ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

THE EUROPEAN UNION'S PARTICIPATION IN THE CREATION OF CUSTOMARY INTERNATIONAL LAW AND ITS IMPACT ON MEMBER STATE SOVEREIGNTY

CHRISTINA BINDER* AND PHILIPP JANIG**

ABSTRACT: This *Article* argues that the ability of the European Union to participate in the creation of customary international law curtails the sovereignty of its Member States. First, it shows that authority to participate in norm-creation constitutes a core aspect of sovereignty under international law. Second, it argues that the conduct of the European Union (as an international organization) may be determinative in ascertaining the existence and content of customary norms. However, that authority lacks an explicit basis in the treaties. Third, it asserts that this encompasses norms that are directly relevant for the Member States, potentially in circumstances outside of the scope of EU law. The *Article* then specifically discusses three types of acts of the Union and their relevance for the creation of customary international law, while providing examples that touch upon traditional interstates relations. In particular, this concerns the legislative practice of the Union, the judicial practice of the Court of Justice of the European Union (CJEU) and public statements made by the Commission in (quasi-)judicial proceedings.

KEYWORDS: customary law – international organizations – sovereignty – legislative practice – judicial practice – statements in proceedings.

* Professor in International Law and International Human Rights Law, University of the Bundeswehr Munich, c.binder@unibw.de.

** Post-Doctoral Researcher and Lecturer in International and European Law, University of the Bundeswehr Munich, philipp.janig@unibw.de.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/734

I. Introduction

This *Article* argues that the ability of the European Union to participate in the creation of customary international law curtails the sovereignty of its Member States, beyond the express devolution of sovereign powers to the organization through the treaties. For that purpose, it makes three specific arguments. First, the authority to participate in norm-creation constitutes a core aspect of (state) sovereignty under international law. Second, the conduct of the European Union (as an international organization) may be determinative in ascertaining the existence and content of customary norms. Third, this encompasses norms that are directly relevant for the Member States, potentially in circumstances not governed by EU law.

These three observations result in the conclusion that the endowment of the European Union with further competences and powers not only leads to an *explicit* transfer of sovereign authority, but also an *implicit* transfer of the authority to contribute to customary international law. That process of relinquishing sovereignty is neither abrupt nor absolute. Nevertheless, gradually and partially, the EU may increasingly enjoy what traditionally is a core prerogative of states within the international legal system.

II. Law-making capacity as an expression of sovereignty

The sovereignty of states is considered to comprise of an internal and an external element, with the latter denoting "that a State is not subject to the legal power of another State or of any other higher authority".[1] This also entails the lack of any central law-making authority on the international level. As the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber emphasized in *Tadić*, "[t]here is [...] no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community".[2] The law-making capacity in principle rather rests with states themselves, as the principal subjects of international law. While consensualist and voluntarist conceptions – which required that all norms had to be based in state consent[3] – no longer find general support in mainstream scholarship (and rightfully so), the inherent connection between state sovereignty on the one hand and the creation of international law on the other remains.

That connection between sovereignty and the capacity to enter into legal commitments was also emphasized by Permanent Court of International Justice (PCIJ) in *S.S. Wimbledon*: "[...] the Court declines to see in the conclusion of any treaty by which a State

[1] NJ Schrijver, 'The Changing Nature of State Sovereignty' (2000) British Yearbook of International Law 65, 71.

[2] International Criminal Tribunal for the former Yugoslavia decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995 IT-94-1-A *Prosecutor v Duško Tadić* para. 43.

[3] R Kolb, *Theory of International Law* (Hart 2016) 105 ff; Permanent Court of International Justice dissenting opinion of M Weiss of 2 September 1927 Rep Series A No 10 *S.S. Lotus* (*France v Turkey*) at 43-44.

undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty; on the contrary, the right of entering into international engagements is an attribute of State sovereignty".[4]

Thus, the mere fact that a state's freedom of action is restricted as a result of an international legal obligation it validly entered into does not alter its sovereignty as such. This may likewise be extended to circumstances in which the commitment consists of complying with decisions made on the level of international organizations. However, such a transfer of law-making powers requires the "[e]xpress prior consent" of any Member State to the "surrender of specific competences or elements of its sovereignty".[5]

Therefore, the extensive transfer of competences from Member States to the European Union (EU) through the treaties does not *ipso facto* affect their sovereignty, in particular insofar as it is reversible both for Member States on the individual level[6] as well as them more generally.[7] That transfer – in addition to internal legislative powers – also includes the explicit mandate to contribute to "the development of international law".[8] For that purpose, the EU may enter into "international engagements"[9] with third states and other international organizations through treaties that also bind the Member States.

In contrast, the EU treaties contain no internal legal basis transferring the Union the authority to contribute to the emergence of customary international law.[10] However, as will argued below, the Union has the capacity to participate in the creation of customary norms from the perspective of international law. While that might not (seriously) affect the freedom of action of Member States in all contexts – in particular insofar as we are concerned with norms relevant for international organizations as such – the Union also contributes to customary law that is directly relevant for the Member States. Given that the EU was never explicitly granted that authority, it may be seen as a curtailment of the sovereignty of Member States. This applies to both its actual exercise (which potentially impacts the weight of state practice and *opinio juris* of Member States), as well as the norms that may eventually result from a process in which the Union participated. The

[4] Permanent Court of International Justice judgment of 17 August 1923 Rep A No 1 *The S.S. 'Wimbledon' (UK, France, Italy, Japan v Germany; Poland intervening)* at 25; see also R Kolb, 'Sovereignty' in C Binder, M Nowak, JA Hofbauer and P Janig (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022) 306 para. 19; L McNair, *The Law of Treaties* (OUP 1986) 35 ("The making of treaties is one of the oldest and most characteristic exercises of independence or sovereignty on the part of States").

