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The International Court of Justice and the Court of Justice of the European Union

Jed Odermatt

1 Introduction

The International Court of Justice, housed at the Peace Palace in The Hague, and the Court of Justice of the European Union, just over 300 kilometres south in Luxembourg, are two very different types of international court. As the 'principal judicial organ of the United Nations',[1] the International Court of Justice (ICJ) is truly a 'world court'. It resolves legal disputes submitted to it through its contentious jurisdiction, and answers legal questions submitted to it through its advisory jurisdiction. Through these judgments and opinions, the ICJ contributes to the universal character of international law. For instance, the ICJ has consistently upheld that international law is a single system that applies to all states, comprised of a set of universal rules.[2]

The Court of Justice of the European Union (CJEU), which includes the Court of Justice (CJ) and the General Court (GC), is the court of a regional supranational organization, the European Union (EU). Many would argue that the CJEU should not be considered an international court at all, and that it more closely resembles a constitutional court for Europe. While its primary goal is to interpret and apply the EU Treaties and EU law, its everyday practice appears to resemble a domestic court. On a given day, it might hear cases on copyright protection, competition law, the freedom of movement or the law governing the EU institutions. This contrasts with the work of the ICJ, dealing with issues such as maritime delimitation, armed conflict or the legality of nuclear weapons. Whereas the ICJ has jurisdiction to resolve international legal disputes between states, the CJEU has a narrower role, that is, to resolve disputes regarding EU law. Whereas the ICJ must wait for states to submit cases and UN organs to submit requests for advisory opinions, the CJEU has compulsory jurisdiction and can hear cases brought by the EU institutions, EU Member States, and certain individuals. Just as the ICJ promotes the universal character of international law, the CJEU has

[1] Art. 92 Charter of the United Nations.

[2] See Mads Andenas and Eirik Bjorge (eds), 'Introduction: From Fragmentation to Convergence in International Law' in *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 1, 33: 'the International Court has in this way not only shown that international law is a single, unified system of law but, in doing so, reasserted its own position in this system, that is, at the centre of the international legal system.'

also been instrumental in promoting the coherence and unity of EU law, particularly by promoting the autonomy of the EU legal order.

It may appear, based on these differences, that the two courts operate in entirely separate worlds. The ICJ faces legal issues on the plane of international law and disputes between states, whereas the CJEU is focused primarily on EU law. Yet over time, there has been much more interaction between Luxembourg and The Hague. These two Courts, both based in Europe, and both born out of war on that continent, are committed to the project of promoting peace. Moreover, the courts have faced similar and overlapping legal issues.

This chapter examines the relationship between these two international courts. It focuses on how the CJEU has dealt with ICJ jurisprudence, by discussing CJEU judgments and Advocate General opinions that have referred to or cited ICJ judgments. The CJEU deals with ICJ judgments in three main ways: when discussing customary international law, when applying the law of treaties, and when using international law to interpret and develop principles of EU law. These three issues often overlap. For example, the CJEU applies the principles of the 1969 Vienna Convention on the Law of Treaties (VCLT) as a source of customary international law, and by doing so, it develops internal EU law on the way that the EU law and international law sources interact.

The ICJ has had an important role in establishing and clarifying principles of international law, and in so doing, promotes the coherence, even universality, of that system.[3] Given the ICJ's expertise and authority, one might expect that the CJEU would show a certain deference to the ICJ when dealing with issues of international law. Yet this is not always the case. At times, the CJEU is open to citing ICJ authority. In other cases, it refers to ICJ case law, but diverges from it in some respects. For example, in a rather subtle manner, it may cite an ICJ judgment to support a proposition, but goes further than the ICJ did in that judgment. In most instances, however, when addressing international law issues, the CJEU does not refer to ICJ jurisprudence at all. The CJEU is, first and foremost, a court of the EU, and when it applies ICJ case law, it does so in order to interpret and apply *EU law*. According to the CJEU, the ICJ's case law is a secondary source of law in the EU legal order. The ICJ is capable of informing the CJEU when dealing with international law issues, but is by no means viewed as a hierarchically superior court.

[3] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 (2) EJIL 265-297; ibid, Andenas and Bjorge, *A Farewell to Fragmentation*.

The chapter examines the judgments and opinions of Advocates General that mention the international court and its case law.[4] It does not discuss, however, the many instances where the CJEU could have referred to an ICJ case but did not do so. It therefore only examines instances where the CJEU chose to refer to the ICJ. It may have done this upon its own initiative, or because the parties made references to ICJ case law in their arguments and submissions.

Whereas the CJEU sometimes cites and discusses ICJ judgments, the reverse is not the case. It is unlikely that the ICJ would discuss CJEU judgments unless a question arose regarding EU law. Yet, because the EU Treaties forbid the EU Member States from submitting disputes related to EU law to any judicial body other than the CJEU, it is unlikely that the ICJ would ever hear such a dispute.[5] If an EU Member State were to bring proceedings before the ICJ that touched upon EU law, the European Commission would bring infringement proceedings against that state. For instance, in the *Mox Plant* case, the CJEU found that Ireland breached its obligations under Article 292 TEC (now Art. 344 TFEU) by submitting a dispute against the UK that would have involved the interpretation of EU law.[6] While the Arbitral Tribunal considered that it had *prima facie* jurisdiction, it noted that the dispute between Ireland and the United Kingdom before the ECJ would be binding under EU law, and may lead to conflicting decisions. The Tribunal decided to suspend the proceedings.[7]

The ICJ's docket once featured disputes between European States, and some of its landmark cases dealt with countries that are now members of the European Union.[8] In later decades, the ICJ's cases have dealt with countries outside Europe. EU membership has arguably made the use of the ICJ between Member States less likely. It is only in cases where there is no EU law dimension, such as the dispute between Italy and Germany in *Jurisdictional Immunities*, where EU Member States brought proceedings against one another. Even in this case, Germany made a declaration stating that the dispute did not involve an EU law

[4] The chapter does not discuss instances where references to the ICJ were incidental or minor.
[5] Judgment of 30 May 2006, *Commission v. Ireland*, C-459/03, EU:C:2006:345 ('MOX Plant').
[6] Ibid.
[7] President's Statement of June 13, 2003, *Ireland v. United Kingdom*, para. 11, available at: < https://pcacases.com/web/sendAttach/877 > accessed 12 August 2019: 'The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.'
[8] E.g. *Case concerning the Barcelona Traction, Light and Power Co Ltd* (*Belgium v. Spain*) Second Phase (Judgment) (ICJ Reports 1970) 3; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Judgment) (ICJ Reports 1954) 19; *North Sea Continental Shelf (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands)* Merits (Judgment) (ICJ Reports 1969) 4.

dimension.[9] When Belgium instituted proceedings against Switzerland in *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, a case involving the interpretation and application of the Lugano Convention, Belgium declared that the Court of Justice of the European Communities 'is without jurisdiction in the area'.[10] Although Belgium discontinued proceedings, Hoffmeister argues that any ICJ judgment 'would have dealt with a matter which had become a matter of Union law under the revised 2007 Lugano Convention' since the CJEU had found that it is exclusively competent in the field covered by the Lugano Convention.[11]

Although the EU is not a UN member or a party to the ICJ Statute, it could potentially appear before the ICJ in some proceedings. While the EU appears in various international dispute settlement bodies, either as a full party or intervener, it has never appeared before the ICJ. The EU could appear before the ICJ via Article 43(2) of the ICJ's Rules of Court.[12] This rule applies where the 'construction of a convention to which a public international organization is a party may be in question in a case before the Court'. As the EU is a party to numerous multilateral conventions, the EU may make use of this rule to make observations on the interpretation of such conventions. The EU can also furnish the ICJ with relevant information in some cases. It is a public international organization that is 'likely to be able to furnish information on the question' in the context of advisory opinions, pursuant to Article 66 of the ICJ Statute. For instance, on 23 June 2023, the ICJ authorized the EU, upon the EU's request, to participate in the advisory proceedings on the *Obligations of States in respect of Climate Change*.[13] It may also provide the Court with information in the context of contentious proceedings under Article 34, paragraph 2 of the ICJ Statute. In August 2022, the EU furnished the Court with information upon its own initiative in the context of the proceedings in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian*

[9] ICJ Press Release 2008/44 of 23 December 2008, 2 ('Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European integration. It adds that outside of that "specific framework" the Member States "continue to live with one another under the regime of general international law.')

