28-33), the implementation of this responsibility (Articles 43-50), and the responsibility of states in connection with acts of international organizations (articles 58-63). This regime therefore governs not only the responsibility of international organizations vis-à-vis states and other international organizations, but also of states in connection with the acts of international organizations.

The model of responsibility of the ARIO nevertheless closely follows that of the ASR. This means that, in principle, the determination of an international organization's responsibility is based on the finding of a breach (a conduct contrary to that required by a primary norm) which is attributable to the international organization (either directly or indirectly) and which is not excused or justified by a recognised defence under international law (such as necessity or self-defence). Once these conditions are verified, an organization will be under a legal obligation to redress the corresponding harm (by means of cessation, assurances of non-repetition, and reparation).[29] Importantly, the attribution of conduct to an organization does not mean that the same conduct cannot be attributed to a state.[30] Conversely, the responsibility of an international organization does not automatically imply the responsibility of its member states.[31]

The final set of 59 articles was adopted by the ILC on second reading in 2011, exactly one decade after the adoption of its 'sister' (state) regime, the ASR. Much like the latter, the ARIO was never necessarily intended to inform a binding legal instrument. It was generally agreed that the text was an exercise in progressive development and that it would remain influential even if simply incorporated in a UNGA resolution.[32] This authority has since been confirmed by the reliance of adjudicate bodies on this system of rules when assessing the responsibility of international organizations. While practice to this effect remains limited, it includes (albeit to a relatively minor degree) rulings by the Court of Justice of the European Union (CJEU), as discussed in section 5 below.

[29] Art 34 ARIO.
[30] Art 19 ARIO.
[31] Art 62 ARIO.
[32] Alvarez (n 16) 345. To this day, the status of the ARIO remains a 'provisional agenda item' at the UNGA. See UNGA Res 66/100 of 9 December 2011; UNGA Res 69/126 of 10 December 2014; UNGA Res 72/122 of 10 December 2017.

## 3. Confirmation: EU practices as evidence of rules of international responsibility

### 3.1. Introduction

By the time the ILC began its discussions on the ARIO, the EU was a party to at least one dispute before the special chamber of International Tribunal of the Law of the Sea (ITLOS).[33] It was likewise an intervening party in cases before the European Court of Human Rights (ECtHR),[34] a regular respondent in dispute settlement proceedings in the context of the World Trade Organization (WTO),[35] and a participant in a growing number of international agreements alongside its member states.[36]

For the EU, therefore, this project represented both an opportunity and a challenge. Staff of the Commission Legal Service were aware that participating in these debates would offer the EU an opportunity to showcase its growing dispute settlement practice and to position itself, in the presence of the states and non-state observers at the Sixth Committee, as a reliable (and responsible) international partner. More importantly, they were also aware that these debates would allow the EU to draw the ILC's attention to specificities connected with the distribution of responsibility between the EU and its member states on the international plane. The Legal Service was aware that the treatment accorded to the EU and its member states in this respect differed from the standard regime of state responsibility. If the ILC was going to mould the ARIO to the ASR's image (following the legacy of the law of treaties), this posed some problems for the EU. These problems related to the specificities of the EU's modality of participation in international agreements – often through 'mixed agreements' concluded by the EU and its member states with

[33] *Case No 7 concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific* (Chile v European Community) (ITLOS, Order of 20 December 2000).

[34] See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* App No 45036/98 (ECtHR, Decision 13 September 2001).

[35] Hoffmeister notes that, by March 2009, the European Community was involved in 79 cases as a complainant, 64 as a respondent and 82 as a third party. Frank Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21(3) European Journal of International Law 723, 724.

[36] See Chapter 3, section 2.

third states – and the complex distribution of powers (and responsibilities) between the organization and its members, as defined in the EU Treaties.

The debates on the ARIO were, therefore, closely monitored by the Commission LS. For the European Commission, this was a project which contended directly with the legal position of the organization, the representation of whose interests rested, first and foremost, with the European Commission itself, as guardian of the Treaties and rightful representative of the Community before dispute settlement bodies and in the negotiation of international agreements.[37] The presence within the staff of the LS of lawyers such as Pieter-Jan Kuijper, Esa Paasivirta and Frank Hoffmeister arguably also bolstered the EU's engagement with this project, which has been credited for setting a precedent of continuous EU engagement with the ILC's work.[38] These were lawyers not only with a background in international law but also with a foothold in academia. They published extensively on the topic throughout (and following) the ILC's work on this project, expanding upon the LS's position and arguably shaping the narrative on the EU's responsibility under international law.[39]

Although most of the attention accorded to these statements has focused on the European Commission's contestation of this project, the LS also confirmed several aspects of the regime proposed by the ILC. In doing so, these statements often relied on EU practices as supporting the analogy between states and international organizations, at least regarding international responsibility, and as evidence of the EU's 'strict observance' of core principle of international responsibility.[40]

Statements of this nature project an image of the EU as a 'trustworthy' international partner that takes action in response to its wrongs. They likewise support the claim that the EU operates on the international plane in conditions of equality with states with respect to the legal standing to invoke (and have invoked against it) responsibility for breaches of international law.

[37] Art 17 Consolidated Version of the Treaty on European Union OJ C115/13 (9 May 2008) ('TEU'); Interviews 18 (6 July 2018) and 21 (17 March 2020).
[38] Interviews 18 (6 July 2018). This is confirmed by the overall distribution of EU statements on ILC projects. See Conclusions, section 2.1.
[39] See inter alia, Esa Paasivirta and Pieter-Jan Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) 36 Netherlands Yearbook of International Law 169; Hoffmeister (n 35); Kuijper & Paasivirta (n 5) 37.
[40] Art 3(5) TEU.

Responsibility is understood as a necessary consequence of the exercise of power, as the ICJ case law suggests.[41] These statements highlight the external recognition of the EU as an entity capable of redressing the wrongs of its organs and agents and of its member states in all matters falling within EU competences, and link this recognition to the EU's very capacity to act under international law.[42] In this sense, these statements assert a positive dimension of EU autonomy. The following section examines some of the statements illustrating this claim.

### 3.2. The EU as an autonomous and 'responsible' international partner

EU statements on the ARIO started out by underscoring the fact that the organization recognises, and 'strictly observes', the general principles of international responsibility reflected in the ILC's draft. This included the principle that 'every internationally wrongful act of an international organization entails the international responsibility of that organization', and the principle that the breach of an international obligation generates a legal duty to redress any resulting harm.[43] The European Commission found it relevant to stress that these principles applied to the EU *in spite of* its *sui generis* character:

> While the EC is in many ways *sui generis*, it is clear that all international actors, be they States or organizations, need to recognise their international responsibility in the event of any wrongful acts.[44]

The LS relied on EU dispute settlement practice as evidence of the EU's willingness to assume responsibility, and to redress any harm resulting from breaches of its international obligations.[45] The EU's legal standing in WTO

[41] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.
[42] ILC, 'Responsibility of international organizations: Comments and observations received from international organizations', 2008 (A/CN.4/593 and Add.1) ('IO Comments ARIO 2008') 34.
[43] Art 3 (Responsibility of an international organization for its internationally wrongful acts) ARIO; Art 1 (responsibility of a state for its internationally wrongful acts) ASR.
[44] ILC, Responsibility of international organizations: Comments and observations received from international organizations, 2004 (A/CN.4/545) ('IO Comments ARIO 2004') 22.
[45] IO Comments ARIO 2008, 33: 'The European Commission fully endorses principles on the content of international responsibility. Just as States, international organizations are under an obligation to cease the wrongful act and offer appropriate assurances of non-repetition, and to make full reparation for the injury caused by the internationally wrongful act. In particular, the

dispute settlement proceedings and its acceptance of article 6 of annex IX of the ITLOS (governing the responsibility of contracting parties under the United Nations Convention on the Law of the Sea (UNCLOS)), represented, in the European Commission's view, clear evidence of the organization's 'acknowledgment of responsibility for breaches of its contractual obligations.'[46] As further evidence of this claim, the Commission relied on the fact that international agreements concluded by the EU at times allowed third states to seize EU courts to claim redress for breaches by the organization, and that the organization did not invoke jurisdictional immunities against private parties when seized in EU courts:

> It should be noted that as far as the European Union is concerned, pursuant to express provisions of the founding treaties, the European Union's institutions are fully accountable vis-à-vis each other and European Union member States for acts and failure to act. In addition, non-European Union States may by virtue of express provisions in international agreements concluded with the Union have the possibility of seizing European Union courts with cases of alleged breaches of the agreement by the Union. Such agreements may also provide for participation of non-European Union contracting parties to preliminary reference proceedings, which is one of the main activities of the Court of Justice of the European Union. Moreover, the European Union has standing before several dispute settlement bodies (including the World Trade Organization dispute settlement bodies and the International Tribunal for the Law of the Sea) which allow non-European Union States to bring proceedings against European Union acts. In addition, unlike other international organizations, the Union does not invoke jurisdictional immunity when European Union acts are challenged by private parties, as long as this is done in European Union courts. Any natural or legal person (regardless of nationality or residence) may institute proceedings against a decision addressed to him or her or which is of direct and individual concern.[47]

dispute settlement practice of the European Community evidences the acknowledgment of international responsibility for breaches of its contractual obligations'.

[46] ibid, 32. See also, art 6 (Responsibility and liability) para 1, Annex IX (Participation by international organization), United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 561: 'Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention'.

[47] ILC, 'Responsibility of international organizations: Comments and observations received from international organizations', 2011 (A/CN.4/637) ('IO Comments ARIO 2011') 22-23.

The statements prepared by the LS seem to reflect an internal perception of the EU system of judicial protection – including for breaches by the EU of its international obligations – as complete and self-sufficient.[48] As such, the narrative of the LS echoes that of the CJEU in well known cases such as *Unión de Pequeños Agricultores* or even *Kadi*, wherein judicial protection was elevated to a fundamental feature of the EU constitutional system and presented not only as broad but also seemingly as exhaustively.[49] Unsurprisingly, the LS did not expand on the limits to third parties' right to challenge EU acts under article 263(4) of the Treaty on the Functioning of the European Union (TFEU),[50] nor on the handful of proceedings instituted by third states against EU institutions in EU courts. Concerning private parties, CJEU case law has long established that individuals are only allowed to challenge EU acts that are directly addressed to them or which directly and individually concern them.[51] While the Treaty of Lisbon widened the *locus standi* of private parties seeking to challenge the validity of EU regulatory acts, the test of 'direct and individual concern' applied to the challenge of legislative acts has long been construed narrowly by the Court.[52] As for actions instituted by third states in EU courts, there are notably few examples in the Court's history, and these are mostly posterior to the adoption of the ARIO. Worthy of mention here are the EU General Court's (GC) rulings in favour of the

[48] This perception comes close to an understanding of the EU system of legal remedies as a 'self-contained' regime; that is, a legal regime which excludes the application of general international law. For a definition of this term and its relation to the EU see Eckart Klein, 'Self-Contained Regime' in *Max Planck Encyclopaedia of Public International Law* (Oxford Public International Law, last updated November 2006); Odermatt (n 23) 15-18. See also, ILC Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 2006 (A/CN.4/L.682) para 129.

[49] Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2022] ECLI:EU:C:2002:462, para 40; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, paras 285 and 335. See Chapter 1, section 3.1.

[50] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 (26 October 2012) ('TFEU').

[51] The requirement of individual concern, in particular, has for long followed the test outlined by the EU Court in *Plaumann*. Private parties must prove that they are affected by an EU act of general application (such as a Directive or a Regulation) 'by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. Case 25/62 *Plaumann & Co. v Commission* [1963] ECLI:EU:C:1963:17, 107.

[52] See Magdalena Kucko, 'The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon' (2017) 2 LSE Law Review 101.

admissibility of actions for annulment filed by the Kingdom of Cambodia and by Switzerland concerning, respectively, trade preferences in rice imports, and acts connected with the implementation of a EU-Switzerland Air Transport Agreement.[53] In addition, in its 2021 ruling in *Venezuela* v *Council*, the CJEU extended this legal standing to third states challenging restrictive measures adopted by the Council.[54]

Specific EU statements also endorsed ILC proposals which extend ASR rules to the assessment of international organizations' responsibility. For instance, the LS endorsed the concept of breach of an international obligation followed by the ASR, which is transferred *ad integrum* from the regime of state responsibility.[55] According to the European Commission, there was 'no need to deviate from the rules for States in this respect'.[56] The LS also confirmed draft rules which stipulated that an international organization can only breach an international obligation to which it is bound (article 11), that the verification of a breach depends on the conduct required by the primary norm (article 12), and that a breach can consist of a composite act (article 13).

The LS relied on EU practices as evidence to support some of these analogies. For instance, this was the case with the ILC's analogy between states and international organizations' standing to invoke (and have invoked against them) breaches of international law. The European Commission argued in favour of a rule which would recognise the right of an international organization, just like a state, to invoke the responsibility of third states or international organizations for breaches owed to its members or to the international community as a whole. Commenting on the ILC's draft by means of a letter of 18 February 2008, the Commission expressed the view that 'organizations should, in principle, be entitled to claim from the responsible organization cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured or of the beneficiary of the obligation breached'.[57] The LS also supported the draft rule to the effect

[53] Case C-70/04 *Switzerland v Commission* [2005] ECLI:EU:C:2005:468; Case T-246/19 *Cambodia and Cambodia Rice Federation (CRF) v Commission* [2020] Order of the General Court EU:T:2020:415.
[54] Case C-872/19 P *Venezuela v Council* [2021] ECLI:EU:C:2021:507, paras 50ff.
[55] Arts 12-15 ASR.
[56] ILC, Responsibility of international organizations: Comments and observations received from international organizations, 2006 (A/CN.4/568 and Add.1) ('IO Comments ARIO 2006') 133.
[57] IO Comments ARIO 2008, 35.

that international organizations have an obligation not to recognise as lawful situations created by the violation of general rules of peremptory international law (*jus cogens*) – that is, rules accepted and recognised by the international community as a whole as norms from which no derogation is permitted and whose observance is due to this same community.[58]

In so far as EU precedent supported rules to this effect, endorsing their codification allowed the European Commission to both showcase EU practices and to confirm the claim that the EU not only strictly abides by international law but also participates in the international community under equal conditions to other actors. These statements refer to the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', adopted by the EU and its member states on 16 October 1991, as evidence of EU practice attesting to its commitment 'not recognise entities which are the result of aggression'.[59] Further evidence included Common Position 96/635/CFSP of 28 October 1996, supporting, inter alia, an arms embargo against Burma/Myanmar, on the basis of the 'continuing violation of human rights in Burma/Myanmar ... in particular, the practice of torture' as a breach of *jus cogens*,[60] as well as Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, which referred to the Union's 'grave concern regarding the situation unfolding in Libya' and condemned 'the violence and use of force against civilians'.[61] The two latter EU acts were used by the ILC as evidence in support of rule 49 ARIO, which addresses the invocation of responsibility by a non-injured state or international organization.[62] The aforementioned declaration is likewise referenced in the commentary to the

[58] ibid.

[59] ibid. See Declaration of 16 December 1991on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 31 ILM 1486 (1992). Blockmans has referred to this declaration as an example of the EU's contribution to the 'development of customary rules on the non-recognition of territorial title resulting from aggression. Steven Blockmans, 'EU global peace diplomacy: Shaping the law on statehood' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013) 130, 139-142. See also Frank Hoffmeister, 'The Contribution of EU Practice to General International Law' in Marise Cremona (ed) *Developments in EU External Relations Law* (OUP 2008) 37, 71-78.

[60] Common Position 96/635/CFSP of 28 October 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Burma/Myanmar OJ L 287 (8 November 1996) 1-2 (no longer in force).

[61] Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, OJ L 58 (3 March 2011) 53-62 (no longer in force).

[62] Commentary to art 49 ARIO, para 9.

ARIO, in support of article 42, addressing the legal consequences resulting from a serious breach of *jus cogens* norms.[63]

While these selected instances of confirmation of ARIO rules may appear anecdotal when contrasted with the European Commission's larger objections to the text, they are relevant to the understanding of the LS's broader rhetoric. These instances of confirmation project an image of the EU as an actor capable of redressing its wrongs in equal measure to the exercise of its powers, and also provide evidence of how the LS understands the analogy between states and international organizations in the context of international responsibility. As such, these examples reinforce what we called a positive dimension of EU external autonomy.[64] At the same time, they are ancillary to the LS's contestation of the ARIO, to which the next section turns. This contestation centred on what the European Commission viewed as the draft's disregard for the distinct features of EU integration, a rhetoric which echoes that found in the EEC statements on the ILC draft articles on most-favoured-nation clauses, examined in chapter 3.[65] By combining this contestation with a confirmation of the EU's commitment to observe international law, the LS, much like the EU Court, seeks to strike a balance between the EU's active participation on the international plane and the protection of the autonomy of the EU legal order.[66]

## 4. Contestation: EU practices as a departure from rules of international law

### 4.1. Introduction

CJEU case law reviewing the compatibility of international agreements concluded by the EU and its member states with EU law has repeatedly established that international law cannot call into question the 'allocation of

[63] Commentary to art 42 ARIO, para 7.
[64] See Chapter 1, section 1.
[65] See Chapter 3, section 3.1.2.
[66] A reading of the Court's understanding of the EU's obligation to contribute to 'the strict observance and the development of international law' (article 3(5) TEU) advanced by Kassoti and Wessel. Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in Paula García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022) (forthcoming).

responsibilities' and 'the allocation of powers fixed by the Treaties'.[67] In *Opinion 1/91*, in particular, the EU Court rejected a draft agreement on the establishment of the European Economic Area in view of the concern that this might allow third parties to rule on the distribution of competences and thus responsibilities between the Union and its member states.[68] A similar position was adopted by the Court in relation to the proceedings initiated by Ireland before the International Tribunal of the Law of the Sea in *Mox Plant*[69] and, most notably, in *Opinion 2/13*, where the Court rejected the draft accession agreement of the EU to the European Convention on Human Rights (ECHR) in view of the possibility that the European Court of Human Rights (ECtHR) might be called upon to rule on the distribution of powers or the criteria for the attribution of responsibility between the EU and its members.[70] The European Commission's contestation of the ARIO must read against this judicial construction, and protection, of EU autonomy; notably, it must be read bearing in mind the limitations imposed by the Court to perceived interferences by international law with EU rules governing the distribution of competence and responsibility between the EU and its member states.

However, the LS's contestation to the ILC draft extended beyond the rules on attribution which have so far received most attention by legal scholarship. The following sections address the different objections to the ILC's text that were raised by the Commission LS. Section 4.2. focuses on how the LS first distinguished the EU and its legal order from international law, as the basis for the claim that distinct rules govern the responsibility of the EU and its member states. Section 4.3. examines the arguments advanced by the LS to the effect that the draft should foresee special rules of attribution of conduct or of responsibility for regional economic integration organizations (REIOs) and its member states (articles 6 to 9 and 14 to 17 ARIO). It likewise examines the LS's contestation of the draft rules governing member states' responsibility for circumvention (article 61 ARIO) and their subsidiary

[67] Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345, para 123; Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 282. See also, Cristina Contartese, 'The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) 54 Common Market Law Review 1627.
[68] Case *Opinion 1/91* [1991] ECLI:EU:C:1991:490, paras 34-35.
[69] Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345, paras 120-123 and 177.
[70] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, paras 224-225.

responsibility where they lead third parties to rely on their responsibility in lieu of – or in combination with – that of the organization (article 63 ARIO). This section demonstrates how this contestation is largely aligned with the CJEU's narrative, as well as with the LS's rhetoric with respect to the ILC's early work on the law of treaties, examined in the previous chapter – it contests perceived deterrents to EU integration or interferences with essential characteristics of the EU legal order, as defined by the EU Court. Section 4.4., in turn, examines the LS's contestation of ILC rules recognising the right of international organizations to adopt countermeasures, and their right to invoke defences under international law. This contestation, we argue, reflects instead the delicate balance struck by the LS between projecting and protecting EU autonomy and attending to its own member states' reservations about international organizations' rights under international law.

## 4.2. The distinct nature of the EU and of its legal order

Much like the statements prepared by the LS in the 1970s with respect to ILC drafts on the law of treaties, examined in chapter 3, the LS's statements on the ARIO are populated by markers of distinction. They refer to the organization's 'special features', to its 'specific character' or to its 'specific nature'.[71] The EU's institutional design is presented as one going 'beyond the normal parameters of classic international organizations'.[72] In LS's rhetoric, the EU is 'not only a forum for member States to discuss and organize their mutual relations but also, in its own right, an actor on the international stage';[73] it has 'a particular structure and 'supranational' nature, and it is at 'an advanced stage' of integration 'which to some extent was sui generis'.[74]

[71] Statement Kuijper 2003 (n 5) paras 13-14; Statement by Mr Kuijper (European Commission), Sixth Committee, Summary record of the 21st meeting, 5 November 2004 (A/C.6/59/SR.21) para 16; Statement by Ms Lehto (Finland) speaking on behalf of the European Union, Sixth Committee, Summary record of the 13th meeting, 27 October 2006 (A/C.6/61/SR.13) para 24.
[72] Statement Kuijper 2003 (n 5) para 13.
[73] ibid.
[74] IO Comments ARIO 2004, 18: 'The particular structure and "supranational" nature of the Community should be borne in mind when analysing its international responsibility as an international organization. Unlike classical intergovernmental organizations, the European Community (EC) constitutes a legal order of its own, with comprehensive legislative and treaty-making powers, deriving from transfer of competence from the member States to the Community level'. See also, Statement by Mr. Hetsch (European Commission), Sixth Committee, Summary record of the 17th meeting, 28 October 2009 (A/C.6/64/SR.17) para 21; Statement Kuijper 2003 (n 5) para 14.

A review of the ensemble of these statements gives us the following image of what the European Commission understands to be the defining traits of the EU's unique legal nature:

i. The transfer of competences to the Union by its member states;
ii. The binding nature of EU decisions;
iii. The supranational decision-making model prevalent in most EU policy areas, in lieu of unanimous consent of its member states;
iv. The CJEU's jurisdictional monopoly over the validity and final interpretation of EU law;
v. The complete system of EU judicial protection;
vi. The 'constitutional' rather than international law nature of the EU's founding Treaties;
vii. The EU's ability to 'act in the international sphere in its own name' often 'to the exclusion of its member states', including its ability to conclude international agreements, to become a member of international organizations, and to be a party to dispute settlement proceedings; and
viii. The executive federalism characteristic of the implementation of international obligations assumed by the EU.[75]

In the LS's view, these features distinguish the EU from other subjects of international law – the EU remains an international organization but forms, within this category, a sub-category of its own. The term REIO is used a 'code-name' for the EU.[76] In the context of these debates, this legal category offers two advantages to EU arguments. It allows the LS to contest both a 'bulk'

[75] See inter alia, IO Comments ARIO 2004, 28-32; IO Comments ARIO 2011, 167-168.
[76] Paasivirta & Kuijper (n 39) 211; Odermatt (n 23) 18. See also, art 44, Convention on the Rights of Persons with Disabilities (13 December 2006) 2514 UNTS 3: '"Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.'

transposition of the regime of state responsibility to international organizations, and to contest organization-specific rules, where it believes they might interfere with the legal autonomy and institutional design of the EU. The LS argued, specifically, that established international treaty practice justified the express reference to the legal category of REIOs in the ILC's text. The opening up of treaty regimes to EU participation by means of a REIO clause – on areas as diverse as the conservation of the environment and natural resources,[77] or the fight against transnational crime[78] – was, in the European Commission's view, sufficiently and 'deeply rooted in modern treaty practice' to warrant distinct rules for this category of international organizations:

> The particular structure and "supranational" nature of the European Community should be borne in mind when analyzing its international responsibility as an international organization. ... concepts such as "regional economic integration organization" have emerged in the drafting of multilateral treaties, which seem to reflect some of these special features.[79]

The LS distinguished the EU both as a legal entity and a legal order. The debates on draft article 10 of the ARIO, in particular, served the second purpose well. This article establishes that the responsibility of an international organization may arise from any 'source of international law applicable to the organization' *including* the rules of the organization.[80] This broad scope, however, begets a broader doctrinal question, already visited in the ILC debates on the law of treaties, namely: whether the rules of an organization, as part of an agreement between states, are international in nature. As indicated by Special Rapporteur Gaja in his Second Report, views on this question vary widely, including: (i) the view that the internal law of an international organization is an integral part of international law, (ii) the belief that, although created through an instrument of international law, the internal law of an organization later becomes distinct from international law, (iii) the view that distinguishes between the different types of rules of the organization, and (iv)

[77] See inter alia, art 13, Vienna Convention for the Protection of the Ozone Layer 1513 UNTS 293 (22 September 1988).
[78] See inter alia, art 67(4), United Nations Convention against Corruption 2349 UNTS 41 (31 October 2003).
[79] IO Comments ARIO 2004, 28. See also, Statement Kuijper 2003 (n 5) para 13.
[80] See also, Commentary to art 4 ARIO, para 2.

an approach which considers that highly integrated international organizations amount to 'a special case'.[81]

For the European Commission, taking a stance on this matter was an opportunity to recall the distinct and autonomous nature of the EU legal order and the implications of this nature for the law of international responsibility. By the early 2000s, the CJEU's case law concerning the original nature of the EU legal system as 'distinct from international law' was part of a longstanding and often revisited narrative.[82] Pursuant to this narrative, 'the legality of EU measures can only be judged against its own legal framework; that is, against norms that have somehow been incepted in the corpus of EU law'.[83] In line with this legal thinking, the European Commission contested the 'generic assumption that the rules of the international organization belong to the sphere of international law' and, more specifically, the 'proposition that *its* internal law forms part of this sphere'.[84] For the Commission LS, while these assumptions

> ... may be correct for traditional international organizations, they do not appear to correspond to the situation of the European Union. It is a general interpretation in the latter, including in its judicial practice, that its internal order is separate from international law.[85]

At the same time, the LS cautioned the ILC against embarking on an analysis of the rules governing the breach of obligations owed by an organization to its members under the rules of the organization. In practice, this would extend the debate into an examination of whether the rules of the organization sufficiently governed aspects of responsibility, potentially drawing conclusions concerning the self-sufficient or self-contained nature of a legal regime. The complexity of the task and its perceived interference with the autonomy of the EU legal order might have justified the LS's warning that the

[81] Commentary to art 10 ARIO, para 5; ILC, 'Seventh report on responsibility of international organizations, by Mr Giorgio Gaja, Special Rapporteur', 2009 (A/CN.4/610) ('Gaja Seventh Report') paras 40-44.
[82] Case 26-62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Case 6-64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66. See Chapter 1, section 3.
[83] Jan Willem van Rossem, 'Interaction between EU law and international law in the light of Intertanko and Kadi: The dilemma of norms binding the Member States but not the Community' (2009) 40 Netherlands Yearbook of International Law 183, 185.
[84] IO Comments ARIO 2011, 152.
[85] ibid, 146.

EU legal system was 'vast' and that it 'raised complex legal questions' which would fall beyond the scope of the ILC's work.[86]

> In our view, the relationship between an organization and its member States or agents is foremost governed by the rules of the organization. These rules do not only define the conditions under which an obligation of the organization may arise (primary rules). Often these internal rules would also set up a special system of responsibility (secondary rules). Even if the International Law Commission attempted to address only relevant secondary rules, it would have to undertake an in-depth study of these in order to find out whether these rules completely govern the subject matter as *leges speciales* or whether there would be room for useful residual general rules. In the framework of the European Community, it should be kept in mind that the scope of Community obligations both vis-à-vis its member States under article 10 EC and vis-à-vis its agents under the staff regulation adopted under article 282 EC is vast and raises complex legal questions not apt for the present codification project.[87]

Special Rapporteur Gaja conceded that 'some organizations may have given rise to a system of law which is distinct from international law', the EU being one such organization.[88] Yet, confronted with diverging views among the ILC membership and among states and international organizations at the Sixth Committee, the ILC opted not to take a 'clear cut' position on the legal nature of these rules:

> Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft articles ... paragraph 2 [of article 10] does not intend to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law.[89]

[86] ILC, 'Responsibility of international organizations: Comments and observations received from Governments and international organizations', 2005 (A/CN.4/556) ('IO Comments ARIO 2005') 43.
[87] ibid.
[88] ILC, 'Third report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur', 2005 (A/CN.4/553) ('Gaja Third Report') 12, para 21.
[89] Commentary to art 10 ARIO, para 7.

In line with its position in the 1980s debates on the draft articles on treaties between states and international organizations or between international organizations,[90] the European Commission opted instead for endorsing a broad definition of the concept of 'rules of the organization' which included the 'established practice' of the organization and of its judicial bodies, a breath later reflected in the commentary to article 2(b) ARIO.[91] This article notes that 'rules of the organization' is a term that should be understood as broadly as possible (as indicated by the use of the phrases 'in particular' or 'other acts of the organization') and expressly takes into account 'the great variety of acts that international organizations adopt' including their evolving practice and the 'judicial or arbitral decisions binding the organization'.[92]

Defending a broad understanding of 'rules of the organization' and insisting on their hermetic distinction from international law, however, raises questions about the relevance of these rules for the regime of international responsibility. Specifically, it stands in contradiction with the relevance of these internal rules for the regulation of international organizations' conduct on the international plane, a point which dominated the EU's remaining contestation to the ARIO.

### 4.3. The attribution of conduct to an organization and member states' responsibility in connection with the conduct of an international organization

The European Commission's contestation to the ARIO's rules on the attribution of conduct to international organizations (articles 6 to 9 and 14 to 17 ARIO), to the rules defining member states' responsibility for circumventing their international obligations through an international organization (article 62), and for leading third parties to believe that they would bear responsibility for the organization's conduct (article 63), are emblematic cases where the relevance of the rules of the organization for the identification of the responsibility regime applicable to the EU and its member states came into play.

[90] See Chapter 3, section 3.2.1.
[91] Art 2(b) ARIO; cf Statement Kuijper 2004 (n 71) para 19.
[92] Commentary to art 2 ARIO, paras 16-18. See also Gaja Seventh Report (2009) paras 10-16.

### *4.3.1. The EU's claim for competence-based responsibility*

Under the ARIO, international organizations and their members are each responsible for their own conduct and for the breach of the obligations they bear. Their responsibility is independent, and their obligations are non-transferrable.[93] The regime of attribution followed by the ARIO mirrors that of the ASR. Thus, international organizations are responsible for the conduct of their organs or agents, of organs or agents of states or organizations placed under their 'effective control', or for conduct accepted or adopted by the organization (articles 6 to 9 ARIO). In addition, international organizations will be responsible where they aid or assist another state or organization in the commission of a wrongful act (articles 14) or where they commit a wrongful act *through* a state or organization. This will be the case where the organization directs or controls (article 15) or coerces (article 16) a state or organization to commit a wrong, or where it circumvents its international obligations by adopting decisions which bind or authorize its member states to act in contravention of the organization's own obligations (article 17). In turn, member states may be held responsible where they aid or assist, direct or control, or otherwise coerce an international organization to commit a wrongful act (articles 58-60 ARIO), where they circumvent their international obligations through an international organization (article 61 ARIO), or where they accept responsibility for the acts of the organization or otherwise lead an injured party to rely on their responsibility (article 62 ARIO).

The legal regime of responsibility set out in the ARIO raised two sets of problems for the European Commission. First, it did not fit the model of mixed agreements through which international obligations are often assumed by the EU and its member states, nor the 'executive federalism' characteristic of the implementation of international obligations by the EU. Second, it could be read as unduly burdening EU member states with responsibility for conduct which, in the LS's view, should be attributed to the organization, not to its members. The discrepancies between the ARIO's regime and the EU case resulted, in the European Commission's view, from the degree of integration achieved at the EU level and the resulting vertical and horizontal dimensions

[93] Leinarte (n 1).

of the relationship established between the organization and its member states.[94]

The horizontal dimension referred to EU mixity – that is, the fact that, in EU practice, by virtue of the competences the EU shares with its member states, international obligations are often undertaken by the organization by way of international agreements concluded by the EU jointly with its members. In mixed bilateral agreements the EU and its member states act as a 'meta-party', jointly assuming the totality of the obligations under the corresponding agreement.[95] This practice is largely aligned with article 48 ARIO, which establishes a preference for joint and several liability in cases of joint contribution to the same internationally wrongful act.[96] Where these agreements are multilateral, however, a declaration of competence is often attached to the agreement expressing that the organization and its members 'are internationally responsible for the fulfilment of the obligations contained within [the agreement] in accordance with their respective competences'.[97] At the EU level, therefore, the distribution of obligations is mediated by the rules of the organization on the distribution of competences. This internal distribution becomes internationally relevant where EU contracting parties accept these declarations, and therefore that the performance of obligations by the EU and its members will follow the internal allocation of powers between the EU and its member states. As noted in chapter 3, these declarations of competence are often vaguely worded, raising questions concerning the formation of consent and the legal protection of EU treaty parties.[98] In the absence of declaration of competence, however, there is a preference for joint

[94] IO Comments ARIO 2004, 29. See also, Paasivirta & Kuijper (n 39) 183ff.

[95] See Pieter-Jan Kuijper, 'International Responsibility for EU Mixed Agreements' in Christopher Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (2010) 209-210.

[96] Art 48 ARIO stipulates that:

> 1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.
>
> 2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

[97] Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, L 115/1 (2 May 2019). See Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base' (2012) 17 European Foreign Affairs Review 491.

[98] See Chapter 3, section 2.

responsibility of the organization and its members. In *Parliament* v *Council*, for instance, a case relied on by the ILC, the CJEU concluded that 'in the absence of derogations expressly laid down in [a treaty, *in casu*, the Fourth EU-ACP Lomé Convention], the Community and its Member States as partners of the ACP States, are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance'.[99]

The vertical dimension, in turn, refers to the 'executive federalism' characteristic of the performance or implementation of international obligations undertaken by the EU.[100] Executive federalism was described by Gaja in his Third Report as a case akin to a situation whereby an obligation of result – to achieve the fulfilment of a certain international obligation through the conduct of its member states – would arise in the legal sphere of the organization.[101] At the EU level, this means that, except for discrete cases such as selected aspects of competition policy, trade defence, or personnel matters, the implementation of EU international obligations is carried out by the domestic authorities of its member states, not by the organization's organs or agents.[102] Article 291 TFEU obliges member states to 'adopt all measures of national law necessary to implement legally binding Union acts'. These include international agreements concluded by the Union which, by force of article 216 TFEU, 'are binding upon the institutions of the Union and on its Member States'. As stressed by the European Commission in its statements at the Sixth Committee, '[t]here is no Community administration throughout the Community territory comparable to the federal Government in federal States'.[103] The organization therefore falls victim to what Kuijper and Paasivirta have called the EU's 'paradox in international relations': a growing autonomy on the international plane coupled with a strong dependence on its member states to ensure the implementation of the organization's international obligations.[104] The example provided by the European Commission in its

[99] Case 316/91 *Parliament v Council* [1994] ECLI:EU:C:1994:76, para 29.
[100] Paasivirta & Kuijper (n 39) 188-192. See also, Robert Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) 47(5) Common Market Law Review 1385, 1400-1401.
[101] Gaja Third Report, paras 12-14.
[102] See Hoffmeister (n 35) 740.
[103] IO Comments ARIO 2004, 29.
[104] Kuijper & Paasivirta (n 5) 41-42.

statements illustrates this point by reference to tariff agreements concluded by the organization:

> I will give an example of this situation: the European Community has contracted a certain tariff treatment with third States through an agreement or within the framework of the World Trade Organization. The third States concerned find that this agreement is being breached, but by whom? Not by the European Community's organs, but by the member States' customs authorities that are charged with implementing Community law. Hence their natural reaction is to blame the member States concerned. In short, there is separation between responsibility and attribution: the responsibility trail leads to the European Community, but the attribution trail leads to one or more member States.[105]

What the European Commission wanted to ensure was that the ARIO recognised the fact that, at least as far as REIOs were concerned, and in cases where the 'responsibility trail' could be traced back to a competence transferred to the organization, responsibility should fall on the organization, not on its member states.[106] This should be true even where the conduct breaching the obligation was carried out by the member states. Competence and attribution formed, therefore, 'part of the same legal scheme'.[107] The LS thus argued that the ARIO should account for this REIO-specificity through special rules or, alternatively, through 'a special exception or saving clause'. Three options were advanced in the EU's statements:

> (i) the codification of special rules whereby the actions of organs of member States could be attributed to the organisation if these were acting, essentially, as agents of the organization,
>
> (ii) the codification of 'special rules of responsibility' so that the breach of the obligation held by the organization might nevertheless be ascribed to it even when it is *prima facie* carried out by organs of the member States, or
>
> (iii) the codification of 'a special exception or saving clause' for the European Community.[108]

[105] IO Comments ARIO 2005, 6.
[106] ibid, 31.
[107] Paasivirta & Kuijper (n 39) 213.
[108] Statement Kuijper 2004 (n 71) para 18; Statement Hetsch 2009 (n 74) paras 21 and 23; IO Comments ARIO 2005, 32.