[5] N Schrijver, 'The Changing Nature of State Sovereignty' cit.; see, art. 25 of the Charter of the United Nations.

[6] Art. 50 TEU; see also case C-621/18 *Wightman and Others* ECLI:EU:C:2018:978.

[7] Given their status as the 'Masters of the Treaties'.

[8] Art. 3(5) TEU.

[9] In the words of *The S.S. 'Wimbledon' (UK, France, Italy, Japan v German; Poland intervening)* cit.

[10] Cf. arguing that such an explicit authorization would be necessary, see United States in International Law Commission, Comments and Observations on Identification of Customary International Law of 14 February 2018, UN Doc A/CN.4/716, 20.

next Section will explore to what extent international organizations in general, and the EU in particular may contribute to the emergence of customary international law.

III. The participation of International Organizations in the formation of customary international law

III.1. Overview

In many ways, international organizations (and its organs) play a central role in the development of international law and may "promote" certain positions[11] or "catalyse" the practice of states[12]. The International Law Commission (ILC) might be a prime example of that: while its work has (from a formal perspective) no direct influence on the state of customary international law, it gives states ample opportunity to develop their practice or voice their *opinio juris* – whether in debates in the Sixth Committee, decisions of domestic courts referencing the ILC or otherwise. However, this Section concerns whether international organizations may *as such* contribute to the emergence of customary international law. In its 2018 Conclusions on the Identification of Customary International Law, the ILC has – cautiously – acknowledged that possibility. In Conclusion 4(2), the ILC considers that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".[13]

This is supported by a rather broad consensus among scholars, who – at least in principle – consider certain acts of international organizations to be relevant.[14] However, scholarly opinion differs in explaining why that should be the case. Kristina Daugirdas has recently summarized three different possible rationales.

First, it may be the *subjective intent* of Member States to endow an international organization (IO) with the power to contribute to the creation of customary international law. As already alluded to above, there is in principle no conceptual barrier to transferring law-making powers to IOs.[15] However, given that so far no IO was explicitly granted that power, this subjective intent could in practice only be inferred.

[11] See, J Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution' (2008) NYIL 127, Section 3.3.

[12] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries of 2018 UN Doc A/73/10, Draft Conclusion 4, Commentary para. 4.

[13] *Ibid*.

[14] T Treves, 'Customary International Law' in A Peters (ed.), *Max Planck Encyclopedia of Public International Law* (2006) para. 50 ("As subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution [.]"); see, with further references, International Law Commission, Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur of 27 March 2015, UN Doc A/CN.4/682, para. 76, fn 179.

[15] K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201, 206 ff.

Second, the capacity to contribute to customary norms may constitute an *implied power* of the IO.[16] Thus, in addition to the powers an IO is expressly granted by states (on the basis of their subjective intent), it has "those powers which [...] are conferred upon it by necessary implication as being essential to the performance of its duties".[17] These two rationales presumably underpin the position of the ILC (as well as many scholars and a number of states) discussed in more detail below, which considers that the potential of an organization to contribute to custom is dependent on its competences.

The third rationale discussed by Daugirdas sees the potential of IOs to contribute to customary norms as a function of their international legal personhood, in connection with their capacity to operate on international level.[18] The notion of legal personality is also underpinning the argument of Jean d'Aspremont, who centres his argument on the notion of customary international law as a self-created restraint. In that view, the only determinative factor whether IOs may contribute to a customary norm is whether they are covered by its scope *ratione personae*: that the pertinent norm creates rights and/or obligations for a particular IO (such as in the case of immunities). Thus, their capacity to do so is not dependent on their specific competences – according to d'Aspremont "there is no such thing as an *ultra vires* practice or *opinio juris*".[19] In comparison to other theories, and in almost all circumstances, that argument would significantly broaden the capacity of IOs to contribute to customary international law.[20]

In the debates in the Sixth Committee, the ILC's work has met varied responses by states.[21] Certain states – most notably the United States – rejected the notion that IOs as

[16] *Ibid*. 207 ff.

[17] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [11 April 1949] Rep 174, 182. See also ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [8 July 1996] Rep 66, para. 25 ("the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities").

[18] K Daugirdas, 'International Organizations and the Creation of Customary International Law' cit. 210 ff; V Lowe, 'Can the European Community Bind the Member States on Questions of Customary International Law' in M Koskenniemi (ed.), *International Law Aspects of the European Union* (Brill 1998) 149, 158 (considering that European "Community statements may count as State practice [...] in as much as they are acts of an international person"). See also the position of Netherlands in Comments and Observations on Identification of Customary International Law cit. 16.

[19] J d'Aspremont, *The Discourse on Customary International Law* (OUP 2021) 69 ff.