[10] ICJ Press Release 2009/36 of 22 December 2009, 2.

[11] Frank Hoffmeister, 'The European Union and the Peaceful Settlement of International Disputes' (2012) 11 (1) *Chinese Journal of International Law* 85.

[12] Ibid para. 77; Art. 43 (2) ICJ Rules of Court: 'Whenever the construction of a convention to which a public international organization is a party may be in question in a case before the Court, the Court shall consider whether the Registrar shall so notify the public international organization concerned. Every public international organization notified by the Registrar may submit its observations on the particular provisions of the convention the construction of which is in question in the case.'

[13] ICJ Press Release 2023/33 of 23 June 2023.

Federation).[14] Even in instances where the EU does not have a formal role before the Court, the Union can also play a role in coordinating the positions of EU Member States and support their interventions. For example, the Union has supported Ukraine's proceedings before the ICJ and the interventions by EU Member States.[15]

2 The CJEU and International Law

In order to understand the CJEU's relationship with the ICJ, it is important to discuss the CJEU's relationship with international law. This relationship is complex and has been subject to quite some academic discussion in recent years. The starting point is that the CJEU does not consider the EU Treaties to be part of the international legal order. Although the EU's founding documents are strictly treaties from the perspective of public international law, the CJEU has held that when establishing the European Communities, the EU Member States created a 'new legal order'.[16] This has had an effect on the way the CJEU approaches other international law instruments. In order for the CJEU to apply and interpret international law, it must have entered the EU legal order. In terms of hierarchy, then, international law is binding on the Union, but is considered as sitting between primary EU law (the EU Treaties, the Charter of Fundamental Rights and general principles of EU Law) and EU secondary law (EU Directives, Regulations). Moreover, the CJEU has set out certain conditions under which international law may enter the EU legal order.

Judge Rosalyn Higgins contrasts the CJEU's approach to international law with that of the European Court of Human Rights.[17] The CJEU views EU law, not as a specialised form of international law, but as an autonomous legal order. Contrast this with the ECtHR, which views its role as interpreting a specialised field of international law, that is, the European Convention on Human Rights. The ECtHR will therefore seek to interpret and apply the Convention in accordance with other principles of international law. This is in stark contrast to the CJEU, which will not use international law to interpret the EU Treaties. For instance, the CJEU has applied the principles of the 1969 VCLT to interpret

[14] ICJ Press Release 2022/29 of 18 August 2022.
[15] European External Action Service, Joint statement on supporting Ukraine in its proceeding at the International Court of Justice, 13 July 2022. https://www.eeas.europa.eu/eeas/joint-statement-supporting-ukraine-its-proceeding-international-court-justice_en
[16] Judgment of 5 February 1963, *van Gend en Loos v. Administratie der Belastingen*, C-26/62, EU:C:1963:1, para. 12.
[17] Rosalyn Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 (1) ICLQ 6.

international agreements, but does not apply such principles when interpreting the EU Treaties themselves.

The CJEU deals with international law in two main ways. The first is when international law is dealt with as part of the EU legal order. When the EU adopts an act, 'it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union'.[18] This is based on Article 3(5) TEU, according to which the Union is to contribute to the strict observance and the development of international law. International law that is binding on the EU is considered to be part of the EU legal order. In these instances, the CJEU might be called upon to decide whether a particular EU instrument is compatible with rules of international law, both treaties and customary international law.

The second is where the CJEU is called upon to answer questions of public international law that arise when interpreting and applying EU law. In the latter scenario, international law is not used as a sword to challenge the legality of an EU law instrument, but as a tool in the Court's reasoning. The CJEU's approach to international law, and its use of ICJ jurisprudence, depends on whether it is using international law in the first method, reviewing the legality of EU acts, or in the second method, using international law to support its reasoning. When international law is a tool to interpret and apply EU law, the CJEU has been quite open to the use of ICJ jurisprudence. Higgins points out that '[t]he purposes for which Public International Law is involved before the European Court are various and interesting. And it is fascinating for an international lawyer to see, through the prism of the jurisprudence of the European Court, the place of Public International Law in the legal disputes of the Community.'[19] The following sections discuss how the CJEU has dealt with ICJ jurisprudence. It will be shown that the CJEU often uses the ICJ jurisprudence as a short cut route to discover international law rules, but rarely engages with the reasoning of the ICJ judgments.

3 Customary International Law

The main way that the CJEU has dealt with ICJ jurisprudence is in order to identify principles of customary international law. The CJEU has held that the

[18] Judgment of 21 December 2011, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864, para. 101.
[19] Higgins (n 15) 6, 17.

EU must respect international law in the exercise of its powers, including customary international law, yet it may not always be clear whether a particular principle has the status of customary international law. First, it uses ICJ jurisprudence as a 'short-route' to find the existence of a principle of customary international law.[20] The CJEU does not usually undertake an independent analysis of whether a particular principle has the status of customary international law, by looking, for instance at whether state practice and *opinio juris* support the customary character of a rule. Rather, it will usually refer to a case of the ICJ or the Permanent Court of International Justice (PCIJ). There are a number of fields of public international law where the CJEU has cited ICJ jurisprudence regarding customary international law.

3.1 International Humanitarian Law

The CJEU has encountered ICJ jurisprudence in cases dealing with international humanitarian law (IHL). For instance, it has discussed how common Article 3 of the Geneva Conventions and Protocol I have the status of customary international law. In *A and Others v. Minister van Buitenlandse Zaken*,[21] Advocate General Sharpston referred to the *Nicaragua v. United States* and the *Nuclear Weapons* Advisory Opinion.[22] *Nicaragua* is cited to support the argument that the rules in common Article 3 reflect customary international law, which 'constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts' and that they reflect 'elementary considerations of humanity'.[23] In this case, A and Others argued that Liberation Tigers of Tamil Eelam (LTTE) could not be classified as a terrorist organization under EU law, because it was engaged in an 'armed conflict', within the meaning of international humanitarian law, with the Sri Lankan government. AG Sharpston found that international humanitarian law does not prohibit the adoption of preventative measures of the type to which LTTE was subject. The Court (Grand Chamber) did not mention the ICJ in its judgment, however. It found that international humanitarian law and the EU law provisions in question, pursue different aims and introduce different mechanisms. Referring to its earlier ruling in *Diakité*, the Court found that the application of the Common Position and Regulation in question do not depend on classifications stemming from international

[20] '[T]he International Court of Justice's findings as a useful short-route to identifying what customary international law on a given topic may be.' Higgins (n 15) 10.
[21] Opinion of AG Sharpston, *A and Others v. Minister van Buitenlandse Zaken*, EU:C:2016:734.
[22] *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) (ICJ Reports 1996) 226 paras. 78 and 79, cited at fn 5; *A and Others* (n 19).
[23] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) Merits (Judgment) (ICJ Reports 1986) 14, paras. 218 and 219, cited at fn 92; *A and Others* (n 19).

humanitarian law.[24] Like in *Diakité*, the Court found that IHL and EU law exist in separate spheres of operation.