To support the existence of this rule, the Commission LS relied on evidence from international dispute settlement practice which, in its view, contributed to a growing recognition that EU member states' acts can be attributed to the EU where the organization holds exclusive competence. This evidence was mostly comprised of references to WTO proceedings, including oral pleadings of the European Communities, WTO panel reports, notifications of mutually agreed solutions, requests for consultations and minutes of meetings.[109] The remaining elements included: written observations by the Commission LS before the ECtHR[110] and decisions by the European Commission of Human Rights;[111] oral statements to the International Civil Aviation Organization (ICAO) Council, and written communications to the ICAO Secretary General;[112] Council decisions authorising the conclusion or ratification of international agreements by the EU and Commission decisions on the organization's accession to international instruments, including their corresponding declarations of competence;[113] one ITLOS order;[114] CJEU rulings;[115] and Opinions by Advocates-General of the Court.[116]

[109] IO Comments ARIO 2004, Annex, 38, items 1-16.

[110] European Commission Legal Service, Written Observations to the President and Members of the European Court of Human Rights in case *Senator Lines GmbH v. 15 Member States of the European Union* App no 56672/00 (ECtHR, 10 March 2004).

[111] Decision of the European Commission of Human Rights, *M. & Co. v Germany* App no 13258/87 (ECtHR, 9 February 1990).

[112] Oral Statement and Comments on the US Response, presented by the Member States of the European Union, before the Council of the International Civil Aviation Organization under its Rules for the Settlement of Differences: disagreement with the United States arising under the Convention on International Aviation done at Chicago on 7 December 1944, Document 7782/2 (Montreal, 15 November 2000); Communication from the Deputy Secretary General of the Council of the European Union to the Secretary General of ICAO, concerning the joint defense of the 15 member States (Brussels, 24 July 2000).

[113] Council Decision 98/685/EC of 23 March 1998 concerning the Conclusion of the Convention on Transboundary Effects of Industrial Accidents, OJ L 326 (3 December 1998); ibid, Annex II: Declaration by the European Community pursuant to article 29 (4) of the Convention on the Transboundary Effects of Industrial Accidents concerning competence.

[114] *Case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean (Chile v European Community)* (ITLOS, Order of 20 December 2000).

[115] Case C-13/00 *Commission v Ireland* [2002] ECLI:EU:C:2002:184; Case C-316/91 *Parliament v Council* [1994] ECLI:EU:C:1994:76; Case C-104/81, *Hauptzollamt Mainz v C. A. Kupferberg & Cie. KG a.A.* [1982] ECLI:EU:C:1982:362.

[116] Opinion of Advocate General Jacobs in Case C-316/91 *Parliament v Council* [1993] ECLI:EU:C:1993:872; Opinion of Advocate General Mischo in Case C-13/00, *Commission v Ireland* [2001] ECLI:EU:C:2001:643.

Within the international dispute settlement practice of the WTO and the ITLOS, it has been conceded that member states' acts can be attributed to an organization. In *EC-Geographic Indications*, for instance, a case concerning a United States and Australian claim that the protections and treatment accorded in the EU to trademarks and geographical indications were incompatible with the EU's WTO obligations, the WTO panel noted that, where member states act in implementation of binding decisions of the organization, they act 'de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'.[117] WTO panels have not, however, prescinded from the presence of EU member states as co-respondents in these disputes.[118] Under the UNCLOS, in turn, the EU and its member states are expressly bound by obligations under this Convention to the extent of their respective competences, by virtue of the EU's declaration annexed to the text.[119] In light of this practice, it has been argued that, at least where member states permanently transfer to an organization powers in respect of matters covered by an international agreement, the organization should be recognised as the sole respondent for a breach, in so far as the organization is the one capable of returning the situation to legality.[120] This situation is far less clear in the context of mixed agreements devoid of a declaration of competence.[121]

Writing on the subject, Paasivirta and Kuijpers, themselves staff of the Commission LS, proposed that a special rule on the attribution of the conduct of REIO member states to the organization should read as follows:

> ... in the case of a REIO the conduct of its member states and their authorities shall be considered as an act of the REIO under international

[117] WTO, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Panel Report, WT/DS174/R, para 7.725.
[118] Leinarte (n 1).
[119] Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179 (23 June 1998) 1-2.
[120] A point made by the European Commission in its observations on art 9 ARIO. See IO Comments 2011, 24.
[121] Leinarte (n 1)189-190; André Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements' in Elisa Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP 2012).

> law to the extent that such conduct falls within the competencies of the REIO as determined by the rules of that REIO.[122]

Similarly, Hoffmeister, also an EU official, ventured an alternative formulation when commenting on the ILC draft as adopted on first reading:

> *Conduct of organs of a Member State of a regional economic integration organization*
>
> The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred.[123]

Hoffmeister's formulation refers both to the situation where member states of a REIO act in compliance with a binding decision of the organization or otherwise act under its normative control.[124] This emphasis on normative control is important here as it distinguishes the links that tie EU member states to compliance and implementation of EU international obligations from other headings of attribution listed in the ARIO. These include the case of organs or agents placed at the disposal of an organization (an attribution heading foreseen in article 7 ARIO) or which act under the organization's direction or control (under article 15 ARIO). These attribution headings allocate responsibility to the organization where it exercises 'effective' (understood as factual or operational) control over its member states' conduct.[125] The examples listed under these headings relate mostly to the attribution to the UN of the conduct of peacekeeping forces deployed in Kosovo as part of the UN Interim Administration Mission in Kosovo (UNMIK) or of the Dutch contingent integrated in the UN Protection Force (UNPROFOR) to Bosnia and Herzegovina.[126] While the commentary to article 15 notes that this attribution heading 'could conceivably' be extended to the adoption of binding decisions

[122] Paasivirta & Kuijper (n 39) 216.
[123] Hoffmeister (n 35) 746.
[124] See Stefan Talmon, 'Responsibility of international Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 413-414; Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (OUP 2016) chapter 2, 54.
[125] Commentary to art 7 ARIO, paras 2 and 10.
[126] Commentary to art 7 ARIO, paras 6-13; Commentary to art 15 ARIO, para 3.

by an organization, it also notes that these cases would be limited to situations where the state is accorded with no discretion, where an organization 'dominates' the member states' conduct, and exercises a degree of 'actual direction of an operative kind'.[127]

The degree of control required under these headings hardly fits the situation of EU member states implementing binding acts of the organization pursuant to their Treaty obligations. Most authors, and the European Commission itself, found it difficult to conceive that EU member states act under the effective control of the EU when implementing a binding EU decision or regulation, or that they operate as organs 'placed at the organization's disposal'.[128] It would likewise be difficult to understand this relationship as one of coercion. As noted in the commentary to article 16 ARIO, coercion by means of a binding decision requires proof that the state was left with 'no effective choice' but to comply with a decision of the organization.[129]

For similar reasons, the European Commission also dismissed the idea that the relationship between the EU and its members could be understood as a case of 'acknowledgment and adoption' of members' conduct by the organization. This was the reasoning implied in Special Rapporteur Gaja's suggestion that the EU's statement to the WTO panel in *European Communities - Customs Classification of Certain Computer Equipment* provided evidence of international practice in support of article 9 ARIO.[130] This subsidiary rule of attribution presupposes that conduct which would normally not be attributable to the organization is nevertheless so 'if and to the extent that the organization acknowledges the conduct in question as its own'. Yet this attribution heading still does not encapsulate the competence-based attribution model advanced by the EU. The European Commission underscored that the EU assumed this responsibility by virtue of its competence, as defined in the

[127] Commentary to art 15 ARIO, paras 4-5.
[128] Paasivirta & Kuijper (n 39) 192; Gleider Hernández, 'Beyond the Control Paradigm - International Responsibility and the European Union' (2012-2013) 15 Cambridge Yearbook of European Legal Stud 643, 650.
[129] Commentary to art 16 ARIO, paras 4-5.
[130] Commentary to art 9 ARIO, para. 3

Treaties, not because it acknowledged the conduct of its member states 'as its own'.[131]

This mismatch of attribution headings and EU arguments notwithstanding, the ILC had difficulties in accepting that a rule of international law had emerged to the effect that the conduct of member states executing binding acts of REIOs should be attributed to the organization. In reaching a conclusion against the existence of – or need for – such a rule, the Special Rapporteur approached WTO practice as a matter of exception, not the norm. Gaja's analysis accorded more weight to the ECtHR's precedent of holding states responsible even in cases where their conduct was undertaken in compliance with binding decisions of an organization of which they were members. Pursuant to the Strasbourg Court's established case law, states remain responsible for the fulfilment of their obligations under the Convention even when they have transferred to an organization competence in 'a field of activity covered by the attribution'.[132] As noted by the ECtHR in *Waite and Kennedy*, for instance:

> The Court is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[133]

The ECtHR's preference for finding states responsible for breaches of the Convention is in part the result of the state-only membership of this legal regime. The EU, in particular, is yet to become a party to this Convention, notwithstanding its mandate to do so under article 6(2) of the Treaty on

[131] IO Comments ARIO 2011, 152. See also ILC Eighth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 2011 (A/CN.4/640) ('Gaja Eight Report') para 41.

[132] *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999) para 67. See also, *Beer and Regan v Germany* App no 28934/95 (ECtHR, 18 February 1999) para 55; *Matthews v United Kingdom* App no 40302/98 (ECtHR, 18 February 1999) para 32.

[133] *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999) para 67.

European Union (TEU).[134] For the ECtHR, therefore, attribution of responsibility to the organization in lieu of its member states would require the Court to conclude for an absence of jurisdiction *ratione personae.* In contrast with WTO dispute settlement practice, therefore, the Strasbourg Court has not refrained from holding EU member states responsible for breaches of Convention rights even where wrongs might relate to the implementation of binding EU obligations.[135]

In view of these distinct precedents, the ILC eventually concluded that it was 'preferrable at the current stage of judicial development not to assume that a special rule has come into existence to the effect that, when implementing a binding act of the European Community, State authorities would act as organs of the European Community'.[136] Of the options proposed by the European Commission in 2003, the ILC opted for a 'safeguard clause', following the ASR model. Article 64 of the ARIO therefore includes a *lex specialis* clause nearly identical to that found in article 55 ASR.[137]

Article 64. *Lex specialis*

> These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 64 of the ARIO essentially confirms that the law of international responsibility forms a system of residual rules which apply to the extent that specialised subsystems of international law do not regulate, through *leges speciales*, the existence, content, or implementation of international responsibility. Much like the ILC's ambivalence about the international or

[134] Art 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. The EU draft accession agreement to the European Convention on Human Rights was rejected by the CJEU in *Opinion 2/13* [2014] ECLI:EU:C:2014:2454.

[135] See *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011). See also, Hoffmeister (n 35) 735.

[136] 2005 ILC Report (A/60/10) 45, para 7.

[137] Commentary to art 64 ARIO, para 7.

internal nature of the obligations arising from the EU treaties, the ILC did not dwell on whether a special subsystem of international law regulating the content or implementation of international responsibility of the EU and its member states existed or was *in status nasciendi*. Instead, the commentary to the text refers to 'the possible existence of a special rule' of attribution of conduct applicable to the EU.[138] In view of the article's reference to special rules of *international* law contained in the rules of the organization, however, it remains contested whether this clause truly covers the European Commission's claim.[139]

### *4.3.2. Member states' responsibility in connection with the conduct of the organization*

Beyond attribution of conduct, two additional provisions of the ARIO provoked reservations from the LS: the rule concerning member states' responsibility for circumventing their international obligations through an international organization (article 61 ARIO), and the rule on member states' subsidiary responsibility for the wrongful act of an organization where states 'led the injured party to rely on its responsibility' (article 62 ARIO). In these two cases, the European Commission cautioned the ILC against a 'direct borrowing' from the ASR on these matters. As initially drafted, both provisions were, in the European Commission's view, 'overinclusive' and 'potentially very

[138] ibid, para 2.

[139] While art 64 ARIO refers to the possibility of these rules emerging from the rules of the organization, which might render the internal rules on the distribution of powers between the EU and its members relevant in this process, it also refers exclusively to rules of international law. d'Aspremont has therefore argued that this reference implies that the regime of the ARIO can only be displaced by rules of the 'same status'. This would militate against according relevance to rules integrated within a legal order distinct from international law, save for where this relevance is expressly recognised by specific treaty regimes or practices (such as in the WTO and ITLOS systems), or accepted by other contractual parties which, in engaging in relations with the EU, either 'assume a risk' or expressly acquiesce to the organization's right to allocate responsibility in line with its evolving internal competences. This reading is also in line with the role accorded to the rules of the organization within the ARIO. The commentary to art 5 and art 10 ARIO indicates that, in principle, the rules on the distribution of competence and on the apportionment of obligations between the organization and its member states are not opposable to, and do not affect the breach of obligations owed to, third parties. See Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 International Organizations Law Review 15. See also, Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2012) 8 International Organizations Law Review 397, 436-443.

far-reaching'.[140] In essence, they risked amounting to deterrents to integration, notably to EU integration.

The European Commission did not object to the existence or emergence of a rule of international law against circumvention as such. The LS in fact confirmed the principle that, just as organizations cannot shield themselves behind states (article 17 ARIO), states cannot shield themselves behind organizations (article 61 ARIO). What the LS sought to avoid was a strict formulation of a rule on non-circumvention which might create the impression that responsibility could arise for a state from the very act of transfer of powers to an organization.[141]

While ECtHR case law lends support to a rule that holds member states accountable for using an international organization to commit an internationally wrongful act,[142] in *Bosphorus* v *Ireland* the Strasbourg Court also conceded that EU member states implementing binding EU decisions benefited from a 'presumption of equivalence' between the system of human rights protection available under EU law and that foreseen in the Convention.[143] In this case, concerning an alleged breach of the right to property under article 1 of protocol 1 to the ECHR resulting from the seizure of a Turkish-registered aircraft by the Irish authorities in implementation of a binding EU regulation, the Strasbourg Court found that Ireland benefited from a presumption of compliance with the convention when implementing legal obligations flowing from its membership of the EU:

> ... State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights ... in a manner which can be considered at least equivalent to that for which the Convention provides ... If such equivalent protection is

[140] Statement by Mr Paasivirta (European Commission), Sixth Committee, Summary record of the 16th meeting, 31 October 2006 (A/C.6/61/SR.16) para 15, 17. See also, ILC, 'Responsibility of international organizations: Comments and observations received from Governments and international organizations', 2007 (A/CN.4/582) 19 ('IO Comments ARIO 2007').

[141] ibid. (Paasivirta) para 15: '... as currently drafted, the article implied that a State could be liable for the mere fact of transferring competence to an international organization, even if the organization acted lawfully, if the State thereby circumvented one of its international obligations. From the European Community's standpoint the approach was difficult to understand'.

[142] See inter alia, *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999) para 67.

[143] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

> considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[144]

Building on this precedent, the European Commission argued that the ILC's text should either require that the state specifically intended to circumvent its obligations when transferring powers to the organization, or otherwise include an express reference to the caveat of 'equivalent protection'.[145] A reading to the contrary might effectively dissuade states from transferring competences to an organization or from giving full effect to EU law for fear of being held internationally liable.

More problematic (or EU-specific at least) was the idea that EU member states might be held liable in cases where third parties were 'led to believe' that they could rely on the fulfilment of the organization's obligation by its member states, or where they were under the impression that states 'accepted' responsibility on behalf of the organization (article 62 ARIO). This article presented a particular challenge for EU treaty practice, notably that of mixed multilateral agreements. As noted above, the distribution of obligations between the organization and its members in these cases often features in a declaration of competence drafted in 'general and nebulous terms'.[146] A typical example might simply stipulate that the EU and its member states 'are internationally responsible for the fulfilment of the obligations contained within [the agreement] in accordance with their respective competences'.[147] Fearful that international dispute settlement bodies applying the ARIO might at some point construe this vagueness as deceit or as acceptance, the European Commission asked for greater clarity in the ILC's drafting:

> ... it might be held that the third State had thus been led to believe that the member States were responsible under international law for the

[144] ibid., paras 155-156. The 'Bosphorus doctrine' was confirmed by the Court in later rulings, including after the CJEU's rejection of the EU draft accession agreement to the European Convention on Human Rights. See *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).
[145] Statement Hetsch 2009 (n 74) para 22.
[146] Talmon (n 124) 419.
[147] European Union, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, OJ L 115/1 (2 May 2019).

> implementation of the whole agreement, even though large parts of it might fall within exclusive Community competence. While the Community could seek its own solutions to such complications, it did not find the wording of [the] draft article [] helpful.[148]

The responsibility of member states based on their 'acceptance' of the organization's responsibility was a matter which, in the LS' view, should be determined by reference to the rules of the organization. This was a 'constitutional' question directly tied to the organization's autonomy.[149] As the LS recalled, under EU law, the freedom of member states to assume responsibility on behalf of the organization was governed by the principle of conferral, not by international law.[150]

The logic underlying the European Commission's position regarding articles 61 and 62 ARIO –according to which the text should establish a 'presumption that a state does not, as a general rule, incur international responsibility for the act of an international organization of which it is a member'[151] – also underlies its position on other rules of the ARIO. For instance, the LS contested the view that existing practice or policy reasons supported a rule whereby member states of an international organization have a 'specific duty' to bring to an end breaches of *jus cogens* norms by the organization. The LS recalled that member states might play very different roles in the organs of an organization, as determined by the organization's rules, and thus have a varying ability to bring a breach to an end.[152]

Taken together, these distinct instances of contestation give credence to the argument advanced in chapter 1, according to which these statements, much like the narrative of the EU Court, largely protect the EU's integration process.

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[148] Statement Paasivirta 2006 (n 140) para 17.
[149] IO Comments ARIO 2007, 29. The European Commission therefore proposed that the article be changed in order to limit member states' responsibility to cases where the state accepted responsibility for the act 'in conformity with the rules of the organization'. See IO Comments ARIO 2011, 167.
[150] IO Comments ARIO 2011, 167: 'On the whole, the main issue that draft article [] raises is the question of "permeability" of international organizations vis-à-vis international law. The text of the draft articles and the commentaries as they stand appear to suggest to third States that there is legal uncertainty as regards where precisely the border lies'.
[151] IO Comments ARIO 2007, 29.
[152] IO Comments 2008, 35.

## 4.4. The EU's reservations about the regime of circumstances precluding wrongfulness and countermeasures

EU statements on two other aspects of this project are particularly useful in understanding the dynamics surrounding the European Commission's engagement with the ILC's work. These are, namely, the statements on the ARIO's proposed regime of circumstances precluding the wrongfulness (articles 20 to 27 ARIO), and those addressing the adoption of countermeasures by international organizations or against international organizations (articles 51 to 57 ARIO). Both cases correspond to an extension of the legal regime of the ASR to international organizations, and both were the object of EU contestation.

This section examines the arguments advanced by the European Commission against each of these proposed rules. It argues that the Commission's reservations regarding the legal equivalence between states and international organizations on these matters reflects the delicate balance struck by the LS between projecting an image of the EU as an autonomous actor operating on conditions of near-equality with states, and the attention paid to its own member states' reservations about the rights accorded to international organizations on the international plane.

### *4.4.1. The invocation of circumstances precluding wrongfulness by an international organization*

Circumstances precluding wrongfulness offer 'a justification or excuse for non-performance' of an international obligation.[153] In line with articles 20 to 27 of the ASR, chapter V of the ARIO recognises that the wrongfulness of an international organization's conduct can be precluded where the acts are carried out with the valid consent of a state or organization (article 20), in self-defence (article 21), in retaliation against a breach (article 22), or by virtue of *force majeure* (article 23), distress (article 24), or necessity (article 25).

Of all the sections of the ARIO, this was indisputably a case that largely lacked evidence in support of the application of these rules to international

[153] Commentary to chapter V ARIO, para 1. On the distinction between circumstances precluding wrongfulness (justifications) and circumstances precluding responsibility (excuses) in the law of state responsibility see Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018).

organizations. For instance, in the final draft, evidence of the invocation of necessity by an international organization is supported by a single example of practice,[154] while distress is supported by none.[155] The ILC acknowledged that some of these defences are 'likely to be relevant for ... a small number of organizations'.[156] Yet the idea that international organizations should be able to avail themselves of the same defences and excuses available to states was often justified by a desire for 'coherence' between both legal regimes,[157] while deviations from the regime of state responsibility were anchored in reasons of 'policy'.[158]

The European Commission's position on the extension of this legal regime to international organizations was cautious. On the one hand, the exclusion of responsibility in the case of third-party consent, for instance, was of 'vital importance' for the EU.[159] This was accompanied by references to the EU's 'considerable practice' in civil crisis management and election monitoring which, in the LS's view, should not be construed as 'undue interference in the domestic affairs of a given country'.[160] On the other hand, the LS did not endorse the existence of a general right of international organizations to invoke defences in a way comparable to states. It requested, for instance, that the ILC provide concrete examples (in its commentaries) of the invocation of distress by humanitarian organizations in respect of persons entrusted to their care, and endorsed a construction of this regime as one tightly framed by the constitutive instruments of international organizations.[161]

In the view of the European Commission, an international organization's right to invoke self-defence (article 21 ARIO) in the context of

[154] *T.D.-N. v CERN*, Judgment no 2183 (ILO Administrative Tribunal, 94th Session, 3 February 2003) para 19. See Commentary to art 25 ARIO, para 2.
[155] Commentary to art 24 ARIO, para 2.
[156] ibid.
[157] For instance, with respect to the invocation of self-defence. Commentary to art 21 ARIO, para 2.
[158] For instance, with respect to the invocation of necessity. Commentary to art 25 ARIO, para 4: 'While the conditions set by article 25 on the responsibility of States for internationally wrongful acts would be applicable also with regard to international organizations, the scarcity of practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States'.
[159] IO Comments 2007, 24.
[160] Statement Lehto (n 71) para 25; IO Comments 2007, 24.
[161] IO Comments 2007, 25.

peace-keeping missions, for instance, was one strictly tied to the mission's mandate, from which it would be difficult to 'extrapolate from those specific mandates a wider right'.[162] Likewise, the invocation of necessity (article 25 ARIO) should be circumscribed to interests which the organization was mandated to pursue or to protect; notably, interests which formed part of the 'core function and reason' of an organization's existence. In the words of the European Commission:

> We observe that, in theory, this scenario may also apply to international organizations. However, such application must be operated with utmost care. For example, an environmental international organization may possibly invoke 'environmental necessity' in a comparable situation where States would be allowed to do so, provided that: (a) It needs to protect an essential interest enshrined in its Constitution as a core function and reason of its very existence; (b) This does not seriously impair an essential interest of other subjects of international law towards which the obligation exists, or the international community as a whole.[163]

Similar limitations and reservations permeated the EU's statements on the regime of countermeasures proposed by the ILC.

### *4.4.2. The adoption of countermeasures by or against international organizations*

Countermeasures correspond to the (justified) suspension or non-performance of an obligation owed to a non-compliant state or organization in order to induce compliance, and to procure cessation and reparation.[164] They are part of a decentralised system of 'self-help' in the vindication of rights, framed by rules of necessity and proportionality.[165] In essence, international law recognises that, in certain cases, non-performance may be a justified response to a breach and a means to return to legality. At the time when the ARIO was drafted, however, practice and precedent concerning countermeasures adopted against or by international organizations were, as noted by Special Rapporteur Gaja,

[162] ibid.
[163] IO Comments 2005, 40. The right of international organizations to invoke necessity was also supported, with similar limitations, by other organizations and states commenting on the draft. See ILC, 'Fourth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur', 2006 (A/CN.4/564 and Add. 1–2) ('ILC Fourth SR ARIO') para 39.
[164] See generally Federica Paddeu, 'Countermeasures' in *Max Planck Encyclopaedia of Public International Law* (Oxford Public International Law, last updated September 2015).
[165] Commentary to art 22 ASR, para 3.

'undoubtedly scarce'.[166] The idea that international organizations might have a general right to adopt countermeasures was considered by some scholars to be 'not progressive development— [but] a leap in the dark'.[167]

In his Sixth Report, Gaja suggested that a new paragraph should be added to article 57 ARIO. This paragraph would recognise the right of REIOs to adopt countermeasures on behalf of their members '[w]here an injured State or international organization has transferred competence over certain matters to a regional economic integration organization of which it is a member'.[168] This reasoning is premised on the idea that, by transferring powers to an organization, states effectively become unable to adopt countermeasures in the corresponding field.[169] This proposal was, however, rejected by the ILC collective. Jamaican ILC member Vasciannie, for instance, failed to see 'why an entity denominated a [REIO] should be given a special status'.[170] This, he argued, would create discrimination against other organizations to which states transferred competences, even if they did so to a lower degree.

The European Commission itself was not particularly fond of these rules. The statements prepared by the LS distinguished between, first, the case of international organizations' right to take countermeasures for the benefit of their members and, second, the right of members to take countermeasures against an organization. Concerning the first case, EU practice in the context of the WTO served as evidence in support of this rule. As noted by the European Commission, the EU had 'extensive practice' in the exercise of a right to

[166] Commentary to art 51 ARIO, para 4; ILC, 'Sixth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur', 2008 (A/CN.4/597) ('Gaja Sixth Report') paras 41 and 44.
[167] Alvarez (n 16) 346.
[168] Gaja Sixth Report, para 66.
[169] ibid, para 62. It should be recalled that a similar reasoning underlies the ILC's conclusions on the identification of customary international law, examined in Chapter 2. In this context, Special Rapporteur Michael Wood argued that the practice of highly integrated organizations such as the EU should be relevant for the identification of rules of custom. One of the reasons advanced in this respect was that 'if one were not to equate the practice of such international organisations with that of States, this would mean ... that its Member States would themselves be deprived of or reduced in their ability to contribute to State practice'. ILC, 'Second Report on identification of customary international law by Michael Wood, Special Rapporteur', 2014 (A/CN.4/672) para 44. See also Chapter 2, section 2.4.
[170] Statement by Mr. Vasciannie, ILC, Summary record of the 2964th meeting, 16 May 2008, YBILC 2008 vol I (A/CN.4/SER.A/2008) 53, para 42.

retaliate within the WTO framework.[171] A further example that could be mentioned here concerns the EU's right, under Regulation 1005/2008, to adopt sanctions against states for failing to comply with their international obligations in relation to fisheries conservation.[172] The European Commission therefore, as a matter of principle, supported the recognition of the right of 'all member states of the international community to adopt countermeasures, including international organizations.[173]

Yet the LS also objected to the development of rules of international law along the lines of the 'specific regime of countermeasures' of the WTO system. According to the European Commission, it was doubtful that a treaty-based regime authorising countermeasures such as that foreseen by the WTO could 'provide genuine examples of countermeasures under general international law'.[174] For the Commission LS, a general rule on decentralised enforcement should, instead, be grounded on the organization's specific mandate, thus competence, to protect the interests that were breached:

> Where the breached obligation relates to subject matters that fall outside the organization's powers and functions, there would be no compelling reason why it should be allowed to take decentralized enforcement action. For example, it is hardly conceivable that a technical transport organization should be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole. Therefore, it seems advisable to restrict the right of an international organization to take countermeasures against another international organization to situations where the former has the statutory function to protect the interest underlying the obligation that was breached by the latter.[175]

[171] Statement by Mr Hetsch (European Commission), Sixth Committee, Summary record of the 22nd meeting, 31 October 2008 (A/C.6/63/SR.22) para 24.
[172] Council Regulation 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations 2847/93, 1936/2001 and 601/2004 and repealing Regulations 1093/94 and 1447/1999, OJ L 286 (29 October 2008). See André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski, Ilias Plakokefalos, collaboration of Dov Jacobs, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) European Journal of International Law 15-72, 70 (Commentary to principle 15, para 3).
[173] IO Comments ARIO 2008, 36.
[174] ibid, 37; IO Comments ARIO 2011, 165.
[175] IO Comments ARIO 2008, 36-37.

Moreover, with respect to the right of member states to adopt countermeasures against an organization of which they are members, the European Commission recalled that the EU system has specific rules regulating this matter. Under the EU Treaties, member states are prohibited from resorting to countermeasures to induce EU institutions' compliance with EU law. As established by the CJEU in *Commission v Luxembourg and Belgium*:

> The treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, even where a community institution has failed to carry out its obligations, except where otherwise expressly provided, the basic concept of the treaty requires that member states shall not fail to carry out their obligations and shall not take the law into their own hands.[176]

The European Commission therefore took this opportunity to underscore the fact that, while broadly helpful, this rule did *not* apply to EU member states, whose relationship (and rights) vis-a-vis the organization were regulated by the special regime of the EU Treaties.[177]

While fidelity to an organization's internal rules of competence with respect to countermeasures and circumstances precluding wrongfulness offers a certain continuity (and coherence) to the LS's position on the ARIO, it also conditions the way in which international organizations operate on the international plane. The LS's contestation reflects a preference for international organizations to have more limited rights than states with respect to the adoption of countermeasures or the invocation of international defences. This preference is the result of a balance between the projection of EU autonomy and the respect for the EU member states' own reservations about the exercise of public powers by international organizations. Addressing the Sixth Committee and commenting on the ARIO in its different drafts, some EU member states (such as France) expressed reservations about extending to international organizations a broad right to invoke self-defence.[178] Others (such

[176] Joined Cases 90/63 and 91/63, *Commission v Luxembourg and Belgium.* [1964] ECLI:EU:C:1964:80, 631. This position is reflected in the commentary to art 52 ARIO, para 7.
[177] IO Comments ARIO 2011, 165.
[178] Statement by Ms Belliard (France), Sixth Committee, Summary record of the 15th meeting, 26 October 2009 (A/C.6/64/SR.15) para 66.

as Germany) proposed limitations to the invocation of necessity by international organisations.[179] As for the regime of countermeasures, both Germany and Austria suggested that countermeasures should be excluded from the relations between an organization and its members, or that an organization's right to resort to countermeasures should be strictly tied to its mandate and the rules of the organization.[180] The European Commission's reservations about some of these rules, therefore, echoes and draws attention to the concerns of its member states.

## 5. The EU's final position on the ARIO and the CJEU's reliance on these rules

The European Commission's final position on the draft adopted by the ILC on second reading is perhaps best described as one of diplomatic detachment. Short of rejecting the draft in its entirety, as it did the ILC articles on MFN clauses discussed in chapter 3,[181] the European Commission instead took this opportunity to recall (and leave registered) that, in its view, the text was mostly an exercise in progressive development, with limited authority, which could not affect the priority given to the *leges speciales* regulating the EU case. In the words of Lucio Gussetti in his last statement on the ARIO, delivered at the Sixth Committee:

> While maintaining its earlier views, the European Union welcomed the general commentary to the draft articles adopted on second reading, in which the Commission acknowledged, among other things, that several of the draft articles were based on scarce practice and tended towards progressive development; that the draft articles did not have the same authority as the corresponding provisions on State responsibility; that international organizations were quite different from States; that because of the diversity of international organizations draft article 64 (*Lex specialis*) assumed particular importance; and that the rules of the organization could be relevant for non-members as well.[182]

This detachment has been accompanied by a limited reliance on this legal regime by the CJEU. References to the ARIO are scarce, at best, in the

[179] ILC, 'Responsibility of international organizations. Comments and observations received from Governments', 2011 (A/CN.4/636 and Add.1–2), comments to art 24 (Germany) 121.
[180] ibid, comments to art 21 (Austria) 119; comments to art 21 (Germany) 119-120.
[181] See Chapter 3, section 3.1.2.
[182] Statement Gussetti 2011 (n 5) para 39.

case law of the Luxembourg court. Much like the CJEU's reliance on the 1969 VCLT over the 1986 VCLT-IO,[183] the Court has drawn greater 'inspiration' from the ASR regime when addressing matters of international responsibility. It has prioritised instruments codifying rules of custom over their non-binding counterparts tailored specifically to international organizations. In doing so, it also supports a narrative of approximation of the EU to the legal position of states.

References to the ASR legal framework in the context of CJEU proceedings have mostly been advanced by the parties to a dispute, or mentioned within passing (and largely insubstantial) references in Advocates-General (AG) Opinions.[184] In *Ezz and Others*, a case concerning the restrictive measures adopted against natural and legal persons in view of the situation in Egypt, the applicants relied on the definition of 'organ of the state' included in the commentary to the ASR to challenge the Court's classification of misappropriation of state funds.[185] In *Walz*, in turn, the Court referred to the definition of damage included in the ASR as the one 'common to all the international law sub-systems' and codifying 'the current state of general international law'.[186] In *Poulsen and Diva*, AG Tesauro referred to the definition of distress included in the ASR as that applicable to the legal analysis of the facts, in view of the absence of a Community definition of term.[187] A

[183] See Chapter 3, section 3.2.2.

[184] See inter alia, Opinion of Advocate-General Léger in case C-224/01 *Köbler v Austria* [2003] ECLI:EU:C:2003:207, para 47; Opinion of Advocate-General Kokott in case C-470/03 *A.G.M.-COS.MET* [2005] ECLI:EU:C:2005:693, para 84; Opinion of Advocate-General Colomer in case C-292/05 *Lechouritou and Others* [2006] ECLI:EU:C:2006:700, para 60; Opinion of Advocate-General Kokott in case C-334/08 *Commission v Italy* [2010] ECLI:EU:C:2010:187, para 30; Opinion of Advocate-General Wathelet in case C-242/13 *Commerz Nederland* [2014] ECLI:EU:C:2014:308, paras 85-87.

[185] The Court dismissed the applicant's argument on the basis that the qualification of the company El-Dekheila as a public undertaking was distinct from the question of whether the disputed acts amounted to a misappropriation of state funds. The use of the ILC's definition of state organ was, therefore, considered 'irrelevant in the present case'. Case T-288/15 *Ezz and Others v Council* [2018] ECLI:EU:T:2018:619, para 272.

[186] Case C-63/09 *Walz* [2010] ECLI:EU:C:2010:251, paras 27-28 and 39.

[187] Opinion of Advocate General Tesauro in Case C-286/90 *Anklagemindigheden v Poulsen and Diva Navigation* [1992] ECLI:EU:C:1992:155, I-6046 and note 20. The view that distress is a recognised excuse under internationally was accepted by the Court in its judgment, notwithstanding the lack of reference to the ILC's work or to other relevant rules of international law. Case C-286/90 *Anklagemindigheden v Poulsen and Diva Navigation* [1992] ECLI:EU:C:1992:453, paras 35-39.

passing reference to the definition of distress included in article 25 ASR also features in AG Kokott's Opinion in *Inter-Environnement Wallonie*.[188]

References to the ARIO are not, however, entirely absent from the EU Court's case law. In *Front Polisario v Council* (2015), for instance, a case concerning an action for annulment brought by the national liberation movement of the Sahrawi people against a Council decision authorising the conclusion of a EU-Morocco Association Agreement and a Liberalization Agreement, the applicant relied on different provisions of the ARIO.[189] At stake was the EU institutions' alleged breach of the respect for the principle of self-determination of peoples, by allowing the international agreement's application to the non-self-governing territory of Western Sahara. Although the General Court (GC) annulled the Council decision authorising the conclusion of the agreement, it dismissed the relevance of the legal regime of international organizations' responsibility. In the Court's view, the object of the dispute was the legality of the contested decision as such, not the legal consequences resulting from that determination. This was an action for annulment, not for damages.[190] The GC nevertheless cautioned that EU institutions had an obligation 'to examine all the elements' of a particular case before authorising the conclusion of an international agreement, including the possibility that such conclusion might indirectly encourage EU treaty partners to infringe international law or that it might otherwise yield economic advantages linked to such infringement.[191] This formulation recalls, in part, the rule on complicity included in article 14 ARIO, which the Commission LS endorsed during the ARIO debates. In its 2011 statement, the EU concurred that international organizations, just like states, should be held liable where their organs expressly intended to aid and assist in the commission of an internationally wrongful act.[192] The threshold of due diligence alluded to by the GC in its ruling is notably distinct from that foreseen in the ARIO, which refers to intent.[193]

The CJEU's subsequent rulings in *Council* v *Front Polisario* (2016) and in *Western Sahara Campaign (UK)* (2018), however, upheld the relevant

[188] Opinion of Advocate-General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* [2018] ECLI:EU:C:2018:972, para 157.
[189] Case T-512/12 *Front Polisario v Council* [2015] ECLI:EU:T:2015:953, para 212.
[190] ibid, para 213.
[191] ibid, paras 230-231 and 247.
[192] IO Comments ARIO 2011, 154.
[193] Commentary art 14 ARIO, paras 1 and 4.