[20] When it comes to the EU, there might be problem arising from the separation of the law-making authority and the actual enforcement. Insofar as the enforcement of EU law remains with the Member States, they must be bound by a given customary rule (potentially prohibiting certain measures of enforcement). However, it is not entirely clear whether – in d'Aspremont's theory – EU legislation in such circumstances could be considered as relevant practice.

[21] See also International Law Commission, Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur of 14 March 2018 UN Doc A/CN.4/717, paras 36 ff.

such could contribute to customary international law, limiting their relevance to assessing the practice of states that might *act through* organizations.[22] However, most states appeared to accept – with varying degrees of enthusiasm (or hesitancy) – the role of organizations: some being in full agreement with the Draft Conclusion and the commentary,[23] others advocating for a more expansive[24] or more limited approach[25].

In summary, there is widespread support that IOs may contribute to the formation and development of customary international law. This is particularly true for the EU[26], which itself has repeatedly and explicitly claimed that its conduct may contribute to the development of customary international law – such as in the debates in the Sixth Committee[27] or, more recently, Advocate General Szupnar in his Opinion in *LG v Rina SpA*[28]. The next part will explore to what extent the practice of IOs should be considered solely a reflection of the collective opinion of Member States or whether it stands on its own.

III.2. Whose practice?

The notion that acts of international organizations may have relevance to ascertain the existence of customary norms is not a particularly novel one: the International Court of Justice (ICJ) has famously relied on resolutions by the UN General Assembly (UNGA) in *Nicaragua*[29] and it reaffirmed their relevance in several cases thereafter.[30] However, as also highlighted by the ILC Commentary, the output of such political organs (consisting of state representatives) is referenced as they "offer important evidence of the collective

[22] Comments and Observations on Identification of Customary International Law cit. 18 ff; citing other states *ibid*. 20 fn 15; see also Belarus in *ibid*. 14; Singapore in *ibid*. 18 ("in these cases, the practice of international organizations *reflects the practice of States*"; emphasis in the original).

[23] *Ibid*. Denmark, on behalf of the Nordic countries (at 14-15).

[24] Austria, *ibid*. 13 ff; the Netherlands, *ibid*. 16.

[25] New Zealand, *ibid*. 17 ff: "the practice of an international organization cannot contribute to the formation of a rule of customary international law unless: it is authorized by that organization's legal functions and powers; has been generally accepted over time by the organization's Member States; and the rule of customary international law is one to which the international organization itself would be bound."; see also Israel, *ibid*. 15.

[26] Third report on Identification of Customary International Law by Michael Wood, Special Rapporteur cit. paras 77 ff.

[27] General Assembly, Sixth Committee: Summary record of the 25th meeting of 28 November 2014 UN Doc A/C.6/69/SR.25, paras 77 ff.

[28] See case C-641/18 *Rina* ECLI:EU:C:2020:3, opinion of AG Szpunar, para. 123 ("so far as customary international law concerns questions pertaining to matters falling within the mandate of international organisations, the practice of international organisations may also contribute to the formation or expression of rules of customary international law.").

[29] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [27 June 1986] Rep 14, paras 188 ff.

[30] See in particular *Legality of the Threat or Use of Nuclear Weapons* cit., para. 70; ICJ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [25 February 2019] Rep 95, para. 151.

opinion of its Members"[31] – even though they are technically acts of the international organization.[32] Thus, the ILC Conclusions understand "conduct in connection with resolutions adopted by an international organization" as a potential form of practice by *states*[33] and evidence of their *opinio juris*.[34]

This may also be seen in a decision by the ICTY Appeals Chamber in *Tadić*, where it cited declarations of the Council of the European Union in support of the customary nature of common Article 3 Geneva Conventions. However, these were taken to reflect the *opinio juris* of the "fifteen Member States of the European Union" and not that of the Union itself.[35] The relevance of these types of practice is no longer disputed, not even by states who otherwise reject the role of IOs in this context.[36]

The more relevant question in the present context is whether the acts of other organs – whose actions are not directly determined by the political will of the Member States – may also play a similar role. Depending on the set-up of the international organization, this could concern political, judicial or even legislative organs. However, judicial recognition on the relevance of such organizational practice is limited at best.[37] Already in 2003, the German Federal Constitutional Court considered in general terms that the "recent legal developments on the international level, characterized by increasing differentiation and an increase in the number of recognized subjects of international law, must be taken into account when ascertaining state practice. Therefore, the acts of organs of international organizations [...] deserve special attention".[38] However, in its further reasoning,

[31] Draft Conclusions on Identification of Customary International Law, with Commentaries (2018) cit., Draft Conclusion 12, Commentary para. 2; see also *Ibid*., Draft Conclusion 4, Commentary para. 4 fn 692; T Treves, 'Customary International Law' cit. para. 50 ("Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution: [...] because it may be preferable to consider many manifestations of such practice, such as resolutions of the UN General Assembly, as practice of the States involved more than of the organizations.").

[32] See N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' (2017) 14 IntlOrgLRev 1, 9 ff.

[33] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 6(2).

[34] *Ibid*. Draft Conclusion 10(2).

[35] *Prosecutor v Tadić* cit. para. 115; *ibid*. para. 113 (the "twelve Member States of the European Community").

[36] See, *e.g*, the comments of Belarus in Comments and Observations on Identification of Customary International Law cit. 14. In the context of the contribution of international organizations to customary international law, Thirlway notably limits his discussions to these forms of practice, see H Thirlway, *The Sources of International Law* (OUP 2019) 72, 92 ff.