In *Diakité,* AG Mengozzi similarly cited the ICJ's Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons* to assert that the Geneva Conventions and the Additional Protocols constitute 'intransgressible principles of international customary law'.[25] The Advisory Opinion was also cited by the Advocate General when discussing how IHL constitutes one complex system comprising of 'Hague law' and 'Geneva law'.[26] The Advocate General did so in order to make the point that, even though those instruments are not binding upon the Union, they represent customary law, and as such are binding on the EU, and that EU law should therefore be interpreted consistently with those rules. Nonetheless, the AG and the Court found that the meaning of 'internal armed conflict' in the Qualification Directive did not have the same meaning as a 'non-international armed conflict' under IHL. One might argue that *Diakité* contributes to a form of fragmentation here, since they both take a different approach to the notion of an armed conflict that is not international in character. However, here the EU law in question and the relevant IHL provisions do have very different aims. They use similar terminology, but for very different purposes.[27]

In *Joined Cases T-208/11 and T-508/11, Liberation Tigers of Tamil Eelam (LTTE),*[28] LTTE argued that placing LTTE on a list relating to freezing of funds violates the 'principle of non-interference' under IHL, by constituting an interference with a third country in an armed conflict. The GC quickly dismissed this argument. While it found that the principle of 'non-interference' is a principle of customary international law, referring to the ICJ's *Nicaragua* judgment,[29] it stated that the principle is set out for the benefit of sovereign states 'and not for the benefit of groups or movements.'[30]

In *Kadi*, perhaps the most well-known CJEU judgment involving international law, there is little engagement with the ICJ. However, Advocate General Maduro

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[24] Judgment of 14 March 2017, *A and Others v. Minister van Buitenlandse Zaken,* C-158/14, EU:C:2017:202, para. 91.
[25] *Legality of the Threat or Use of Nuclear Weapons* (n 20) para. 79, cited in Opinion of AG Mengozzi, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides,* EU:C:2013:500, fn 24.
[26] Opinion of AG Mengozzi ibid para. 29.
[27] See further, Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3 *Cambridge Journal of International and Comparative Law* 696, 714.
[28] Judgment of 16 October 2014, *LTTE v. Council,* T-208/11, EU:T:2014:885.
[29] *LTTE v. Council* ibid para. 69. The GC uses the term 'non-interference' as synonymous with the 'principle of non-intervention', although the *Nicaragua* judgment uses the term 'non-intervention': 'The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.' (*Nicaragua* (n 21) para. 202).
[30] Ibid.

made passing reference to the *Lockerbie* case (Libyan Arab Jamahiriya v. United Kingdom, Provisional Measures) to support the argument that Article 103 of the UN Charter applies to binding decisions of the UN Security Council.[31] The Court of First Instance (as it then was) also made a number of references to ICJ judgments, including *Lockerbie*,[32] to support the primacy of resolutions of the UN Security Council. In that case, the Court of First Instance found that it had the power to conduct 'indirect judicial review' of UN Security Council resolutions, limited to violations of *jus cogens* norms. In making this argument, the Court of First Instance referred to the 1996 *Nuclear Weapons* Advisory Opinion, to support the idea that *jus cogens* norms constitute 'intransgressible principles of international customary law' from which neither the Member States nor the UN bodies may derogate.[33]

In some circumstances, the CJEU may refer to the ICJ in support of a specific legal finding. In *Organisation juive européenne*,[34] the CJEU decided on the requirements under EU law relating to the labelling of products originating in Israeli occupied territories. Advocate General Hogan was unequivocal in his assessment that 'from the perspective of international law, the Israeli occupation of these territories is illegal.'[35] In support of this view, the Advocate General relied on the ICJ opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[36] finding that it is 'beyond argument that the Israeli settlement policy is regarded as a manifest breach of international law, […]'[37] The Grand Chamber also relied on the ICJ's *Wall* advisory opinion to support its finding that some settlements 'give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law.'[38] The Grand Chamber concluded that the question of whether a foodstuff originates in a settlement in violation of international humanitarian law may influence a consumer's decision to purchase

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[31] Opinion of AG Maduro, *Kadi and Al Barakaat International Foundation v. Council and Commission*, C-415/05 P, EU:C:2008:30, para. 18.

[32] Judgment of 21 September 2005, *Yassin Abdullah Kadi v. Council and Commission*, T-315/01, EU:T:2005:332. In particular, the CFI referred (at para. 184) to *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America*) Provisional Measures (Judgement) (ICJ Reports 1992) 16 para. 42, and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United Kingdom*) (Order) (ICJ Reports 1992) 113 para. 39.

[33] *Kadi v. Council and Commission* (n 30) para. 231.

[34] Judgment of 12 November 2019, *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*, C-363/18, EU:C:2019:954.

[35] Opinion of AG Hogan, *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*, C-363/18, EU:C:2019:494, para. 53.

[36] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (ICJ Reports 2004) p. 136 (paras. 88 and 155).

[37] Opinion of AG Hogan (n 35) para. 55.

[38] *Organisation juive européenne* (n 34) para. 48.

the product.[39] Rather than conducting its own assessment of the legality or otherwise of the Israeli occupation of the territories in question, the CJEU uses the ICJ's findings as a short-route.

3.2 Diplomatic and Consular Law

The CJEU has also dealt with the customary law status of the Vienna Convention on Consular Relations (VCCR),[40] particularly those relating to the privileges and immunities of consular officers and consular employees. In *Evans*, AG Wahl found that the ICJ had not stated that the VCCR provisions reflect customary international law, but represent 'principles which are deeply rooted in international law'.[41] AG Wahl refers to the ICJ judgment in *United States Diplomatic and Consular Staff in Tehran*,[42] which sets out that the VCCR provisions 'codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions'.[43] AG Wahl then found that Articles 48 and 71 of the VCCR on privileges and immunities represent customary international law. The question in this case related to the calculation of old age pension benefits for Ms Evans, who had been employed by the British Consulate General in Rotterdam. The Court looked at whether the provisions of the VCCR relating to the privileges of consular staff had the status of customary international law before the Convention had come into force for the Netherlands. Duquet notes that, unlike its sister convention, the Vienna Convention on Diplomatic Relations,[44] the VCCR was not seen as a straightforward exercise of 'codifying' customary international law.[45] This is evidenced by the fact that, during the drafting of the VCCR, there was far less agreement among delegates on disputed issues of consular law, contrary to the diplomatic law counterpart. While it is accepted by scholars that the VCCR represents customary international law, it is more disputed which