Council decisions previously annulled by the GC in these proceedings.[194] Applying the VCLT rules on treaty interpretation, the Court concluded that the concept of 'territory of Morocco' included in the agreements and protocols in question did not extend to the waters adjacent to the territory of Western Sahara – a reading to the contrary would run counter to the respect for the principle of self-determination of peoples, to which the EU is bound.[195] The Court likewise noted that the international principle of relative effect of treaties allowed for international agreements to produce effects for a third party with the latter's consent.[196] Although the Court concluded that the people of Western Sahara had not consented to the disputed EU-Morocco agreements, it nevertheless ruled in favour of the validity of the Council's decision authorizing their conclusion, based on its strict interpretation of 'territory'. Therefore, the Court did not have to address either the legal consequences that would result for the EU from the breach of the principle of self-determination, or the EU's obligation of non-recognition and non-assistance to Morocco's conduct resulting from article 42 of the ARIO, which the European Commission endorsed in its Sixth Committee statements on this project.[197]

In September 2021, the GC was again seized of this matter and annulled a Council decision authorising the conclusion of EU-Morocco trade and fisheries agreements now expressly applicable to the territory of Western Sahara based on 'the populations' consent'.[198] One of the applicant's pleas again referred to the EU's international responsibility under the ARIO.[199] Again, the GC avoided addressing the legal status of the territory of Western Sahara and, thus, the legal consequences arising for the EU from the conclusion of international agreements applied to occupied territories.[200]

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[194] Case C-104/16 P *Council v Front Polisario* [2016] ECLI:EU:C:2016:973; Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118.
[195] ibid (*Polisario* 2016) para 92; (*Western Sahara* 2018) paras 64 and 83.
[196] ibid, paras 100 and 107.
[197] IO Comments 2008, 35, para 3.
[198] Case T-279/19 *Front Polisario v Council* [2021] ECLI:EU:T:2021:639; Joined Cases T-344/19 and T-356/19 *Front Polisario v Council* [2021] ECLI:EU:T:2021:640.
[199] ibid, paras 239 and 298.
[200] For a critical reflection on these rulings see Eva Kassoti, 'The Long Road Home. The CJEU's Judgments in Joined Cases T-344/19 and T-356/19 and in Case T-272/19 - Front Polisario v Council' (*Verfassungsblog*, 6 October 2021) <https://verfassungsblog.de/the-long-road-home/>; Jed Odermatt, 'Contesting Consent. Why the EU-Morocco Trade Agreements Were Concluded Without the Consent of the People of Western Sahara' (*Verfassungsblog*, 7 October 2021) <https://verfassungsblog.de/contesting-consent/>

In the context of the Eurozone crisis, in turn, the EU Court ruled on the responsibility of EU institutions placed at the disposal of another international organization (article 7 ARIO), notably, the European Stability Mechanism (ESM). The case of *Ledra Advertising Ltd and Others* concerned an action for annulment and for damages lodged by Cypriot banks disputing a Memorandum of Understanding on the restructuring of Cypriot banks negotiated by the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), on the one hand, and the Cypriot authorities, on the other.[201] One of the questions before the Court was whether this Memorandum amounted to an act of the EU institutions, the validity of which could be examined (and challenged) under EU law, notably, article 17 of the EU Charter of Fundamental Rights, protecting the right to property. Just four years earlier, in *Pringle*, the Court had concluded that the acts of the European Commission and the ECB in the context of the ESM were conducted *outside* the framework of EU law.[202] In light of the type of tasks assigned to EU institutions in the context of the ESM, the Court was of the view that these acts 'solely commit[ted] the ESM', not the EU institutions as such.[203] In his Opinion in *Ledra*, therefore, Advocate-General Wahl argued that, if the acts of EU institutions fell outside of EU law, they were governed by rules of public international law 'whose validity and value', in his view, 'are accepted and recognised by all the Member States of the Union, as well as by the Union itself'.[204] Wahl took the rules of the ARIO as a 'source of inspiration' and compared the position of the European Commission and the ECB within the ESM to that of organs of an organization 'placed at the disposal of another international organisation'.[205] In negotiating and signing the MoU, he concluded, EU institutions acted 'under the actual control, of the Board of Governors of the ESM' who thus bore responsibility for these acts.[206] In its 2016 ruling in *Ledra,* the Court maintained the position it articulated in *Pringle* but also clarified that, even when acting within the ESM, the European Commission remains bound to observe its mandate as guardian of the EU

[201] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701.
[202] Case C-370/12 *Pringle v Ireland* [2012] ECLI:EU:C:2012:756.
[203] ibid, para 161.
[204] Opinion of Advocate General Wahl in Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:290, para 98. See also, ibid, paras 99-100.
[205] ibid (Wahl) para 100.
[206] ibid.

Treaties and thus to ensure that its acts observe EU law.[207] In the Court's view, however, by allowing the adoption of the contested Memorandum, the European Commission did not contribute to a serious breach of the appellants' right to property.[208]

The residual use of the ARIO by the CJEU resonates with the European Commission's parting Sixth Committee statement on the organization's perception of the project's authority. At the same time, however, the Court's occasional reliance on the ARIO also confirms the lasting relevance of these rules in filling the regulatory gaps still found in the assessment of international organizations' responsibility.

## 6. Accounting for the EU in the codification and development of rules on the responsibility of international organizations

The limited practice and precedent supporting the drafting of the ARIO, together with the EU's growing participation in dispute settlement, largely explain the number of references to the EU in the ARIO debates. Each of Special Rapporteur Gaja's reports includes references to the EU, Gaja himself being a prolific writer not only on matters of international but also of EU law.[209] The types of practice referred to in Gaja's reports and in the ARIO's different drafts include, for instance: rules of EU primary and secondary law,[210] case law of the CJEU,[211] international arrangements concerning the EU's participation

[207] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701, para 67. See Paul Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising Et Al. v European Commission and European Central Bank' (2017) 13 European Constitutional Law Review 369.

[208] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701, para 75.

[209] Among his many engagements, Gaja was also a member of the Advisory Board of the Common Market Law Review and of the Columbia Journal of European Law. He published on a range of EU law topics. See inter alia, Giorgio Gaja, 'Aspetti giuridici della cooperazione europea nella politica estera' (1976) 59 Rivista di Diritto Internazionale 468; Giorgio Gaja, 'The European Community's Rights and Obligations under Mixed Agreements' in David O'Keeffe, Henry G Schermers (eds) *Mixed Agreements* (Kluwer 1983) 133-140.

[210] Reference is made, notably, to Council Regulation (EEC) No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina, OJ L 102 (16 Apr 1982), as evidence of the adoption of countermeasures by a non-injured international in response to a breach of an obligation owed to the international community as a whole. See Gaja Sixth Report, para 58, note 67.

[211] Reference is made, inter alia, to Case C-6/69 *Sayag v Leduc* [1969] ECLI:EU:C:1969:37 as an example of practice concerning the classification of acts of staff of an international organization

in international organizations,[212] dispute settlement practices addressing the responsibility of EU member states under the ECHR[213] or of the organization under the WTO system,[214] declarations by the EU on behalf of (or jointly with) its member states with respect to the invocation or the consequences of responsibility,[215] as well as EU practice in election monitoring missions.[216] Combined, the commentaries to the ARIO as adopted on second reading contain twelve references to the EU.[217] However, there is a selective use of EU practices in support of ILC draft rules. Policy choices, more than (the absence of) practice, often best explain the ILC's approach to EU-related practices in this context.

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as ultra vires. See Gaja Second Report, para 56. In his third report, in turn, Gaja refers, notably, to Case C-12/86 *Demirel* [1987] ECLI:EU:C:1987:400 to explain the source of EU member states' duty to give effect to obligations assumed by the Community in international agreements; to Case C-6-64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66 when discussing the legal nature of the rules of an international organization and the singularity of the EU legal order in this respect; and to Cases C-175/84 *Krohn v Commission* [1987] ECLI:EU:C:1987:8 and C-237/98 P *Dorsch Consult v Council and Commission* [2000] ECLI:EU:C:2000:321 when discussing the attribution of wrongful acts to an organization. See Gaja Third Report, paras 15, 21-22, and 34.

[212] Reference is made, notably, to the modifications to the FAO Constitution so as to allow for EU membership. See commentary to art 2(a) ARIO, para 14 and note 76.

[213] Reference is made, notably, to *Matthews v United Kingdom* App no 40302/98 (ECtHR, 18 February 1999); *Senator Lines GmbH v 15 Member States of the European Union* App no 56672/00 (ECtHR, 10 March 2004); *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999); and *Bosphorus v Ireland* App No 45036/98 (ECtHR, 30 June 2005) in examining the responsibility of member states for conduct adopted in connection with binding acts of the organization. See Gaja Third Report, paras 32-33; Gaja Fourth Report, paras 69-71.

[214] Reference is made, notably, to the Communities' oral pleadings before the WTO panel in *European Communities—Customs Classification of Certain Computer Equipment* WT/DS62/R; WT/DS67/R; WT/DS68/R (5 February 1998) as illustrating the claim that responsibility of an organization need not rest on attribution of conduct to the organization; and to *European Communities: Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/R/ECU (22 May 1997) as evidence of a claim made by a non-injured state against an international organization. See Gaja Second Report, paras 8-11, Gaja Sixth Report, para 30.

[215] Reference is made, notably, to the Council Declaration of 16 December 1991 on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' 31 ILM 1486 (1992) as an instance of practice concerning the consequences resulting from the serious breach of obligations under a peremptory norm of general international law, namely, the obligation not to recognise as lawful situations resulting from aggression; and to the oral statement and comments on the US response delivered by the Director-General of the Legal Service of the European Commission on behalf of the EU member states before the ICAO (15 November 2000) as practice with respect to the invocation of the rule of exhaustion of local remedies. See Gaja Fifth Report, para 64; Gaja Sixth Report, para 17.

[216] See Gaja Fourth Report, para 13.

[217] Commentary to arts 9, 17, 20, 25, 32, 45, 48, 49, 51, 61, 62, and 64 ARIO.

On the one hand, the commentary to the ARIO often relies on EU practices as evidence of existing or emerging rules of international law, or as validation of the ILC's choice to extend to international organizations rules found in the regime of state responsibility. For instance, in formulating a rule on the invocation of responsibility by an international organization for breaches owed to the international community as a whole (article 49 ARIO), the ILC recalled that practice was 'not very indicative ... the most significant practice [being] that of the European Union'.[218] The same was true for evidence of countermeasures taken by a non-injured international organization against a state.[219] In his second report, Gaja likewise refers to CJEU case law as evidence of practice supporting the need for a functional link between the acts of organs and agents and the functions accorded to the organization.[220] The CJEU's ruling in *Parliament v Council*, in turn, is the only evidence advanced in support of a rule concerning the recognition of joint responsibility of an organization and its members in cases of contribution to the same internationally wrongful act.[221]

On the other hand, policy reasons (arguably more than the specificities of EU practices) often also militated against this reliance. In rejecting the inclusion in the draft of REIO-specific rules on attribution and on countermeasures, both Gaja and the ILC membership noted that they saw little value in including provisions in this legal regime that would be 'of practical relevance only for a limited number of international organizations', notably, the EU.[222] In conversations with European Commission officials at the margins of the Sixth Committee debates on the ARIO in New York, the Special Rapporteur further remarked that adding greater complexity to the draft would simply delay the project for little purpose. After all, chances were high that the CJEU would ultimately rely on the ASR in lieu of the ARIO, much as it has relied on the 1969 VCLT in lieu of the 1986 VCLT-IO.[223] This premonition has been confirmed by the CJEU's practice, as discussed in the previous section.

[218] Commentary to art 49 ARIO, para 9.
[219] Gaja Sixth Report, para 58.
[220] Gaja Second Report, para 56; Case C-6/69 *Sayag v Leduc* [1969] ECLI:EU:C:1969:37.
[221] Commentary to art 48 ARIO, para 1; Case C-316/91 *Parliament v Council* [1994] ECLI:EU:C:1994:76.
[222] Gaja Third Report, para 15. See also supra, section 4.4.2.
[223] Interview 19 (6 July 2018). See also, Chapter 3, section 3.2.2.

In reaching the conclusion that the state of international dispute settlement did not support the existence of the special rules proposed by the European Commission, however, the ILC also privileged specific policy considerations over others. The dominant view within international legal scholarship is that competence-based responsibility renders the regulation of international wrongs permeable to the uncertainties of an organization's institutional design.[224] While the rules of an organization are not irrelevant on the international plane – be it in the determination of an organization's capacity to conclude international agreements or in the determination of the interests entrusted to its protection in assessing the lawfulness of countermeasures[225] – international law reins in this relevance. Thus, acts of organs or agents of an organization may still be attributed to the organization if they exceed the authority accorded to these organs or agents, or if they are adopted against the organization's instructions,[226] and the organization's rules cannot be invoked against non-members which have not accepted them.[227]

As regards the EU, rules on the distribution of competence between the organization and its member states become relevant on the international plane because third parties 'accept a risk' that these rules may be invoked when engaging in relations with the EU, or acquiesce to their relevance when accepting the organization's declaration of competence in mixed agreements.[228] Talmon has therefore noted that 'it is not the division of competence as laid down in the rules of the organization that is decisive but the division of competence *as declared to the other parties to the treaty*'.[229] Yet elevating the treatment accorded to the EU by international dispute settlement bodies or by its contracting parties to the level of a special rule of international law, might imply an endorsement of this practice, which the ILC was not ready to favour.

[224] Leinarte (n 1); Gracia Marín Durán, 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model' (2017) 28(3) European Journal of International Law 697. See also, Cristina Contartese, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States: What Does Recent Practice add to the Debate?' (2020) 17(2) International organizations law review 418.

[225] Art 6 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM 543 (1986) (not yet in force); art 22(2)(b) and art 52(1)(b) ARIO.

[226] Art 8 ARIO.

[227] See Commentary to art 5 ARIO, para 3; Commentary to art 10 ARIO, para 9; art 32 ARIO.

[228] Hernández (n 128) 664-665.

[229] Talmon (n 124) 418.

Ultimately, the aim of the ARIO was to close an accountability gap emerging from the lack of consensus concerning the rules that govern – or should govern – the responsibility of international organizations. A legal system which privileged conduct-based attribution and shied away from the complexity of competence-distribution within the EU, reinforced this accountability approach and was thus justified from a policy point of view.

To these concerns we should also add the ILC's discomfort with the European Commission's (and CJEU's) understanding of the position of the EU legal order in relation to international law. International law does not object to the development of specialised regimes or to the ability of states to regulate the relations *inter se* through *leges speciales*. This possibility is inherent to the nature of dispositive rules of international law and is expressly recognised in article 64 ARIO. Special Rapporteur Gaja, however, warned that the contention whereby EU law formed a legal system fully distinct from and 'impermeable' to international went 'too far':

> The European Commission drew from its remark that the law of the EU is "separate from international law" the conclusion that "the relationship between the EU and its member States is not governed by international law principles, but by European law as a distinct source of law". This seems to go too far. While no doubt there exist rules of international law that are discarded by EU law in the relationship between the EU and its members, the application of international law is not entirely excluded even in areas covered by EU law.[230]

Gaja's choice of wording clashes, in particular, with the CJEU's later contention in *Opinion 2/13*, that the 'very nature [of EU law] requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law'.[231]

Contrasting epistemic vantagepoints notwithstanding, the ARIO seems to account for (if not endorse) several of the views expressed by the European Commission in these debates. In addition to article 64 ARIO and its express reference to the EU in its commentaries, article 25 (necessity), in line with the position advanced by the LS, limits the ability of international organizations to invoke this justification 'to the extent that the organization has, in accordance

[230] Gaja Eight Report, para 43.
[231] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, para 212.

with international law, the function to protect' the relevant interests.[232] Likewise, the commentary to article 61 ARIO makes express reference to the need for a 'specific intention' to circumvent international obligations through an organization to establish states' responsibility.[233] Importantly, the ILC found it necessary to note in the commentary to article 62 ARIO that 'there is clearly no presumption that a third party should be able to rely on the responsibility of member states'.[234] Article 52 ARIO likewise recognises the ability of international organizations to limit the right of member states to adopt countermeasures against an organization.[235]

Notwithstanding the European Commission's objections to the text, therefore, some authors have referred to the ARIO (notably the inclusion of article 64 therein) as an illustration of 'the influence that the comments of the EU had' in this process and how this reflects 'an actual influence of the EU in the development of international law'.[236]

## 7. Concluding remarks

The debates on the ARIO remain, to date, the most scrutinised example of EU engagement with the ILC and its work. This chapter revisited the statements prepared by the Commission LS's on the ARIO as an example of the LS' views on the relationship between EU and international law and the EU's contribution to the development of the law on international responsibility.

By distinguishing between statements confirming and contesting ILC rules, this chapter demonstrated how, notwithstanding the European Commission's well-explored objections to the ARIO, its LS also confirmed several rules of this ILC text. It repeatedly confirmed the EU's commitment to

[232] Commentary to art 25 ARIO, para 4.
[233] Commentary to art 61 ARIO, para 2.
[234] Commentary to art 62 ARIO, para 10. The commentary stressed, however, that responsibility cannot be made conditional on the rules of the organization unless they produce legal effects in the relations with the third party. ibid., paras 7 and 12.
[235] Commentary to art 52 ARIO, para 4.
[236] Scarlet McArdle and Paul James Cardwell, 'EU External Representation and the International Law Commission: An Increasingly Significant International Role for the European Union?' in Steven Blockmans and Ramses A. Wessel (eds), *Principles and Practices of EU External Representation* (CLEER Working Papers 2012/5) 91. cf Penelope Nevill, 'The European Union as a Source of Public International Law Part IV: Developments in European Law' (2013) Hungarian Yearbook of International Law and European Law 281, 289-294.

'strictly observe' fundamental principles of international responsibility, including specific rules of attribution later relied on by the CJEU. EU statements also refer to EU practices as evidence of rules ultimately supported by the ILC largely on EU precedents, which reflects a measure of EU contribution to the development of international law in this respect. These rules included, notably, those on the invocation of responsibility by an international organization for breaches owed to the international community as a whole, alongside those on the adoption of countermeasures by international organizations, or on the obligation of international organization not to recognise situations manifestly in breach of obligations under peremptory rules of general international law. Through confirmation, the LS recurringly linked the assumption of responsibility to an organization's capacity and autonomous exercise of transferred powers, affirming an essential aspect of EU autonomy.

This autonomy claim resurfaces, in a different form, in the European Commission's contestation to the ILC text. The review of the different arguments advanced by the LS reflects two distinct rationales: a first one protecting EU autonomy and its integration model, and a second attending to the concerns of its member states about the position of international organizations in international law. The first of these rationales is illustrated in the arguments advanced by the LS to the effect that international dispute settlement practice involving the EU and its member states justified the inclusion in the draft of special rules of attribution for REIOs – that is, rules accounting for the division of competences between the EU and its member states within its own institutional order. This rationale is likewise reflected in the LS's claim that the ILC should avoid formulating rules which hold member states responsible in connection with acts of an organization where intent or additional thresholds are not met. The second rationale, however, emerges from the LS's contestation of the draft's rules on countermeasures or defences in international law. The European Commission endorsed the limitations suggested by the ILC to the rights of international organizations in this context, in deference to its member states' concerns about the position of international organizations under international law.

A parallel should be drawn between the LS's statements on the law of treaties, discussed in the previous chapter, and those examined in this chapter. Both have included instances where the LS tried to persuade the ILC to

include rules reflecting EU specificities. In both cases, the European Commission ventured that these rules might be of relevance not only for the EU's specific case but also for future organizations at equivalent stages of integration.[237] These claims are correlated with the perceived interference of these rules with EU autonomy or integration. At the same time, the LS has often conceded that safeguard clauses might instead account for these specificities, a concession which reflects the European Commission's awareness of the difficulty of seeing certain EU practices, either on treaty-making or in dispute settlement, vindicated in rules of general application.

This has also been the approach largely followed by the ILC. Rules addressing the specific case of REIOs – with respect to rules of attribution or to countermeasures – were rejected for reflecting only the case of the EU. At the same time, EU practices were relied on extensively in the formulation of several of the ARIO's rules and, thus, in the progressive development of international law on the responsibility of international organizations. As demonstrated in this chapter, normative (or 'policy') reasons, rather than the 'exceptional' nature of EU practices, often governed the ILC's decision for or against the development of international rules in line with those proposed by the EU.

[237] See IO Comments ARIO 2011, 168, para 2: 'While the European Union may currently be the only such organization which exhibits all the special internal and external features that have been described above, other regional organizations may sooner or later be in a position to make similar claims'.

# 5 | Substantive Areas of International Law

## 1. Introduction

The European Union (EU) is a multipurpose, general organization.[1] The organization's objectives, as listed in article 3 of the Treaty on European Union (TEU), include aims ranging from the promotion of 'the well-being of its peoples' to international peace and the development of the Earth.[2] Unlike bodies such as, for example, the World Meteorological Organization, the Universal Postal Union, or the International Hydrographic Organization, one would be hard-pressed to single out a field of EU 'specialty'. Since it was founded, the EU's powers have expanded well beyond the customs-union at 'an advanced stage of regional integration' introduced in chapter 3.[3] By now, its member states have endowed the organization with powers conform with the EU's objectives, in fields as diverse as migration, the protection of the environment, disaster relief, development cooperation, and cooperation in criminal matters, to name but a few.

The issues discussed in this chapter relate to this growing set of EU objectives and powers. This chapter examines the statements prepared by the European Commission Legal Service (LS) and delivered in the EU's name at the United Nations General Assembly (UNGA) Sixth Committee concerning four International Law Commission (ILC) projects falling within this broad spectrum of EU competences. The analysis focuses on the EU's statements concerning four ILC topics: the expulsion of aliens, the protection of persons in the event of disasters, the prevention and punishment of crimes against

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[1] In international law, a common criterion to distinguish between different international organizations is their classification into special (technical or functional) organizations and general organizations. The former category includes entities such as the World Health Organization; the latter category includes, most emblematically, the United Nations, as well as regional cooperation organizations such as the European Union, the Council of Europe or the African Union. See Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (6th edn, Brill Nijhoff 2018) paras 63-64.

[2] Art 3(1) and (5) Consolidated Version of the Treaty on European Union OJ C115/13 (9 May 2008) ('TEU').

[3] 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. See Chapter 3, section 3.1.2.

humanity (CAH), and the protection of the atmosphere.[4] For the sake of completeness and thematic continuity, the EU's statements on the ILC draft articles on CAH are examined together with the organization's earlier statements on the establishment of an international criminal court (ICC), delivered in the 1990s.[5] Apart from this exception, all the topics examined in this chapter have been studied by the ILC in the last decade (more precisely, between 2009 and 2021) and they all address the position of international organizations to varying degrees. In these projects, international organizations are primarily referred to as 'assisting actors' in the discharge of states' international obligations.[6] They are structures for inter-state cooperation, not necessarily rights and duty holders as such.

What distinguishes the focus in this chapter from the preceding analysis is the subject-matter of the projects examined. These are not projects concerning the creation of primary rules (through treaties or custom) or the legal consequences (responsibility) resulting from their breach.[7] Instead, all the projects examined in this chapter concern primary rules as such, in different substantive areas of international law. The draft rules examined here define rights (e.g., the right of states to expel individuals from their territory), prohibitions (e.g., of torture or of collective expulsions), obligations of due diligences (e.g., to prevent, reduce or control atmospheric pollution and atmospheric degradation), of best efforts (e.g., to endeavour to give effect to recommendations), and of result (e.g., to adopt effective legislative, administrative, or judicial measures to prevent crimes). Two of these topics –

[4] ILC, Draft articles on the expulsion of aliens, 2014 ILC Report (A/69/10) chapter IV, para 45 ('EOA'); ILC, Draft articles on the protection of persons in the event of disasters, 2016 ILC Report (A/71/10) chapter IV, para 48 ('PPED'); ILC, Draft articles on crimes against humanity, 2019 ILC Report (A/74/10) chapter IV, para 45 ('CAH'); ILC, Draft guidelines on the protection of the atmosphere, 2021 ILC Report (A/76/10) chapter IV, para 39 ('POA').

[5] The preparation of a draft statute for the first permanent international criminal court was part of the 'second part' of the ILC's work on a Draft Code of Crimes Against the Peace and Security of Mankind. The draft statute was adopted by the ILC on second reading in 1994 and served as a basis for the 1998 Rome Statute of the International Criminal Court. For a summary of the ILC work on this topic see ILC, 'Summaries of the Work of the International Law Commission. Draft code of crimes against the peace and security of mankind (Part II) — including the draft Statute for an international criminal court' <https://legal.un.org/ilc/summaries/7_4.shtml>. For the list of EU statements on this particular topic see Annex I. See also, ILC, Draft Statute for an International Criminal Court, 1994 ILC Report (A/49/10) para 91.

[6] See arts 3(d) and 7 PPED.

[7] On the distinction between primary and secondary rules of international law see James R. Crawford, *State Responsibility: The General Part* (CUP 2013) 38.

the expulsion of aliens and the protection of persons in the event of disasters – share a strong human rights dimension. They reiterate fundamental principles of international human rights and international humanitarian law. The ILC guidelines on the protection of the atmosphere, in turn, contend directly with EU powers in environmental protection.

The examination of these four projects in a study about the EU's engagement with the ILC is therefore not simply driven by an aspiration to completeness of this study. The analysis of these additional statements also allows us to test whether the dynamic underlying the LS's approach to ILC projects on what we called 'procedural' topics of international law, examined in chapters 3 and 4, applies as well to projects addressing different 'substantive' topics of international law, discussed in this chapter. Like the analysis conducted in the previous chapters, therefore, this chapter systematically examines statements where the EU confirmed or contested rules advanced by the ILC and explores how, in doing so, the Commission LS built a story about the EU's contribution to the development of international law in these different fields. The chapter critically examines the arguments advanced by the LS for or against different draft rules; the use made of EU practices as evidence supporting or departing from international rules; and how these statements present the organization as a subject of international law.

The analysis demonstrates how, in these substantive areas of international law specifically, the LS's discourse has been particularly centred on a positive dimension of EU autonomy – that is, in projecting an image of the EU as an international actor whose practices effectively contribute to the development of international law in areas as diverse as disaster relief or environmental protection. It is submitted that this discourse is part of the EU's broader action as a 'diplomatic actor' in the fields of human rights and climate change.[8] The EU's engagement with these ILC projects, therefore, operationalises EU foreign policy objectives such as the protection of human rights, the rule of law, and the sustainable development of the environment, *in casu*, through debates on the 'progressive development' of international law

[8] See Karen E. Smith, 'The EU as a Diplomatic Actor in the Field of Human Rights' in Joachim A. Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Palgrave Macmillan 2015) 155-177; Simon Schunz, 'The European Union's Climate Change Diplomacy', ibid, 178-201.

and its codification.[9] In doing so, EU statements often establish an identity between EU rules, values, and interests, and those of the international community. Conversely, the Commission LS has also often contested proposals advanced by the ILC. This contestation has centred on rules which, in the LS's view, misinterpreted EU rules, advanced rules which might interfere with the autonomy of the EU legal order, or which the LS perceived as an inadequate reflection of international developments.

The chapter is structured as follows. Each section examines the EU's statements on one of these four topics, introducing first the project's scope and the EU's powers in the relevant field. This background situates the reader by outlining the aims of each project and the relevant legal developments within EU law. These rules of international and EU law provide context to the claims advanced by the LS and to the debates held at the ILC and at the Sixth Committee with respect to each topic. The first two projects analysed concern topics where the ILC expressly indicated that a number of the rules it proposed corresponded to a progressive development of international law. Thus, section 2 focuses on the EU's statements on the ILC draft articles on the expulsion of aliens, and section 3 addresses the EU's position on the draft articles on the protection of persons in the event of disasters. The analysis demonstrates how the LS sought to persuade the ILC to draft rules that were aligned with the EU legal regime by establishing an identity between legal developments within the EU legal order and the direction of development of international law. At the same time, the LS contested rules which might extend to third states the protections accorded on the basis of EU citizenship or free movement rights, or which, in its view, might weaken EU member states' rights or sovereignty. Sections 4 and 5, in turn, focus on two ILC projects which centred more on a codification of rules of custom and on ensuring a broad acceptance of the proposed texts by states. Section 4 examines EU statements on the first draft convention on CAH, while section 5 turns to the ILC guidelines on the protection of the atmosphere, the first ILC project on environmental protection regarding which the EU has delivered statements. Section 4 demonstrates how EU statements on the CAH project were largely diplomatic reaffirmations of the organization's commitment to the fight against impunity for core international crimes. Those on the guidelines on the protection of the atmosphere, in turn, are singled out for the way in which they reflect the LS's

[9] Art 3 and art 21 TEU.

use of these debates to draw attention to, and promote parallel EU international efforts in, notably, the negotiation and implementation of the Paris Agreement on Climate Change.[10] Section 6 addresses the references to the EU and its practices in these four projects. In line with the review carried out in chapters 3 and 4, this section does not measure the influence that EU proposals might have had on the drafting of these rules. Rather, it examines how the ILC has accounted for EU practices (and some of the specificities of these practices) in these projects. Section 7 offers some concluding remarks about the EU's statements on these four topics, and the position their reflect concerning the EU's contribution to the development of international law in these distinct areas.

## 2. The expulsion of aliens

### 2.1. Introduction

The task of identifying rules of international law governing the expulsion of aliens – that is, of individuals not holding the nationality of the expelling state[11] – was recommended for inclusion in the ILC programme of work in 2000.[12] The project sought to systematise the international rules and principles governing the conduct of states in relation to the removal of aliens from their territory in view of the absence of a 'comprehensive international legal regime which governs international migration'.[13] In 2004, the ILC appointed Maurice Kamto, Cameroonian professor, politician, and lawyer, as Special Rapporteur.[14] One decade and nine reports later, thirty-one draft articles on the expulsion of aliens were adopted by the ILC on second reading and were recommended to the UNGA for the purpose of adoption of a convention on their basis, which is yet to come into fruition.[15]

The scope of the draft articles is broad. The text sets out rules governing the exercise of the sovereign right of a state to 'expel an alien from its territory' – it identifies permitted and prohibited grounds and forms of

[10] Conference of the Parties, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev/1 (12 December 2015).
[11] Commentary to art 1 EOA.
[12] 2000 ILC Report (A/55/10) Annex, 142.
[13] ILC, 'Expulsion of Aliens. Memorandum by the Secretariat' (A/CN.4/565 and Corr.1) para 2.
[14] 2004 ILC Report (A/59/10) para 364.
[15] UNGA Res 69/119 of 10 December 2014.

expulsion, rules on the protection of aliens in the expelling and transit states, and the international responsibility of the expelling state in cases of unlawful expulsion. On the one hand, the text codifies well established rules and principles of international human rights law, refugee law and humanitarian law, such as the principle of non-refoulement, the prohibition torture, and the prohibition of collective expulsions.[16] On the other, it transcends a mere scientific restatement of existing rules of custom. The General Commentary to the draft notes expressly that some of the rules proposed are expressions of a trend in international law's development yet to be crystallized in the established practice of states:

> ... the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature. On certain aspects, practice is still limited, although it does point to trends permitting some prudent development of the rules of international law in this domain. This is why the present draft articles involve both the codification and the progressive development of fundamental rules on the expulsion of aliens.[17]

The commentary to different articles expressly indicates that the proposed rule corresponds to a development of international law. This is the case, for instance, of article 23, which imposes a prohibition against expulsion in cases where there is a risk that the individual might be subject to the death penalty;[18] article 26, which foresees an individual's right to challenge an expulsion decision;[19] and article 29, which establishes an alien's right to readmission to the expelling state in case of unlawful expulsion.[20] While these

[16] Arts 4, 16 and 17 EOA.

[17] General commentary EOA, para 1. See also, Commentary to art 3 EOA, para 2; Commentary to art 23 EOA, para 4.

[18] Commentary to art 23 EOA, paras 3-4: 'While it may be considered that, within these precise limits, this prohibition now corresponds to a distinct trend in international law, it would be difficult to state that international law goes any further in this area. Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects: ... second, because the scope of protection has been extended to cover not only situations where the death penalty has already been imposed but also those where there is a real risk that it will be imposed'.

[19] Commentary to art 26 EAO, para 11: '... as an exercise in the progressive development of international law the Commission considered that even foreigners unlawfully present in the territory of the expelling State for a specified minimum period of time should have the procedural rights listed in paragraph 1'.

[20] However, as noted in the commentary, '[e]ven from the standpoint of progressive development, the Commission was cautious about formulating any such right. Draft article 29 therefore concerns solely the case of an alien lawfully present in the territory of the State in question who has been expelled unlawfully and applies only when a competent authority has

articles were grounded on existing practice and precedent, they do not reflect an 'extensive and virtually uniform practice' of states.[21] Their inclusion reflects instead a normative position concerning desired state conduct.

Notwithstanding the number of international organizations directly or indirectly involved in matters of migration, the EU is the only organization listed as having delivered statements on the draft as adopted on first reading.[22] In total, the EU delivered five statements between 2009 and 2014.[23] In addition, the Director-General of the European Commission Legal Service addressed a lengthier letter to the UN Legal Counsel in 2010, relaying the EU's observations on the proposed rules.[24] The LS's decision to deliver statements on this project coincided with the adoption, at the EU level, of the first legal instrument harmonising member states' conduct in the removal and return of third country nationals: Directive 2008/115/EC of 16 December 2008 on common standards and procedures for returning illegally staying third-country

established that the expulsion was unlawful and when the expelling State cannot validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question'. Commentary to art 29, para 2.

[21] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* Judgment [1969] ICJ Rep 3, para 74. On the requirements generally required to determine that a rule correspond to a codification of customary international law see generally, James R. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 21ff. See also, Commentary to conclusion 2, ILC Draft conclusions on the identification of customary international law, 2018 ILC Report (A/73/10) chapter V, para 65.

[22] ILC, 'Ninth report on the expulsion of aliens, submitted by Mr Maurice Kamto, Special Rapporteur', 2014 (A/CN.4/670) ('Kamto Ninth Report'). See also ILC, 'Eighth report on the expulsion of aliens, submitted by Mr Maurice Kamto, Special Rapporteur', 2012 (A/CN.4/651) ('Kamto Eight Report').

[23] See Annex I.

