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

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

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

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

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

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

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

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

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

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

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

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

[6] Art. 3(5) TEU.

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

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

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

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

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

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

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

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

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

[14] See contribution by Papastavridis in this Volume.

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

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

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

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

[19] See contribution by Vatsov in this Volume.

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

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

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

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

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

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

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

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

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

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