[37] See, noting that the Third Report of the ILC Special Rapporteur does not refer to judicial practice, SD Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2015) AJIL 822, 828; J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' in F Lusa Bordin, A Th Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (CUP 2022) 66, 77.

[38] German Federal Constitutional Court decision of 5 November 2003, 2 BvR 1243/03, 2 BvR 1506/03 [BVerfGE] 109, 38, para. 50 ("ist bei der Ermittlung der Staatenpraxis den neueren Rechtsentwicklungen auf

the Federal Constitutional Court only based itself on case law of the ICTY, which hardly could be considered as organizational practice in the sense discussed above.[39]

That being said, the actual limiting factor of the role of IOs constitutes the *type* of customary norms to which organizational practice may contribute.

III.3. Which norms?

ILC Conclusion 4(2) considers that organizational practice may 'in certain cases' contribute to the creation of customary international law. While the Conclusions themselves do not elucidate the matter any further, the commentary argues that this may be the case in case of norms: (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties).[40]

This *Article* will focus on the first type of norms,[41] *i.e.* on norms whose subject matter falls within the mandate of the organizations. In that context, IOs can contribute to norms that have typically developed in an inter-state (or even intra-state) setting and, as a result, will more directly impact the freedom of action of states.

According to the ILC, an international organization should be able to contribute to norms that fall within its mandate.[42] The Commission argues that pertinent practice "arises most clearly" in cases of exclusive competence, but "may also arise" where the IO was awarded "competences [...] that are functionally equivalent to powers exercised by states".[43] This would otherwise lead to a situation in which the "Member States would themselves be deprived of or reduced in their ability to contribute to State practice".[44]

internationaler Ebene Rechnung zu tragen, die durch fortschreitende Differenzierung und eine Zunahme der anerkannten Völkerrechtssubjekte gekennzeichnet sind. Deshalb verdienen die Handlungen von Organen internationaler Organisationen und vor allem internationaler Gerichte besondere Aufmerksamkeit"; translation by the authors).

[39] *Ibid*. paras 54 ff.

[40] See Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 5.

[41] With regard to those norms that 'are addressed specifically' to IOs, see in more detail K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201, 215 ff.

[42] See, *e.g.*, GM Danilenko, 'The Theory of International Customary Law' (1988) GYIL 9, 20 ff ("it is widely recognized that the practice of international organisations also contributes to the creation of customary rules in areas of their competence."); T Treves, 'Customary International Law' cit. para. 50 ("Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution [...] because of the limited scope of the competence of the organizations"); see, *contra*, J d'Aspremont, *The Discourse on Customary International Law* cit. 72 ff (arguing that the question of competences should be irrelevant).

[43] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 6.

[44] Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur cit. para. 77; see also F Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2018) 123 ("doing otherwise would exclude from the picture practice stemming from the collective action of States").

This is particularly stark in the context of exclusive competences of the EU, where "EU Member States may be legally prevented from taking a separate position in international legal forums, especially when the EU has adopted a position on a certain subject".[45] For instance, the common commercial policy as an exclusive competence includes the power to enter into agreements on international trade and foreign direct investment.[46]

In this context, some scholars and states argue that organizational practice should only be relevant if the IOs enjoys "exclusive competences".[47] That view is arguably too narrow. In effect, it would limit the group of international organizations able to contribute to customary norms to the EU – at least it is not apparent whether any other IO enjoys "exclusive competences".[48] The concerns raised by some that certain states could – through creating numerous IOs – gain an outsized influence on the creation of customary norms,[49] may be mitigated by appropriately weighing the importance of organizational practice in each instance. That being said, the specific situations in which IOs (to take the words of the ILC) are "functionally equivalent" to states remain somewhat elusive.[50] The matter will be further discussed in the following Section.

While the ILC Conclusions themselves include a specific reference to organizational practice, they do not address the question of *opinio juris*.[51] However, the Commentary notes that "practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law".[52] Thus, IOs similarly have to act out of the belief that they are legally permitted, required or prohibited to do so under customary international law.[53] For

[45] J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 77.

[46] Art. 206 TFEU; see also Opinion 2/15 *Accord de libre-échange avec Singapour* ECLI:EU:C:2017:376, paras 33 ff.

[47] See in particular SD Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2015) AJIL 822, 828 (citing statements by several states purportedly in favour of that restriction); see also the views of Israel in Comments and Observations on Identification of Customary International Law cit. 15.

[48] N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' cit. 8.

[49] See F Lusa Bordin, *The Analogy between States and International Organizations* cit. 122 ff.

[50] N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' cit. 8 ff.

[51] *Ibid*. cit. 5 ff; see also, noting the absence, the comments by the Netherlands, in Comments and Observations on Identification of Customary International Law cit. 16 and the United States *ibid*. 20 ff; see also H Thirlway, *The Sources of International Law* cit. 65, fn20 ("A point that remains somewhat obscure is whether an international organization which engages in a potentially custom-creating practice must, if the practice is to be regarded as relevant, similarly be inspired by *opinio juris*, and if so, what form this might take.").

[52] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 5 (footnote omitted).