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[39] *Organisation juive européenne* (n 34) para. 56.
[40] *Vienna Convention on Consular Relations* (24 April 1963) 596 UNTS 261, entered into force 19 March 1967.
[41] Opinion of AG Wahl, *Raad van bestuur van de Sociale verzekeringsbank v. L.F. Evans*, C-179/13, EU:C 2014:2015, para. 36.
[42] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) (ICJ Reports 1980) 3 para. 45, cited in Opinion of AG Wahl ibid fn 18.
[43] Opinion of AG Wahl (n 39) para. 36.
[44] *Vienna Convention on Diplomatic Relations* (18 April 1961) 500 UNTS 95, entered into force 24 April 1964.
[45] Sanderijn Duquet, Oxford Reports on International Law, Commentary to 'Raad van bestuur van de Sociale verzekeringsbank v Evans, Judgment, C-179/13, ILEC 078 (CJEU 2015), 15th January 2015, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]; European Court of Justice (5th Chamber)' International Law in EU Courts (ILEC), available at: <http://opil.ouplaw.com> accessed 12 August 2019.

articles have acquired customary status, and, as was important in this case, at which point in time. The Court adopted the position of AG Wahl, without any discussion of the negotiating history of the VCCR, and by merely mentioning the quoted passage from the *Iran Hostages* case. This is arguably an example of the CJEU going further than what the ICJ had stated, by finding that the VCCR, at the relevant time, had the status of customary international law.

Opinion 2/15 dealt with the question of who was competent to conclude the EU-Singapore Free Trade Agreement (EUSFTA).[46] Was the EU competent to conclude the EUSFTA alone, or did the agreement also require the participation of the EU Member States? One of the issues in this case dealt with the 'Investor-State Dispute Settlement' ('ISDS') mechanism in the agreement. Under the EUSFTA neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party have consented to submit or has submitted to arbitration. The Council argued that the EU does not have competence to legislate in the field of diplomatic protection, as only the EU Member States had the competence to decide whether or not to give diplomatic protection in a particular case. Advocate General Sharpston looked to the definition of diplomatic protection in international law. The opinion cited the International Law Commission's 2006 Draft Articles on Diplomatic Protection,[47] the PCIJ,[48] and the ICJ.[49] Citing the ICJ's *Interhandel* case *(Switzerland v. United States of America)*, AG Sharpston found that it is a principle of customary international law that 'before a State gives diplomatic protection to its injured nationals, those nationals must first have exhausted local remedies.'[50]

In *Hungary v. Slovakia*[51], the CJEU determined that privileges and immunities enjoyed by a Head of State were part of customary international law.[52] However, the Court came to this conclusion without any analysis or references to international or domestic case law.

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[46] *Opinion 2/15*, EU:C:2017:376 and Opinion of Advocate General Sharpston, EU:C:2016:992

[47] United Nations International Law Commission, Draft Articles on Diplomatic Protection with commentaries (2006), adopted by the International Law Commission at its fifty-eighth session and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10), Yearbook of the International Law Commission, 2006, vol. II, Part Two ('UN ILC Draft Articles on Diplomatic Protection'), Article 1 and Commentary on Article 1, para. 2.

[48] *Mavrommatis Palestine Concessions (Greece v. UK)* (PCIJ Reports 1924) Series A, No. 2, 12.

[49] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)* (Judgement) Second Phase (ICJ Reports 1970) 3 para. 78; *Interhandel Case (Switzerland v. United States of America)* (Judgment) (ICJ Reports 1959) 6, 27.

[50] Opinion of AG Sharpston (n 44) para. 539.

[51] Judgment of 16 October 2012, *Hungary v. Slovakia*, C-364/10, EU:C:2012:630.

[52] *Hungary v. Slovakia* ibid para. 46 ('[O]n the basis of customary rules of general international law […] the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities.')

3.3 Nationality and Citizenship

The CJEU has also referred to ICJ jurisprudence relating to questions of nationality and citizenship. The CJEU has been instrumental in developing and defining the concept of EU citizenship. Yet the starting point of the Court is that international law and EU law leave it to the state to decide the conditions regarding the acquisition of nationality.

In *Brouillard*,[53] the Belgian referring court sought guidance on whether the function of a legal secretary for the *Cour de cassation* should be considered 'employment in the public service', within the meaning of Article 45(4) TFEU. The CJEU considered its previous case law, including *Alevizos*,[54] a case dealing with an officer in the Greek Air Force who had been temporarily posted to the North Atlantic Treaty Organisation (NATO). According to Article 45(4) TFEU, the provisions on the free movement of workers do not apply to 'employment in the public service'. This is based on the idea of 'the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.'[55] Advocate General Sharpston highlighted how this definition in EU law stems from the ICJ's *Nottebohm* case.[56]

The *Nottebohm* case is used as authority for the principle that the granting of nationality by a state is only entitled to be recognised where there is a 'genuine connection' between the individual and the State granting nationality. In this case, Liechtenstein was not able to take up a case against Guatemala based on the nationality of Mr Nottebohm (a German national who had obtained Lichtenstein nationality), because there had been no prior genuine link between Mr Nottebohm and Lichtenstein.[57] *Nottebohm* has been cited in a number of cases in support of this principle in the EU context.[58]

The CJEU faced similar issues in *Rottman*.[59] According to the CJEU's case law, it is for the EU Member States, having regard to relevant Union law, to set out

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[53] Judgment of 6 October 2015, *Brouillard*, C-298/14, EU:C:2015:652.
[54] Judgment of 26 April 2007, *Alevizos*, C-392/05, EU:C:2007:251, paras. 69 and 70.
[55] Ibid para. 70.
[56] *Nottebohm (Lichtenstein v. Guatemala)* (Judgment) Second Phase (ICJ Reports 1955) 4, 23, cited in Opinion of AG Sharpston *Brouillard*, C-298/14, EU:C:2015:408, fn 18.
[57] *Nottebohm* ibid para. 23.
[58] See Opinion of AG La Pergola, *Pereira Roque*, C-171/96, EU:C:1997:425, para. 31; Opinion of AG Kokott, *Hadadi*, C-168/08, EU:C:2009:152, AG Kokott referred to *Nottebohm* in reference to the principle of priority of the more effective nationality, which has long been recognised in international law regarding the right of States to afford diplomatic protection (at para. 52).
[59] Judgment of 2 March 2010, *Janko Rottman v. Freistaat Bayern*, C-135/08, EU:C:2010:104.

the conditions for the acquisition and loss of nationality.[60] In this case, the Federal Administrative Court of Germany asked the CJEU whether a decision by a Member State on naturalisation that causes an EU citizen to lose his or her EU citizenship and renders them stateless, violates EU law. The Court (Grand Chamber) found that the question falls within the ambit of EU law by virtue of the 'nature and its consequences'.[61] Whereas the Court did not examine international law when coming to this conclusion, Advocate General Maduro's starting point was the principle of international law that 'questions of nationality are in principle within the reserved domain of States'. In this regard, AG Maduro cites the PCIJ Advisory Opinion *Nationality Decrees Issued in Tunis and Morocco*[62] and the *Nottebohm* case.[63]

3.4 Law of the Sea

The CJEU has also been an active court in the field of the law of the sea. On a number of occasions, the CJEU has been called upon to determine the customary law status of principles in this field.