[24] European Commission, Letter of 22 February 2010, from the Director-General of the European Commission Legal Service, Luis Romero Requena, to Patricia O'Brien, UN Under-Secretary-General for Legal Affairs and UN Legal Counsel (JUR (2010) 50059. The letter is a response to the ILC's 2009 request for information from governments concerning four main legal issues: '(a) the grounds for expulsion provided for in national legislation; (b) the conditions and duration of custody/detention of persons who are being expelled in areas set up for that purpose; (c) whether a person who has been unlawfully expelled has a right to return to the expelling State; and (d) the nature of the relations established between the expelling State and the transit State in cases where the person who is being expelled must pass through a transit State'. See 2009 ILC Report (A/64/10) chapter III, 16. According to the observations by the EU delegation, this letter was initially not circulated to the ILC. Its substance was, however, treated in the Special Rapporteur's Eight Report. Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 21st meeting, 27 October 2011 (A/C.6/66/SR.21) para 45; Kamto Eight Report, paras 32-48.

nationals (EU Return Directive).[25] In the opinion of Special Rapporteur Kamto, this regulatory regime represented one of the few forms of evidence of legal regimes regulating states' practices on matters of migration.[26]

The following sections of this chapter examine, first, the EU's competence to regulate matters contenting with the expulsion of aliens – in EU parlance, 'the removal of third country nationals' – and the degree of EU integration on these matters. This competence and its exercise by the EU provide the backdrop for the analysis of the LS's decision to engage with this project, and the substance of the corresponding statements. This contextual overview is then followed by an examination of the statements themselves. Much as in the previous chapters, the analysis is structured around acts of confirmation and contestation. We examine the instances where the LS agreed with the rules proposed by the ILC or otherwise argued that EU practices confirmed the existence or development of rules of international law. We likewise examine the rules or guidelines contested by the LS, and how this contestation and confirmation reflect the EU's understanding of its relationship with these rules and of its contribution to the development of international law on the expulsion of aliens.

## 2.2. EU powers and practices in the expulsion of 'third country nationals'

In 1997, the competence of EU member states in the broad field of 'aliens law' was partly transferred to the (then) European Community (EC), with the Amsterdam amendment to the Treaty on European Union and the Treaty establishing the European Communities (TEC).[27] The adoption of the Treaty of Lisbon one decade later merged the EC and the EU under a single Union and integrated these competences into the broader EU policy area of freedom, security, and justice (AFSJ). The harmonisation of EU member states laws with

[25] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348 (24 December 2008) ('Return Directive').

[26] See also Alexander T. Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) viii.

[27] Treaty of Amsterdam, amending the Treaty on European Union, the Treaties Establishing the European Communities and related acts OJ 340/1 (10 November 1997) ('Amsterdam Treaty'), Title IIIa, art 73k(3). See also, Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4th edn, OUP 2016) chapter 2; Koen Lenaerts, Piet Van Nuffel and Tim Corthaut, *EU Constitutional Law* (OUP 2021) paras 1.038, 8.002, 8.004, and 8.007-8.0013.

respect to the expulsion of third country nationals is the result of the Union's return policy and intersects with distinct EU competences concerning the regulation of border checks, asylum, and immigration, now contained in Chapter 2 of Title V of the Treaty on the Functioning of the European Union (TFEU).[28]

Internally, the practice of EU member states concerning the expulsion of third country nationals has been harmonised through the adoption of the EU Return Directive, CJEU case law interpreting the scope of this Directive,[29] and additional secondary legislation specifically addressing the cooperation between member state authorities over the mutual recognition of expulsion decisions.[30] EU integration in this field has also been accompanied by the creation of EU agencies with the power to coordinate joint returns of irregular migrants (Frontex) and to support member states in coordinating asylum procedures (EASO).[31] The Return Directive, specifically, governs the conditions for return decisions, voluntary returns, the removal of third country nationals from the territory of an EU member state (with special rules for unaccompanied migrants), the detention of third country nationals, and procedural safeguards pending the execution of return decisions. Importantly, article 1 of this Directive establishes that its 'common standards and procedures' are to be carried out 'in accordance with fundamental rights as general principles of Community law as well as international law, including

[28] Art 4(2)(j) and art 67(2), Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 (26 October 2012) ('TFEU').

[29] A number of CJEU rulings have interpreted different provisions of this Directive which are relevant to the legal questions discussed by the ILC. See inter alia, Joined Cases C-473/13 and C-514/13 *Bero and Bouzalmate* [2014] ECLI:EU:C:2014:2095; Case C-554/13 *Zh. and O.* [2015] ECLI:EU:C:2015:377; and, more recently, Case C-409/20 *Subdelegación del Gobierno en Pontevedra (Amende en cas de séjour irrégulier)* [2022] ECLI:EU:C:2022:148.

[30] Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals OJ L 149/34 (2 June 2001).

[31] Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation 863/2007 of the European Parliament and of the Council, Council Regulation 2007/2004 and Council Decision 2005/267/EC, OJ L 251 (16 September 2016); Regulation 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132 (29 May 2010). See also, European Commission, 'A European Agenda on Migration', COM (2015) 240 (13 May 2015) 10.

refugee protection and human rights obligations', establishing a normative link between the EU legal regime and international law.[32]

Externally, article 79(2)(c) TFEU accords the EU with an express legal basis to adopt measures concerning the 'illegal immigration and unauthorised residence, including *removal and repatriation* of persons residing without authorisation', as well as the competence to conclude readmission agreements with third countries of origin or provenance of third country nationals.[33] On the basis of these powers, the Union has concluded readmission agreements with countries such as Sri Lanka (2005), Ukraine (2007), Cape Verde (2013), and Belarus (2020).[34] Readmission clauses have likewise been included in stabilisation and association agreements (a number of which were concluded during the ILC's consideration of this topic)[35] and in partnership and cooperation agreements.[36] Readmission clauses establish obligations for the parties concerning the readmission of their nationals, stateless persons, or of nationals of third states who illegally entered the EU through their territory. By way of example, the readmission clause included in the stabilisation and

[32] Art 1 Return Directive.

[33] Art 79(2)(c) and (3) TFEU (emphasis added).

[34] Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation OJ L 124 (17 May 2005); Agreement between the European Community and Ukraine on the readmission of persons OJ L 332 (18 December 2007); Agreement between the European Union and the Republic of Cape Verde on the readmission of persons residing without authorisation OJ L 282 (24 October 2013); Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation OJ L 181 (9 June 2020).

[35] See inter alia, art 81, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, Council and Commission Decision 2009/332/EC/Euratom of 26 February 2009, OJ L 107 (28 April 2009); art 83, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part, OJ L 108 (29 April 2010); art 83, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, OJ L 278 (18 October 2013).

[36] See inter alia, art 72(2), Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ L 239 (9 September 1999); art 75(2), Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, OJ L 246 (17 September 1999); art 34(2)(g) and (4), Framework Agreement on Comprehensive Partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part, OJ L 125 (26 April 2014).

association agreement concluded between the EU and Kosovo in 2016, reads as follows:

> Article 88
> Readmission
>
> With a view to cooperating in order to prevent and control illegal migration, the Parties shall, upon request and without further formalities:
>
> (a) readmit any Kosovo citizens or EU nationals illegally present in the respective other Party;
>
> (b) readmit non-EU nationals and stateless persons having entered the territory of a Member State via Kosovo or Kosovo via the territory of a Member State.
>
> Kosovo shall provide its citizens with appropriate identity documents and shall extend to them the administrative facilities necessary for such purposes.
>
> The parties agree to explore possibilities to start negotiations with a view to concluding an agreement regulating the specific procedures for readmission of the persons referred in points (a) and (b) of the first paragraph.
>
> Kosovo shall explore possibilities to conclude readmission agreements, should objective circumstances so permit, with the countries taking part in the SAP and undertakes to take any necessary measures to ensure the flexible and rapid implementation of those agreements. The EU will explore possibilities to assist the respective countries throughout this process, should objective circumstances so permit.[37]

Authors have remarked, often critically, that the internal and external exercise of EU powers in the regulation of migration flows has had implications for state practice at three distinct levels. First, the exercise of these powers harmonises EU member states' conduct. Second, it harmonises the conduct of third states in the EU's neighbourhood with which the EU has concluded readmission agreements. And third, it also shapes the conduct of these neighbouring states vis-a-vis third states. Specifically, by force of their relations with the Union, non-EU states will often replicate EU clauses and approaches

[37] Art 88, 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 L 71 (16 March 2016).

to irregular migration in their dealings with other states.[38] Delcour has argued, for instance, that '[b]y shaping [its neighbouring] countries' response to international migration, the EU influences migration flows and governance not only in the neighbourhood but also in adjacent regions', which often leads to the implementation of more restrictive migration practices by third countries which seek to externalise the effects of compliance with their EU obligations.[39] The Return Directive, in particular, has been subject to criticism for the manner in which it harmonises the regional practice of EU member states. A 2013 report by the Special Rapporteur on Human Rights addressed to the UN Human Rights Council, for instance, berated the institutionalisation of systematic detention of irregular migrants as a result of 'the harmonisation of European Union law, and in particular the passing of the Return Directive'.[40]

It is against this background of EU powers, their exercise, and the international community's perception of their effects, that the LS's statements concerning the ILC draft articles on the expulsion of aliens must be understood.

### 2.3. Confirmation: The EU Return Directive and the development of international law

EU statements were not exactly full of praise for the ILC's decision to study the topic of expulsion of aliens. The Commission LS engagement with this project came rather late in the ILC's consideration of the topic, and from the outset, the statements outlined some of the EU's concerns about the draft. The first EU statement addressing this project was delivered at the Sixth Committee's sixty-fourth session in 2009 by Patrick Hetsch, at that time Deputy Director-General of the Legal Service of the European Commission.[41] The

[38] Bernard Ryan, 'The Migration Crisis and the European Union Border Regime' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders. The Extraterritorial Reach of EU Law* (OUP 2019) 197, 220.

[39] Laure Delcour, 'The EU: Shaping Migration Patterns in Its Neighbourhood and Beyond' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013) 263.

[40] United Nations Human Rights Council, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', A/HRC/23/46 (24 April 2013) paras 47-48. See also, Anneliese Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' (2009) 11(1) European Journal of Migration and Law 1.

[41] Statement by Mr. Hetsch (European Commission), Sixth Committee, Summary record of the 18th meeting, 28 October 2009 (A/C.6/64/SR.18) para 79.

statement addressed Special Rapporteur Kamto's fifth report, and focused on what the LS believed to be the 'problems' in this report. In view of the ILC's progressive development approach to the topic, EU statements of confirmation of ILC draft rules were conveyed more as claims regarding the relevance of EU practices to this exercise rather than endorsements of the rules as such.

In the statements, EU practices are advanced as unquestionably relevant 'for the formation of international law' and for 'the process of elaborating authoritative draft articles and commentaries'; as evidence which should inspire the ILC's work on the 'progressive development' of international law in this field.[42] The EU Return Directive, in particular, is submitted as evidence of a legal regime with 'clear, transparent and fair common rules', and as 'the first [EU] legal instrument to provide for a common catalogue of specific rights for illegally staying third country nationals'.[43] It is introduced into the debates as a model for international law's development.

As a claim regarding the development of rules of international law, the LS based its argument on the fact that these rules formed 'part of current regional State practice that was binding on European Union member States, as well as on a significant number of other European States Member of the United Nations'.[44] A statement by Lucio Gussetti, European Commission Principal Legal Adviser for Foreign and Security Policy and External Relations representing the EU at the Sixth Committee's 2011 session, reflects this idea. Gussetti argued that that, notwithstanding the EU's status as a 'special regime', these rules inform the practice of an increasing number of states. He noted, in particular, that:

> [h]is delegation concurred with the Commission's view that practices and precedents deriving from special regimes, including European Union law, should be treated with caution in the light of such issues as the fundamental distinctions already highlighted. However, there would soon be more than 30 European Union States with established legal standards corresponding to the provisions of the Return Directive, which set the standards of treatment for non-European Union nationals. Some of the guarantees applicable in the case of expulsion of [non]

[42] Statement Gussetti 2011 (n 24) paras 48 and 51.
[43] ibid, paras 46-47.
[44] ibid, para 51.

> European Union nationals might therefore be relevant for the formation of international law insofar as they constituted State practice.[45]

The suggestions advanced by the LS essentially endorsed rules which mirrored EU law. For instance, the EU supported draft rules which promoted the principle of voluntary return and the duty of states to readmit their citizens; it defended the idea that the draft's 'without prejudice' clause should be limited to rules which were 'more favourable to the person subject to expulsion'; it proposed that sexual orientation should be included as a prohibited ground for discrimination in expulsion decisions, and that the state of health of aliens should also be a factor in expulsion decisions.[46] With regard to procedural safeguards, EU statements on draft article 26 (procedural rights of aliens subject to expulsion) suggested that the text should include the right to 'written notice' of an expulsion decision, that appeals against expulsion decisions should be subject to speedy judicial review, and that further limitations should be imposed on states' rights to exclude certain categories of aliens from the scope of procedural safeguards offered by the draft.[47] These proposals are generally in line with article 4 (more favourable provisions), article 5 (non-refoulement, best interests of the child, family life and state of health), article 7 (voluntary departure), article 12 (form), article 13 (remedies), and the scope of the principle of non-discrimination listed in paragraph 21 of the Return Directive's preamble.[48]

In the EU statements, considerable attention was also devoted to article 19 of the ILC's draft concerning the detention of aliens pending expulsion. The LS proposed that article 19 should be divided into two distinct rules, essentially mirroring articles 15 (detention) and 16 (conditions of detention) of the Return Directive.[49] The statements suggested that draft article 19 should include a first paragraph replicating paragraph 1 of article 15 of the Return Directive, to the effect that detention should only be used where necessary to prepare a removal, namely where there is a risk of absconding or where the alien hampers the expulsion.[50] A second provision (article 19*bis*)

[45] ibid, para 48.
[46] Statement by Mr. Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 18th meeting, 1 November 2012 (A/C.6/67/SR.18) paras 58-60 and 63.
[47] ibid, para 66.
[48] See art 4(3), art 5(c), art 7 and Preamble, para 10, EU Return Directive.
[49] Statement Gussetti 2012 (n 46) paras 61-62.
[50] ibid, para 61.

would then, in line with article 16 of the Return Directive, address detention conditions, procedural safeguards in cases of detention, and the detention of minors, including assurances that detainees would be given 'sufficient living space' and placed in 'facilities specifically designed for that purpose'.[51]

The statements prepared by the LS generally support the authority of the EU's views and the relevance of EU practices, and therefore often draw on the alignment between EU internal rules and international norms or the practice of international organizations. For instance, article 15(1) of the Return Directive (dealing with detention) is presented as a legal confirmation of the Council of Europe's Twenty Guidelines on Forced Return[52] and of the International Court of Justice's (ICJ) ruling in *Diallo*.[53] This ruling, concerning a Guinean national who was detained by the authorities of the Democratic Republic of Congo pending his expulsion, established that while international law does not prohibit states from detaining foreign nationals, it requires them to observe the principles of necessity, proportionality, and respect for

[51] ibid, para 62. Art 19*bis* was worded as follows:
Article 19*bis*
Conditions of detention of aliens subject to expulsion

> 1. Aliens detained pending expulsion should normally be accommodated in facilities specifically designed for that purpose. Such facilities should provide accommodation which is clean and which offers sufficient living space for the numbers involved.
> 2. Detainees should not normally be held together with ordinary prisoners. Men and women should be separated from the opposite sex if they so wish; however, the principle of family life should be respected and families should therefore be accommodated accordingly.
> 3. Detainees shall have access to lawyers, doctors, non-governmental organizations, members of their families and the Office of the United Nations High Commissioner for Refugees, and should be able to communicate with the outside world, in accordance with the relevant national regulations.
> 4. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees.
> 5. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time, respecting the child's best interests.
> 6. Children shall have a right to education and a right to engage in play and recreational activities appropriate to their age. The provision of education may be made subject to the length of their stay. Separated children should be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

[52] Council of Europe, Committee of Ministers, Twenty Guidelines on Forced Return (4 May 2005).
[53] *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Judgment [2010] ICJ Reports 639.

procedural rights.[54] In turn, article 15(2) of the same Directive (concerning aliens' right to effective judicial review of an expulsion decision) is presented by the LS as being aligned with article 5(4) of the European Convention on Human Rights (ECHR) and article 9(4) of the International Covenant on Civil and Political Rights (ICCPR).[55]

The LS's decision to propose that the ILC's text be redrafted in line with articles 15 and 16 of the Return Directive is noteworthy, notably when we consider the context of international criticism voiced towards the Directive. The decision appears to contribute to reputation building by making the case, in the presence of international actors, that these rules are aligned with international law. At the EU level, these rules have also been at the basis of several requests for preliminary rulings addressed to the CJEU by the judicial authorities of EU member states.[56] The single case cited by the LS in its Sixth Committee statements, for instance, refers to the interpretation and implementation of these rules. In *El Dridi*, a case concerning a third country national sentenced to one year's imprisonment in Italy for illegal stay, the Court established that articles 14 and 15 of the EU Return Directive preclude member states from resorting to detention on the exclusive grounds of permanence of an individual in their territory beyond the time indicated in a removal order.[57] By explaining this ruling in its statements, therefore, the Commission LS also offers clarification to its Sixth Committee audience about the correct interpretation of these EU rules, as established by the CJEU case law.[58]

The LS presented other proposals for amendments to the ILC draft in an effort to align the draft's rules with international standards incorporated into the EU legal order. They proposed, for instance, that draft article 21 (departure to the state of destination) should promote the voluntary return of third country nationals, in line with the Council of Europe's Twenty Guidelines

[54] ibid, paras 75-85.
[55] Statement Gussetti 2012 (n 46) para 61.
[56] See inter alia, and more recently, Joined Cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* [2020] ECLI:EU:C:2020:367 paras 224, 268-281.
[57] Case C-61/11 PPU *El Dridi* [2011] ECLI:EU:C:2011:268 para 62.
[58] Subsequent CJEU rulings have nevertheless established that administrative detention is permissible when a person refuses to leave the territory and if it is not possible to issue a return decision. See Case C-673/19 *M and Others* [2021] ECLI:EU:C:2021:127.

and article 7 of the Return Directive.[59] More broadly, the EU's statement of 2012 established an identity that drew on both the objectives pursued by the ILC in its work as well as the objectives of EU law, arguing that both regimes sought to safeguard human dignity through 'minimum standards based on the rule of law', the compliance with which was 'in the interest of all states'.[60]

These instances of confirmation show how the EU (specifically the Commission LS) tried to persuade the ILC to draft rules aligned with the EU Return Directive, supporting (and vindicating) the legitimacy of these rules by establishing a normative identity between them and those of other regional and international human rights regimes. In doing so, the LS likewise argued that the exercise of EU powers in this field effectively shapes states' practice beyond EU borders, thus contributing to the development of international law.

### 2.4. Contestation: The special regime of EU citizenship and free movement rights

The dominant stance of the LS concerning this exercise was, nevertheless, one of contestation. This contestation centred, primarily, on the Special Rapporteur's reliance on EU rules governing the legal position of EU citizens, their family members, and persons otherwise enjoying a right to free movement in the EU. The background to this contestation is as follows.

Under EU law, a distinction is made between the expulsion regime applicable to aliens (governed by the EU Return Directive), and the regime applicable to foreign resident EU citizens, their family members (including those who are non-EU nationals), and other categories of third country nationals with the right to free movement under EU law. The latter benefit from an enhanced regime of protection governed by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (Citizens Directive),[61] and also from the bilateral partnership, stability and association agreements, and other

[59] Statement Gussetti 2012 (n 46) para 63.
[60] ibid, para 57.
[61] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158 (30 April 2004) ('Citizens Directive').

legal arrangements that are applicable, for instance, to long-term residents.[62] EU citizens, for instance, can only be expelled from another EU member state if they represent a threat to public policy, public security or public health, or for abuse of rights, for fraud, or if they place an unreasonable burden on an EU member state's national social security system.[63] However, these standards are stricter as far as third country nationals not cover by these legal regimes are concerned.

The concept of 'third country national', in fact, does not match that of 'alien' adopted under this ILC project. The latter encompasses a heterogenous category of persons when translated into the categories of EU law.[64] In theory, it includes all persons who do not hold the nationality of an EU member state, even if they are covered by one of the EU free movement arrangements.[65] However, as noted by Molnár, even if one were to subdivide the concept of third country nationals, and only consider persons 'illegally staying or unlawfully present' in the territory of an EU member state, it would still include very distinct categories of individuals from the perspective of EU law, notably those who:

> entered illegally into the territory of an EU Member State (either through the border crossing points or through "green" or "blue" borders by avoiding the control); overstayers; status changers; rejected asylum seekers, and, through the lenses of international law, even *persons having enjoyed the EU right of free movement* if they become an unreasonable burden to the social assistance system of the host Member State or for any other reason they lose the right to freedom of movement.[66]

However, article 14 of the ILC's draft formulated the prohibition of discrimination based on nationality in absolute terms, which did not align well

[62] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country national who are long-term residents OJ L 16 (23 January 2004).
[63] Art 14, art 27 and art 35 Citizens Directive.
[64] Tamás Mólnar, 'EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back' (2017) 2 Pécs Journal of International and European Law 40, 42-43.
[65] From those covered by EU regimes on family reunification or seasonal work, for instance, to those benefiting from arrangements under EU partnership, stability or association agreements to those enjoying the right of free movement within the European Economic Area (such as Swiss nationals).
[66] Mólnar (n 64) 43.

with the nuances in category of the EU legal system.[67] In addition, Special Rapporteur Kamto's Sixth Report relied heavily on Directive 2004/38/EC and drew on CJEU case law as evidence that there were limits on states' rights to invoke public order and public safety as a ground for expulsion.[68] Kamto suggested, in particular, that certain guarantees that were accorded to EU citizens under EU free movement law, while difficult to 'mechanically transpose' to international law, were nevertheless 'indicative of a trend' which should serve as evidence for the progressive development of the international legal system.[69] This was a deliberate choice, not a misrepresentation of EU rules, as implied by the EU delegation. In his Second Report, Kamto discussed the concept of EU citizenship and noted that, under EU law, the enhanced safeguards enjoyed by EU citizens did not apply to the expulsion of 'non-Community aliens'.[70] In his view, however, this legal regime should serve as 'a source of inspiration' for further integration and for the 'codification and gradual development of rules' in this field. As indicated in Kamto's Sixth Report:

> This reasoning is consistent with EC law and cannot be extended to the right to expel non-Community aliens. However, it is already indicative of a trend whose spread can all the more readily be foreseen, given the development of community integration in many regions of the world and the fact that European integration has often been a source of inspiration for other integration efforts of the same type.[71]

Neither the EU nor its member states concurred with the Special Rapporteur's reading. The LS's statements do not discard the benefits of the EU legal order being used, in general, 'as an example for the international set of legal rules proposed' by the ILC,[72] but strongly contest the Special

[67] ILC, 'Fifth report on the expulsion of aliens, by Mr Maurice Kamto, Special Rapporteur', 2009 (A/CN.4/611 and Add1) ('Kamto Fifth Report') para 156. In the Fifth Report, art 14(1) was worded as follows: 'The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind, on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
[68] ILC, 'Sixth report on the expulsion of aliens, by Mr Maurice Kamto, Special Rapporteur', 2010 (A/CN.4/625, Add.1 and Add.2) ('Kamto Sixth Report') paras 103-116.
[69] ibid, paras 104-116, and 143-148.
[70] ILC, 'Second report on the expulsion of aliens, by Mr Maurice Kamto', 2007 (A/CN.4/573 and Corr.1) ('Kamto Second Report') paras 131-132. See also, Kamto Sixth Report, para 148.
[71] Kamto Sixth Report, para 148.
[72] Statement by Mr Tricot (Observer for the European Union), Sixth Committee, Summary record of the 25th meeting (A/C.6/65/SR.25) para 42.

Rapporteur's extensive reading of EU law in this respect. EU statements therefore contested the Special Rapporteur's broad formulation of the prohibition of discrimination based on nationality, and the extension of the benefits resulting from EU citizenship and special agreements to international rules. In line with a discourse already present in the EU's very first statements to the ILC in the 1970s (discussed in chapter 3),[73] the LS recalled that the EU's 'own legal order and own form of citizenship' could not be extended without compromising the special nature of the EU law.[74] Thus, while the rules in place for third country nationals could (and should) serve as evidence for the development of international law, this reliance should not extend to the special regime deriving from EU citizenship. As Molnár noted, the EU had a vested interest in ensuring that its preferential system remained attractive:

> The EU's opposition to elevate the higher standards elaborated for the expulsion of EU citizens (and their family members) onto the scale of general international law can be explained by the Union's disinterest in reducing the added value of the freedom of movement within the EU borders and consequently, in losing a slice of the privileged status attached to EU citizenship.[75]

The LS justified its reading of international law by reference to the European Court of Human Rights' (ECtHR) recognition of the acceptability of certain discriminations based on nationality within the EU system. In *Moustaquim v Belgium*, a case concerning the deportation of a Moroccan national residing in Belgium further to his conviction for a criminal offence, the applicant argued that his deportation violated the prohibition of discrimination on the basis of nationality and his right to family and private life (articles 8 and 14 ECHR), in so far as EU citizens could not be deported on similar grounds.[76] The ECtHR concluded, however, that as regards 'the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order'.[77] This reading was confirmed by later case law of the Strasbourg Court.[78]

[73] See Chapter 3, section 3.1.
[74] Statement Hetsch (n 41) para 79.
[75] Mólnar (n 64) 51.
[76] *Moustaquim v Belgium* App no 12313/86 (ECtHR, 18 February 1991).
[77] ibid, paras 48-49.
[78] See *C v Belgium* App no 21794/93 (ECtHR, 7 August 1996) para 38.

In addition to this contestation, the LS also expressed some reservations about ILC proposals which sought to develop rules beyond the standards practiced within the EU legal order. For instance, EU statements contested the ILC's proposal of a rule on the suspensive effect of appeals against expulsion decisions.[79] Under EU law, neither third country nationals (pursuant to article 13 of the Return Directive) nor EU citizens and their family members (pursuant to article 31 of the Citizens Directive) benefit from an automatic suspension of the enforcement of return or removal decision by virtue of their judicial review.[80] In the LS's view, therefore, a rule to this effect would not be supported by practice and would amount to 'an incentive to abuse appeal procedures'.[81] The LS likewise contested the inclusion of a list of procedural safeguards in draft article 26 (procedural rights of aliens subject to expulsion) arguing that this went beyond universal state practice and *opinio juris*, notably as the scope of some of the rights in this list (e.g. the right to be heard) were broader than what was foreseen under EU law.[82]

The LS's final position on the ILC's draft articles, as adopted on second reading, was one of distancing. This detachment was justified by the LS by reference to the rejection of some EU proposals which the Commission considered to have 'a strong human rights character (such as the inclusion of sexual orientation as a ground for non-discrimination, the right to a speedy judicial review of the lawfulness of detention, the right to receive a written decision and the right to information about available legal remedies)'.[83] On first

[79] See 2012 ILC Report (A/67/10) 17; Statement by Mr Caflisch (Chair of the International Law Commission), Sixth Committee, Summary record of the 18th meeting, 1 November 2012 (A/C.6/67/SR.18) para 29. In its 2012 version, art 27 EOA was worded as follows: 'An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision'.

[80] The automatic suspensive effect of return decisions is limited to appeals based on a breach of the principle of non-refoulement, where the removal of the applicant might place her at a real risk of being subject to torture, inhumane or degrading treatment. See Case C-1811/16 *Gnandi* [2018] ECLI:EU:C:2018:465, para 56.

[81] Statement Gussetti 2012 (n 46) para 67. See also, Statement by Denmark (on behalf of the Nordic countries), ILC, 'Expulsion of aliens: Comments and observations received from Governments. Addendum', 2014 (A/CN.4/669/Add.1) 7.

[82] European Commission, Letter of 22 February 2010, from the Director-General of the European Commission Legal Service, Luis Romero Requena, to Patricia O'Brien, UN Under-Secretary-General for Legal Affairs and UN Legal Counsel (JUR (2010) 50059). See also, Mólnar (n 64) 55.

[83] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 19th meeting, 27 October 2014 (A/C.6/69/SR.19) para 71.

reading, EU statements also showed some reservations regarding the transformation of the draft into a binding international instrument, expressing a preference for 'framework principles'.[84] Gussetti's statement on the final draft, in turn, reiterated this position. The statement underscored not only the EU's dissatisfaction with the ILC's decision not to integrate into the draft some of the 'more progressive' standards in force in the EU but also called on all UN member states 'to take appropriate actions to guarantee those rights in cases of expulsion of aliens'.[85] The EU expected that the same standards be extended to its citizens in comparable cases.[86]

EU statements on this project illustrate how the LS's position on ILC draft articles is necessarily framed by the rules and legal developments within the EU's own legal order, and the safeguard of this same order's essential characteristics. These statements have also allowed for the projection (and claim for recognition) of the EU as a human rights actor, whose legal system confirms, strengthens, and develops rules of international human rights law. In line with the reading of the EU's foreign policy objective to contribute to the development of international law (article 3(5) TEU) advanced in chapter 1, the EU legal regime (including that of the EU Return Directive) is presented in these statements as a more detailed system of rules, apt to be relied on as evidence for the development of the international legal system.[87] In support of this contention, the LS relies on the alignment of these rules with the international practice of, for instance, the Council of Europe, as granting further authority of the EU's own rules. In turn, EU statements contested rules which misconstrued, in the LS's view, the specificities of the EU's 'own legal order and its own form of citizenship' or which were not aligned with EU practices.

A similar image transpired in the EU's statements on the ILC's work on the protection of persons in the event of disasters which, much like the draft articles on the expulsion of aliens, sought to develop international law towards a stronger protection of human rights. As the next section shows, however, the outcome of this project met with a warmer welcome as far as the EU was concerned.

[84] Statement Gussetti 2012 (n 46) para 68.
[85] Statement Gussetti 2014 (n 83) para 71.
[86] Statement Gussetti 2012 (n 46) para 57.
[87] See Chapter 1, section 4.

## 3. The protection of persons in the event of disasters

### 3.1. Introduction

Three years after the ILC began its work on the expulsion of aliens, one more topic contending directly with the protection of individuals was introduced into the ILC's programme of work: namely, the protection of persons in the event of disasters.[88] Eduardo Valencia-Ospina, a Columbian lawyer and politician with a longstanding career in the UN system, elected to the ILC in 2006, was appointed to lead this project.[89] Special Rapporteur Valencia-Ospina submitted a total of eight reports between 2008 and 2016, resulting in the adoption of a set of eighteen articles on disaster law in 2016.

The articles seek to strike a 'delicate balance ... between the paramount principles of sovereignty and non-intervention on the one hand and the no-less-vital protection of the individuals affected by a disaster on the other'.[90] They cover both natural and manmade disasters and address both vertical and horizontal relationships (between victims, the affected state and assisting actors, and between the affected state and assisting actors, respectively).[91] They codify the main principles governing disaster situations (as derived from international, regional and bilateral instruments of hard and soft law) as well as obligations of conduct and of result concerning cooperation in the reduction of the risk of disasters, the provision of disaster relief within a state's territory, the facilitation of external assistance and, where 'a disaster manifestly exceeds [a state's] national response capacity', the request for external assistance.[92] Some of the draft's rules are expressly aimed at progressively developing international law. As noted by an external expert group commenting on the project as adopted on first reading (2014), some of these rules – such as article 3 (definition of disaster), article 13 (duty of the affected state to seek assistance) or article 14 (consent of the affected state to

[88] 2006 ILC Report (A/61/10) para. 257; UNGA Res. 61/34 of 4 December 2006; UNGA Res 62/66 of 6 December 2007.
[89] 2007 ILC Report (A/62/10) para 375.
[90] ILC, 'Eighth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur', 2016 (A/CN.4/697) ('Valencia-Ospina Eight Report') para 28.
[91] See art 3 PPED. See also, Sean D Murphy, 'Protection of Persons in the Event of Disasters and Other Topics: The Sixty-Eighth Session of the International Law Commission' (2016) 110 American Journal of International Law 718, 2.
[92] See inter alia, arts 4-7 and art 11 PPED.

external assistance) – represent 'original construction[s]', 'independent primary obligations of conduct' or 'a fundamental advancement for international disaster law'.[93]

The debates on disaster law could count on the consistent participation of both technical and general international organizations. In addition to the EU, six UN specialised agencies and related bodies or organizations submitted information to the ILC on this topic,[94] alongside the Association of Caribbean States (CARICOM), the Council of Europe, the World Bank (WB), the International Committee of the Red Cross (ICRC), and the International Federation of the Red Cross and Red Crescent Societies (IFRC).[95] The articles adopted in 2016 include multiple references to the 2017 IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,[96] as well as an express reference to states' duty to cooperate with the UN and relevant components of the Red Cross and Red Crescent Movement in the fulfilment of their obligations under the draft articles.[97] More specifically, the article's commentary expressly acknowledges

[93] Giulio Bartolini, Tommaso Natoli and Alice Riccardi, Report of the Expert Meeting on the ILC's Draft Articles on the Protection of Persons in the Event of Disasters (International Disaster Law Working Paper Series 03/2015) 4-5. See also, Dire Tladi, 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?' (2017) 16(3) Chinese Journal of International Law 425.

[94] See inter alia, FAO, 'Comments and observations by FAO on the draft articles on protection of persons in the event of disasters adopted on first reading by the International Law Commission at its 661h session' <https://legal.un.org/ilc/sessions/68/pdfs/english/pop_fao.pdf>; IOM, 'IOM comments and observations on the International Law Commission Draft articles on the protection of persons in the event of disasters with commentaries' <https://legal.un.org/ilc/sessions/68/pdfs/english/pop_iom.pdf>.

[95] CARICOM, 'Written Contribution' <https://legal.un.org/ilc/sessions/68/pdfs/english/pop_acs.pdf>); Council of Europe, 'Extract from response received from the Council of Europe on 25 November 2014' <https://legal.un.org/ilc/sessions/68/pdfs/english/pop_council_of_europe.pdf>; ICRC, 'ICRC comments on The ILC Draft Articles on The Protection of Persons in the Events of Disasters' <https://legal.un.org/ilc/sessions/68/pdfs/english/pop_icrc.pdf>.

[96] The Commentary to art 3 PPED, for instance, refers to the definition of 'disaster' included in the 2007 IFRC Guidelines as broader than the one adopted by the PPED, and the Commentary to art 6 PPED notes that the phrase 'particularly vulnerable' is based on article 4(3)(a) of the IFRC Guidelines. Commentary to art 3 PPED, paras 3 and 13; Commentary to art 6 PPED, paras 6-7. See also, commentary to art 4 PPED, para 3; Commentary to article 17 PPED, para 5; Commentary to article 15 PPED, para 3; IFRC, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (30IC/07/R4 annex).

[97] Commentary to art 7 PPED, paras 7-8. See also art 3(e) and art 8 PPED; Commentary to art 4 PPED, para 16.

the role that international organizations and other non-state actors play in disaster relief:

> Much of the activity in the field of disaster response, and to a certain extent in that of disaster risk reduction, occurs through organs of intergovernmental organizations, non-governmental organizations and other non-State entities such as IFRC.[98]

The EU participated actively in these debates. The Commission LS referred to the ILC's decision to include this topic in its programme of work as 'particularly opportune', and a means of promoting 'the objective of advocating respect for, and strengthening of, the international legal regime pertaining to protection of persons in the event of disasters'.[99] A total of six EU statements were delivered on this project between 2008 and 2014.[100] Much as in the debates on the expulsion of aliens, EU statements on this project coincided with the adoption, at the EU level, of key legal instruments approximating EU member states' practice in disaster relief and assistance. These include Decision 1313/2013/EU on a Union Civil Protection Mechanism (CPM), adopted in 2013, and Regulation 375/2014 establishing the European Voluntary Humanitarian Aid Corps, adopted in 2014.[101]

The following section first contextualises these statements in relation to the EU's powers in civil protection and humanitarian aid, before examining how the LS confirmed or contested the draft rules advanced by the ILC in this project. This analysis demonstrates how the LS presented EU practices as being aligned with, and strengthening, fundamental principles of international human rights and humanitarian law, while at the same time emphasising the importance of this project being grounded on the established practice and consent of states.

[98] Commentary to art 4 PPED, para 5.
[99] Statement Gussetti 2011 (n 24) para 52.
[100] See Annex I.
[101] Decision 1313/2013/EU of the European Parliament and the Council on a Union Civil Protection Mechanism OJ L 347 (20 December 2013) ('CPM Decision') later amended by Regulation 2021/836 of the European Parliament and of the Council of 20 May 2021 (PE/6/2021/REV/1) OJ L 185 (26 May 2021); Regulation No 375/2014 of the European Parliament and of the Council of 3 April 2014 establishing the European Voluntary Humanitarian Aid Corps OJ L 122 (24 April 2014) later repealed by Regulation 2021/888 of the European Parliament and of the Council of 20 May 2021 establishing the European Solidarity Corps Programme (PE/30/2021/INIT) OJ L 202 (8 June 2021).