[53] See also comments by the United States in Comments and Observations on Identification of Customary International Law cit. 20 ff ("If the practice of an international organization ever directly contributed

that purpose, IOs themselves may (and might necessarily have to) formulate their own *opinio juris* – according to the Commentary, the non-exhaustive list in Conclusion 10(2) "applies *mutatis mutandis* to the forms of evidence of acceptance of law (*opinio juris*) of international organizations".[54]

III.4. Conclusion

The capacity of the EU to contribute to customary international law is dependent on its competences. More specifically, it should be examined whether the organization, in light of those competences, has *functionally replaced* the Member States.[55] In that context, it should not be necessary that the Member States are *fully* replaced (such as with regard to exclusive competences), as long as the organization meaningfully has the ability to act with regard to subject matters and in certain forms that are traditionally the prerogative of states. Moreover, with regard to certain issues, it is readily apparent that a *functional* replacement may well be *partial*. For instance, the allocation of competences pertaining to international agreements depends on the subject matter of a given specific agreement. When it comes to customary principles of treaty law that are of relevance for all types of treaties it appears sensible to inquire into the practice and *opinio juris* of both the EU and its Member States. The next Section will address in more detail the existing activities of the EU in that regard.

IV. The Practice of the EU and its Relevance in the Creation of Customary International Law

IV.1. Overview

The ILC Conclusions provide non-exhaustive lists of forms of state practice (Conclusion 6(2))[56] and evidence of *opinio juris* (Conclusion 10(2)).[57] According to the Commentary, these

to the formation or expression of customary international law, it would only be when the international organization engages in the practice out of a sense that it has the legal obligation to do so").

[54] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Conclusion 10, Commentary para. 7.

[55] See already C Binder and JA Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization: An International Law Perspective' in F Lusa Bordin, A Th Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* cit. 7, 20 ff; see also T Treves, 'Customary International Law' cit. para. 52.

[56] International Law Commission, Draft Conclusions on Identification of Customary International Law of 2018 UN Doc A/73/10, Conclusion 6, para. 2: "Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts".

[57] *Ibid*. Conclusion 10, para. 2: "Forms of evidence accepted by law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions;

should apply *mutatis mutandis* to the practice and *opinio juris* of international organizations.[58] The EU organs indeed regularly take acts that fit into these different categories, which (similar to states) may relate to internal matters or external relations with states or other international organizations. However, whether the Union has the competence to take certain measures, as well as the residual influence of the Member States, will depend on the subject matter at issue. While it might be most apparent that the Common Foreign and Security Policy (CFSP) touches upon questions of customary international law,[59] it is also the field in which the Member States have retained the most influence.[60]

This Section will discuss three types of acts and their relevance in the present context, namely the *legislative practice* of the Union, the *judicial practice* of the Court of Justice of the European Union (CJEU) and *public statements* made by the Commission in (quasi-)judicial proceedings.[61]

IV.2. Legislative practice of the Union

The ILC Conclusions list "legislative and administrative acts"[62] (*i.e.* "the various forms of regulatory disposition effected by a public authority"[63]) as one potential form of state practice, while "public statements made on behalf of States"[64] expressing their *opinio juris* may include statements made "when introducing draft legislation before the legislature"[65].

Within the EU competences, the Union organs may be empowered to pass legislation and – in certain circumstances – take administrative (enforcement) acts.[66] In numerous

diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference".

[58] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 4, Commentary para. 4; *ibid*. Draft Conclusion 6, Commentary para 7; *ibid*. Draft Conclusion 10, Commentary para. 7.

[59] See, e.g., J Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution' (2008) NYIL 127, 130 ("It can [...] be stated with confidence that all EU external relations based on the EC Treaty count as relevant practice under international law").

[60] Given that the decision-making authority rests with the European Council and the Council of the EU, which generally decide with unanimity in the context of the CFSP. See art. 31 TEU.

[61] There are of course other forms of relevant practice. With regard to treaty practice, see, J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 80 ff.

[62] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 6(2).

[63] *Ibid*. Commentary, para. 5.

[64] *Ibid*. Draft Conclusion 10 para. 2.

[65] *Ibid*. Commentary, para. 4.

[66] These enforcement acts might likewise touch upon questions of customary international law, thus qualifying as organizational practice and assertions to their legality as *opinio juris*. See Decision 85/206/EEC of the Commission of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.870 – Aluminium imports from eastern Europe) (Only the German, English, French, Italian and Dutch

matters, that may touch upon inter-state relations or international law they either fully or at least partially replace domestic legislatures. This already starts with the *jurisdictional link* the EU applies in its legislation and in particular in which circumstances it will apply extraterritorially, which will impact the customary norms on jurisdiction.[67]

However, EU legislation might similarly be important when it comes to substantive questions. This was recently confirmed by the UK Supreme Court in *General Dynamics United Kingdom Ltd v State of Libya*. Libya argued that there was a norm of customary international law requiring the service of documents through diplomatic channels in case of instituting proceedings against a sovereign defendant (as foreseen in art. 22 of the UN Jurisdictional Immunities Convention). The Court rejected that argument after a survey of state practice, which – in addition to Australia, Hong Kong, New Zealand, Singapore, Switzerland, the UK and the US – included a reference to the EU Service Regulation.[68] This is arguable the most explicit confirmation that EU legislation constitutes practice relevant for the ascertainment of customary international law.[69]

In addition, organs are required under EU primary law to state the reasons for any measure taken (art. 296(2) TFEU). These reasons "must disclose in a clear and unequivocal fashion the reasoning followed by the institution that adopted that measure"[70], which may also include considerations pertaining to (customary) international law.[71] For instance, the European Parliament recently adopted the Anti-Coercion Regulation in the first reading – designed to counteract "economic coercion" by third states.[72] The reasons reaffirm the customary nature of the principle of non-intervention, as defined in the

texts are authentic), para. 9.2. (dismissing a plea of sovereign immunity concerning foreign trade organizations of socialists states in competition proceedings, as these "[s]uch claims are properly confined to acts which are those of government and not of trade").