One of the most important cases in this field is *Poulsen*[64] involving a challenge to EC legislation on the grounds that it violated international law of the sea. The Danish prosecutor brought proceedings against Poulsen on charges that they had transported and stored on board their vessel salmon caught in the North Atlantic, in contravention of an EC Regulation intended to protect fishery resources.[65] The company that owned the vessel was registered in Panama, and the vessel was also registered in Panama and flew the Panamanian flag. The master and crew were Danish, and the vessel was normally berthed in Denmark between voyages. The referring Danish Court asked whether Article 6 of the Regulation should be interpreted as applying to all nationals of the Member States, whatever the country in which the fishing vessel concerned is registered and whatever flag it flies, and regardless of where the vessel is located. The Court held that Article 6 of the Regulation must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea. The Court found this to include

[60] Ibid para. 39.
[61] Ibid para. 42.
[62] See *Advisory Opinion of 7 February 1923 on Nationality Decrees Issued in Tunis and Morocco*, Series B No. 4 (1923), 24, cited in Opinion of AG Maduro, *Janko Rottmann v. Freistaat Bayern*, C-135/08, EU:C:2009:588, para. 18.
[63] *Nottebohm* (n 54).
[64] Judgment of 24 November 1992, *Anklagemyndigheden v. Poulsen and Diva Navigation Corp*, C-286/90, EU:C:1992:453.
[65] Council Regulation (EEC) No 3094/86 of 7 October 1986, laying down certain technical measures for the conservation of fishery resources (OJ 1986 L 288, p. 1).

the *Convention on the Territorial Sea and the Contiguous Zone,*[66] the *Convention on Fishing and Conservation of the Living Resources of the High Seas*[67] as well as the *United Nations Convention on the Law of the Sea*.[68] The Court found that a vessel registered in a non-EC state could not be treated as a vessel with the nationality of an EC Member State on the ground that it has a 'genuine link' with that Member State. It also found that Community legislation could not be applied in respect to a vessel of a non-EC Member country in the exclusive economic zone of a Member State as it enjoys freedom of navigation in that area. Under international law of the sea, a vessel in principle has only one nationality, that of the State in which it is registered. Nothing in the legislation suggested that the European Community intended to impose obligations on European Community nationals on the basis of personal jurisdiction. The Court found that there was nothing in the text or preamble of the Regulation in question that demonstrated that it was intended to apply on the basis of personal jurisdiction.

This judgment is important insofar it states that the EU 'must respect international law in the exercise of its powers'. The Court found that the Regulation in question 'must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.'[69] One of the questions in this regard was whether the United Nations Convention on the Law of the Sea (UNCLOS) represented customary international law at the relevant time. In order to address this issue, the CJEU cited the ICJ cases in *Delimitation of the Maritime Boundary in the Gulf of Maine Region*;[70] *Continental Shelf Case*[71] and *Nicaragua v. United States of America*.[72] The Court held that the EU must exercise its powers in conformity with customary international law.[73] Although the Court was quite thorough in its assessment of the state of international law of the sea, its engagement with the ICJ cases remains rather shallow.

In *Salemink*[74] the referring Court asked whether certain professional activity, which took place on a gas-drilling platform on the continental shelf adjacent to

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[66] *Convention on the Territorial Sea and the Contiguous Zone* (29 April, 1958) 516 UNTS 205, entered into force 10 September 1964.
[67] *Convention on Fishing and Conservation of the Living Resources of the High* Seas (29 April 1958) 559 UNTS 285, entered into force 20 March 1966.
[68] *United Nations Convention on the Law of the Sea* (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994 ('UNCLOS').
[69] *Poulsen* (n 62) para. 9.
[70] *Delimitation of the Maritime Boundary in the Gulf of Maine Region (Canada v. United States of America)* (Judgment) (ICJ Reports 1984) 294 para. 94.
[71] *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)* (Judgment) (ICJ Reports 1985) 30 para. 27.
[72] *Military and Paramilitary Activities in and against Nicaragua* (n 21) 111-112 paras. 212 and 214.
[73] Barbara Brandtner and Hans-Peter Folz, 'The International Practice of the European Communities: Current Survey' (1993) 4 EJIL 430, 442.
[74] Judgment of 17 January 2012, *Salemink*, C-347/10, EU:C:2012:17.

the Netherlands, outside the Netherlands' territorial waters, was covered by EU law. The CJEU referred in this instance to the ICJ's *North Sea Continental Shelf Cases*[75] and Article 77 UNCLOS and determined that a Member State has sovereignty (although limited) over the continental shelf adjacent to it. The CJEU concluded that '[a] Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations.'[76] Work carried out at an offshore installation on the continental shelf should therefore be understood as having taken place within the territory of the Netherlands for the purposes of EU law. Similarly in *Weber* the CJEU held that 'in the absence of any provision in the Brussels Convention governing that aspect of its scope or any other indication as to the answer to be given to this question, reference must be made to the principles of public international law relating to the legal regime applicable to the continental shelf and, in particular, the Geneva Convention […]'[77] In *Salemink*, the CJEU dealt with questions relating to the rules and principles of international law regarding the legal regime applicable to the continental shelf. The Opinion of Advocate General Cruz Villalón also referenced the ICJ's relevant case law. He argued that there is no separate definition of 'EU territory' and that the territorial scope of the EU Treaties can only be ascertained 'within the framework of international law by means of treaties establishing boundaries.'[78] The AG cited the ICJ Advisory Opinion in *Libyan Arab Jamahiriya/Chad*[79] to support the proposition that under international law: '[t]hat boundaries have greater permanence than the treaties which establish them shows the extraordinary importance of territorial limits as a factor in the stability of the international community.'[80] In *Weber*, the Court also referred to the *North Sea Continental Shelf* cases when referring to the rights of the coastal state regarding the area of the continental shelf.[81]

3.5 Jurisdiction, Territory and Statehood

[75] *North Sea Continental Shelf* (n 8).
[76] *Salemink* (n 72) para. 36.
[77] Judgment of 27 February 2002, *Weber*, C-37/00, EU:C:2002:122, para. 31.
[78] Opinion of AG Cruz Villalón, *Salemink*, C-347/10, EU:C:2011:562, para. 43.
[79] *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (Judgement) (ICJ Reports 1994) 6, 37.
[80] Opinion of AG Cruz Villalón (n 76) fn 13.
[81] *North Sea Continental Shelf* (n 8) quoted in *Weber* (n 75) para. 34.

The CJEU has dealt with ICJ case law when dealing with issues of jurisdiction and territorial scope of treaties. In *Air Transport Association of America and Others (ATAA)*,[82] the CJEU was called upon to decide whether an EU directive that extended the EU's scheme for greenhouse gas emission allowance trading[83] to international aviation was consistent with international law. The EU's Emissions Trading Scheme (ETS) applied to flights that arrive or depart from the territory of an EU Member State. It applied to the entire flight, even in cases where the majority of the flight took place outside the airspace of EU Member States. It was argued that the EU's ETS was in violation of a number of international treaties, as well as customary international law binding upon the Union. In particular, it was argued that the Directive violated customary international law based on its 'extra-territorial effects'.

ATAA gives some insight into how the CJEU decides whether a rule has customary international law status. First, the CJEU examines whether the customary rule in question is codified in an international treaty.[84] In *ATAA*, the CJEU noted that the principles being invoked are enshrined in Article 1 of the Chicago Convention,[85] Article 2 of the Geneva Convention on the High Seas[86] and Article 87(1) of UNCLOS.[87] Second, the Court refers to the jurisprudence of the ICJ[88] and the PCIJ.[89] Third, the Court takes into account whether any of the parties contested the existence of the rules of customary international law in their written observations or during court proceedings.[90] The Court's approach is less clear, however, when a rule's customary status is contested. This was the case

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[82] Judgment of 21 December 2011, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864 ('ATAA').