### 3.2. EU powers and practices in situations of disaster

While intergovernmental cooperation between EU member states on matters of disaster relief and assistance dates back to the 1980s, the EU's powers in this field have mostly been developed in the last two decades.[102] Civil protection and humanitarian aid, as the two main EU competence areas relevant to the response to global emergencies, are framed in the EU Treaties as a primary responsibility of EU member states, carried out with the assistance, coordination, and capability-building support of the EU. The EU's role in this context, therefore, is a primarily supportive one.[103] The EU dimension enhances the coordination and effectiveness of EU member states' action, with due account for the implications that crisis management has on the exercise of member states' sovereignty and on the sovereignty of third states.

EU powers are based on two distinct (and complementary) legal bases: one internal, and one external. Internally, the EU has the competence 'to support, coordinate or supplement' its member states' actions in civil protection.[104] The exercise of these competences does not supersede the exercise of competence by EU member states; rather, it complements it. Two emblematic examples of the exercise of EU powers based on article 196 TFEU are the 2007 Civil Protection Financial Instrument, the 2012 European Solidarity Fund, and the Civil Protection Mechanism (CPM) that followed it.[105] In 2019, RescEU also came to reinforce the CPM by creating a reserve of

[102] IFRC, 'Analysis of Law in the European Union pertaining to Cross-Border Disaster Relief' (2010) <https://disasterlaw.ifrc.org/sites/default/files/media/disaster_law/2020-09/193300-Analysis-of-law-in-EU-EN.pdf> 6.

[103] Bart Van Vooren and Ramses Wessel, *EU External Relations Law: Text, Cases and Materials* (1st edn, CUP 2014) 312. cf. Robert Schütze, 'The European Community's Federal Order of Competences: A Retrospective Analysis' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties* (Hart 2009) 63, 74-75 (arguing that the non-pre-emptive effect of EU competence in humanitarian aid competence is but temporary).

[104] Arts 6(f) and 196 TFEU. See Florika Fink-Hooijer, 'The EU's Competence in the Field of Civil Protection (Article 196, Paragraph 1, a–c TFEU)' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff, 2014) 137.

[105] Council Decision 2007/162/EC of 5 March 2007 establishing a Civil Protection Financial Instrument OJ L 71 (10 March 2007) repealed by the CPM Decision; Council Regulation 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund OJ L 311 (4 November 2002). See also Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause OJ L 192 (1 July 2014).

resources (the 'rescEU reserve') specifically earmarked to 'respond to health emergencies, and chemical, biological, radiological, and nuclear incidents'.[106]

Externally, the EU Treaties accord the Union with the power, together with its member states, to carry out 'activities and [to] develop a common policy' on the delivery of humanitarian aid.[107] Article 214 TFEU, in particular, gives the EU competence to conclude international agreements with 'third countries and competent international organizations' on the provision of 'ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters'. EU humanitarian aid operations are governed by a 1996 Council Regulation, and the European Consensus on Humanitarian Aid sets out the 'common vision' guiding EU and its member states' action in this field.[108] The EU's external participation in humanitarian aid and assistance missions is largely coordinated by the European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO) and the Council Working Party on Humanitarian Aid and Food Aid (COHAFA). Importantly, the EU is involved in numerous joint initiatives together with UN, the ICRC, and other international and humanitarian organizations with respect to third countries' capacity building, response and recovery in disaster situations.

It is against this backdrop of EU law and the growing exercise of EU powers in this field that the statements prepared by the LS on the ILC draft articles on the protection of persons in the event of disasters are couched.

[106] European Commission, Communication from the European Commission to the European Parliament, the Council and the Committee of the Regions. Strengthening EU Disaster Management: rescEU Solidarity with Responsibility (COM/2017/0773 final).
[107] Arts 4(4) and 214(1) TFEU.
[108] Council Regulation 1257/96 on humanitarian aid OJ L 163 (2 July 1996) amended by Regulation 1882/2003 of the European Parliament and the Council of 29 September 2003, Regulation 219/2009 of the European Parliament and the Council of 11 March 2009, and Regulation 2019/1243 of the European Parliament and the Council of 20 June 2019 ('Humanitarian Aid Regulation'); Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008/C 25/01), 'The European Consensus on Humanitarian Aid. The humanitarian challenge' OJ C 25 (30 January 2008) ('EU Consensus on Humanitarian Aid').

These statements position the EU as a 'key actor' providing 'an important share of international humanitarian aid' and with 'much experience to share'.[109]

### 3.3. Confirmation: The EU as an international disaster relief actor

This positioning is of particular importance, not only because it concerns a field where EU powers are 'supportive' to those of its members, but also because the EU, as a multipurpose organization, is far from the first international actor that comes to mind when one thinks of disaster relief or crisis management. These debates, therefore, accorded the European Commission with an important discursive space to project an image of the EU (and seek its recognition) as an increasingly relevant international disaster relief actor. In addition to explaining in some detail EU powers and relevant practices, EU statements illustrate this rhetoric in different ways.

For instance, these statements repeatedly requested that regional integration organizations (RIOs) be expressly mentioned in the draft.[110] In the LS's view, the draft's reference to intergovernmental and non-governmental organizations did not accord sufficient recognition for the EU's role in this process. RIO is an interchangeable descriptor of regional economic integration organization (REIO), well-known as a 'code name' for the EU and already relied on by the LS in its statement on the ILC work on the responsibility of international organizations (discussed in chapter 4).[111] Special Rapporteur Valencia-Ospina certainly did not intend to exclude the EU from this legal regime, as his response to this EU request at the 2011 Sixth Committee session otherwise confirms.[112] Yet, for the European Commission, if the UN and the ICRC were expressly mentioned in the text, RIOs should be as well. This accorded the EU's role both visibility and legal recognition.

[109] Statement Gussetti 2011 (n 24) para 52; Statement by Ms Cujo (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 4 November 2013 (A/C.6/68/SR.23) para 30.
[110] See Statement Gussetti 2011 (n 24) para 57; Statement Gussetti 2012 (n 46) para 73; Statement Cujo (n 109) para 32.
[111] See Esa Paasivirta and Pieter-Jan Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) 36 Netherlands Yearbook of International Law 169, 211. See also, Chapter 4, section 4.2.
[112] Statement by Mr Valencia-Ospina (Special Rapporteur on the protection of persons in the event of disasters), Sixth Committee, Summary record of the 25th meeting, 31 October 2011 (A/C.6/66/SR.25) para 60.

> ... the reference in those draft articles to the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations might raise the question as to whether the provisions also included regional integration organizations, such as the European Union. In order to dispel any doubts on that score, [the EU] suggested that regional integration organizations should be expressly mentioned in the draft articles or that their inclusion should be made clear in the commentaries.[113]

To assert the relevance of EU practices in this context, much as it had done in its statements on previous ILC projects, the LS argued here that the exercise of powers by the EU in this field was relevant to the assessment of the practice not only of its member states but also of third states and international organizations beyond the EU regional order. For instance, these statements draw the Special Rapporteur's attention to the fact that the CPM extends to non-EU member states such as Norway, Iceland, and Liechtenstein. They also reference the fact that the satellite imagery produced by the EU Global Monitoring for Environment and Security (GMES) programme is available 'not only to European Union actors but also to other international actors' and that the Union is a leading provider of funding for disaster relief operations carried out by external partners.[114]As argued by Lucio Gussetti, addressing the Sixth Committee on 27 October 2011:

> The practical outcome [of the exercise of EU competence on humanitarian aid] was the provision of funding to some 200 partners, including non-governmental organizations, United Nations agencies and other international organizations such as the International Committee of the Red cross, the International Federation of the Red cross and the Red Crescent Societies and a number of specialized agencies from European Union member states.[115]

Most EU statements confirming ILC rules likewise emphasise how these draft rules are largely reflected in, and strengthened by, EU practices. As such, this discourse also reinforces the relevance of the EU's own practices by reference to international law and the practice of other international organizations, drawing on the authority of these organizations to confirm that of the EU. The LS made comments on seven of the ILC's draft rules and at

[113] Statement Gussetti 2011 (n 24) para 57.
[114] ibid, paras 53-54; Statement Gussetti 2012 (n 46) para 71.
[115] Statement Gussetti 2011 (n 24) para 52.

different points in time, established parallels between their content and EU instruments.[116]

For instance, EU statements endorsed draft articles 10 and 11 advanced by the ILC, which set out the primary duty of states to provide disaster relief and to seek external assistance when a disaster 'manifestly exceeds [the state's] national response capacity'.[117] The LS 'concurred with the premise' of these rules – which is otherwise reflected in the agreed practices at the EU level, notably, the European Consensus on Humanitarian Aid, the Civil Protection Financial Instrument, and the 'right to international humanitarian assistance' foreseen in Council Regulation 1257/96 on humanitarian aid.[118] The LS's defence of a 'people-focused' approach to designing these rules was also anchored on the legal regime formed by these EU instruments.[119] The same holds true for the EU's strong support for the draft's rule on the reduction of the risk of disasters, and its backing of a prevention-focused approach to disaster relief.[120] The LS's proposal concerning what later became draft article 9 (reduction of the risk of disasters), for instance, was to include the concept of 'resilience', as reflected in the EU Consensus on Humanitarian Aid and confirmed by the UN Hyogo Framework for Action, to which the Consensus itself refers.[121]

[116] ibid, paras 55-57. See also, Statement Gussetti 2012 (n 46) paras 70-72.
[117] See arts 10 and 11 PPED.
[118] Statement Gussetti 2011 (n 24) paras 55-56. See Humanitarian Aid Regulation, para 4.
[119] See Statement Gussetti 2012 (n 46) para 72; Statement Cujo (n 109) para 32; EU Consensus on Humanitarian Aid, paras 31-32; Humanitarian Aid Regulation, preamble, para 11: 'Whereas humanitarian aid decisions must be taken impartially and solely according to the victims' needs and interests'. See also, Valencia-Ospina Eight Report, paras 286, 288, 295 and 350.
[120] See Statement Cujo (n 109) para 30; Statement by Mr Cabouat (France), Sixth Committee, Summary record of the 24th meeting, 4 November 2008 (A/C.6/63/SR.24), para 81. See also, Valencia-Ospina Eight Report, para 44.
[121] Additional EU comments to draft article 9 included: a suggestion that the rule refer to 'systematic' measures and to the 'effective implementation' of legislation; that a reference be included to states' obligation to account for 'people and communities at risk and the infrastructure necessary to their well-being'; and that the text's reference to 'appropriate measures' include 'pre-emptive measures which assist people or communities in reducing their exposure and enhancing their resilience'. European Union, '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 81 on "Protection of persons in the event of disasters"', United Nations, New York, 4 November 2013; Statement Cujo (n 109) para 31. See also, World Conference on Disaster Reduction, 'Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters' (A/CONF.206/6), 4 and note 7; EU Consensus on Humanitarian Aid, para 75.

### 3.4. Contestation: EU reservations about rules imposing obligations of assistance

While the EU was a rather staunch supporter of this project, some of the LS's statements also reflect reservations regarding ILC proposals which could be seen as encroaching upon (member) states' sovereignty. This contestation brings to the fore one particular dimension of the EU's participation in these debates, namely the public international law nature of the rules discussed therein. As argued in chapter 2, the LS's decision to prepare statements on ILC projects is not solely based on the opportunity that these statements accord the EU to project its relevance as an autonomous international actor, but also on the idea that these statements might assist EU member states. This benefit would come from transferring to the Commission LS (and the EU delegate at the Sixth Committee delivering these statements) the task of explaining to an international audience the relevant legal developments within the EU legal order, and by drawing greater attention to member states' joint concerns – including concerns connected with the exercise of member states' sovereignty under international law – through the organization.

The LS's contestation of some of the ILC's draft rules in this project illustrates this dynamic. The predominantly rights-based approach endorsed by the EU was combined with a reiteration of the core premise underlying this legal regime: that the primary duty of assistance of a disaster-ridden population falls on the affected state, and that international rules must be based on well-established state practice and the customary law principles of sovereignty and non-intervention. As noted by the French delegate speaking on the Union's behalf at the Sixth Committee in 2008, although disasters were exceptional events, they did not warrant a departure from existing rules:

> Disasters were exceptional events, but that did not warrant departing from the body of rules which already existed, de lege lata, for providing relief and assistance to victims. The topic could be codified by striking a reasonable balance between identifying the customary law principles in the matter and determining their consequences for the specific mechanisms for ensuring protection (...). For the purposes of an eventual framework convention on the protection of persons in the event of disasters, the Commission should seek to identify the customary law principles governing the offer by States and international organizations of relief and assistance, and its acceptance by States, as well as the conditions for providing it. A close eye should be kept on the

> general practice of States and their own convictions as to their rights and obligations.[122]

This stance was then also reiterated by the Observer for the European Union and explains the reservations expressed in the EU statements regarding Special Rapporteur Valencia-Ospina's reliance on article 222 TFEU (the EU's 'solidarity clause') as evidence of practice supporting the existence of a state's duty, under general international law, to assist third states in cases of natural or manmade disasters. In his Sixth Report, Valencia-Ospina refers to this article as a norm of 'hard-law' which 'sets the [EU] apart from other regional coordination schemes'.[123] While the Commission LS did not contest that this rule might provide relevant evidence, it did react to this proposal with caution. EU statements thus underscored 'the latitude' that the EU Treaties accord EU member states in deciding whether or not to provide assistance to other members of the organization in case of a terrorist attack, or following natural or manmade disasters.[124] Importantly, at the time of the ILC debates on this rule (and as otherwise stressed by the EU delegate at the Sixth Committee) discussions among EU member states were ongoing with respect to the implementation of this clause.

The LS likewise favoured a rule which left the affected state sufficient latitude to determine when a disaster 'exceeds its national response capacity', rejecting the proposals by some states that objective criteria should be used to determine when this requirement was fulfilled.[125] EU statements on draft article 11 (duty of the affected state to seek external assistance) instead 'welcomed the balance between the need to safeguard the national sovereignty of affected States on the one hand and the duty to cooperate on the other'.[126] The LS also suggested that the commentary to the text should explain what was meant by a state's 'arbitrarily withheld' consent to external assistance and that it should outline what kind of motivation would be deemed 'acceptable' for a state to

[122] Statement Cabouat (n 120) paras 80-81.
[123] ILC, 'Sixth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur', 2013 (A/CN.4/662) ('Valencia-Ospina Sixth Report') para 103.
[124] Statement Gussetti 2012 (n 46) para 70. See Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause OJ L 192 (1 July 2014).
[125] See Valencia-Ospina Eight Report, paras 225, 231 and 244.
[126] ibid, para 225.

refuse external assistance, endorsing a tactful, 'case-by-case approach' to the matter.[127]

Overall, the LS's statements on this project were rather positive. As exercises in the projection, through law, of the EU's relevance as an international (disaster relief) actor, and in the protection of EU member states' interests, they were mostly successful. The LS was pleased that some key EU suggestions made it into the ILC's final text or the commentaries, notably the express reference to RIOs – a point which, from an EU perspective, confirms the organization's relevance as an international actor in this field.[128] This probably explains the LS's overt willingness (even enthusiasm) for the EU to 'participate in any efforts' aimed at transforming these ILC draft articles into a binding convention.[129] The same enthusiasm marked the EU's statements on the ILC work on CAH, examined in the next section.

## 4. The prevention and punishment of crimes against humanity

### 4.1. Introduction

The ILC has a long legacy regarding the codification of rules of international criminal law. This legacy includes the 1949 principles of international law recognised in the Charter and judgments of the Nuremberg tribunal,[130] the discussion of questions of international criminal jurisdiction,[131] the adoption of the Draft Code of Crimes against the Peace and Security of Mankind,[132] and

[127] ibid, para 268.
[128] RIOs are expressly mentioned in the general commentary to the text. In addition, several of the suggestions made or supported by the EU are reflected in the final text. These include, inter alia: the regulation of both pre-and-post-disaster situations as well as 'complex' emergencies, not excluding armed conflict; the reference to satellite imagery as a form of technical assistance in the commentary to draft article 8 (forms of cooperation in response to disasters); the reference to the Sendai framework in the commentary to article 10 (cooperation for disaster risk reduction) as suggested by the EU and the UN Office for Disaster Risk Reduction; or the reference in the commentary to draft article 14 (conditions on the provision of assistance) to the special needs of vulnerable groups and to a needs-based approach to disaster relief. See General commentary PPED, para 3; commentary to art 1 PPED, paras 3-4; commentary to art 5 PPED, para 3; commentary to art 18 PPED, para 8; commentary to article 14 PPED, para 7. See also, Valencia-Ospina Eight Report, paras 168, 181, 185, 286, 288, 295, and 376.
[129] ILC, Statement by Mr. Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 20th meeting, 24 October 2016 (A/C.6/71/SR.20) para 44.
[130] UNGA Resolution 177 (II) of 21 November 1947; 1950 ILC Report (A/CN.4/34) para 97.
[131] 1950 ILC Report (A/CN.4/34) paras 128–145.
[132] 1996 ILC Report (A/51/10) para 50.

the drafting of the Rome Statute of the International Criminal Court.[133] At the time of writing, the ILC's attention is focused on the rules governing the immunity of state officials from foreign criminal jurisdiction,[134] while the topic of universal criminal jurisdiction has also been included in its long-term programme of work.[135]

The draft articles on the prevention and punishment of CAH are part of this legacy. The topic was included in the ILC's programme of work in 2014 with the appointment of Sean D. Murphy, Professor of International Law at George Washington University (US), as its Special Rapporteur.[136] The draft was advanced as a set of rules which 'would be both effective and likely acceptable to States, based on provisions often used in widely adhered-to treaties addressing crimes, as a basis for a possible future convention'.[137] The resulting regime fills a lacuna left by the absence of an international convention expressly addressing CAH, in a legal landscape otherwise populated by the 1949 Geneva Conventions and their additional protocols, the 1948 Genocide Convention, and the 1984 Convention against Torture.[138] The definition and punishment of CAH, by contrast, is still largely governed by the rules of the Rome Statute of the ICC and those of other international criminal tribunals, with the jurisdictional limitations that these statutes entail.[139]

[133] ibid, para 91.

[134] This topic was included in the ILC programme of work in 2007 with the appointment of Mr. Roman A Kolodkin as Special Rapporteur. In 2012, Concepción Escobar Hernández replaced Mr Kolodkin as Special Rapporteur. In 2021, the ILC discussed Ms Escobar Hernández's Eight Report on the topic. For a summary of the ILC work on this topic see ILC, 'Summaries of the Work of the International Law Commission. Immunity of State officials from foreign criminal jurisdiction' <https://legal.un.org/ilc/summaries/4_2.shtml>. See also, 2007 ILC Report (A/62/10) para 375.

[135] See 2018 ILC Report (A/73/10) Annex, 307ff.

[136] 2014 ILC Report (A/69/10) para 266.

[137] General commentary CAH, para 3.

[138] See inter alia, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (12 August 1949); Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (8 June 1977); Convention on the prevention and punishment of the Crime of Genocide 78 UNTS 277 (9 December 1948); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (10 December 1984).

[139] See arts 7 and 11-15, Rome Statute of the International Criminal Court 2187 UNTS 38544; arts 5-9, Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res 827 (25 May 1993) as amended on 17 May 2002; arts 3 and 5-8, Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) as amended on 13 October 2006.

In 2019, a full set of fifteen draft articles, including an annex with a procedure for the exchange of requests for mutual legal assistance, was adopted by the ILC on second reading and recommended to the UNGA for the purpose of adoption of a binding international convention.[140] The CAH articles are largely aligned with the Rome Statute and expressly avoid to conflict with existing legal regimes.[141] They include both negative obligations (such as the prohibition of non-refoulement) and a number of positive obligations of conduct or best efforts (such as states' obligation to assert jurisdiction over these crimes and to 'afford one another the widest possible measure of legal assistance in investigations, prosecutions and judicial proceedings').[142] Much like the momentum created at the time of the adoption of the Rome Statute, the CAH project attracted an unprecedented level of participation by civil society and international and non-governmental organizations.[143] Seven international organizations, one treaty body, two UN working groups, a number of UN special procedures mandate holders, as well as 700 non-governmental organizations and individuals submitted information on this topic.[144]

The draft articles themselves, while primarily addressed to states, also refer to the role of international organizations in the prevention and punishment of crimes against humanity. Draft article 4(b), for instance, imposes on states an obligation to cooperate with 'relevant intergovernmental organizations and, as appropriate, other organizations'. Draft article 14(9) encourages states to conclude 'agreements or arrangements with international mechanisms that are established by the [UN] or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity'.[145] There is explicit reference to Interpol in the context of

[140] 2019 ILC Report (A/74/10) para 42.
[141] General commentary CAH, para 4: 'The present draft articles avoid any conflicts with the obligations of States arising under the constituent instruments of international criminal courts and tribunals, such as the International Criminal Court as well as "hybrid" tribunals containing a mixture of international law and national law elements'.
[142] Art 5(1), art 3(2), art 4, art 7 and art 14 CAH.
[143] Paula Escarameia, 'Prelúdios de uma Nova Ordem Mundial: O Tribunal Penal Internacional' (2003) 104(2) Nação Defesa 11, note 30.
[144] See ILC, 'Fourth report on crimes against humanity by Sean D Murphy, Special Rapporteur', 2019 (A/CN.4/725) para 7; ILC, 'Crimes against humanity. Comments and observations received from Governments, international organizations and others', 2019 (A/CN.4/726 and Add.1 and Add.2).
[145] See also Commentary to art 14 CAH, para 21.

mutual legal assistance in the collection of evidence,[146] and also to the components of the International Committee of the Red Cross (ICRC), within the limits of their respective mandates.[147] Importantly, the draft expressly encourages states to establish the criminal, civil, or administrative liability of legal persons, where they find it 'appropriate' and in accordance with the limits of their national laws.[148]

The ILC's decision to undertake the study of this topic was strongly welcomed by the EU. The LS prepared the EU's written statement on the first full draft as presented in 2018, followed by statements at the Sixth Committee sessions in 2019 and 2020.[149] The following sections provide a brief overview of the EU's powers and relevant practices in this field, and also examine the EU's statements on this project, notably, their confirmation and contestation of the ILC's text. What distinguishes the LS's position with respect to this text is the absence of contestation as such. EU statements on this project come closer to political confirmations, in the context of legal debates, of the EU's and its member states' commitment to the fight against impunity for international crimes, despite the EU's limited competences in this field.

### 4.2. EU powers and practices in the prevention and punishment of international crimes

Under the Lisbon Treaty, the Union has well-defined but limited powers to harmonise the substantive and procedural criminal law of its member states. EU competence in this respect is limited to de minimis harmonisation (by means of Directives) of a fixed set of legal issues, notably, the admissibility of evidence, the rights of victims of crime, procedural safeguards in criminal proceedings, and the prosecution and punishment of particularly serious cross-border crimes, including CAH.[150] Cooperation between EU member states in this field is based on mutual trust and mutual recognition, and any harmonisation beyond that foreseen in the Treaties requires the unanimous consent of all EU member states.[151] Member states may likewise request that draft directives on either procedural or substantive criminal law be reviewed by

[146] Annex CAH, para 2.
[147] Commentary to art 4 CAH, para 14.
[148] Art 6(8) CAH and Commentary, paras 42-43 and 45-46.
[149] See Annex I.
[150] Arts 82 and 83 TFEU. See Kai Ambos, *European Criminal Law* (CUP 2019) 319-323.
[151] Art 83 (1) TFEU. See Valsamis Mitsilegas, *EU Criminal Law* (Hart 2009) chapter 3, 115.

the European Council if they believe that the proposed rules 'affect fundamental aspects of [the member state's] criminal justice system'.[152]

These limitations notwithstanding, the EU has adopted several acts on police and judicial cooperation in criminal matters that have direct implications for EU member states' cooperation in the prosecution and punishment of international crimes. A 2003 Council Decision specifically addressed the commitment of member states to enhanced cooperation in this field and reinforced the institutional set-up of the EU's specialised network of contact points on the investigation and prosecution of genocide, crimes against humanity, and war crimes (Genocide Network) hosted by the EU Agency for Criminal Justice Cooperation (Eurojust).[153] The Network is tasked with enhancing EU member states' judicial and law enforcement cooperation, as well as building up their capabilities in the fight against core international crimes. In addition, there are several sectoral EU instruments on police and judicial cooperation in criminal matters which regulate member states' cooperation in this respect. Most emblematically, the European Arrest Warrant (EAW) Framework Decision eliminated the requirement of double criminality in intra-EU surrender procedures concerning individuals sought for the (alleged) commission of serious criminal offences, including CAH.[154] The same holds true for other EU instruments regulating the mutual recognition of criminal judgments, confiscation and freezing orders, and investigation orders.[155]

[152] Arts 82(3) and 83(3) TFEU.

[153] Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes OJ L 118 (14 May 2003); Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes OJ L 118 (14 May 2003).

[154] Art 2(2), Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190 (18 July 2002) ('EAW').

[155] Art 7(1), Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L 327 (5 December 2008); Annex D, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters OJ L 130 (1 May 2014); art 3(1)(30), Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders OJ L 303 (28 November 2018).

The EU also has noteworthy external powers in this field. A 2006 agreement between the EU and the ICC, for instance, sets out a specific regime for the Union's cooperation with this international court.[156] The agreement includes generic obligations of cooperation and consultation 'on matters of mutual interest', arrangements on the exchange of information, on privileges and immunities, and on the training of legal professionals.[157] The EU is expressly committed to 'advanc[ing] universal support for the Rome Statute of the International Criminal Court'.[158] Importantly, a number of partnership and cooperation agreements, as well as association agreements concluded by the EU and its member states, include a clause either confirming the parties' commitment to their obligations under the ICC statute or, more generally, confirming the parties' support for the court in the fight against international crimes.[159] These agreements have included, for instance, express references to the right of EU military missions to transfer individuals to the ICC.[160] The EU's ability to persuade third states to align their conduct with these EU commitments also extends beyond formal treaty relations. EU candidate countries, for instance, have avoided concluding agreements with the US which exempt US nationals from prosecution by the ICC, in anticipation of their accession to the Union.[161]

The LS's decision to prepare an EU statement on this project must be read against these legal developments and competences, combined with the EU's precedent of making statements on the fight against impunity for international crimes. In the 1990s, during the ILC debates on the drafting of

[156] Agreement between the International Criminal Court and the European Union on cooperation and assistance OJ L 115 (28 April 2006).
[157] ibid, arts 4, 7, 12 and 15.
[158] Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP OJ L 76 (22 March 2011).
[159] See art 5, Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part OJ L326 (09 December 2017); art 6, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part OJ L260 (30 August 2014).
[160] See art 7, Agreement between the European Union and the Central African Republic concerning detailed arrangements for the transfer to the Central African Republic of persons detained by the European Union military operation (EUFOR RCA) in the course of carrying out its mandate, and concerning the guarantees applicable to such persons OJ L251 (24 April 2015).
[161] Frank Hoffmeister, 'The Contribution of EU Practice under International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 117-118.

the Rome Statute, the EU and its member states strongly supported the establishment of the Court, referring to the ILC's work as a 'historically significant opportunity'.[162] The EU supported the permanent character of the court, the principle of complementarity, rules on due process and on the respect for the rights of victims of crime. The draft statute was, in the EU's view, part of the creation of 'a more just international order'.[163] Two decades later, EU statements refer to this legacy.[164]

### 4.3. Confirmation: The EU as an actor in the fight against impunity for international crimes

If confirmation is understood as an expression of agreement with ILC proposals, then as far as this project is concerned, it extended to the exercise as a whole. The LS did not dwell on specific draft rules as such. Rather, it endorsed the ILC's decision to undertake this work and conveyed the EU's support for the transformation of this ILC draft text into a binding international instrument. The statement delivered on behalf of the EU and its member states at the Sixth Committee meeting of 24 October 2020 makes this endorsement clear:

> We see the elaboration of a Convention as a major step towards strengthening the international criminal justice system and as an illustration of States working together to close gaps in international law. A new Convention would reinforce the legal framework on the criminalization of crimes against humanity and would facilitate national investigations, prosecution, and punishment of such crimes. The Convention would offer an additional legal tool to prevent and punish

[162] Statement by Mr Wathelet (Belgium) speaking on behalf of the European Community and its member States, Sixth Committee, Summary record of the 18th meeting, 26 October 1993 (A/C.6/48/SR.18) para 1; Statement by Mr Verweij (Netherlands) speaking on behalf of the European Union, Sixth Committee, Summary record of the 11th meeting, 21 October 1997 (A/C.6/52/SR.11) para 1.

[163] Statement by Mr Yáñez-Barnuevo (Spain) speaking on behalf of the European Union, Sixth Committee, Summary record of the 25th meeting, 30 October 1995 (A/C.6/50/SR.25) paras 50 and 52; ibid (Statement Verweij) para 3.

[164] ILC, 'Crimes against humanity: Comments and observations received from Governments, international organizations and others', 2019 (A/CN.4/726, Add.1 and Add.2), Comments by the European Union, 128.

> crimes against humanity at the national level and, at the same time, a new legal basis for inter-state cooperation on that matter.[165]

Much like in the projects so far examined in this chapter, the LS used these debates to provide an overview of the legal developments within the EU legal system which, in its view, should be accounted for by the ILC in its study of this topic. These statements often refer to EU law as a source of more detailed rules on these matters and emphasise the alignment between EU rules and principles and international law. The EU's written statement on this topic, for instance, includes a list of twelve EU legal acts governing judicial cooperation in criminal matters between EU member states (ranging from the EAW to the European Investigation Order), as well as references to the EU Treaties and to non-binding instruments such as the 2016 EU Global Strategy.[166] These instruments are presented as evidence of relevant practice 'for the benefit of the ILC and its work'.[167] Specific legal regimes – such as Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime – are likewise referred to as offering a 'substantive and detailed' set of rules, confirming the LS's perception of EU rules as particularly advanced forms of state conduct regulation.[168] In turn, EU statements establish an identity between EU rules and principles and international law. They refer to the prevention and punishment of core international crimes as a 'core principle of the European Union' and 'an integral part' of EU foreign policy.[169] Article 21 TEU, specifically, is advanced as evidence of the EU's commitment to 'the rule of law and the principles of international law'.[170]

[165] European Union, 'Statement on behalf of the European Union and its Member States at the Sixth Committee on the Agenda item 81: "Crimes against humanity"', United Nations, New York 14 October 2020 <https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/05mtg_eu.pdf>
[166] European Union, 'Written contribution of the European Union on the draft articles on crimes against humanity, as adopted on first reading by the International Law Commission at its 69th session, 27 November 2018' <http://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_eu.pdf&lang=E> ('EU Written Contribution CAH') 4-5.
[167] ibid, para 17.
[168] ibid, para 15; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime OJ L 315 (14 November 2012).
[169] Ibid (EU Written Contribution CAH) paras 5-6 and 9.
[170] ibid, paras 5 and 10.

### 4.4. Contestation (or its absence)

EU statements on this ILC project follow the same discursive pattern and argumentative structures that are found in other projects, but one. The LS did not contest any of the rules proposed by the ILC. Without speculating too much about the reasons for this particularity, some explanations can be advanced in this respect.

The ILC draft remains intentionally close to the Rome Statute, and it seems the LS was particularly pleased with this decision.[171] It should be recalled that EU member states were at the forefront of the establishment of the ICC, and the EU itself endorsed this legal regime. The fidelity of the Special Rapporteur Murphy's articles with the Rome Statute's text and his express commitment to deliver a text as 'acceptable' to states as possible, at least partially explain the absence of fundamental contestations of the draft from EU member states or from the EU as such. In addition, the nature of the topic itself arguably militates against EU contestation. Granted, EU member states have transferred to the organization powers for the harmonisation of police and judicial cooperation in the fight against international crimes. Their prosecution and punishment, however, remain connected with the exercise of sovereign prerogatives, as demonstrated by the limitations to EU powers in this field. Tellingly, at least one of the EU's statements on this project is indexed as a statement not by the EU but 'on behalf of the EU and its member states'. This indicates that the EU's participation in these debates was mostly in support of its members, who were themselves largely in favour of the text.[172] When discussing the EU's engagement with this project, one EU official remarked that in view of the EU's political commitment to the principles and rules of this project and the number of international organizations contributing to the debates, the absence of an EU statement on this topic would simply look 'odd'.[173]

Combined, these statements operate primarily as what another EU official called a 'diplomatic discussion about legal matters.'[174] They reiterate the

[171] ibid, para 13.
[172] Greece being the exception as far as the adoption of a convention based on the draft articles was concerned. See ILC, 'Fourth report on crimes against humanity by Sean D Murphy, Special Rapporteur', 2019 (A/CN.4/725) paras 22-29 and notes thereto.
[173] Interview 19 (17 March 2020).
[174] Interview 20 (27 March 2020).

joint commitment of EU member states to the cause and project an image of the EU as an actor with what the EU delegate at the Sixth Committee termed, 'a long-standing commitment to fighting impunity for the most serious crimes of concern to the international community as a whole', and thus a relevant actor also in the development of international law in this respect.[175]

## 5. The protection of the atmosphere

### 5.1. Introduction

One final project deserves examination in this chapter: the ILC Guidelines on the Protection of the Atmosphere. The analysis of this project in the context of this research is relevant not simply for the sake of completeness. EU statements on this project also represent the EU's first engagement with the ILC's work on international environmental law, notwithstanding the existence of an express legal basis establishing a Community competence in this respect since the 1987 Single European Act,[176] and the ILC's larger legacy in the codification of international environmental law.[177] The LS's decision to engage with this project should be contextualised within the EU's broader efforts to profile itself as a leading global actor in environmental protection. Specifically, these statements are singled out for the manner in which the LS used these debates to draw

[175] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 28 October 2019 (A/C.6/74/SR.23) para 42.

[176] Single European Act OJ L 169/1 (29 June 1987), Title VII ('Environment'), arts 130r–t (Title XX, arts 191-193 TFEU). The absence of an express legal basis in the Treaties prior to the SEA amendment did not prevent the Community from adopting relevant legislation in this respect, either based on (now) article 115 TFEU or on (now) article 352 TFEU. See inter alia, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds OJ L 103 (25 March 1979).

[177] This topic integrates a larger legacy of ILC codification of rules of international environmental law. To date, this body of work has included the adoption of draft articles on the law of transboundary aquifers, work on the topic of protection of the environment in relation to armed conflict (ongoing at the time of writing) and, most recently, the inclusion in the ILC's programme of work of a project devoted to sea-level rise in relation to international law. See ILC, Draft Articles on the Law of Transboundary Aquifers, 2018 ILC Report (A/63/10) para 53; 2019 ILC Report (A/74/10) chapter VI ('Protection of the environment in relation to armed conflicts') paras. 58–71; 2021 ILC Report (A/CN.4/740) chapter IV ('Sea-level rise in relation to international law') paras 240-296.

attention to and promote parallel EU international efforts, notably in the negotiation and implementation of the Paris Agreement on Climate Change.[178]

The ILC's decision to study the international law implications of the protection of the atmosphere was outlined in its long-term programme of work in 2011.[179] In 2013, Shinya Murase, Professor of Law at Jochi University (Japan), was appointed Special Rapporteur to this project,[180] following the footsteps of his predecessor, Ambassador Chusei Yamada, who had previously led the ILC's study on shared natural resources (law of transboundary aquifers).[181] When this topic was included in the ILC's programme of work, however, several states expressed reservations about the technical nature and political implications of the project.[182] The scope of the topic was, notably, subject to strict conditions from the outset. A '2013 Understanding' on the project's design, resulting from informal consultations and preliminary work on the topic by a group of ILC members (including Special Rapporteur Murase, Sean Murphy, Georg Nolte, Dire Tladi, Marcelo Vázquez-Bermúdez, and Sir Michael Wood), delimited the project's scope.[183] Its output would be centred on the development of 'draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein'.[184] Importantly, several aspects were *ab initio* removed from the study,

[178] Sebastian Oberthür and Lisanne Groen, 'The European Union and the Paris Agreement: leader, mediator, or bystander?' (2017) 8 WIREs Clim Change 1.