[67] In that context, the EU has repeatedly asserted that the extra-territorial application of domestic legislation violates international. See, *e.g.*, Council of the European Union, Sanctions Guidelines – update, 5664/18, 4 May 2018, para. 52.

[68] UK Supreme Court judgment of 25 June 2021 *General Dynamics United Kingdom Ltd (Respondent) v State of Libya (Appellant)* [UKSC] 22, see Lord Lloyd-Jones (Lord Burrows agreeing) para. 54, Lord Stephens (Lord Briggs agreeing) paras 149-150, 156.

[69] See also the legal position of Croatia voiced in International Centre for Settlement of Investment Disputes, Decision on the Respondent's Jurisdictional Objections *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, of 30 September 2020 N. ARB/17/34, para. 56 (in which Croatia referred to the "inviolability of diplomatic archives, documents and official correspondence [...] as confirmed by the widespread practice of both States and the European Union itself.").

[70] Case C-611/17 *Italy v Council (Fishing Quota for Mediterranean Swordfish)* ECLI:EU:C:2019:332, para. 40.

[71] Although "[i]t is not necessary for the reasoning to go into all the relevant facts and points of law", see *ibid*. See also generally K Lenaerts, P Van Nuffel, *EU Constitutional Law* (OUP 2021) 717 ff, para. 27.

[72] European Parliament Resolution P9_TA(2023)0333 of 3 October 2013 on the proposal for regulation of the European parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries. For a brief analysis, see A Nguyen, 'Questioning the EU Anti-Coercion Instrument – Conflating the Curtailment of "Strategic Autonomy" with the Erosion of Sovereignty?' (10 October 2023) EJIL:Talk! www.ejiltalk.org.

Friendly Relations Declaration[73] and quite notably assert that: "Coercion is prohibited and therefore a wrongful act under international law when a country deploys measures [...] in order to obtain from another country an action or inaction which that country is not obliged to perform under international law and which falls within its sovereignty, and when the coercion reaches a certain qualitative or quantitative threshold, depending both on the objectives pursued and the means used".[74] Likewise, the reasons confirm that the rules on state responsibility as codified in the 2001 ILC Articles constitute customary international law, in particular those concerning attribution, reparation and countermeasures.[75]

IV.3. Judicial practice of the CJEU

When it comes to the relevance of the work of adjudicatory bodies, the ILC Conclusion draw a clear distinction between *national* and *international* courts. While decisions of both might be relevant as subsidiary means for the determination of customary international law,[76] only the former can directly contribute to the emergence of customary norms.[77] Conclusion 6(2) lists "decisions of national courts" as a form of state practice,[78] and the Commentary to Conclusion 10 notes that they might contain statements expressing an *opinio juris* when "pronouncing upon questions of international law".[79] The ILC does not provide a definition for its understanding of 'national courts' and notes that the distinction between them and international courts "is not always clear-cut". In particular, the former "includes courts with an international composition operating within one or more

[73] See *ibid*. recital 5. In that context, the reasons also suggest that the Union itself is protected by the principle of non-intervention. In addition, *ibid*. recital 7: the "third country" from which the intervention emanates "should be understood to include not only a third State, but also a separate customs territory or other subject of international law because such entities are also capable of economic coercion".

[74] See *ibid*. recital 15. The reasons further provide a non-exhaustive list of the factors to be taken into account, naming "the form, the effects and the aim of the measures which the third country is deploying. [...] In addition, [...] whether the third country pursues a legitimate cause, because its objective is to uphold a concern that is internationally recognised, such as, among other things, the maintenance of international peace and security, the protection of human rights, the protection of the environment, or the fight against climate change".

[75] See *ibid*. recital 13 (countermeasures), recital 14 (reparation) and recital 16 (attribution). With regard to the proportionality analysis in the context of countermeasures, the reasons assert that an "injury to the Union or a Member State is understood under international law to include injury to Union economic operators" (see recitals 5, 13).

[76] As already foreseen by art. 38(1)(d) ICJ Statute; see Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 13.

[77] J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 82 ff.

[78] See already ICJ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [3 February 2012] Rep 99, paras 72 ff.