[83] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, 25 OJ 2003 L 275, p. 32, 25 October 2002.

[84] See *Poulsen* (n 62). The Court took into account the Geneva Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone UNTS vol 16; Geneva Convention of 29 April 1958 on the High Seas, UNTS vol 450, p. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958) 559 UNTS 285, entry into force 20 March 1966; and the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994, 'in so far as they codify general rules recognized by international custom', para. 10.

[85] *Convention on International Civil Aviation* (7 December 1944) 15 UNTS 295, entered into force 4 April 1947 (Chicago Convention).

[86] *Convention on the High Seas* (n 82).

[87] *ATAA* (n 80) para. 104.

[88] Ibid; *Military and Paramilitary Activities in and against Nicaragua* (n 21) 392 para. 212; Kuijper notes that 'Normally, the Court will adduce judgments of the ICJ in order to confirm that certain provisions of international conventions to which the EU is not a party are declaratory of customary international law.' 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, Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (TMC Asser Press 2013) 597.

[89] *ATAA* (n 80) para. 104; *The Case of the S.S 'Lotus' (France v. Turkey)* (PCIJ Reports 1927) Series A, No. 10, 25.

[90] *ATAA* (n 80) para. 105.

regarding the alleged principle 'that aircraft overflying the high seas are subject to the exclusive jurisdiction of the State in which they are registered'.[91] In *ATAA*, the Court did not conduct its own analysis of whether this was a principle of customary international law, but merely stated that 'insufficient evidence exists to establish' that the principle of exclusive flag-state jurisdiction of vessels would apply by analogy to aircraft flying over the high seas.[92]

Advocate General Kokott discussed the ICJ jurisprudence in more detail. First, AG Kokott refers to Article 38(1)(b) of the ICJ Statute to find that customary international law is one of the generally recognised sources of international law.[93] Second, she refers to ICJ cases in order to introduce the two-element test, whereby 'a settled practice on the part of the particular subjects of international law (*consuetudo*; objective element), which is recognised as a rule of law (*opinio juris sive necessitatis*; subjective element).'[94] Note that AG Kokott refers to *subjects* of international law, not States, as the ICJ did. The *Continental Shelf Case* to which the AG refers, mentions that '[t]he *States* concerned must therefore feel that they are conforming to what amounts to a legal obligation.'[95] In *Nicaragua*, to which AG Kokott also refers, the ICJ said that '[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.' In *Continental Shelf*, the ICJ set out that '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.'[96] Whether customary international law can be developed by legal subjects other than states is a matter of debate, one that has recently dealt with by the International Law Commission.[97] It is interesting to see how the Advocate General takes a proposition established by the ICJ's jurisprudence and subtly expands it to include other subjects of international law.

The CJEU will more likely refer to ICJ judgments if they have been specifically mentioned in the pleadings of the parties. For instance, in Case C-507/13 *United Kingdom v. Parliament and Council*, the UK had argued that the Capital

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[91] Ibid para. 106.
[92] Ibid.
[93] Opinion of AG Kokott, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:637, para. 115.
[94] Ibid.
[95] *North Sea Continental Shelf* (n 8) para. 77 (emphasis added).
[96] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* (Judgment) (ICJ Reports 1985) 13 para. 27.
[97] See, International Law Commission, Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, International Law Commission Sixty-seventh session, Geneva, (4 May-5 June and 6 July-7 August 2015), UN Doc A/CN.4/682. See further, Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 22 ICLQ 2.

Requirements Directive IV, insofar it applied to employees of institutions located outside the EEA, violated principles of customary international law. The UK argued that the Directive, which was aimed at the remuneration of individuals employed within certain financial institutions, was invalid because it applied 'extraterritorially', in violation of what the UK argued to be a principle of customary international law. Advocate General Jääskinen rejected this argument: 'the United Kingdom would simply be wrong if it sought to claim that only territorial jurisdiction to legislate is permitted under international law.'[98] AG Jääskinen discussed the ICJ cases referred to by the UK – *Anglo-Norwegian fisheries* case, *Nottebohm*, *Arrest Warrant*, *Lotus*, and *Barcelona Traction* – and found that none of the authorities supported a principle of international law against extraterritoriality.

In *Spain v Commission*,[99] the CJEU was called upon to decide whether Kosovo could be considered a 'third country' within the meaning of Article 35 of Regulation 2018/1971.[100] The Grand Chamber concluded that the term 'third country' and 'third State' were used interchangeably in EU law. Yet it also found that Kosovo could be treated as a 'third country' within the meaning of the regulation without infringing international law. It came to this conclusion by referring to the ICJ's *Kosovo*[101] advisory opinion, in which the ICJ concluded that Kosovo's declaration of independence on 17 February 2008 did not violate international law. Beyond this brief reference to the ICJ's opinion in *Kosovo*, the Grand Chamber did not consider Kosovo's status as a state under international law or engage with the ICJ's reasoning. The ICJ's opinion was only relevant insofar as the CJEU considered whether the Union had infringed international law.

In *Venezuela v Council*, the CJEU addressed the question whether third countries were capable of bringing an action for annulment under the fourth paragraph of Article 263 TFEU.[102] The Council argued, inter alia, that Venezuela could not be considered a 'legal person' for the purposes of that provision, and grounded its argument in the concept of reciprocity in international law. The Grand Chamber found that a third state is a legal person whose rights and interests can be

[98] Opinion of AG Jääskinen, *UK v. Parliament and Council*, C-507/13, EU:C:2014:2394, para. 38.
[99] *Kingdom of Spain v. European Commission*, C-632/20 P, EU:C:2023:28.
[100] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ 2018 L 321, p. 1).
[101] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) (ICJ Reports 2010) 403.
[102] *Bolivarian Republic of Venezuela v. Council of the European Union*, C-872/19 P, EU:C:2021:507.

adversely affected by EU acts, and can therefore challenge those acts. Moreover, the EU's obligation to respect the rule of law 'cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States'[103] Advocate General Hogan dismissed the argument that international law precluded an interpretation of 'legal person' to include a state. In particular, AG Hogan referred to *Jurisdictional Immunities of the State (Germany v. Italy – Greece Intervening)* to demonstrate that under customary international law, the doctrine of state immunity is a shield to suit; however, it cannot be used to limit an applicant's standing before EU courts.[104]

4 The Law of Treaties

The second area in which the CJEU has engaged with ICJ jurisprudence is in the field of the international law of treaties. As mentioned above, the CJEU does not apply the principles of the VCLT to interpret the EU Treaties, but has used those principles to interpret international agreements to which the EU is a party. Although the EU is not a party to the VCLT, the CJEU has found that such principles can be applied to the EU to the extent that they represent customary international law. In *Wightman*, a case dealing with whether the United Kingdom could revoke its intention to withdrawal from the EU under Article 50 TEU, Advocate General Campos Sánchez-Bordona discussed the customary international law status of the VCLT (in particular Articles 65-68 relating to the invalidity, termination, withdrawal from or suspension of the operation of a treaty). In doing so, the Advocate General referred to the ICJ judgments of *Armed Activities on the Territory of the Congo*[105] and *Gabčíkovo-Nagymaros Project*,[106] finding that while these provisions of the VCLT did not declare customary international law, they reflect the customary international law obligation to act in good faith.[107] The Full Court ultimately decided the question of revocability on other grounds, but nevertheless found that the VCLT 'corroborates' its finding that 'a notification of withdrawal [...] may be revoked at any time before it takes effect.'[108] Thus, while the Court has employed the provisions of the VCLT in a

[103] *Venezuela v. Council*, para. 52.
[104] Opinion of AG Hogan, *Bolivarian Republic of Venezuela v. Council of the European Union*, C-872/19 P EU:C:2021:37, para. 68.
[105] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (new application: 2002), (ICJ Reports 2006) 6, para. 125.
[106] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (ICJ Reports 1997) 7, para. 109.
[107] Opinion of AG Sánchez-Bordona, *Wightman*, C-621/18, EU:C:2018:978, para. 74 and footnote 54.
[108] Judgment of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999, para. 70-71.

number of cases, it will only apply those provisions insofar they reflect customary international law.