[179] 2011 ILC Report (A/66/10) Annex B. See also, ILC, 'First report on the protection of the atmosphere, prepared by Mr Shinya Murase, Special Rapporteur', 2014 (A/CN.4/667) ('Murase First Report') paras 1-4.

[180] 2013 ILC Report (A/68/10) para 168.

[181] For a summary of the ILC work on this topic see ILC, 'Summaries of the Work of the International Law Commission. Shared natural resources (Law of transboundary aquifers)' < https://legal.un.org/ilc/summaries/8_5.shtml>. See also, ILC, Draft Articles on the Law of Transboundary Aquifers, 2018 ILC Report (A/63/10) para 53.

[182] See inter alia, Statement by Ms Belliard (France), Sixth Committee, Summary record of the 20th meeting, 26 October 2011 (A/C.6/66/SR.20) para 48; Statement by Ms Noland (Netherlands), Sixth Committee, Summary record of the 28th meeting, 4 November 2011 (A/C.6/66/SR.28) para 64; Statement by Mr Jahangiri (Islamic Republic of Iran), Sixth Committee, Summary record of the 27th meeting, 2 November 2011 (A/C.6/66/SR.27) para 52; Statement by Ms Guo (China), Sixth Committee, Summary record of the 19th meeting, 2 November 2012 (A/C.6/67/SR.19) para 52; Murase First Report, para 3.

[183] ILC, Summary record of the 3197th meeting, 9 August 2013 (A/CN.4/SER.A/2013) paras 29-32.

[184] 2013 ILC Report (A/68/10) para 168 was worded as follows:

> 'The Commission included the topic in its programme on the understanding that:

including 'the liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries'. It was likewise expressly noted that the proposed rules were not intended to 'fill gaps', 'impose on current treaty regimes', or 'interfere with relevant political negotiations, including those on climate change'.[185] The preamble to the final draft adopted by the ILC in 2021 refers expressly to this agreement:

> *Recalling* that the present draft guidelines were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein[186]

The limitations to the project's scope have been strongly criticised by international law scholars (including some ILC members) who see in it 'a regressive approach' to the codification of international law.[187] At the same time,

> (a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;
> (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to "fill" gaps in the treaty regimes;
> (c) Questions relating to outer space, including its delimitation, are not part of the topic;
> (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.
>
> The Special Rapporteur's reports would be based on such understanding.

[185] ibid. See also, Preamble POA, para 8 and Guideline 2 POA.
[186] Preamble POA, para 8.
[187] Nilüfer Oral, 'The International Law Commission and the Progressive and Codification of Principles of International Environmental Law' (2019) 13(6) FIU Law Review 1075, 1099; Peter

this is the first ILC project to address the protection of the global commons, indigenous populations, populations affected by sea-level rise, and also the first one to include a compliance mechanism.[188] The twelve guidelines adopted by the ILC on first reading in 2018 and the text adopted by the Drafting Committee on second reading in 2021, identify a set of state obligations concerning the protection of the atmosphere, its equitable, reasonable and sustainable use, the exercise of due diligence in activities aimed at the large-scale modification of the atmosphere, and international cooperation in the protection of the atmosphere from pollution and degradation.[189]

In view of the technical-scientific dimension of atmospheric depletion, this drafting exercise counted on the involvement of the scientific community and of specialised international organizations, such as the World Meteorological Organization (WMO), with whom Special Rapporteur Murase held regular consultations.[190] The guideline's commentary, in turn, makes ample reference to the practice of international organizations.[191] Guideline 8, specifically, sets out the obligation of states 'to cooperate, as appropriate, with each other and with relevant international organizations' to ensure adequate protection of the atmosphere, in particular through measures which enhance 'scientific knowledge' of atmospheric pollution and degradation.[192]

Following the structure of the previous sections, the following sections draw the reader's attention to EU competences and practices in the field of the environment (notably atmospheric protection) that are relevant to understanding the statements prepared by the Commission LS on this project.

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H Sand and Jonathan B Wiener, 'Towards a New International Law of the Atmosphere?' (2016) 7 Goettingen Journal of International Law 195.

[188] See Guideline 9(3) POA; ibid, commentary, para 18.

[189] Guidelines 3-8 POA.

[190] Interview 2 (4 June 2019).

[191] The forms of practice include decisions, studies and reports adopted by international organizations. For instance, the commentary to the Guidelines' preamble relies on the WTO Appellate Body report in *United States-Standards for Reformulated and Conventional Gasoline* (1996) WT/DS2/AB/R to support the statement that the atmosphere is seen as an 'exhaustible natural resource', and on a 2009 study by the International Maritime Organization (IMO) on greenhouse gas emissions when referring to human activities with a direct impact on the oceans. Commentary to the Preamble POA, paras 1 and 6, notes 14 and 34. The commentary to Guideline 1 (use of terms) likewise notes that the definition of 'pollution' used in the Guidelines is based on art 1(a) of the 1979 Convention on Long-Range Transboundary Air Pollution 1302 UNTS 217 (13 November 1979). Commentary to Guideline 1 POA, para 7.

[192] Guideline 8 POA; ibid, commentary, paras 8 and 13.

These statements are then examined as acts of confirmation and contestation of the ILC's work. They demonstrate how the LS positioned the EU as a leading global actor in environmental protection, presenting EU rules as aligned with (and shaping) international developments. The text also examines how the LS contested ILC guidelines which not only ran counter to EU rules and practices but, specifically, to the EU's international efforts in the negotiation of treaty regimes such as the Paris Agreement. These statements are singled out by the way in which they underscore the ILC's responsibility in promoting compliance with environmental law standards.

## 5.2. EU powers and practices in environmental protection

Environmental protection occupies a special place in the EU Treaties. Article 11 TFEU requires that environmental concerns be accounted for across all EU policies, while article 191 TFEU sets out the Union's ambitious objectives in this field.[193] While EU competence in this context is, in principle, limited to minimum harmonisation rules, the exercise this competence based on articles 191 to 193 TFEU has resulted in the approximation of EU member states' practice in a remarkable array of environmental law matters. Relevant EU acts include, among others, the Habitat Directive, the Waste Directive, the Water Framework Directive, and the Landfill Directive.[194] There are also a number of EU instruments which specifically address the quality of the air, limits to the emission of specific pollutants, and the depletion of the ozone layer, including the Ozone Regulation and the Directive on atmospheric pollutants.[195] The former outlines rules on the production, import, export, sale, use, recovery, recycling, reclamation and destruction of substances that damage the ozone

[193] Art 191(1) TFEU.

[194] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206 (22 July 1992); Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives OJ L 312 (22 November 2008); Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste OJ L 182 (16 July 1999); Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327 (22 December 2000).

[195] Regulation 1005/2009 of the European Parliament and the Council of 16 September 2009 on substances that deplete the ozone layer (recast) OJ 286/1 (31 October 2009); Directive 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344 (17 December 2016).

layer, while the latter imposes national commitments for emission reduction concerning substances that deplete the atmosphere.

In view of the cross-border and global nature of environmental phenomena, the external dimension of this policy area is salient. The Union is tasked, in particular, with 'promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change'.[196] It has an express competence to cooperate with third countries and international organizations in the pursuit of objectives such as the improvement of the overall quality of the environment, promoting the sustainable management of global natural resources, and fighting climate change.[197] In the exercise of these powers, the EU has participated in the adoption of multilateral instruments within the UN Framework Convention on Climate Change (UNFCC) – most emblematically, the 2015 Paris Agreement and the 1998 Kyoto Protocol.[198] The EU is also a party to a number of international instruments specifically addressing the reduction of atmospheric pollution, including the 1979 Geneva Convention on Long-range Transboundary Air Pollution, and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[199]

As a whole, environmental policy is a field where the EU has been judged to effectively 'shape the climate' around it and to operate as a 'standard-setter' for international environmental norms.[200] Hoffmeister illustrates this formative effect of EU integration by referring to the manner in which both the 1991 Espoo Convention and the 1992 OSPAR Convention include provisions which are directly modelled on EU legal norms, and also to the ways in which

[196] Art 191(1) TEFU.
[197] Art 191(4) TFEU; art 21(2)(d) and (f) TEU.
[198] Paris Agreement to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/2015/L.9/Rev/1 (12 December 2015); Kyoto Protocol to the UN Framework Convention on Climate Change, 2303 UNTS 148 (11 December 1997).
[199] Council Decision 81/462/EEC of 11 June 1981 on the conclusion of the Convention on long-range transboundary air pollution
OJ L 171 (27 June 1981); Montreal Protocol on substances that deplete the ozone layer: Declaration by the European Economic Community OJ L 297 (31 October 1988).
[200] Christina Eckes, 'EU climate change policy: Can the Union be just (and) green?' in Dimitris Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (OUP 2013). See also, Christoph Knill and Jale Tosun, 'Hierarchy, networks, or markets: how does the EU shape environmental policy adoption within and beyond its borders' in Sandra Lavenex and Frank Schimmelfenning (eds), *EU External Governance. Projecting EU Rules Beyond EU Membership* (Routledge 2010).

the 2000 EU Water Framework Directive has been used as a frame of reference 'by many countries wishing to develop similar policies'.[201] The same sentiment underlies the CJEU's ruling in *Air Transport Association of America and Others*, discussed in chapter 1.[202] This case concerned the imposition of a EU greenhouse gas emission trading scheme to all flights departing from or arriving in the territory of EU member states. The EU Court noted that the disputed EU measures sought to preserve a higher standard of environmental protection and were, ultimately, an expression of the commitments assumed by the EU under international agreements, notably the Kyoto Protocol.[203]

It is against the role that environmental policy and cooperation play in EU integration, and the CJEU's narrative whereby EU rules both strengthen and develop international environmental law and standards, that the statements prepared by the Commission LS on the ILC guidelines on the protection of the atmosphere must be understood. The LS stressed that the EU 'appreciate[d] the work' of the Special Rapporteur on this topic and that the Union had a 'strong interest' in this project.[204] In addition to a written statement, EU statements were delivered at the Sixth Committee sessions in 2016, 2017, 2018 and 2021.[205] The statements included comments on eight of the twelve proposed guidelines, as well as on the preamble to the text.[206]

## 5.3. Confirmation: The EU as an international environmental actor

Much like the EU statements on other ILC projects examined in this chapter, those on the protection of the atmosphere revisit a discourse which seeks to ensure an alignment between the rules proposed by the ILC and EU law. They

[201] Hoffmeister (n 161) 122-123. See Convention on Environmental Impact Assessment in a Transboundary Context 1989 UNTS 309 (25 February 1991) (Espoo Convention); Convention for the Protection of the Marine Environment of the North-East Atlantic 2354 UNTS 67 (22 September 1992) (OSPAR Convention).

[202] See Chapter 1, section 4; Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864.

[203] ibid, para 128.

[204] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 24th meeting, 29 November 2016 (A/C.6/71/SR.24) para 52; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 24th meeting, 25 October 2018 (A/C.6/73/SR.24) para 103.

[205] See Annex I.

[206] The EU submitted comments on all but guidelines but guideline 4 (environmental impact assessment), guideline 5 (sustainable utilization of the atmosphere) and guideline 8 (international cooperation). EU statements nevertheless refer to some of these issues indirectly.

also reflect a particular understanding of the autonomous nature of the EU and its legal order. These statements project an image of the EU as a leading global actor that actively participates in legal developments on the international plane and which, together with its member states, is committed 'to real action to confront environmental threats'.[207] The LS establishes, in particular, an identity between EU values and rules and international law, at times drawing on the authority of international law to support EU positions. In doing so, these statements often establish the way in which EU action and EU rules shape international legal developments, advancing a positive dimension of EU external autonomy, whereby EU rules and external action effectively contribute to the development of international law.

The degree to which EU law is embedded in international legal developments is particularly important for this project. EU statements place a special emphasis on the external dimension of the pursuit of EU objectives on environmental protection. They reiterated the fact that '[p]rotection of the atmosphere required the involvement, not only of a single State or international organization, but of the international community as a whole' and that 'the protection of the atmosphere could not be achieved unless the international community worked to limit the degradation of that essential planetary resource'.[208] The wealth of references in EU statements to international instruments, UNGA resolutions and the practice of other international organizations attest to this embeddedness and support the relevance of the EU as an international actor in this field. These instruments include the Paris Agreement, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Gothenburg Protocol to the Convention on Long-range Transboundary Air Pollution, all of which count the EU as a treaty party.[209] EU

[207] Statement Gussetti 2016 (n 204) para 57.
[208] ibid, paras 55 and 55.
[209] Council Decision 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change OJ L 282 (19 October 2016); Council Decision 88/540/EEC of 14 October 1988 concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer OJ L 297 (31 October 1988); Council Decision 2003/507/EC of 13 June 2003 on the accession of the European Community to the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone OJ L 179 (17 July 2003). See Statement Gussetti 2016 (n 204) para 56; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 22nd meeting, 26 October 2017 (A/C.6/72/SR.22) paras 55, 60-61; Statement Gussetti 2018 (n 204) para 103.

statements establish a direct link between this external participation and the internal legal system of EU rules. For instance, the LS's suggestion that the preamble to the ILC text include references to specific international agreements, including the Montreal Protocol and the UNECE Convention on Long Range Transboundary Air Pollution, suggests that these instruments are 'reflected in the EU acquis', notably, the EU Atmospheric Pollutants Directive or the Sulphur Directive.[210]

The LS's confirmation of other draft guidelines proposed by the ILC likewise reflects the integration of these rules and principles within the EU environmental law regime. The LS endorsed, for instance, guideline 5 (sustainable utilisation of the atmosphere) a principle that has had legal expression in the EU Treaties since their Amsterdam amendment in 1999.[211] The same holds true for the confirmation of the express reference in the guidelines to the relationship between the protection of the atmosphere and international trade and investment law (guideline 9), other rules of international law (guideline 10), and international human rights law (guideline 12).[212] The LS welcomed these formulations in so far as they were aligned with EU internal rules (notably the cross-policy approach to environmental concerns expressed in article 11 TFEU) and external action (notably the EU-Canada Comprehensive Economic and Trade Agreement (CETA)).[213] Other examples of confirmation include the EU's position on guideline 12 (dispute settlement)

[210] See European Union, 'Written contribution of the European Union on the draft guidelines on the protection of the atmosphere, as adopted on first reading by the International Law Commission at its 70th session' <https://legal.un.org/ilc/sessions/72/pdfs/english/poa_eu.pdf> ('EU Written Contribution POA') para 2. See also, Directive 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants OJ L 344 (17 December 2016); Directive 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels OJ L 132 (21 May 2016).

[211] Art 2 of the Amsterdam Treaty tasked the European Community with promoting 'a harmonious, balanced and sustainable development of economic activities, sustainable and noninflationary growth'. Under the Lisbon Treaty, the fostering of sustainable environmental development and the development of 'international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources' form an integral part of EU foreign policy objectives. Art 2 Amsterdam Treaty; art 21 (2)(d) and (f) TFEU.

[212] The text adopted on second reading by the Drafting Committee streamlined these different guidelines into one single guideline. See Guideline 9 POA.

[213] Statement Gussetti 2017 (n 209) paras 57 and 59. See Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11 (14 January 2017) preamble, para 6.

which refers to the peaceful settlement of disputes and to the role of scientific and technical experts in the resolution of 'fact-intensive and science-dependent' disputes,[214] or on a rule on environmental impact assessment, a matter regulated at EU level through binding instruments such as the EU Environmental Impact Assessment Directive and the Strategic Environmental Assessment Directive.[215] In his final statement at the Sixth Committee on this project, Gussetti also drew a parallel between the formulation of guideline 8 (duty of cooperation) and article 191 TFEU, which reflects a similar wording.[216]

### 5.4. Contestation: The ILC's role in promoting the ratification of international agreements

Notwithstanding this broad or principological endorsement, the LS initially showed strong reservations about this project. EU statements strongly contested some of the project's limitations in scope and also objected to the effects that this choice might have on states' understanding of their international obligations, and on the development of international law as such. What singles out these EU statements from others examined in this chapter is how they also reflect the LS's use of this forum to complement the EU's efforts in the negotiation of international agreements and how they link this ILC project to the promotion of states' compliance with international law.

In his 2017 statement, Lucio Gussetti cautioned the ILC 'not to include in the guidelines on the topic concepts or wordings that were in conflict with existing international agreements on environmental law'.[217] He recommended, in particular, that the Special Rapporteur should carefully bear in mind the concept of 'common but differentiated responsibilities' included

[214] EU Written Contribution POA, para 8; Guideline 12 POA.
[215] Statement Gussetti 2016 (n 204) para 54; Guideline 4 POA. See also, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment OJ L 26 (28 January 2012); Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ L 197 (21 July 2001).
[216] Statement by Mr Gussetti (Representative of the European Union, in its capacity as observer), Sixth Committee, Summary record of the 16th meeting, 25 October 2021 (A/C.6/76/SR.16) para 38; Art 191(4) TFEU: 'Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned'.
[217] Statement Gussetti 2017 (n 209) para 54.

in the Paris Agreement,[218] and he underscored the distinction between the ILC's work (which he referred to as 'programmatic guidelines') and legally binding international agreements.[219]

The inclusion in the guidelines of the precautionary principle (in direct contradiction with the '2013 Understanding') was one point on which the EU was most insistent. This was notably emphasised with respect to guideline 7 (intentional large-scale modification of the atmosphere).[220] The reference therein to states' duty to exercise 'prudence and caution' when carrying out activities aimed at the large-scale modification of the atmosphere was considered insufficient by the EU delegation, and was seen as a watering down of existing international commitments. EU statements cautioned the ILC about the use of permissive language and provided an alternative formulation to this rule which would expressly include the precautionary principle. This would read as follows:

> Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to a positive assessment by all potentially affected States Members of the United Nations, members of United Nations specialized agencies or regional economic integration organizations, following a multinational environmental impact assessment based on the precautionary principle, public consultations and any other applicable rules of international law.[221]

EU statements clearly link the ILC's work with the promotion of the international community's compliance with environmental commitments.[222] These statements refer to ILC recommendations as contributing to 'the implementation of existing obligations in international law, such as those arising under the Paris Agreement', thus using these Sixth Committee debates to further EU diplomatic efforts elsewhere.[223] The LS seems to accord the ILC a

[218] ibid, para 56. See also, Statement by Ms Suvanto (Finland) speaking on behalf of the Nordic countries, Sixth Committee, Summary record of the 24th meeting, 25 October 2018 (A/C.6/73/SR.24) para 118; ILC, 'Protection of the atmosphere. Comments and observations received from Governments and international organizations', 2020 (A/CN.4/735).
[219] Statement Gussetti 2017 (n 209) para 54.
[220] Guideline 7 POA: 'Activities aimed at intentional large-scale modification of the atmosphere should only be conducted with prudence and caution, and subject to any applicable rules of international law, including those relating to environmental impact assessment'.
[221] Statement Gussetti 2018 (n 204) para 105; EU Written Contribution POA, para 4.
[222] Statement Gussetti 2016 (n 204) paras 55-57.
[223] Statement Gussetti 2018 (n 204) para 107.

direct responsibility in this process. The statements urge the body of Commissioners to draft a text which 'encourages states to join, ratify or implement relevant multilateral environmental agreements',[224] by at least including in the Preamble to the text a reference to international instruments whose ratification and implementation was lagging:

> Regarding the preamble, the European Union proposed the inclusion of references to the Montreal Protocol on Substances that Deplete the Ozone Layer and the need to ratify the Kigali Amendment to the Montreal Protocol; to the entry into force of the 2015 Paris Agreement and the need for its swift implementation; to the need to ratify the amended Gothenburg Protocol to the Convention on Long-range Transboundary Air Pollution; and to the need to appropriately reflect the forthcoming political declaration on pollution by the United Nations Environment Assembly, to be held in December 2017 and the Assembly's resolution on air pollution proposed by Canada and sponsored inter alia by the European Union.[225]

Although neither this long list of international instruments nor the precautionary principle made it to the ILC's final text, the EU's last statement on this project ended on a positive note. At the Sixth Committee, the representative for the EU simply noted that 'the draft guidelines built on a strong body of customary international law and conventions' and that the EU 'supported the [ILC's] recommendation that the General Assembly take note of the draft guidelines in a resolution and ensure their widest possible dissemination'.[226] Gussetti took this opportunity, in particular, to re-emphasise the relevance of cooperation with international organizations and noted that the EU would 'apply [the] draft guidelines in accordance with the powers conferred on it under the Treaty'.[227]

Taken together, these statements reflect not only a particular understanding of how the EU legal order is aligned with international environmental law, but also of the impact of the ILC's work, regardless of its 'programmatic' character, on states' understanding of international rules. Importantly, they also reflect the European Commission's understanding of EU law and external action as directly contributing to (and often leading)

[224] EU Written Contribution POA, para 2.
[225] Statement Gussetti 2017 (n 209) para 62.
[226] Statement Gussetti 2021 (n 216) para 36.
[227] ibid, para 38.

developments in international environmental law, as well as its growing interest in participating in debates on ILC topics addressing issues of environmental law. At the time of writing, the EU has submitted its preliminary remarks on the ILC's ongoing work on sea-level rise in relation to international law, and both EU and UN officials expect an active EU engagement with this project, notably in light of its implications for international legal regimes such as law of the sea, where the practice of the EU and its member states has become increasingly relevant.[228] It is therefore also expected that the rhetoric underlying the statements examined in this section might inform that of subsequent projects.

## 6. Accounting for the EU in the codification and development of rules in substantive areas of international law

This final section examines the references to the EU in the four ILC projects under analysis. The particularity of this exercise when performed in relation to these four projects rests in the statement with which this chapter started: that the EU is a multipurpose organization; simultaneously not specialised in the protection of migrants, the provision of disaster relief, the prosecution of international crimes, or the mitigation of atmospheric depletion, but nevertheless involved in all these activities, both at the regional and international levels. While the relevance of EU practices might be less evident for the identification of rules on disaster relief than that of the ICRC, references to EU practices are present throughout these four projects.

In developing the ILC draft articles on the expulsion of aliens, all but Special Rapporteur Kamto's Fourth Report include references to EU law. These range from European Commission communications and reports by the European Parliament on matters of migration policy,[229] the EU's participation

[228] Statement by Ms Gauci (European Union), Sixth Committee, Summary record of the 19th meeting, 28 October 2021 (A/C.6/76/SR.19) paras 72-73; Interviews 9 (30 July 2019 and 31 July 2019) and 22 (3 December 2020). See also, Esa Paasivirta, 'Four Contributions of the European Union to the Law of the Sea' in Jenő Czuczai and Frederik Naert (eds), *The EU as a Global Actor - Bridging Legal Theory and Practice. Liber Amicorum in honour of Ricardo Gosalbo Bono* (Brill Nijhoff 2017) 241.

[229] The SR relies on the Communication from the European Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health' COM(1999) 372 final (19 July 1999) to support the argument that the definition of 'public

in international bodies such as the Global Commission on International Migration,[230] mixed agreements concluded by the EU such as the EU-ACP Cotonou Agreement,[231] the Schengen acquis,[232] EU primary law (including numerous references to the EU Charter of Fundamental Rights (CFR)),[233] CJEU case law (at times explained in detail)[234] and, understandably, the Return Directive and the Citizens Directive.[235] In the ILC project on the protection of persons in the event of disasters, in turn, Valencia-Ospina's reports refer to EU practice in the context of mixed agreements, to EU primary law (namely the CFR)[236] and EU secondary law (such as Council Regulation 1257/96 on humanitarian aid),[237] as well as to EU external disaster relief actions, notably its

order' is not entirely left to states, as confirmed by the practice of the EU. Kamto Sixth Report, para 103 and note 128; Kamto First Report, 206.

[230] Kamto Second Report, para 28 and note 46.

[231] ibid, para 32 and note 52; Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 OJ L 317 (15 December 2000).

[232] Kamto Second Report, para 184.

[233] The EU Charter of Fundamental Rights and specific provisions therein – notably, arts 1 and 2 – are referred to by Special Rapporteur Kamto when discussing the concept of 'fundamental rights', the link between the right to life and the prohibition of the death penalty, and the definition of the concept of human dignity. See Kamto Fifth Report, paras 26, 57-58, and 70-71. See also, Charter of Fundamental Rights of the European Union C 202/390 (7 June 2016).

[234] The CJEU ruling in *Bonsignore* is relied on by the Special Rapporteur as an illustration of how the CJEU has interpreted relevant rules of EU law establishing that expulsion grounded on public order and public safety must be exclusively based 'on the personal conduct of the individual'. See ILC, 'Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur', 2010 (A/CN.4/625 and Add.1–2) ('Kamto Sixth Report') para 105 and note 132. See also, Case 67/74 *Bonsignore* [1975] ECLI:EU:C:1975:34.

[235] See Kamto Sixth Report, paras 106-116. Other EU secondary acts listed include Regulation 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security OJ L 355 (30 December 2002) referred to by the Special Rapporteur is his discussion of auxiliary measures adopted by EU member states in the context of removal of aliens.

[236] In his Third Report, the Special Rapporteur refers to the EU Charter of fundamental Rights as 'exemplary' evidence of a regional human rights instrument codifying the principle of non-discrimination and human dignity. ILC, 'Third report on the protection of persons in the event of disasters, by Mr Valencia-Ospina Special Rapporteur, 2010 (A/CN.4/629) paras 32, 55 and note 83. See also ILC, Valencia-Ospina Sixth Report, para 101-03 (referring to art 196 TFEU and the EU Treaties 'solidarity clause' of art 222 TFEU in the context of a discussion of EU competence and practice in civil protection).

[237] See Valencia-Ospina Third Report, para 30 and note 79 (referring to this EU act as an example of legal recognition of the principle of neutrality in the provision of humanitarian aid). See also, Humanitarian Aid Regulation, preamble, para 10.

operations in Haiti in 2010.[238] The same holds true for the ILC articles and reports on crimes against humanity which refer, for instance, to the codification of the principle of non-refoulement in article 19 CFR,[239] to EU declarations in the context of the UN Convention on Corruption,[240] and to the EAW Framework Decision.[241] The reports submitted by Special Rapporteur Shinya Murase the development of the ILC guidelines on the protection of the atmosphere, in turn, include references to multiple EU Directives as binding instruments that address aspects of atmospheric pollution,[242] CJEU case law interpreting EU instruments on environmental impact assessment,[243] and the CETA.[244]

References to EU practices in the final drafts as adopted on second reading, however, are scarcer. The articles on the expulsion of aliens adopted in 2014 refer to EU practices in 3 footnotes and the commentary to two draft articles.[245] Those on the protection of persons in the event of disasters include a single reference to the EU in the commentary to article 9 (reduction of the risk of disasters).[246] The text on crimes against humanity, in turn, refers to the EU in a handful of footnotes and in the commentary to draft article 13

[238] See ILC, 'Fourth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur', 2011 (A/CN.4/643) ('Valencia-Ospina Fourth Report') para 105.
[239] See ILC, 'Third report on crimes against humanity, by Sean D Murphy, Special Rapporteur', 2017 (A/CN.4/704) ('Murphy Third Report') para 98 and note 144.
[240] See Commentary to art 15 CAH, para 4 and note 658 (referring to the EU declaration to art 66 of the UN Convention on Corruption as an example of practice attesting of how states and international organizations may opt out of compulsory dispute settlement in international treaties which include criminal provisions). See also, Declarations by the European Union, 2003 United Nations Convention against Corruption 2349 UNTS 41.
[241] See Commentary to art 13 CAH, para 36 (referring to the criteria used by the European Arrest Warrant Framework Directive to deal with multiple requests for extradition as relevant or indicative practice).
[242] See Murase First Report (2014) 18-19. See also, ILC, 'Third report on the protection of the atmosphere, by Shinya Murase, Special Rapporteur', 2016 (A/CN.4/692) ('Murase Third Report') 49.
[243] See Murase Third Report, para 49 and note 166. The Court's interpretation of the EU Environmental Impact Assessment Directive is referred to as the Court's contribution 'in a decisive way to the effectiveness' of this legal regime. See also, Murase First Report, para 42.
[244] ILC, 'Fourth report on the protection of the atmosphere, by Shinya Murase, Special Rapporteur', 2017 (A/CN.4/705) ('Murase Fourth Report') para 26.
[245] Commentary to art 14 EOA, para 5.
[246] Commentary to art 9 PPED, para 5 (referring to the EU Civil Protection Mechanism and the European Commission Action Plan on the Sendai Framework for Disaster Risk Reduction 2015-2030 as evidence of 'widespread practice of States reflecting their commitment to reduce the risk of disasters'.).

(extradition),[247] while the guidelines on the protection of the atmosphere adopted in 2021 refer to the EU in the commentary to guideline 10 (implementation), noting that the national implementation of obligations related to atmospheric protection also includes 'obligations of regional organizations such as the European Union'.[248]

The manner in which EU practices are referred to in the design of these rules has been markedly varied. One particularity resulting from the subject-matter and nature of these projects is that EU practices are mostly understood as an expression of the regional practice of its member states. Under the draft rules on the expulsion of aliens, EU practices are referred to as those of 'a community of states'.[249] In the draft articles on the protection of persons in the event of disasters EU rules are, interchangeably, the expression of the practices of a regional (integration) organization or of the regional practice of its members.[250] At times, EU practices seem to be relied on as evidence supporting the existence of specific international rules or principles. For instance, in the context of the ILC's work on the protection of persons in the event of disasters, the Special Rapporteur refers to the CFR as 'exemplary' evidence of a regional human rights instrument codifying the principle of non-discrimination and human dignity,[251] and to Council Regulation 1257/96/EU on humanitarian aid as a 'a good example' of the application of the principle of neutrality in disaster situations.[252] In the identification of rules on the prevention and punishment of CAH, article 19(2) CFR provides evidence of the obligation of non-refoulement,[253] and the EU's declaration on article 66 to the UN Convention on Corruption illustrates the fact that states (and international organizations) may opt out of compulsory dispute settlements included in international treaties on criminal matters.[254] In turn, the reports addressing the development of guidelines on the protection of the environment

[247] Commentary to art 13 CAH, para 36 and notes 260, 469, 491 and 658.
[248] Commentary to guideline 10 POA, para 3.
[249] Kamto Ninth Report, paras 37 and 46.
[250] Valencia-Ospina Sixth Report, para 103; Statement Valencia-Ospina (n 112) para 60; Commentary to art 9 PPED, para 5.
[251] Valencia-Ospina Third Report, note 83.
[252] ibid, para 30 and note 79. See also, Valencia-Ospina Sixth Report, para 101-103 (referring to art 196 TFEU and the EU Treaties 'solidarity clause' of art 222 TFEU in the context of a discussion of EU competence and practice in civil protection).
[253] Commentary to art 5 CAH, para 5 and note 260.
[254] Commentary to art 15 CAH, para 4 and note 658.

refer to CETA as an instrument which confirms the parties' recognition of the relationship between trade and environmental policies.[255]

At the same time, several references to the EU reflect the ILC's understanding that the rules developed within the EU legal order often correspond to a specialised legal regime. In the context of disaster relief and assistance, the 'solidarity clause' of article 222 TFEU and the CPM are described as norms which set 'the Union apart from other regional coordination schemes'.[256] In the CAH project, the CFR serves as an example of a legal instrument with 'more specific standards binding upon States',[257] and the EAW criteria for dealing with multiple requests for surrender are an illustrative practice providing more detailed rules.[258] The same holds true for the guidelines on the protection of the atmosphere, where the Special Rapporteur's Third report notes that 'in comparison with a large number of international instruments, the [EIA] directive contains rather detailed provisions that have also been specified by many rulings of the European Court of Justice'.[259]

As noted, the ILC's decision to rely – or not to rely – on EU practices in formulating rules of general application depends on whether these rules are also supported by the established practice of states or other international organizations. Yet at times, this decision also relies on 'policy reasons', to use the wording of the ILC commentary to the articles on the responsibility of international organizations examined in the previous chapter.[260] The ILC project on the expulsion of aliens provides a good illustration of the often-elusive legal reasoning underlying these choices. What distinguishes this project from others is its reliance on EU law, at times in lieu of other international instruments or as a primary source of inspiration. For instance, in delimiting the content of public security as a ground for expulsion, Special Rapporteur Kamto noted that 'ICJ jurisprudence provides little assistance in defining this notion ... that of other international and regional courts, such as the Court of Justice of the European Union, [being] of greater interest with

[255] Murase Fourth Report, para 26.
[256] See Valencia-Ospina Sixth Report, paras 103-104.
[257] Commentary to art 11 CAH, para 7 and note 491.
[258] Commentary to art 13 CAH, para 36.
[259] Murase Third Report, para 49.
[260] See Chapter 4, section 1. See also, Commentary to art 9 ARIO, para 5; Commentary to art 25 ARIO, para 4.

regard to this question'.[261] The CJEU's understanding of the term is then said to be shared by other adjudicative bodies such as the International Centre for Settlement of Investment Disputes (ICSID).[262] Under this project, the regime of legal protections against expulsion accorded to EU citizens is seen as 'indicative of a trend' that should be transposed to international law at large.[263] EU law is likewise used as evidence for some of the specific rules proposed. For instance, proposed draft article D1 (voluntary return) expressly notes that paragraph 3 therein (requiring that the person expelled be provided with appropriate notice to prepare for departure) corresponds to a progressive development of international law, based on Directive 2008/115/EC, even though 'that Directive cannot be said to be well established in general international law'.[264] In formulating a rule on individuals' right to legal aid, in particular, the Special Rapporteur notes that the inclusion of this right in the draft corresponds to a progressive development drawn from the EU system:

> Although treaty law does not explicitly provide a basis for the right to legal aid, the Special Rapporteur believes that such a basis could be established, in line with progressive development of international law, by drawing on [EU] law, and also acknowledge an important trend in State practice, as had been revealed by the analysis of national legislation.[265]

Conversely, the Special Rapporteur also concluded that a number of EU practices espoused concepts which were 'still evolving', were 'extremely progressive', or which simply found no support in international law, such as the EU's reliance on the notion of a 'safe country' of origin in return proceedings.[266] Even where requirements resulting from EU legal rules were reflected in the final text of the draft or commentary, the Special Rapporteur was cautious, where possible, in supporting their authority on international references as opposed to EU law.[267] It should be recalled that some states strongly objected

[261] Kamto Sixth Report, para 96.
[262] ibid, para 97.
[263] ibid, paras 104-116, and 143-148.
[264] Kamto Sixth Report, para 417.
[265] ibid, para 389.
[266] ibid, para 490.
[267] See Commentary to art 14 EOA, para 4. The ILC refers to the prohibition of discrimination based on sexual orientation as one regarding which 'differences remain and in certain regions the practice varies', but which is nevertheless supported by the Human Rights Committee interpretation of the International Covenant on Civil and Political Rights. The inclusion of this

to Kamto's reliance on EU law in this codification process. The US delegation, for instance, cautioned that the draft articles

> ... should not seek to codify new rights, or to import concepts from such regional bodies as the European Commission or the European Court of Human Rights. Instead, they should reflect established principles of law set forth in widely ratified international human rights conventions.[268]

The diversity and specialisation of legal regimes such as that formed by the EU is incorporated into the ILC's drafts by virtue of the very default and general nature of the rules proposed. All of these drafts include clauses recognising the right of states to agree on more specific rules. Article 6 of the draft articles on the expulsion of aliens, for instance, notes that the draft's rules concerning the protection of refugees are without prejudice to 'any more favourable rules or practice'.[269] The commentary to article 14 (prohibition of discrimination), in particular, expressly notes that the draft 'preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.'[270] Draft article 18 of the articles on the protection of persons in the event of disasters, in turn, expressly notes that the proposed rules 'are without prejudice to other applicable rules of international law' and the commentary to draft article 3 (use of terms) notes that, in regulating the position of 'other assisting actors' in the delivery of humanitarian assistance, the rules do not purport to affect 'the differing legal status of these actors under international law'.[271] This legislative technique is replicated in draft article 2 of the CAH draft, which notes that the definition of crimes included therein is 'without prejudice to any broader definition provided for in any international

ground was also part of the EU's statements on this topic. See Statement Gussetti 2012 (n 46) para 59.