[79] Draft Conclusions on Identification of Customary International Law, with Commentaries cit., Draft Conclusion 10, Commentary para. 5.

domestic legal systems, such as "hybrid" courts and tribunals involving mixed national and international composition and jurisdiction".[80] In addition, the Commentary does not list the CJEU among those bodies exemplary of "international courts and tribunals".[81]

However, in light of the arguments made above, it is not altogether clear why the international/national court distinction should be of relevance here. The question is rather whether the CJEU's case law constitutes *organizational* practice and represents the *opinio juris* of the EU *as an organization* in those fields in which it may contribute to customary international law.[82] In most instances that is undoubtedly the case.[83] At any rate, even if one insists on the pertinence of the international/national court distinction, there are good reasons to conceive the CJEU as a "domestic" court for the purposes of the emergence of customary international law, at least in significant parts of its jurisprudence. While the CJEU is clearly an international court from a certain perspective,[84] it is in many ways functionally closer to domestic (constitutional) courts.[85] Firstly, EU law constitutes an autonomous legal order, distinct from international law.[86] Secondly, the CJEU enjoys compulsory and exclusive jurisdiction to adjudicate upon disputes arising from EU law (see art. 344 TFEU). Thirdly, the decisions of the CJEU have direct effect within the domestic legal orders of the Member States and – depending on the particular type of proceeding and the specific case – will tend to provide for much more specific legal consequences than an international court.

[80] *Ibid*. Draft Conclusion 13, Commentary para. 6.

[81] *Ibid*. Draft Conclusion 13, Commentary para. 4; J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' cit. 83 ff.

[82] Whether a particular decision constitutes practice or *opinio juris* would depend on the specific circumstances. For instance, in *Racke* the CJEU's decision was limited to examining the lawfulness of a prior decision to terminate a treaty, with the Court considering that the Council was permitted to base itself on a "fundamental change of circumstances" under customary international law. In those circumstances, the decision itself may understood as representing the *opinio juris* of the organization, with the prior (political) decision to terminate potentially constituting organizational practice. See case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293.

[83] In addition, in comparison to other international courts, it is more readily apparent that the CJEU's decisions "represent" the EU. The subject matters upon which the CJEU adjudicates – *i.e.* disputes or questions arising in the context the EU legal order – are as such inherently linked to the EU as an organization. In contrast, such an "inherent connection" typically does not exist between the legal questions addressed by the ICJ in its case law and the United Nations, at least in contentious cases.

[84] In that it is created through treaty and oversees the interpretation and implementation of treaties. See J Allain, 'The European Court of Justice Is an International Court' (1999) NordicJIL 249.

[85] In contrast, Odermatt argues for a case-specific analysis, in which the CJEU "may be considered an international court in certain instances and analogous to a national court in others". However, apart from the context of customary norms addressed specifically to international organizations, Odermatt essentially relegates the role of the CJEU to restating the views of the Member States. See J Odermatt, *International Law and the European Union* (CUP 2021) 51 ff.

[86] See in particular case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66, 593.

The CJEU has addressed a broad range of different matters of customary international law in its case law so far.[87] A field in which the EU has at least partly "functionally replaced" the Member States, and where the CJEU has been especially active, is treaty law, where the Court engages with the customary principles reflected in the Vienna Convention on the Law of Treaties[88]. In that context, it may well be read as further developing these rules. For instance, it considered that art. 34 VCLT (*pacta tertiis nec nocent nec prosunt*)[89] is an expression of a broader principle of customary international law on the "relative effect of treaties". In the Court's case law, it functions as an interpretative rule and requires that treaties also do not infringe the rights of other "third parties", in particular peoples entitled to self-determination.[90]

IV.4. Positions taken by the Commission in (quasi-)judicial proceedings

When it comes to *opinio juris*, ILC Conclusion 10 also lists "public statements made on behalf of States", which according to the Commentary may in particular include "assertions made in written and oral pleadings before courts and tribunals".[91] The power to represent the Union in legal proceedings rests with the Commission. While the pertinent art. 335 TFEU explicitly provides this only for domestic legal proceedings "[i]n each of the Member States", the CJEU considered the provision to be "the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission".[92] As a result, the European Commission is authorized to represent the EU in legal proceedings before foreign and international (quasi-)judicial bodies as well.[93] Most importantly, while the Commission has to *consult* the Council prior to expressing positions on behalf of the EU[94], it does not have to seek prior approval for those

[87] See, with further references to case law, K Lenaerts and P Van Nuffel, *EU Constitutional Law* cit. 708 ff, para 26.

[88] Which, quite notably, is not ratified by all Member States. See United Nations, *United Nations Treaty Collection* treaties.un.org.

[89] The provision provides that a "[a] treaty does not create either obligations or rights for a third State without its consent".

[90] See case C-386/08 *Brita* ECLI:EU:C:2010:91 paras 44 ff (regarding the Palestinian territories); case C-104/16 P *Council v Front Polisario* ECLI:EU:C:2016:973 paras 100 ff (regarding Western Sahara); see also case T-279/19 *Front Polisario v Council* ECLI:EU:T:2021:639 paras 194 ff.

[91] Draft Conclusions on Identification of Customary International Law, with Commentaries (2018) cit., Draft Conclusion 10, Commentary para. 4. On the relevance of "views expressed by European Union institutions" (not necessarily in connection with legal proceedings) for purposes of customary international law, see the Dissenting Opinion of Gavan Griffith QC in Permanent Court of Arbitration Final Award of 2 October 2003 PCA Case No. 2001-03 *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v United Kingdom*) (fn 46].

[92] Case C-73/14 *Council v Commission* ECLI:EU:C:2015:663 para. 58.