4.1 Treaty Interpretation

The main way in which the CJEU applies the VCLT principles is through treaty interpretation. Article 31(1) VCLT sets out the general rule of treaty interpretation: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[109] The CJEU has also used Article 31(2)(c), which states that an interpreting body may also take into account, for the purposes of interpretation '[a]ny relevant rules of international law applicable in the relations between the parties.'

4.2 Preparatory Work

The VCLT allows an interpreting body to take into account the preparatory work of the treaty as a supplementary means of interpretation.[110] While the CJEU has been highly reluctant to employ *travaux préparatoires* in interpreting the EU Treaties or EU law, it has been somewhat open to examining preparatory work when interpreting international agreements.

In *Bolbol*, the Advocate General went into quite some detail examining the drafting history behind the *Geneva Convention of 28 July 1951 Relating to the Status of Refugees*.[111] According to Ms Bolbol, a stateless Palestinian, the purpose of Article 1D of the Refugee Convention was to make clear that a person registered or entitled to be registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), but residing outside the area in which UNRWA operates, should be automatically granted refugee status. AG Sharpston examined the *travaux préparatoires* related to the 1951 Convention and found that the drafting conference 'had the situation in Palestine uppermost in its mind' when it drafted Article 1D. To support this interpretation, AG Sharpston took into account the fact that treaty provisions may be interpreted in light of the 'contemporaneous common will' of the drafting parties, relying on the ICJ's judgments in *Land and Maritime Boundary between Cameroon and*

[109] *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980.
[110] Art. 32 VCLT.
[111] Opinion of AG Sharpston, *Bolbol*, C-31/09, EU:C:2010:119, paras. 41-47.

Nigeria[112] and the decision of the Eritrea-Ethiopia Boundary Commission, which refers to the *Argentina/Chile Frontier Case*.[113] AG Sharpston also refers to the interpretive practices of other international dispute settlement bodies, which have taken into account the object and purpose of the treaty, in accordance with the rule of interpretation set out in the VCLT.[114] AG Sharpston mentioned that the ICJ has not yet ruled on the interpretation of Article 1D of the 1951 Convention.[115] Finally, the AG also mentioned the ICJ when discussing the question whether UN General Assembly Resolutions should be considered 'law' *sticto sensu*. The AG noted that the question had not been resolved by the ICJ, and referred to the *Nuclear Weapons Advisory Opinion* (1996).[116]

The CJEU, however, did not examine the drafting history of the Convention, since it found the wording of Article 1D to be sufficiently clear.[117] There are few occasions where the CJEU will use preparatory work to aid interpretation. The *Libyan Arab Jamahiriya v. Chad* case has been cited in support of the contention that *travaux préparatoires* constitute a supplementary source, whereas the treaty itself is the primary source for interpretation.[118] Another reason for this reluctance stems from the CJEU's general inclination towards teleological reasoning in EU law.[119] However, it has been noted that the CJEU's reluctance to refer to *travaux préparatoires*, both when dealing with international law and EU law, might be slowly waning, as preparatory materials are becoming more available.[120]

4.3 Subsequent practice

Article 31 VCLT also allows an interpreting body to examine 'subsequent practice' of the parties to a treaty, which establishes an agreement regarding the

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[112] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)* (Judgment) (ICJ Reports 2002) 303 para. 59, quoted in Opinion of AG Sharpston ibid fn 42.
[113] Decision on Delimitation of the Border between Eritrea and Ethiopia, delivered on 13 April 2002 by the Eritrea-Ethiopia Boundary Commission at paragraphs 3.3, 3.4 and 3.13.
[114] *Libyan Arab Jamahiriya v. Chad* (n 77) para. 41, cited in *Bolbol* (n 103) fn 62.
[115] Opinion of AG Sharpston (n 103) fn 37.
[116] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) (ICJ Reports 1996) 66, cited in Opinion of AG Sharpston (n 103) fn 6.
[117] Judgment of 17 June 2010, *Bolbol*, C-31/09, EU:C:2010:351, para. 51.
[118] Opinion of AG Saggio, *Portugal v. Council*, C-149/96, EU:C:1999:92, para. 20.
[119] Pieter Jan Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Geneva Convention* (Oxford University Press 2011) 256 (260): '[t]here has always been a tendency at the Court to argue that the special character of the Community legal order required special, more teleologically oriented, interpretation methods than was usual in international law.'; Cathrine M. Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in D. B. Hollis, *Oxford Guide to Treaties* (Oxford University Press 2012) 517: 'in its (sparse) references to the rules of interpretation as part of the general law of treaties, the CJEU can be seen to employ a large degree of teleological reasoning coupled with a reluctance to use the *travaux préparatoires* as a supplementary means of interpretation.'
[120] See Samuel Miettinen and Merita Kettunen, '*Travaux* to the EU Treaties: Preparatory Work as a Source of EU Law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 145–167.

treaty's interpretation.[121] As with preparatory work, the CJEU is reluctant to use subsequent practice of the parties to aid interpretation, both in EU law, and regarding international agreements.

In *Oberto* ('European Schools'), one of the questions dealt with by the CJEU was whether the subsequent practice of the parties to a treaty could override the terms of that treaty. The CJEU made a rather bold remark in this regard, stating that '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'.[122] The CJEU cited the ICJ's 1962 Temple of *Preah Vihear* (Cambodia v. Thailand) for authority for that statement. The CJEU sought to interpret the Convention defining the Statute of the European Schools taking into account the 'subsequent practice' of the parties. While an interpreting body may make recourse to the subsequent practice of the parties to ascertain the context, it is less clear whether such practice may override the clear terms of a treaty.