[268] Statement by Mr Simonoff (United States), Sixth Committee, Summary record of the 25th meeting, 29 October 2010 (A/C.6/65/SR/25) para 7.

[269] Art 6 EOA.

[270] Commentary to art 15 EOA, para 5. Further examples include the commentary to art 26 (procedural rights of aliens subject to expulsion) which notes that 'paragraph 2 should be understood to preserve any other procedural right an alien subject to expulsion may enjoy under a rule of international law, in particular one laid down in a treaty, which is binding on the expelling State', and the commentary to art 15 (vulnerable persons), which notes that '[t]he addition of the phrase "and other vulnerable persons" clearly indicates that the list included in paragraph 1 is not exhaustive'. See commentary to art 26 EOA, para 8; commentary to art 15 EOA, para 3.

[271] Art 18 PPED; Commentary to art 3 PPED, para 19.

instrument, in customary international law or in national law'.[272] Similarly, the guidelines on the protection of the atmosphere, due to their nature and their overtly subsidiary scope, note instead that they do not 'impose on current treaty regimes rules or principles not already contained therein'.[273]

## 7. Concluding remarks

This chapter brought together EU statements on four distinct ILC projects, all of which addressed the codification and progressive development of rules of substantive international law. It focused on the European Commission's understanding of the relationship between these draft rules and guidelines and EU practices, and its understanding of the EU's contribution to the development of public international law in these distinct fields. The analysis covered the expulsion of aliens, the protection of persons in the event of disasters, crimes against humanity, and the protection of the atmosphere. In doing so, it sought as well to determine whether there was a particular pattern underlying the EU's position on ILC draft rules that have expanded to cover rather distinct EU policy areas, and whether parallels could be drawn between these statements and those examined in the previous chapters.

The review of the EU's statements on these different projects supports the conclusion that, on these substantive areas of international law, and particularly in cases where EU competences are largely shared with or supportive of those of its member states, the Commission LS's decision in favour of an EU participation in these debates is mostly anchored on the projection of a positive dimension of EU external autonomy. On most of these topics, EU statements confirm the EU's growing role as an international actor – and as an actor that mostly 'strictly observes' international law rather than develops it. The LS has used these statements as an opportunity to explain EU powers and legal developments within the EU legal order (such as the adoption of the CPM or the Return Directive). The relevance of this exercise in an external context contends directly with EU autonomy. Unlike states, the relevance of EU practices is conditioned by its Treaty powers and is ancillary to that of states – it requires explanation, and justification.

[272] Art 2 CAH.
[273] Preamble POA, para 8; General commentary POA, para 2.

Unsurprisingly, the LS has mostly confirmed ILC proposals which reflect norms to which the EU itself ascribes, as reflected in EU acts or in international agreements to which the EU, or its member states, are parties. As demonstrated in this chapter, several of the LS's suggestions with respect to projects such as the draft articles on the expulsion of aliens or the guidelines on the protection of the atmosphere can be traced back to rules found in EU directives or international agreements to which the EU is a party. EU practices are often presented as being aligned with several of the rules proposed by the ILC and, importantly, the principles and values of the international legal order. They often establish an identity between the rules, values and principles of the EU legal system and international law, drawing on the authority of international law to reinforce the EU's own. This was notably the case of EU statements on the protection of persons in the event of disasters, or the draft articles on CAH.

Yet at times EU statements on these projects also betray a claim that EU acts and external action shape not only the practice of EU member states but also that of third states, thus contributing to the development of international law in these fields. This claim seems more marked with respect to the ILC articles on the expulsion of aliens and the ILC guidelines on the protection of the atmosphere and was mostly advanced through contestation of ILC proposals. This contestation centred on rules which, in the LS's view, deviated from EU practices, by reflecting either a 'regress' or an unsubstantiated 'progress' of international law. With respect to both topics, the LS considered that the ILC could have done more – that it could have proposed rules more protective of those expelled or could have been firmer with respect to states' environmental protection obligations. In this rhetoric, the standards of the EU's own legal order and of international agreements to which it is a party are presented as more progressive or advanced in this respect. This is a discourse already found in the case law of the CJEU examined in chapter 1 – one wherein the EU is at the forefront of legal developments in the promotion of human rights or environmental protection.[274]

By contrast, the LS has also contested rules which go beyond the obligations – including those pertaining to human rights – accepted by EU member states, or which rely on EU law to substantiate the development of international law in a manner which the LS perceives as interfering with EU

[274] See Chapter 1, section 4.

autonomy. This is true of its contestation of a rule on the automatic suspensive effect to appeals against expulsion. Or, also, of its contestation of a development of international rules in line with intra-EU protections against expulsion accorded on the basis of EU citizenship or free movement rights.

The ILC seems to recognise the relevance of the EU as an international actor, even in respect to the formation and development of rules not directly addressed to international organizations. All the projects examined in this chapter refer to the EU, to varying degrees. Several of the LS's suggestions are reflected in the final texts adopted by the ILC or in the commentaries thereto. At times, references to EU rules in Special Rapporteurs' reports or in the commentaries to ILC texts indicate a perception of the EU system as comprising more detailed rules or more progressive approaches to the regulation of states' conduct, such as in the expulsion of aliens or the surrender procedures for criminal investigation or prosecution. This has not prevented some Special Rapporteurs from relying on EU practices as 'inspiration' for the development of international law, although this reliance has at times been met with stern protest by state delegations at the Sixth Committee. The ILC itself has often noted that EU proposals refer too exclusively to its unique case and are thus not apt to serve as evidence of rules of general application. The reasoning that supports choices for or against the reliance on EU rules also at times betrays the ILC's own policy choices concerning the direction of international law's development.

# Conclusions | The Story Told

## 1. Introduction

This thesis set out to uncover a story – the one told by the European Union (EU) at the United Nations General Assembly (UNGA) Sixth Committee concerning the EU's relationship with, and contribution to, public international law. This story was examined by revisiting the statements prepared by the Legal Service (LS) of the European Commission concerning eleven different topics studied by the UN International Law Commission (ILC), a UNGA subsidiary body entrusted with the development of international law and its codification, between 1975 and 2021.[1]

By examining statements so far studied in isolation from each other, this study explored how these statements are prepared, discussed, coordinated, and delivered. It examined their substance and their relation to each other. In essence, this thesis examined *how* the EU has engaged with the work of the ILC and *what* this engagement tells us about the EU's own understanding of its relationship with, and contribution to, public international law.

This engagement was analysed by clustering EU statements around three themes: the law of treaties, international responsibility, and substantive areas of international law. It is now time to bring these together and to revisit some of their main findings, to take stock of the story told.

## 2. Overview: summary of the main findings

The assumption underlying this thesis was that this engagement, and these EU statements, offer important insights into how the European Commission understands the relationship between the EU and international law, and the EU's contribution to the development of the international legal order; that they offer an additional angle to a story so far mostly explored through the case law of the Court of Justice of the EU (CJEU).

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[1] The analysis covered statements delivered by the EU or on its behalf between the UNGA Sixth Committee's thirtieth session (1975) and this committee's seventy-sixth session (2021). See Introduction, section 3.4. See also, art 1, UNGA Resolution 174 (II), Statute of the International Law Commission (21 November 1947) last amended by UNGA Res 36/39 of 18 November 1981 ('ILC statute').

As demonstrated in this work, these statements are unique for several reasons. They are an expression of a by now established EU practice of engagement with the ILC, led by Commission legal advisers. Unlike other Sixth Committee statements – which are now mostly prepared by the European External Action Service (EEAS) and, specifically, the EU Delegation to the UN in New York – statements addressing the topics examined in this research are still prepared by the Commission LS in Brussels and are delivered mostly by staff of this LS, traveling to New York. At the same time, while most Council working groups are now chaired by the High Representative of the Union for Foreign Affairs and Security Policy, or by EEAS delegates on behalf of the High Representative, meetings of the Comité Juridique (COJUR), where EU statements on ILC topics are discussed, are still chaired by the state holding the Council Presidency.

These statements are also delivered in a unique setting, very much distinct from that of the CJEU. They are delivered at the UNGA Sixth Committee, a forum dominated by states and a growing number of observer organizations. As demonstrated in this thesis, EU statements on the work of the ILC are often perceived as the outcome of intensely coordinated views between the EU and its member states, but also as the statements of just one more international actor, and a non-state actor as such.[2] As far as Sixth Committee debates on the work of the ILC are concerned, therefore, the EU benefits from the reiteration of its views on international law and the EU's contribution to its development by the collective of its member states. Moreover, the ILC is a body busied with the codification and development of public international law. The rules it drafts are, as demonstrated in this thesis, strongly grounded on an assessment of states' practice – the relevance of the practice of international organizations in the development of international law is a matter which, while gathering growing attention, still warrants more serious consideration by this UNGA body.[3] EU statements on these topics are, therefore, delivered in a context where the relevance of the EU as an international actor might not be as self-evident as it perhaps stands in the legal imaginary of EU officials. Importantly, these statements are delivered in

[2] Interviews 1 (4 June 2019), 2 (4 June 2019) and 3 (9 July 2020).

[3] Janina Barkholdt, 'The Contribution of International Organizations to the Formation, Interpretation and Identification of International Law. Questions Arising from the Work of the International Law Commission' (2020) 18 International Organizations Law Review 1. See Chapter 2, section 2.4.

dialogue with international lawyers and often reflect the use by Commission legal advisers of the language and legal reasoning of international law to advance EU claims, and of international law's authority to support the EU's own.

Specifically, these statements are a relevant expression of the use by the Commission LS of 'diplomatic discussions about legal matters' to position the EU among, and in relation to, other members of the international community.[4] The content of these statements reflects an institutional conviction that EU practices are indisputably relevant to the development of public international law in a growing number of fields, from the law of treaties to the protection of the Earth's atmosphere. Importantly, these statements also reflect the importance that international law holds for the EU, and the role that EU lawyers have long played in advancing the claim that the EU is an entity which, in the words of article 3(5) of the Treaty on the European Union (TEU), not only strictly observes international law but also contributes to its development.

At the same time, these statements also betray the LS's awareness of the difficulties of seeing certain specificities of the EU, as a legal entity and a legal order, reflected or accounted for in rules of general application. The EU's final positions on ILC texts, and the Commission's overall degree of engagement with the ILC's work, reflect the 'political capital' the EU is willing to invest in persuading the international community to advance rules in line with EU practices. EU officials seem to share an understanding of the relevance of an EU presence in these debates but also of the moderate margin of influence the EU can exert in this context.[5]

The European Commission has thus mostly used this discursive space to familiarise an international audience with EU competences and with relevant developments within the EU legal order. EU practices are often presented not only as aligned with international law but as advancing this legal system. Unsurprisingly, the LS has endorsed draft rules, guidelines or conclusions that are in line with the rules, principles, and values of the EU's own legal order, often establishing an identity between these rules and values and those of international law. At the same time, as demonstrated in this research, the LS

[4] A term used by one EU official to describe UNGA Sixth Committee debates. Interview 19 (17 March 2020).
[5] Interviews 18 (6 July 2018), 19 (17 March 2020), 20 (27 March 2020) and 23 (4 December 2020).

has also at times used these debates to clarify contested aspects of the EU Court's case law, or to advance EU diplomatic positions in other fora.

Disagreement with the draft rules, conclusions or guidelines formulated by the ILC has likewise served an important function in this context. It has often allowed the European Commission to distinguish the EU from other subjects of international law and to safeguard the 'essential characteristics' of the EU legal order, as defined by the CJEU.[6] The greater the misalignment between the rules proposed by the ILC and these characteristics, the greater the LS's investment has been in persuading the ILC that EU practices are part of an established or emerging practice of states and other organizations, or in distinguishing the EU and its legal order from international law. Overall, the image that emerges is one tightly connected to, and governed by, a broader EU ambition to participate in the development of the international legal system while protecting the autonomy and integrity of its own legal order.

The 'unfriendliness' towards international law often ascribed to the EU Court's case law,[7] however, is difficult to ascribe to the Commission's engagement with the ILC. For all but two of the projects examined in this research, EU statements do not often reject the authority of the ILC's work or question its overall relevance for the EU. EU statements on more recent ILC topics have in fact stressed the importance of general international law in relation to the EU legal order.[8] The only two cases where the LS was more strongly against the draft rules proposed by the ILC concerned topics traditionally within Community competence, notably, the rules on most-favoured-nation (MFN) clauses in trade agreements and on the responsibility of international organizations (ARIO).[9] Overall however, the LS has largely avoided engaging in doctrinal debates. While EU statements have often emphasised the special regime that the EU forms in relation to general

[6] See Chapter 1, section 3.1. See also, Cristina Contartese, 'The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) 54 Common Market Law Review 1627.

[7] Jan Klabbers, 'Volkerrechtsfreundlich? International Law and the Union Legal Order' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011) 95.

[8] EU, 'Contribution of the European Union on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation' (2015) <http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/sasp_eu.pdf&lang=E>.

[9] See Chapter 3, section 3.1 and Chapter 4.

international law, the LS has mostly invested in endorsing a broad understanding of the principle of autonomy of international organizations – or, in Paul Reuter's words, of international organizations' right to their 'own legal image'.[10]

## 2.1. Patterns of engagement

The EU's participation in Sixth Committee debates concerning the ILC's work has not been a linear one, but it has by now grown into a permanent feature of EU institutional practice. The investment of the Commission LS in scrutinising the ILC annual report and selecting topics on which the EU might form a position began as early as 1975 and, despite some interruptions, has remained relatively constant since the early 2000s.[11] The way in which the EU has engaged with the ILC, however, has not been limited to the preparation of official statements. The LS's attempts to persuade the ILC of the EU's own reading of existing or emerging rules of international law has involved a diffuse process of formal exchanges within and at the margins of COJUR and UNGA Sixth Committee meetings, academic publications, and informal meetings, which have coalesced into an established practice of EU engagement with the ILC.

The choice of which ILC topics the EU should engage with was described by one EU official as governed more by a 'fingertip feel' than a formal strategy.[12] Chapter 2 combined information gathered during expert interviews with a descriptive analysis of the rules, principles and processes that

[10] 1974 ILC Report (A/9610/Rev.1) 299, paras 3 and 6 (commentary to art 6 (capacity of international organizations to conclude treaties)).

[11] The analysis of EU statements at the UNGA Sixth Committee addressing the ILC Annual Report shows a fluctuating level of engagement, measured by reference to the number of statements. Following a period of regular statements (1975–83), focused on the ILC's draft articles on most-favoured-nation (MFN) clauses and the draft articles on treaties between states and international organizations or between international organizations, there was an interregnum (between 1984–91 and 1996–2002) interrupted only by statements on the establishment of the International Criminal Court (1992–5). EU statements on the ILC work resumed in 2003, addressing the draft articles on the responsibility of international organizations (ARIO), and have remained a permanent feature since. See ILC, Draft articles on most-favoured-nation clauses, 1978 ILC Report (A/33/10) chapter II, para 74 ('MFN'); ILC, Draft articles on the law of treaties between states and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63; ILC, Draft articles on the responsibility of international organizations, 2011 ILC Report (A/66/10) chapter V, para 87 ('ARIO'). For the list of EU statements on each of these projects see Annex I.

[12] Interviews 19 (17 March 2020) and 21 (9 April 2020).

govern this engagement, to offer an image of the institutional practices that inform it. It brought the reader into a scene populated by different actors (the ILC membership, the legal advisers of EU member states and of the EU institutions) and carried out in different spaces (Geneva, Brussels, and New York). It demonstrated how normative considerations also underly the EU's engagement with the ILC, notably: whether, all things considered, there is a shared understanding that the EU *should* speak on the existence or emergence of rules of public international law and the EU's contribution to their development. This normative aspect is important when one considers the very subject matter of these statements and the fact that the ILC's work is primarily focused on the practice of states. As shown in this thesis, the statements prepared by the Commission LS have concerned topics as diverse as MFN clauses, the expulsion of aliens, and the prevention and punishment of crimes against humanity.

Competence, however, has played a different role in this engagement. While an emphasis on the existence of EU competence has been used by the Commission LS to project an image of the EU as an increasingly relevant international actor, disputes concerning which institution prepares or delivers these statements at the Sixth Committee, or about the existence or extent of EU competences, are largely unheard of. As noted by at least two EU officials interviewed in the context of this research, these statements convey EU policy, they do not establish it, and who delivers these statements in New York is a matter of little concern to the EU's international partners.[13] As such, the preparation and delivery of EU statements addressing the ILC annual report has resulted more from established practice rather than a strict inter-institutional delimitation of competences between legal advisers in the Commission, the Council and (now) the EEAS. As argued in this thesis, the preparation of these statements by the Commission LS is best explained by reasons of a practical and social-institutional order: the fact that this engagement began with statements on MFN clauses, the impetus given to this engagement by staff of the Commission LS during the debates on the ARIO, and the fact that the COJUR, in Brussels, remains the forum where these statements are discussed with the same member states' legal advisers that prepare Sixth Committee statements to be delivered in New York.

[13] Interviews 22 (3 December 2020) and 23 (4 December 2020).

Moreover, these statements also serve an important function for EU member states. As argued in chapter 2, EU statements relieve member states of the task of explaining EU legal developments or the complexity of EU powers and practices to an audience mostly comprised of international lawyers, and they often draw the international community's attention to collective EU concerns. The preparation of EU statements on ILC projects, therefore, reflects member states' acceptance of – or 'tolerance' towards – the EU's voice and visibility in this process. They are a manifestation of the idea that EU statements advance the collective interests of member states by vindicating their views on the status or direction of international law's development, and of the Commission LS's attention to these same member states' concerns. An appraisal of the topics regarding which the EU has decided *not* to formulate a statement also supports this conclusion. The topics omitted have ranged from issues connected strongly with the exercise of state sovereignty (such as the codification of rules on state officials' immunity from foreign criminal jurisdiction) to topics that are contested or 'politically sensitive' among the EU's membership (such as the identification of peremptory norms of general international law (*jus cogens*)).[14]

## 2.2. Confirmation and contestation

The concepts of confirmation and contestation were used in this research to categorise and structure the EU's position on the existence and development of international rules. As suggested in this work, they operate as discursive expressions of the positive and negative dimensions of EU autonomy – that is, they reflect the EU's claim to the ability to transform international law on conditions of equality with other actors, and its claim to self-govern over its own legal order.

Confirmation, as an expression of agreement with the draft rules, conclusions, or guidelines advanced by the ILC, has been used by the LS to project an image of the EU as an actor who, in the words of article 3(5) TEU, 'strictly observes' international law. Statements of this type have relied heavily on CJEU case law and EU dispute settlement practice (notably in the WTO

[14] Dire Tladi, 'Codification, Progressive Development, New Law, Doctrine, and the Work of the International Law Commission on Peremptory Norms of General International Law (Jus Cogens): Personal Reflections of the Special Rapporteur' (2019) 13(6) FIU Law Review 1137, 1141-1142.

context) to position the EU as an organization which abides by international law on the international plane and whose rules, values and interests on the institutional plane are aligned with, strengthen, or advance those of the international community at large. In doing so, the LS has often drawn on the authority of international law to support the EU's own positions. This has been particularly true with respect to the substantive areas of international law examined in chapter 5. With respect to these topics, EU statements often emphasise how the EU legal system is embedded in a broader network of bilateral and multilateral instruments.

This rhetoric not only positions the EU as a global actor but also often makes the claim that EU rules correspond to a more 'advanced' legal regime. Statements of this type reflect an image of the EU as a more 'developed' form of legal integration. Drawing from the topics explored in this thesis, examples of this can be found in the LS's references to the EU's civil protection mechanism, to EU rules on the surrender of individuals pursuant to a European Arrest Warrant, or to the breadth of safeguards accorded to third country nationals under the EU Return Directive. These legal regimes are portrayed as not only being aligned with international human rights and humanitarian law principles but also as advancing the application of these principles. At a broader level, therefore, confirmation contributes to reputation and justification. It allows the European Commission to profile the EU, in the presence of international actors, as a reliable international partner whose legal order and external actions find justification in, and advances, international law.

These statements have likewise provided the Commission LS with an opportunity to familiarise an international audience with EU practices and to assert the relevance of the EU as a global actor. They profile the EU as an actor with relevant practices on the conclusion and operation of treaties (chapter 3), the invocation or assumption of international responsibility (chapter 4), and in a growing number of areas of international activity, from criminal justice, to migration, disaster relief, and environmental protection (chapter 5). In doing so, these statements position the EU as an 'active contributor to shaping practice' relevant for, *inter alia*, the identification of rules on the provisional application of treaties;[15] a 'key actor' with 'much experience to share' for the

[15] Statement by Ms Cujo (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 9 November 2015 (A/C.6/70/SR.23) para 119.

ILC work on the protection of persons in the event of disasters;[16] or one of the organizations most impacted by the ILC project on the responsibility of international organizations.[17]

This research also demonstrates how debates at the Sixth Committee have provided the LS with an important platform to explain developments within the EU legal system. ILC projects often coincided with the adoption, at the internal level of the EU, of key legal instruments harmonising EU member states' approach to third-country nationals or promoting inter-state cooperation on civil protection, such as the EU Return Directive or the EU Civil Protection Mechanism.[18] Competences and their exercise, while not central to ILC debates as such, have been central to the EU. They have been used by the Commission LS to justify the authority of EU views and the relevance of the EU's participation in these debates. This claim is an important one. It reflects an awareness by the European Commission of the fact that, unlike the practice and the views of states, the relevance of EU practices and views to the formation and transformation of international law requires affirmation, and justification.

Contestation likewise forms an essential part of how the LS defines the EU's relationship with international rules and how it, at times, defends a distinct (EU) direction to international law's development. The LS's disagreement with ILC draft rules reflects the measure of development of international law the EU is willing to endorse and the manner in which the EU has sought to influence this direction, or distance itself from this system of default rules. The LS has primarily contested ILC proposals which differ from the system of rules at the EU level, and which create disincentives to integration among EU member states. Echoing the CJEU's understanding of the relationship between

[16] Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 21st meeting, 27 October 2011 (A/C.6/66/SR.21) para 52; Statement by Ms Cujo (Observer for the European Union), Sixth Committee, Summary record of the 23rd meeting, 4 November 2013 (A/C.6/68/SR.23) para 30.

[17] Statement by Mr Kuijper (European Commission), Sixth Committee, Summary record of the 14th meeting, 27 October 2003 (A/C.6/58/SR.14) para 13; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 18th meeting, 24 October 2011 (A/C.6/66/SR.18) para 38.

[18] For instance, EU statements on the ILC's draft articles on the expulsion of aliens (starting in 2009) followed the adoption of the EU Return Directive (in 2008). Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (2008) OJ L 348; Statement by Mr Hetsch (European Commission), Sixth Committee, Summary record of the 18th meeting, 28 October 2009 (A/C.6/64/SR.18) para 79.

EU and international law, these statements have often contested rules which, in the LS's view, disturb the 'essential characteristics' of the EU legal order, or which run counter to the 'allocation of responsibilities' and 'the allocation of powers' in the EU Treaties.[19] The LS has likewise contested rules which might extend the responsibility of its member states – for instance, for 'acceptance of responsibility' for the acts of the organization[20] – or which might limit its member states' discretion to provide or consent to international assistance.[21] Contestation is not, therefore, solely centred on a projection or protection of EU autonomy; it has also been used to protect EU member states' sovereignty. Importantly, contestation has been transversal to all the EU statements concerning the ILC's work, with the notable exception of the draft articles on crimes against humanity, to which the EU tabled no objections.[22]

To persuade the ILC of its reading of international law, the LS relied on this juridical community's language and methods. It often argued that EU rules or international practices are not only an expression of the regional practice of EU members but also shape the practice of third states and other organizations. EU rules on the removal of third country nationals, for instance, are presented as informing the practice of EU neighbouring countries, while EU rules on civil protection or humanitarian aid are seen as relevant for the analysis of the practice of third states and international organizations. Rare are the occasions, however, where the LS was adamant that EU rules should serve as a model for the design of rules of general application. The few cases where this claim was made were, as demonstrated in this thesis, cases in which the LS perceived ILC draft rules as a potential threat to the EU's integration model, or where the LS had a vested interest in defending the legitimacy of EU rules or international efforts in the presence of international actors. Where this was the case, the LS argued, for instance, that ILC proposals found no footing in existing state practice or *opinio juris*; that they incorrectly construed emerging

[19] See Chapter 1, section 3. See also, Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345, para 123; Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 282.

[20] See Chapter 4, section 4.3.2; ILC, Responsibility of international organizations: Comments and observations received from international organizations, 2011 (A/CN.4/637) 36.

[21] See Chapter 5, section 3.4; ILC, Eight Report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur, 2016 (A/CN.4/697) paras 225, 231 and 244.

[22] See Chapter 5, section 4.4.

'trends' in international practice; that they insufficiently accounted for the diversity of international organizations; or that the EU's own proposed amendments to the draft rules, even if seemingly limited to its unique case, were of relevance to international organizations which might come to reach the EU's level of integration.

Different cases illustrate this conclusion. EU statements on the MFN project, where the non-recognition of a 'customs-union exception' was perceived by the European Commission as a challenge to EU integration, carry the sketch of a customary law analysis. In the LS's view, the multiplication of these exemptions in international agreements served as evidence of the emergence or crystallisation of a rule of custom. The same holds true for the statements on the ARIO. Here, the LS invested most significantly, including through academic publications, in establishing that a special rule had emerged in international practice governing the attribution of member states' acts to the EU in line with the distribution of competences defined in the EU Treaties and in the case law of the CJEU. In doing so, the LS's analysis relied heavily on case law of regional and international dispute settlement bodies. In the context of substantive areas of international law, in turn, EU statements on the expulsion of aliens are indicative of a similar trend. In contesting Special Rapporteur Kamto's suggestion that the protections against expulsion accorded to EU citizens might serve as a model for the development of international rules according all aliens with enhanced protection, the LS argued that this progressive development of international law found no footing in international practice, and was contrary to the unique nature of the EU's 'own legal order and its own form of citizenship'.[23] Finally, EU statements on the ILC guidelines on the protection of the atmosphere reflect the LS's use of these statements to galvanise the international community into complying with environmental law standards championed by the EU elsewhere, notably in the negotiations of the Paris Agreement.[24] They place on the ILC a direct responsibility for encouraging 'states to join, ratify or implement relevant multilateral environmental agreements' and in promoting 'the implementation of existing international law obligations'.[25] In doing so, these statements reflect not only

[23] Statement Hetsch (n 17) para 7.
[24] See Sebastian Oberthür and Lisanne Groen, 'The European Union and the Paris Agreement: leader, mediator, or bystander?' (2017) 8(1) WIREs Clim Change 445.
[25] European Union, 'Written contribution of the European Union on the draft guidelines on the protection of the atmosphere, as adopted on first reading by the International Law Commission

the EU's negotiating role in these international instruments but also the LS's use of these debates to reinforce EU external action in other fora.

### 2.3. The role of autonomy in the story told

These instances of contestation and confirmation give credence to the argument advanced in chapter 1 and demonstrated throughout this thesis: that the CJEU narrative concerning the autonomy of the EU and its legal order permeates the discourse of EU actors on the international plane.[26] Specifically, that this narrative provides the background story to the story told by the Commission LS at the Sixth Committee. It explains the LS's positions and preferences concerning the existence or emergence of rules of international law, and the direction of development of the international legal order.

The distinct or 'exceptional' nature of the EU, as a legal entity and a legal order, has been a recurring theme in EU statements. In line with, and on the shoulders of, the case law of the CJEU, EU statements at the Sixth Committee have repeatedly told a story that distinguishes the EU treaties, and the EU legal system as such, from international law. The narrative whereby the EU Treaties, unlike 'ordinary international treaties', are 'more than an agreement' between contracting parties,[27] explains the LS's position on a number of rules proposed by the ILC. It has been particularly marked in EU statements on what this thesis called 'procedural' topics of international law – those on treaties, custom, and the responsibility of international organizations – but has equally resurfaced in EU statements on substantive areas of international law.

The EU's understanding of its right to self-govern – of its autonomy – explains why EU statements on the law of treaties applied to international organizations focused on including in the ILC's draft a broad definition of 'rules of the organization' and of the principle of autonomy of international

at its 70th session', para 7 <https://legal.un.org/ilc/sessions/72/pdfs/english/poa_eu.pdf>; Statement by Mr sGussetti (Observer for the European Union), Sixth Committee, Summary record of the 24th meeting, 25 October 2018 (A/C.6/73/SR.24) para 107.

[26] As noted in the Introduction, this thesis relied in part on Bordin's distinction between the 'international plane' and the 'institutional plane'. Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019) 8-9.

[27] Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66; Case 26-62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

organizations.[28] They explain why EU statements on the relevance of subsequent agreements and subsequent practice in the interpretation of treaties, or on the effects of armed conflicts on treaties, were grounded on a strict juxtaposition between the application of rules of international law to the interpretation of international agreements concluded by the EU, on the one hand, and their irrelevance for the interpretation, suspension or termination of the EU Treaties, on the other.[29] They explain the LS's contestation of a progressive development of international law which might extend to third country nationals protections against expulsion originally accorded to EU citizens alone, by force of the EU's 'own legal order and its own form of citizenship'.[30] And they also explain the LS's contestation, in the debates on the ARIO, of the 'generic assumption that the rules of an organization belong to the sphere of international law' – an assumption which, in the words of the Observer for the EU at the Sixth Committee, while 'correct for traditional international organizations' does not 'appear to correspond to the situation of the European Union' whose 'internal order is separate from international law'.[31]

The EU itself has often been defined in these statements as an entity at 'an advanced stage of regional integration'.[32] The definition of the EU as a legal entity, as far as these debates are concerned, however, has been context sensitive. It has varied over time, and in function of the rules in relation to which it is uttered. With respect to ILC projects on the law of treaties and the ILC conclusions on the identification of customary international law, the EU's self-image has been closer to that of a state rather than an international organization. In these debates, the definition of the EU as an entity with sufficient 'relevant similarities' to be assimilated to a state is instrumental to the LS's claim that, in the conclusion of treaties or the identification of custom, the EU should be accorded a treatment at least 'no less favourable than that given

[28] In the context of the ILC's work on the law of treaties. See Chapter 3, section 3.2.1.
[29] See Chapter 3, sections 4.1.2 and 4.3.2., respectively.
[30] In the context of the ILC's work on the expulsion of aliens. See Chapter 5, section 2.4.
[31] ILC, Responsibility of international organizations: Comments and observations received from international organizations, 2011 (A/CN.4/637) 146.
[32] 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; Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, Summary record of the 19th meeting, 20 November 2015 (A/C.6/70/SR.19) paras 83-84.

to international organizations',[33] and that EU practices should be recognised as relevant to the formation or identification of these rules.[34] With respect to these topics, the LS has refrained from referring directly to the EU as an international organization, instead emphasising the degree of powers transferred by EU member states to the organization.

By contrast, as far as other ILC projects are concerned, the LS has, in line with international legal scholarship, predominantly profiled the EU as an international organization with some 'specificities'.[35] Since the delivery of EU statements on the ARIO, the LS has consistently relied on the legal category of regional economic integration organization (REIO) or a regional integration organization (RIO)when discussing the relevance of, and the relationship between, EU practices and rules of international law.[36] It has argued for the express recognition of this legal category in ILC drafts, ranging from the ARIO to the draft articles on the protection of persons in the event of disasters.[37] For the EU, this classification has two advantages. On the one hand, it allows the Commission LS to claim that EU practices are relevant for ILC norm-drafting processes addressing the legal position of international organizations (such as the ARIO) or regulating member states' cooperation with international organizations (such as those examined in chapter 5). On the other hand, it also allows the LS to distinguish the EU's legal nature, and legal order, from that of other subjects of international law.

The story that these statements tell about the EU's understanding of its relationship with, and contribution to, public international law, is one largely aligned with the CJEU's narrative of EU autonomy. The statements prepared on the MFN or the ARIO projects, for instance, are part of, and aligned with, the broader narrative of the CJEU concerning the protection of the essential characteristics of the EU legal order and 'the implementation of the process of

[33] Statement by Mr Peters (Luxembourg), speaking on behalf of the European Economic Community, Sixth Committee, Summary record of the 44th meeting, 11 November 1980 (A/C.6/35/SR.44) para 13.
[34] Statement Gussetti (n 31) para 84. See also, Bordin (n 25) 49ff.
[35] See inter alia, Kuijper (n 16) para 13.
[36] See Jed Odermatt *Internaltional Law and the European Union* (CUP 2021) 18, 201-202.
[37] Statement Kuijper (n 16) para 13; ILC, Responsibility of international organizations: Comments and observations received from international organizations, 2004 (A/CN.4/545) 5; Statement Gussetti (n 15) para 57.

integration that is the raison d'être of the EU itself'.[38] In the same vein, the view that the EU legal order embodies a more 'advanced' system of rules – found in the few Court cases addressing the idea of development of international law discussed in chapter 1[39] – underlies some of the statements analysed in chapter 5. In these, the EU legal system is viewed as part of a larger trend towards a progressive development of international rules or as a more developed form of these rules.

In sum, the safeguarding of both a positive (projection) and a negative (protection) dimension of EU external autonomy permeate the discourse of EU actors at the international level. Both these dimensions inform the EU's ambition to contribute to the development of international law, and also explain and limit the ambit of possible arguments advanced by the LS with respect to the topics discussed by the ILC. By preparing statements relaying the EU's views on the development of international law and its relation to EU practices, therefore, the Commission participates in a process both of projecting and of protecting EU rules not only *from* international law but also *through* it.

The difficulties of reconciling this discourse of distinction with a claim of transformation of rules of general application, however, explains the LS's combined recourse in its statements to two types of legal arguments. One of these conveys how EU rules and practices have a formative effect on the practice of third states and other international organizations; and the other argues that these rules correspond to a 'better', more 'progressive' or 'evolved' version of existing practice, which should be emulated by the international community. The awareness of this difference, and of the broader legal and political considerations involved in the act of formulating an EU position on the public international law topics examined in this research, also explains why the LS has shied away from expanding on the 'issues of doctrine' that have dominated ILC debates. The Commission has avoided voicing an institutional position on the question of whether the EU fits within the ILC's definition of an international organization, on the origins of international organizations' treaty-making powers, or on whether all international organizations or perhaps just some might be *jus generative* forces capable of contributing to 'the

[38] Case *Opinion 2/13* [2014] ECLI:EU:C:2014:2454, para 172. See also Case *Opinion 1/91* [1991] ECLI:EU:C:1991:490, para 17.
[39] See Chapter 1, section 4.

formation or expression' of rules of customary international law.[40] Instead, the LS has limited itself to asserting, repeatedly, that by virtue of the EU Treaties, of the EU's degree of integration, and of the case law of the EU's Court, the EU *is* an international actor capable of concluding treaties and co-creating custom.

These reservations betray a larger sensitivity, already articulated by Wouters and Hermez, concerning the EU's participation in UNGA Sixth Committee debates: the suggestion that discussions on rules of international law held at this level might not be the best, or at least the most obvious, space for the EU 'to profile itself as an innovator and instigator of change'.[41] The same uniqueness that the EU often claims for itself, and which makes it a 'clear-cut' example of an organization capable of contributing to the formation or expression of rules of custom or with relevant practice for the ILC's work, also makes it - paradoxically - often not the best suited model for the formulation of rules of public international law.[42]

## 3. The reception of EU statements by the ILC

This conclusion relates to the last line of inquiry pursed in this thesis. While this was a study focused on the EU's discourse and ambitions, as articulated by the European Commission LS, their reception by the ILC formed a secondary, albeit not negligible, part of the analysis. The reception of the EU's story was addressed at the end of each of the substantive chapters (chapters 3 to 5), drawing on interviews and the analysis of the references to, and use of, EU practices in the ILC's work.