[93] *Ibid*. para. 59 (regarding proceedings before ITLOS); see case C-131/03 P *Reynolds Tobacco and Others v Commission* ECLI:EU:C:2006:541 para. 94 (regarding proceedings before domestic courts of third states).

[94] *Council v Commission* cit., para. 86.

submissions.[95] Whether the same principles apply with regard to legal proceedings relating to the Common Foreign and Security Policy is not yet fully clear, given that it is generally excluded from the Commission's competence to "ensure the Union's external representation" (art. 17(1) TEU).[96]

The competence of the Commission most importantly involves the dispute settlement mechanisms of those treaties and organizations to which the EU itself is a party, namely the World Trade Organization (WTO) and the UN Convention on the Law of the Sea (UNCLOS). In both of these forums – before WTO Panels[97] and ITLOS[98] – the Commission has made assertions on the state of general (customary) international law in its submissions. Similarly, it made assertions on custom in *amicus curiae* briefs in proceedings before the US Supreme Court[99] and US District Courts[100]. However, arguably the most notable practice in that context has been the (unsuccessful) attempt of the European Commission to provide an international law reasoning for the inapplicability of intra-EU Bilateral Investment Treaties (BITs). In the annulment proceedings *Micula v Romania* it argued that in accordance with customary international law codified in art. 59(1)

[95] *Ibid*. paras 76, 82.

[96] The question in particular arises in the context of the recent written submissions by the European Union in the context of ICJ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia Federation)* [27 September 2023]. However, the content of the submissions is not yet public, and the press statement by the ICJ does not indicate which EU organ submitted it. See A Melzer, 'The ICJ's Only Friend in Ukraine v. Russia: On the EU's Memorial in the Case of Ukraine v. Russia before the ICJ' (7 October 2022) Völkerrechtsblog voelkerrechtsblog.org.

[97] Communication COM(2000) 1 final from the Commission of 2 February 2000 on the precautionary principle; WTO, European Communities: Measuring Affecting the Approval and Marketing of Biotech Products – Reports of the Panel of 29 September 2006 WT/DS291/R, WT/DS292/R and WT/DS293/R, paras 7(78) ff (on the precautionary principle).

[98] The only contentious case involving the European Union has been struck out of the list prior to reaching the stage of arguments, see International Tribunal for the Law of the Sea order of 16 December 2009 n. 7 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*. However, the Commission has made statements in advisory proceedings, see International Tribunal for the Law of the Sea written statement of the European Commission on Behalf of the European Union of 29 November 2013 n. 21 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, paras 54 ff, and para. 104; International Tribunal for the Law of the Sea written statement by the European Union of 15 June 2023 N. 31 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, para. 24.

[99] See Supreme Court of the United States of 23 January 2004 N. 03–339 *Jose Francisco Sosa v Humberto Alvarez-Machain*, paras 15 ff.

[100] See Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain (3 May 2019) US District Court for DC Civil Action No. 1:18-cv-2254, *Masdar Solar & Wind Cooperatief U.A. v The Kingdom of Spain*, at 18-19 (asserting the customary status of Articles 30 and 59 VCLT).

VCLT, intra-EU BITs were terminated as the (subsequently concluded) EU Treaties governed the same matter.[101] The *amicus curiae* brief in *Micula* as part of a longer-standing push by the Commission for the termination of intra-EU BITs, in which its position on their impermissibility – at least initially – differed from that of a number of Member States.

V. Conclusions

This *Article* made the argument that the European Union in principle has the capacity to contribute to customary international law, before exploring various forms in which its practice and *opinio juris* might show itself. Most notably, the EU's contribution is distinct from that of the Member States[102] and, at times, unusually explicit. For instance, the definition of "economic coercion" in the context of the Anti-Coercion Regulation and for the purposes of the principle of non-intervention is, while in line with mainstream scholarship, arguably much more categorical than positions typically expressed by states. The examples discussed above moreover concern norms and principles that are equally of relevance for Member States, be it issues of treaty law or the service of documents on sovereign defendants. That should not necessarily go to say that the EU is particularly *successful* in its attempts to shape customary international law: the various arguments in connection with intra-EU BITs or the CJEU's reasoning in *Racke* have generally garnered little support by other actors.

However, that observation does not detract from the core argument of this contribution, namely that the increasing relevance of the EU's conduct in the ascertainment of customary international law impacts on the sovereignty of the Member States. For one, the competence of the EU in this context lacks a clear foundation in the treaties. In addition, as already noted above, the EU's conduct goes beyond matters relevant for international organizations as such and touches upon issues that might become relevant in disputes between any individual Member State and a third state under international law. The extent to which the freedom of action of Member States is restricted as a result will of course differ from instance to instance, depending on various factors: whether it concerns exclusive or shared competences of the Union, the residual influence of the Member States on decision-making and (as a factual matter) whether the position of the Union actually differs from those of the Member States. At any rate, the topic exemplifies how sovereign authorities are continuously re-balanced between the Union and the Member States and attests to the increasing relevance of the EU on the international level.

[101] While not making that argument explicitly in terms of customary international law, Romania was not a party to the VCLT making it as such inapplicable to the dispute, see International Centre for Settlement of Investment Disputes, Decision on Annulment *Ioan Micula, Viorel Micula and Others v Romania* of 26 February 2016 N. ARB/05/20, paras 330 ff.

[102] See also C Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' (2007) NYIL 3, 55 ff.