The review of the ILC's approach to the EU in the eleven projects examined in this research reveals a reserved recognition by the ILC of the relevance of EU practices for the identification and development of rules of public international law. References to the EU have featured, to varying degrees, in Special Rapporteurs' reports, ILC annual reports, and the

[40] See Chapter 3, section 3.2.1., and Chapter 2, section 2.4., respectively.
[41] Jan Wouters and Marta Hermez, 'The EU's Contribution to "the Strict Observance and the Development of International Law" at the UNGA Sixth Committee' in Spyros Blavoukos and Dimitrios Bouratonis (eds), *The EU in UN Politics: Actors, Processes and Performances* (Palgrave 2017) 160.
[42] An argument made earlier in Teresa Cabrita, 'The integration paradox: an ILC view on the EU contribution to the codification and development of rules of general international law' (2021) 5(1) Europe and the World: A law review 1.

commentaries to ILC draft articles, guidelines or conclusions. The forms of practice cited have ranged from bilateral and multilateral treaties to which the EU is a party[43] to EU primary law[44] and secondary law,[45] to name but a few. On the one hand, the 'particularities' of the EU case have not prevented some Special Rapporteurs from relying on EU rules as 'inspiration' for the progressive development of international law, as evidenced by the project on the expulsion of aliens.[46] On the other hand, this reliance has been countered by states' objections to ILC drafts which refer 'in too exclusive a manner to a case as special as' the EU.[47] Decisions against the reliance on EU practices to formulate rules of international law have been grounded on arguments ranging from the fact that they do not reflect the established practice of states or other organizations, to more normative concerns about the desirability of 'developing' international rules modelled on the EU's example.

The ILC's reservations about relying on EU practices are accompanied by diverging understandings, among the ILC membership, about the EU as a subject of international law. The EU has been described as everything from 'a hybrid union of States' similar to an intergovernmental organization[48] to something akin to 'a federation of states'.[49] Under the draft rules on the expulsion of aliens, EU practice is relevant as the expression of

[43] See Commentary to art 4 MFN, para 6 and note 77 (referring to the 1963 Yaoundé Convention concluded by the European Economic Community (EEC) with 18 'associated African states and Madagascar', and the EEC association agreements with Arusha, Rabat and Tunis).

[44] See Commentary to art 62 ARIO, para 7, note 366 (referring to art 300(7) EC Treaty); Commentary to art 18, para 3, ILC, Draft articles on the expulsion of aliens, 2014 ILC Report (A/69/10) chapter IV, para 45 ('EOA') (referring to the EU Charter of Fundamental Rights); Commentary to art 5, para 5, note 260, and Commentary to art 11, para 7, note 491, ILC, Draft articles on crimes against humanity, 2019 ILC Report (A/74/10) chapter IV, para 45 ('CAH') (also referring to the EU Charter of Fundamental Rights).

[45] See Commentary to art 10 CAH, para 8, note 469, and Commentary to art 13 CAH, para 1, note 560 (referring to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190 (18 July 2002)).

[46] See ILC, 'Sixth report on the expulsion of aliens, by Mr Maurice Kamto, Special Rapporteur', 2010 (A/CN.4/625 and Add.1–2) paras 209. See also, Chapter 5, section 2.

[47] See Commentary to art 36bis, para 10, ILC, Draft articles on the law of treaties between states and international organizations or between international organizations, 1982 ILC Report (A/37/10) chapter II, para 63.

[48] ILC, 'Seventh report on the most-favoured-nation clause, by Mr Endre Ustor, Special Rapporteur', 1976 (A/CN.4/293 and Add1) 115, para 19.

[49] Interview 2 (4 June 2019).

the practice of 'a community of states'.[50] In the draft articles on the protection of persons in the event of disasters, it is interchangeably used as the expression of the practice of a regional (integration) organization or as the regional practice of its members.[51] The EU legal order, in turn, has been described as a 'regional order'[52] or a 'special regime',[53] 'a peculiar legal system'[54] akin to 'the domestic law of a large federal state',[55] or a 'sub-system' of international law.[56] While in more recent ILC projects this 'difference' is acknowledged somewhat matter-of-factly,[57] it nonetheless gave rise to some debate at the ILC in the 1970s.[58]

Ultimately, the ILC's ambivalence towards international organizations in general extends to the particular case of the EU. If the 2018 customary international law project concluded that the EU is clearly capable of contributing to the expression or formation of custom,[59] the organization's unorthodox features have also militated against drawing on EU practices for evidence of international rules. Faced with the difficult task of accounting for institutional diversity in general and EU 'exceptionalism' specifically, the ILC has consistently opted to refer to specific features of EU practices in the commentaries to its texts or in 'without prejudice' or *lex specialis* clauses.[60] This reflects both an awareness of the relevance of the EU as an international actor, and of the peculiarities of the EU as a subject of, and a contributor to, international law.

[50] ILC, 'Ninth report on the expulsion of aliens, submitted by Mr. Maurice Kamto, Special Rapporteur', 2014 (A/CN.4/670) paras 37, 46.
[51] See ILC, 'Sixth Report on the protection of persons in the event of disasters, by Eduardo Valencia-Ospina, Special Rapporteur', 2013 (A/CN.4/662) para 103; Statement by Mr Valencia-Ospina (Special Rapporteur on the protection of persons in the event of disasters) Sixth Committee, Summary record of 25th meeting, 31 October 2011 (A/C.6/66/SR.25) para 60; Commentary to art 9, para 5, ILC Draft articles on the protection of persons in the event of disasters, 2016 ILC Report (A/71/10) chapter IV, para 48.
[52] Interview 6 (19 July 2019).
[53] Commentary to art 14 EOA, para 5.
[54] Interview 3 (9 July 2019).
[55] Interview 2 (4 June 2019).
[56] Interview 5 (19 July 2019).
[57] ILC, 'Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Georg Nolte, Special Rapporteur', 2015 (A/CN.4/683) para 28.
[58] ILC, 'Report on the most-favoured-nation clause, by Mr Nikolai A. Ushakov, Special Rapporteur', 1978 (A/CN.4/309, Add.1 and Add.2) para 66.
[59] Commentary to conclusion 4, para 6, ILC, Draft conclusions on the identification of customary international law, 2018 ILC Report (A/73/10) chapter V, para 65.
[60] See Commentary to art 64 ARIO, para 2.

## 4. Outlook: other stories

In his 1986 novel, *A Jangada de Pedra*, José Saramago tells the story of how the Iberian Peninsula broke apart from the European continent, coming to float adrift in the Atlantic Ocean.[61] Legal reflections on the relationship between the EU and international law, although spared the flair of fiction, often resort to a narrative wherein the EU has broken its ties with international law, has come to exist as an isolated nomad, adrift from the larger system of international rules.

Without wishing to overstate the heuristic significance of the EU's engagement with the ILC's work, some parting considerations are in order concerning the implications of this engagement, firstly, for the advancement of international legal thinking concerning the role of international organizations in the formation and development of international law and, secondly, in (re)defining the narrative on the relationship between the EU and the international legal order.

In 1953, Josef Kunz remarked that:

> While most international organizations have not so far changed the character of the international community, and while the impact exercised by these international organizations is step by step and non-sensational, unknown by the great masses, this impact may pave the way even for a structural change in the law of nations.[62]

By participating in these debates, the EU makes known to 'the great masses' a claim whereby international organizations, as actors in their own right, contribute to the formation and transformation of international law. This participation contributes to a rethinking of the position of international organizations as subjects and shapers of international law. Even if the arguments advanced by the Commission LS may be seen as limited to 'the EU case' or to specific ILC projects, claims concerning the relevance of EU practices to the identification of international rules shed light on the role played by international organizations in this process. This is so even if, to date, EU claims might resonate with the EU alone. By engaging with the ILC's work in

[61] José Saramago, *A Jangada de Pedra* (Caminho, 1986); José Saramago, *The Stone Raft* (Giovanni Pontiero tr, Harvill Press 2000).
[62] Josef L Kunz, 'General International Law and the Law of International Organizations' (1953) 47(3) American Journal of International Law 456, 462.

defence of greater recognition of international organizations' autonomy and participation in the development of international law, the EU has been one additional voice in favour of a more thorough consideration of international organizations' role in this process, and a rather vocal one at that.

The LS's investment in the preparation and delivery of these statements also attests to the relevance of international law for the EU and to the role of EU lawyers in advancing the claim that the EU contributes to the development of the international legal order. Importantly, this engagement has brought to bear an institutional practice and narrative that makes use of the idioms and argumentative structures of international law to explain EU powers and practices and their effects on international law, from an EU perspective and to an international audience. By doing so in dialogue with a 'classic' body dealing with 'classic' public international law rules, in the context of seemingly technical-legal debates held in a political setting, this engagement helps demystify the complexity of EU law. It contributes to an approximation of international legal scholarship to the breadth of EU competences and practices which might co-contribute to international law. It also demands of EU lawyers an effort to systematise, explain, and convince their international law counterparts of such. In itself, this engagement helps more than hinders the EU's claim to contribute to the development of international law. It approximates the peninsula to its continent.

This engagement also dispels the more fatalistic views of those who see in the narrative of the CJEU the EU's distancing from international law. As demonstrated in this thesis, the EU Court's narrative of autonomy permeates Commission legal advisers' discourse concerning the ILC's work. Yet, the way in which this autonomy is defined and defended in international fora also brings the EU closer to the legal image of a subsystem of international law, a composite by-product of its fragmentation and specialisation still permeable to international rules. In the words of the EU written statement on the relevance of subsequent agreements and practice in relation to the interpretation of treaties:

> ... despite its autonomous character, the Union law is not an absolutely closed or impermeable legal order; quite to the contrary, it is open to

> other orders, to which it refers to fill its own lacunae, one of those legal orders being international law.[63]

Seen as a whole, the EU's engagement with the ILC can be best described as moderately enthusiastic. In the last decade, EU statements have supported the transformation of selected ILC draft articles into binding conventions (such as those on the protection of persons in the event of disasters or on crimes against humanity) and have referred to the 'authoritative value and practical usefulness' of the ILC's work.[64] Even if the LS's expectations to see EU views reflected in earlier ILC texts such as the ARIO were partially frustrated, this engagement has been maintained, and strengthened. When asked why this has been the case, one EU official replied with the aphorism '*point n'est besoin d'espérer pour entreprendre, ni de réussir pour persévérer*'.[65] As argued in this thesis, this engagement has not been based on the belief that EU practices should be reflected in rules of general application, but that they can be. EU statements have allowed the LS to explain (and protect) specific features of EU integration and EU autonomy, and to project an image of the EU as an increasingly relevant global actor. The ILC's expected turn in the near future to topics such as the settlement of disputes to which international organizations are parties might offer the LS further opportunities to do so.

This thesis advanced a framework to understand and contextualise the EU's engagement with the ILC's work, to explain and in part predict the choices that EU statements convey. While it did not exhaust all the lines of inquiry that it might have pursued, the analysis put forward here demonstrates the role that the Commission LS has played in dialoguing with international lawyers and in explaining what is meant, from an EU perspective, by an EU contribution to the development of international law. This dialogue itself is part and parcel of this process. This thesis, in turn, may serve as the basis (a starting point or inspiration) for ongoing and future research about the EU's relationship with international law; about the role of the Legal Services of EU

[63] European Union, 'Contribution of the European Union on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation' (2015) 2 <https://legal.un.org/ilc/sessions/67/pdfs/english/sasp_eu.pdf>

[64] Statement Gussetti (n 23) para 110.

[65] 'One need not hope to engage, nor to succeed to persevere' (author tr). Interview 18 (6 July 2018).

institutions in drafting and crafting this story, and in approximating legal imaginaries in its step.

# I | List of Statements

## 1. EU Statements

The statements below are ordered by year of adoption of the corresponding draft articles, conclusions or guidelines by the ILC on second reading. Most references are to the summary records of Sixth Committee meetings, which provide the most concise review of EU statements. In addition, the list includes written submissions by the EU on each topic and, where relevant, the review of EU comments in ILC reports.

### Most-Favoured-Nation Clauses, 1978 ILC Report (A/33/10) chapter II, para 74

Statement by Mr Cassese (Italy) speaking on behalf of the European Economic Community and its nine member states, Sixth Committee, Summary record of the 1544th meeting, 21 October 1975 (A/C.6/SR.1544) paras 37-45

Statement by Mr Hardy (Observer for the European Economic Community), Sixth Committee, Summary record of the 1549th meeting, 27 October 1975 (A/C.6/SR.1549) paras 47-53

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# Summary |

## Confirming and Contesting International Law: The European Union and the United Nations International Law Commission

The European Union's (EU) relationship with international law has long attracted the attention of political scientists and legal scholars alike. Legal scholarship, in particular, has developed a growing interest not only in how EU law relates to international law but also in how the EU, as a legal entity and a legal order, changes the international legal system.

This thesis explores the EU's relationship with, and contribution to, public international law from a novel perspective. It examines the EU's own understanding of how EU practices relate, and contribute, to the development of rules of international law by means of a systematic analysis of the statements prepared and delivered by staff of the European Commission Legal Service (LS) at the United Nations General Assembly (UNGA) Sixth Committee, concerning the work of a UNGA subsidiary body specifically entrusted with the codification and progressive development of public international law: the UN International Law Commission (ILC). The thesis frames these statements as manifestations of the EU's ambition to contribute 'in the wider world ... to the strict observance and the development of international law', an ambition with legal expression in article 3(5) of the Treaty on the European Union.

As such, this thesis sets out to uncover a story – the one told by the EU to international lawyers, states, and non-state observers gathered at the Sixth Committee, concerning the relationship between existing or emerging rules of international law and EU practices and, importantly, the EU's own contribution to their development. This inquiry is guided by one main question: how has the EU engaged with ILC projects and what does this engagement tell us about the EU's understanding of its relationship with, and contribution to, public international law?

In answering this question, the analysis covers all the EU statements addressing the Sixth Committee's consideration of ILC annual reports, from this committee's thirtieth session (in 1975) to its seventy-sixth session (in 2021) and examines the EU's position with respect to eleven distinct topics studied by the ILC. EU statements on these topics are organised around three thematic

clusters: the law of treaties, the responsibility of international organizations, and substantive areas of international law. By examining statements so far studied in isolation from each other and combining their analysis with semi-structured interviews with EU officials and ILC members, this thesis provides not only the first comprehensive review of the EU's engagement with the ILC but also sheds light on the role of EU legal advisers in weaving together a story about the EU's relationship with international law and its contribution to the international legal order. This work therefore adds a new angle of analysis to the EU's understanding of its relationship with international law, so far explored primarily through an examination of the case law of the Court of Justice of the European Union (CJEU).

The EU's positions with respect to the rules proposed by the ILC are presented as acts of confirmation and of contestation. Confirmation and contestation are used in this research as framing concepts aiding the author, and the reader, in systematising the EU's understanding of the relationship between EU practices and the rules, conclusions and guidelines proposed by the ILC. Confirmation is a term reserved for situations where the EU agreed with ILC proposals, or otherwise used its right to deliver a statement to project an image of the EU as an actor whose practices are aligned with or strengthen international law. Contestation, by contrast, concerns statements where the EU objected to ILC proposals, by contesting the existence (or emergence) of a rule, its absence, its scope, or its application to the EU. As demonstrated in this thesis, through confirmation and contestation, the statements prepared by Commission legal advisers produce meaning about the EU as an entity, an actor, and a legal order, in relation to international law and in dialogue with international actors. Specifically, they reflect a particular understanding of the EU's relationship with international law and the measure of development of international law the EU is willing to endorse.

The analysis of EU statements with respect to the eleven ILC topics examined in this research shows how the Commission LS has mostly confirmed ILC rules, guidelines or conclusions aligned with EU rules, values, and interests. Importantly, these statements have provided the EU with an opportunity to familiarise an international audience with EU competences and with developments within the EU legal order, often coinciding with the adoption of relevant legislation at the internal level of the EU. As argued in this thesis, this emphasis on EU practices and competence in the confirmation of

international law has allowed the Commission LS to project an image of the EU as a relevant international actor whose practices contribute to the development of international rules in areas as diverse as treaty-making, the protection of persons in the event of disasters, or the fight against impunity for international crimes. EU statements on more recent ILC topics – such as the ILC articles on the effects of armed conflicts on treaties – also reflect the use of this discursive space by the EU to offer clarification to contested aspects of the Court of Justice's case law. Others, such as the statements on the ILC guidelines on the protection of the atmosphere, make use of this dialogue with international partners to promote EU international negotiation efforts in other venues. EU practices are often presented as embedded in a broader network of international instruments and as not only aligned with international law but also at the forefront of its development. This dynamic of confirmation is transversal to all the statements examined in this research and is particularly salient with respect to ILC topics addressing different substantive areas of international law, examined in chapter 5.

Contestation, in turn, has allowed the Commission LS to object to draft rules, conclusions or guidelines which differ from the system of rules at the EU level, which run counter to EU values or interests, or which, as argued in this thesis, disturb the 'essential characteristics' of the EU legal order or seemingly create disincentives to EU integration. Rare were the occasions, however, where Commission legal advisers were adamant that EU practices should be reflected in rules of general application. Perhaps aware of the paradox that integration carries – wherein the EU becomes particularly well placed to contribute to the development of international rules in a growing number of fields but also often too unique for its practices to be relied on in formulating rules of general application – EU statements have, with few exceptions, shied away from doctrinal debates and have instead favoured broad rules and 'without prejudice' clauses that accommodate EU autonomy. This thesis demonstrates that the few instances where the Commission LS insisted that ILC texts should reflect rules in line with EU practices were those pertaining to topics closer to EU exclusive competences or the EU's legal position as a subject of international law, notably the ILC articles on most-favoured-nation clauses and on the responsibility of international organizations.

This thesis brings together these acts of confirmation and contestation to uncover a story about the EU's understanding of its relationship with and

contribution to international law. It demonstrates how the story told through these statements transports to the international level the narrative of EU autonomy developed in the CJEU's case law. Statements prepared by the Commission LS often repeat and refer to this narrative, contesting the existence or emergence of international rules which do not account for the autonomy and constitutional features of the EU. As argued in chapter 1 and demonstrated in the chapters that follow, autonomy forms the background story that renders visible (and arguably predictable) the reasoning behind some of the positions defended by EU actors internationally. Specifically, it shapes the Commission LS's position on what are, and are not, acceptable developments of international law, and what are correct or incorrect readings of international *lex lata* and *lex ferenda*. As such, these statements form part of a broader process both of projecting and of protecting EU rules not only *from* international law but also *through* it.

The unfriendliness towards international law often ascribed to the Court's case law, however, is difficult to sustain with respect to the EU's engagement with the ILC. As argued in this thesis, the EU's engagement with the ILC attests to the continued importance that international law, and the EU's participation in debates about its development, still holds for the EU. These statements are also evidence of the role played by the EU legal advisers, notably within the Commission LS, in advancing the claim that EU practices contribute to the development of international rules, in dialogue with international actors. The EU's engagement with the ILC has by now grown into an established EU practice led by the Commission LS, notwithstanding the establishment of the European External Action Service and the changes in EU external representation brought about by the Treaty of Lisbon. This engagement reflects the importance ascribed by the Commission to leading the preparation of statements on the ILC report, as the most prominent item in the Sixth Committee's agenda. For EU member states, in turn, these statements aid, and often unburden, national legal advisers from the task of explaining the wealth and specificities of EU practices and draw greater attention to EU member states' collective concerns.

From the ILC's side, the EU's participation in these debates has been largely welcomed. This thesis demonstrates how recent ILC projects have emphasised the relevance of EU practices in the provisional application of treaties or recognised the effect that integration has in the EU's ability to

contribute to the formation or expression of rules of custom. All the projects examined in this research refer, to varying degrees, to EU practices in their preparation, or in the commentaries to final texts. Some ILC members have relied heavily on EU practices as indicative of emerging trends in states' practice or as evidence of practice by an international organization, notably where practice by other international organizations was relatively scarce. At the same time, debates within the ILC and at the Sixth Committee also reflect reservations about relying on EU practices as evidence or inspiration for the development of rules of general application. The EU is often seen as a more developed or largely unique example of regulation of states' conduct or of autonomous participation by an international organization in international relations. This study demonstrates how EU practices have both served as evidence of states or international organizations' practice supporting the existence or emergence of a rule of international law and at times been rejected for corresponding in too exclusive a manner to the unique case of the EU.

This thesis provides a framework to understand and contextualise the EU's engagement with the ILC, to explain and in part predict the choices that EU statements convey. It also demonstrates how the EU's engagement with the ILC has brought to bear an institutional practice, and a story, that makes use of the idioms and argumentative structures of international law to explain EU powers and practices and their effects on international law. In confirming and contesting the rules, conclusions or guidelines proposed by the ILC, EU legal advisers have often resorted to the language, authority and reasoning of international law to support EU positions. Statements prepared by the Commission LS have often stressed how EU practices are not only an expression of the regional practice of EU member states but also shape the practice of third states and other international organizations, or have instead argued that the rules proposed by the ILC had no footing in existing state practice and *opinio juris*, misconstrued emerging trends in international practice, or insufficiently accounted for the diversity of international organizations, and for the EU's uniqueness therein. This engagement has required of EU legal advisers an effort in explaining, systematising, and at times demystifying, EU competences and the relevance of their exercise for the (trans)formation of public international law. It has also drawn international lawyers' attention to the effects of EU integration on the formation and development of international rules. As such, this engagement sheds light on

what is meant, from an EU perspective, by the EU's contribution to, in the words of article 3(5) TEU, 'the strict observance and the development of international law'. This engagement itself is part and parcel of this process.

# Samenvatting |

## Bevestiging en betwisting van het internationaal recht: De Europese Unie en de Commissie voor Internationaal Recht van de Verenigde Naties

De relatie van de Europese Unie (EU) met het internationaal recht trekt al geruime tijd de aandacht van zowel politicologen als rechtsgeleerden. Met name de rechtswetenschap heeft een groeiende belangstelling ontwikkeld, niet alleen voor de wijze waarop het EU-recht zich verhoudt tot het internationaal recht, maar ook voor de wijze waarop de EU als juridische entiteit en rechtsorde het internationale rechtsstelsel verandert.

Dit proefschrift onderzoekt de relatie van de EU met en haar bijdrage aan het internationaal publiekrecht vanuit een nieuw perspectief. Het onderzoekt de eigen opvatting van de EU over hoe EU-praktijken zich verhouden tot en bijdragen aan de ontwikkeling van regels van internationaal recht door middel van een systematische analyse van de verklaringen die door medewerkers van de Juridische dienst van de Europese Commissie (LS) zijn voorbereid en afgelegd in de Zesde Commissie van de Algemene Vergadering van de Verenigde Naties (AVVN), betreffende de werkzaamheden van een hulporgaan van de AVVN dat specifiek belast is met de codificatie en geleidelijke ontwikkeling van internationaal publiekrecht: de Commissie voor Internationaal Recht van de VN (ILC). In het proefschrift worden deze verklaringen gezien als uitingen van de ambitie van de EU om bij te dragen 'in de rest van de wereld [...]tot de strikte eerbiediging en ontwikkeling van het internationaal recht", een ambitie die juridisch tot uitdrukking komt in artikel 3, lid 5, van het Verdrag betreffende de Europese Unie.

Als zodanig wil dit proefschrift een verhaal blootleggen - het verhaal dat de EU vertelt aan internationale juristen, staten en niet-statelijke waarnemers verzameld in de Zesde Commissie over de relatie tussen bestaande of opkomende regels van internationaal recht en EU-praktijken en, belangrijk, de eigen bijdrage van de EU aan de ontwikkeling daarvan. Dit onderzoek wordt geleid door één hoofdvraag: hoe heeft de EU zich ingezet voor ILC-projecten en wat vertelt deze inzet ons over de opvatting van de EU over haar relatie tot en haar bijdrage aan het internationaal publiekrecht?

Bij het beantwoorden van deze vraag worden alle verklaringen van de EU over de behandeling van de jaarverslagen van de ILC door de Zesde Commissie geanalyseerd, vanaf de dertigste zitting van deze commissie (in 1975) tot de zesenzeventigste zitting (in 2021), en wordt het standpunt van de EU ten aanzien van elf verschillende door de ILC bestudeerde onderwerpen onderzocht. De EU-verklaringen over deze onderwerpen zijn georganiseerd rond drie thematische clusters: het verdragenrecht, de verantwoordelijkheid van internationale organisaties, en materiële gebieden van internationaal recht. Door verklaringen te onderzoeken die tot nu toe los van elkaar zijn bestudeerd en de analyse ervan te combineren met semigestructureerde interviews met EU-ambtenaren en ILC-leden, biedt dit proefschrift niet alleen de eerste uitgebreide beoordeling van de betrokkenheid van de EU bij de ILC, maar werpt het ook licht op de rol van de juridische adviseurs van de EU bij het samenvoegen van een verhaal over de relatie van de EU met het internationaal recht en haar bijdrage aan de internationale rechtsorde. Dit werk voegt derhalve een nieuwe invalshoek toe aan de opvatting van de EU over haar relatie met het internationaal recht, dat tot dusver vooral werd onderzocht aan de hand van de rechtspraak van het Hof van Justitie van de Europese Unie (HvJEU).

De standpunten van de EU ten aanzien van de door het ILC voorgestelde regels worden voorgesteld als handelingen van bevestiging en betwisting. Bevestiging en betwisting worden in dit onderzoek gebruikt als kaderbegrippen die de auteur, en de lezer, helpen bij het systematiseren van de opvatting van de EU over de relatie tussen EU-praktijken en de door het ILC voorgestelde regels, conclusies en richtsnoeren. Bevestiging is een term die gereserveerd is voor situaties waarin de EU instemde met ILC-voorstellen, of anderszins gebruik maakte van haar recht om een verklaring af te leggen om een beeld te projecteren van de EU als een actor wiens praktijken in overeenstemming zijn met het internationaal recht of dit versterken. Betwisting daarentegen betreft verklaringen waarin de EU bezwaar maakte tegen ILC-voorstellen, door het bestaan (of de opkomst) van een regel, het ontbreken ervan, de reikwijdte of de toepassing ervan op de EU te betwisten. Zoals in dit proefschrift wordt aangetoond produceren de verklaringen van de juridische adviseurs van de Commissie door bevestiging en betwisting betekenis over de EU als entiteit, actor en rechtsorde, in relatie tot het internationaal recht en in dialoog met internationale actoren. Met name weerspiegelen zij een bepaalde

opvatting over de relatie van de EU met het internationaal recht en de mate van ontwikkeling van het internationaal recht die de EU bereid is te onderschrijven.

Uit de analyse van de EU-verklaringen met betrekking tot de elf ILC-onderwerpen die in dit onderzoek zijn onderzocht blijkt dat de LS van de Commissie meestal de ILC-regels, -richtsnoeren of -conclusies hebben bevestigd die op EU-regels, -waarden en -belangen zijn afgestemd. Belangrijk is dat deze verklaringen de EU een gelegenheid hebben geboden om een internationaal publiek vertrouwd te maken met de bevoegdheden van de EU en met de ontwikkelingen binnen de EU-rechtsorde, vaak samenvallend met de goedkeuring van relevante wetgeving op het interne niveau van de EU. Zoals in dit proefschrift wordt betoogd heeft deze nadruk op EU-praktijken en -bevoegdheid bij de bevestiging van het internationaal recht de LS van de Commissie in staat gesteld een beeld van de EU te projecteren als een relevante internationale actor wiens praktijken bijdragen tot de ontwikkeling van internationale regels op uiteenlopende gebieden als verdragssluiting, de bescherming van personen bij rampen of de bestrijding van straffeloosheid voor internationale misdrijven. Uit EU-verklaringen over recentere ILC-onderwerpen - zoals de ILC-artikelen over de gevolgen van gewapende conflicten voor verdragen - blijkt ook dat de EU deze discursieve ruimte gebruikt om opheldering te verschaffen over betwiste aspecten van de rechtspraak van het Hof van Justitie. Andere, zoals de verklaringen over de ILC-richtsnoeren inzake de bescherming van de atmosfeer, maken gebruik van deze dialoog met internationale partners om de internationale onderhandelingsinspanningen van de EU op andere plaatsen te bevorderen. EU-praktijken worden vaak voorgesteld als ingebed in een breder netwerk van internationale instrumenten en als niet alleen afgestemd op het internationale recht, maar ook in de voorhoede van de ontwikkeling ervan. Deze dynamiek van bevestiging is transversaal voor alle in dit onderzoek onderzochte verklaringen en is bijzonder opvallend met betrekking tot ILC-onderwerpen die betrekking hebben op verschillende materiële gebieden van internationaal recht, die in hoofdstuk 5 worden onderzocht.

De LS van de Commissie heeft op haar beurt bezwaar kunnen maken tegen ontwerp-regels, conclusies of richtsnoeren die afwijken van het stelsel van regels op EU-niveau, die indruisen tegen de waarden of belangen van de EU, of die, zoals in dit proefschrift wordt betoogd, de 'essentiële kenmerken' van

de EU-rechtsorde verstoren of schijnbaar een belemmering vormen voor de integratie van de EU. Het kwam echter zelden voor dat de juridische adviseurs van de Commissie onvermurwbaar waren dat EU-praktijken in regels van algemene strekking moesten worden weerspiegeld. Wellicht in het besef van de paradox die integratie met zich meebrengt – waarbij de EU bijzonder goed in staat is om bij te dragen aan de ontwikkeling van internationale regels op een groeiend aantal gebieden, maar vaak ook te uniek is voor het baseren van de formulering van regels van algemene strekking op haar praktijken - hebben EU-verklaringen, op enkele uitzonderingen na, zich onttrokken aan debatten in de rechtsleer en in plaats daarvan de voorkeur gegeven aan ruime regels en 'onverlet'-clausules die de autonomie van de EU respecteren. Dit proefschrift toont aan dat de weinige gevallen waarin de LS van de Commissie erop aandrong dat ILC-teksten regels zouden bevatten die in overeenstemming waren met EU-praktijken, betrekking hadden op onderwerpen die dichter bij de exclusieve bevoegdheden van de EU of de rechtspositie van de EU als subject van internationaal recht lagen, met name de ILC-artikelen over meestbegunstigdenatieclausules en over de verantwoordelijkheid van internationale organisaties.

Dit proefschrift brengt deze handelingen van bevestiging en betwisting samen om een verhaal bloot te leggen over de opvatting van de EU over haar relatie met en bijdrage aan het internationaal recht. Het toont aan hoe het verhaal dat via deze verklaringen wordt verteld het narratief over de autonomie van de EU dat in de rechtspraak van het HvJEU is ontwikkeld overbrengt naar het internationale niveau. Verklaringen van de LS van de Commissie herhalen en verwijzen vaak naar dit narratief en betwisten het bestaan of de opkomst van internationale regels die geen rekening houden met de autonomie en de constitutionele kenmerken van de EU. Zoals betoogd in hoofdstuk 1 en aangetoond in de volgende hoofdstukken vormt autonomie het achtergrondverhaal dat de redenering achter sommige van de standpunten die de EU-actoren internationaal verdedigen zichtbaar (en aantoonbaar voorspelbaar) maakt. Met name geeft het vorm aan het standpunt van de LS van de Commissie over wat wel en niet aanvaardbare ontwikkelingen van internationaal recht zijn, en wat juiste of onjuiste interpretaties van internationale *lex lata* en *lex ferenda* zijn. Als zodanig maken deze verklaringen deel uit van een breder proces van zowel het projecteren als het beschermen

van EU-regels, niet alleen *tegen* het internationale recht maar ook *door middel daarvan*.

De onvriendelijkheid ten aanzien van het internationaal recht die vaak aan de rechtspraak van het Hof wordt toegeschreven is echter moeilijk vol te houden wat betreft de betrokkenheid van de EU bij het ILC. Zoals in dit proefschrift wordt betoogd getuigt de betrokkenheid van de EU bij het ILC van het blijvende belang dat het internationaal recht, en de deelname van de EU aan debatten over de ontwikkeling ervan, nog steeds voor de EU heeft. Deze verklaringen getuigen ook van de rol die de juridische adviseurs van de EU, met name binnen de LS van de Commissie, spelen bij het bevorderen van de stelling dat EU-praktijken bijdragen tot de ontwikkeling van internationale regels, in dialoog met internationale actoren. De betrokkenheid van de EU bij het ILC is inmiddels uitgegroeid tot een gevestigde EU-praktijk onder leiding van de LS van de Commissie, ondanks de oprichting van de Europese Dienst voor Extern Optreden en de veranderingen in de externe vertegenwoordiging van de EU als gevolg van het Verdrag van Lissabon. Dit engagement weerspiegelt het belang dat de Commissie hecht aan het leiden van de voorbereiding van verklaringen over het ILC-verslag, als het meest prominente punt op de agenda van het Zesde Comité. Voor de EU-lidstaten op hun beurt helpen deze verklaringen de nationale juridische adviseurs bij het uitleggen van de rijkdom en de specifieke kenmerken van EU-praktijken en ontlasten zij hen vaak van deze taak, en vestigen zij meer aandacht op de collectieve zorgen van de EU-lidstaten.

Van de kant van de ILC is de deelname van de EU aan deze debatten grotendeels toegejuicht. Dit proefschrift toont aan hoe recente ILC-projecten de relevantie van EU-praktijken bij de voorlopige toepassing van verdragen hebben benadrukt of het effect hebben erkend dat integratie heeft op het vermogen van de EU om bij te dragen aan de vorming of uitdrukking van gewoonteregels. Alle in dit onderzoek onderzochte projecten verwijzen, in verschillende mate, naar EU-praktijken bij de opstelling ervan of in de commentaren bij definitieve teksten. Sommige ILC-leden hebben sterk vertrouwd op EU-praktijken als indicatie van opkomende trends in de praktijk van staten of als bewijs van de praktijk van een internationale organisatie, met name wanneer de praktijk van andere internationale organisaties relatief schaars was. Tegelijkertijd blijkt uit de debatten binnen de ILC en in het Zesde Comité ook dat men bedenkingen heeft bij het vertrouwen op EU-praktijken

als bewijs of inspiratie voor de ontwikkeling van regels van algemene strekking. De EU wordt vaak gezien als een meer ontwikkeld of grotendeels uniek voorbeeld van regulering van het gedrag van staten of van autonome deelname van een internationale organisatie aan internationale betrekkingen. Deze studie toont aan hoe EU-praktijken zowel hebben gediend als bewijs voor de praktijk van staten of internationale organisaties ter ondersteuning van het bestaan of de opkomst van een regel van internationaal recht, als soms zijn verworpen omdat zij te exclusief overeenkwamen met het unieke geval van de EU.

Dit proefschrift biedt een kader om de betrokkenheid van de EU bij het ILC te begrijpen en te contextualiseren, om de keuzes die uitspraken van de EU overbrengen te verklaren en deels te voorspellen. Het laat ook zien hoe de betrokkenheid van de EU bij het ILC heeft geleid tot een institutionele praktijk, en een verhaal, dat gebruik maakt van het taalgebruik en de argumentatieve structuren van het internationaal recht om de bevoegdheden en praktijken van de EU en hun effecten op het internationaal recht te verklaren. Bij het bevestigen en betwisten van de door het ILC voorgestelde regels, conclusies of richtsnoeren hebben de juridische adviseurs van de EU vaak hun toevlucht genomen tot de taal, het gezag en de redenering van het internationaal recht om de EU-standpunten te ondersteunen. In door de LS van de Commissie opgestelde verklaringen werd vaak benadrukt dat EU-praktijken niet alleen een uitdrukking zijn van de regionale praktijk van de EU-lidstaten, maar ook de praktijk van derde landen en andere internationale organisaties vormgeven, of werd daarentegen betoogd dat de door het ILC voorgestelde regels geen steun vonden in de bestaande staatspraktijk en *opinio juris*, opkomende trends in de internationale praktijk verkeerd interpreteerden of onvoldoende rekening hielden met de diversiteit van internationale organisaties en met het unieke karakter van de EU daarin. Dit engagement heeft van de juridische adviseurs van de EU een inspanning gevraagd om de bevoegdheden van de EU en het belang van de uitoefening ervan voor de (ver)vorming van het internationaal publiekrecht uit te leggen, te systematiseren en soms te demystificeren. Het heeft ook de aandacht van internationale juristen gevestigd op de effecten van EU-integratie op de vorming en ontwikkeling van internationale regels. Als zodanig werpt deze betrokkenheid licht op wat, vanuit EU-perspectief, wordt bedoeld met de bijdrage van de EU aan, in de woorden van artikel 3, lid 5, VEU, 'de strikte eerbiediging en de

ontwikkeling van het internationaal recht'. Dit engagement zelf maakt een essentieel deel uit van dit proces.