In *Front Polisario*,[123] AG Wathelet strongly criticized the CJEU's approach in *Oberto*. First, he noted that the *Preah Vihear* case pre-dates the VCLT, and cannot be considered as concerning the interpretation of Article 31(3)(b) VCLT, which did not exist at the time of the ICJ judgment. Moreover, AG Wathelet argued that there is nothing in *Preah Vihear* to support the CJEU's bold assertion: 'I cannot see anywhere in that judgment that the International Court of Justice held, whether expressly or not, that the subsequent practice followed in the application of a treaty could override the clear terms of that treaty.'[124] He noted that the ICJ judgment concerned notions of estoppel or acquiescence in international law, and not subsequent practice. AG Wathelet was open to the idea that subsequent practice could override the terms of a treaty, but would set a very high bar for this: only in cases where it is 'known to and accepted by the parties and is sufficiently widespread and sufficiently long term to constitute *a new agreement in itself*.'[125] In *Front Polisario*, the CJEU found that the subsequent practice of the EU and Morocco relating to the interpretation of an Association Agreement could not override the terms of the treaty relating to the territorial application of that agreement. The CJEU dealt with a number of other public international law

[121] Art. 31 (2) (b) VCLT; See Gordon Slynn, 'The Use of Subsequent Practice as an Aid to Interpretation by the Court of Justice of the European Communities' in Roland Bieber and Georg Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts* (Nomos 1987) 138.
[122] Judgment of 11 March 2015, *Oberto and O'Leary*, Joined Cases C-464/13 and C-465/1, EU:C:2015:163, para. 61.
[123] Opinion of AG Wathelet, *Front Polisario*, C-104/16 P, EU:C:2016:677.
[124] Ibid paras. 93, 96.
[125] Ibid para. 96 (emphasis added).

issues, including the right to self-determination, in the *Front Polisario* and *Western Sahara Campaign*[126] cases. The CJEU's approaches to international law, including references to ICJ jurisprudence has been discussed in more detail elsewhere.[127]

4.4 Binding Unilateral Declarations

The CJEU has also dealt with rather novel issues in the law of treaties. This was the case in *Venezuelan Fisheries*, where the question arose whether the EU had the capacity to make a 'binding unilateral declaration'. It was uncontested that States could make such declarations, but unclear whether the EU has such capacity, and if so, which procedure under EU law would apply to the creation of such an instrument. The Commission argued that a unilateral binding declaration is essentially equivalent to an international agreement, relying on the ICJ's *Nuclear Tests* case.[128] Advocate General Sharpston noted that the question of whether legal persons other than states, such as the EU, had the capacity to make such unilateral declarations, had not been decided by the ICJ, nor had it been dealt with by the ILC.[129] AG Sharpston noted that, in accordance with the international law principle that obligations cannot be imposed upon a State without its consent, unilateral declarations are binding, even without the acceptance of another party. AG Sharpston refers in this regard to the ICJ's *Nuclear Tests* judgments that dealt with unilateral declarations.[130]

The case also dealt with the definition of a 'treaty' under public international law. AG Sharpston mentioned that the ICJ has suggested that the definition of a 'treaty' in Article 2(1)(a) VCLT reflects customary international law, citing *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening). While the notion of a 'treaty' in international law and an 'agreement' in EU law are similar, the case law shows that there is some slight difference between the two concepts. The EU tends to have a broader definition than in public international law.

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[126] Judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118.
[127] See Jed Odermatt, 'Fishing in Troubled Waters: ECJ 27 February 2018, Case C-266/16, R (on the application of Western Sahara Campaign UK) v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs' (2019) 14 (4) *European Constitutional Law Review* 751-766; Jed Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)' (2017) 111 (3) AJIL 731-738.
[128] Opinion of AG Sharpston, *Parliament and Commission v. Council*, Joined cases C-103/12 and C-165/12, EU:C:2014:334, para. 34.
[129] Ibid) para. 85.
[130] Ibid para. 34.

4.5 Fundamental Change in Circumstances

Perhaps one of the most famous instances of the CJEU applying the international law of treaties was in the *Racke* case. In *Racke,*[131] the CJEU relied on the ICJ's judgment in *Gabcikovo-Nagymaros*[132] in support of its conclusion that the principle of fundamental change of circumstances is a customary law principle in the law of treaties. One of the questions in that case related to the termination of an agreement with Yugoslavia based on the *rebus sic stantibus* principle, and whether the outbreak of hostilities in Yugoslavia constituted a fundamental change of circumstances under Article 62 VCLT.

The *rebus sic stantibus* principle was also mentioned in the Bilateral Investment Treaties (BITs) cases. *Commission v. Austria* and *Commission v. Sweden*, dealt with the possible incompatibility between Union law and the bilateral investment treaties of EU Member States with third States. The defendant Member States, Austria and Sweden, argued that in case of conflict, there were existing mechanisms under public international law that would allow them to avoid applying their BITs, including relying on *clausula rebus sic stantibus*. The CJEU swiftly rejected these arguments.[133] In *Commission v. Finland*, which also dealt with Member State BITs, AG Sharpston also rejected the argument that the fundamental change of circumstances could be relied upon, citing the part of *Gabčíkovo-Nagymaros Project* quoted in *Racke*: 'The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.'[134]

5 The Development of Principles of EU Law

Another way in which the CJEU has engaged with ICJ jurisprudence is more subtle: when the CJEU develops principles of EU law. In some cases, when developing a certain EU law principle, the CJEU acknowledges that it has origins in public international law. This is the case with regard to the principle of 'good faith' in EU law. It is interesting that the CJEU does not apply the principle of

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[131] Judgment of 16 June 1998, *A. Racke GmbH & Co v. Hauptzollamt Mainz,* C-162/96, EU:C:1998:293, para. 50.

[132] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgment) (ICJ Reports 1997) 7 para. 104.

[133] Judgment of 3 March 2009, *Commission v. Austria,* C-205/06, EU:C:2009:118, paras. 38-40; Judgment of 3 March 2009, *Commission v. Sweden,* C-249/06, EU:C:2009:119, paras. 39-41.

[134] *Racke* (n 123) para. 50, quoted in Opinion of AG Sharpston, *Commission v. Finland*, C-118/07, EU:C:2009:525, fn 33.

good faith as a principle of international law, but rather applies it as an EU law equivalent, the principle of legitimate expectations.[135] De Baere and Roes have also argued that the duty of loyalty in EU law is an expression of the principle of good faith in international law.[136] Rather than applying an existing international law principle, the CJEU found an EU law equivalent. This approach allows the Court to assert the autonomy of EU law – as it is an independent legal system that does not derive its authority from international law, it applies principles of EU law, even if those principles find their origin in international case law.

The CJEU has found that 'the principle of good faith is a principle of customary international law the existence of which has been recognised by the International Court of Justice' and is as such binding upon the European Union.[137] The CJEU recognised the principle of 'legitimate expectations' as an EU expression of the principle of good faith in *Opel Austria*.[138] In this case, Austria argued that the Council had acted in breach of the principle of good faith in international law when it adopted Regulation No 3697/93 imposing a 5.9% duty on gearboxes produced by General Motors Austria. Opel sought to annul the regulation on the basis *inter alia* that it violated the obligation under international law not to defeat the object and purpose of a treaty before its entry into force. The CJEU found that the principle of good faith was a rule of general international law and thus binding upon the Community. It found this principle of good faith to be the public international law corollary of the EU law principle of the protection of legitimate expectations. The Court referred in this context to the decision of the PCIJ in *Certain German Interests in Polish Upper Silesia*, in which the PCIJ indicated that a signatory state may be 'under an obligation to abstain from any action likely to interfere with [the treaty's] execution when ratification has taken place'.[139] The Court found that there was a legitimate expectation on the part of traders such as Opel that the Council and other parties to the EEA Agreement would not act to defeat the object and purpose of that agreement. Interestingly, it was not the principle in Article 18 VCLT that gave rise to actionable rights, but the equivalent EU law principle regarding the protection of legitimate expectations. The Council Regulation was not annulled due to a deficiency stemming from public

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[135] Judgment of 22 January 1997, *Opel Austria v. Council*, T-115/94, EU:T:1997:3: 'the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice [sic] (see the judgment of 25 May 1926, German interests in Polish Upper Silesia, PCIJ, Series A, No 7, pp. 30 and 39) and is therefore binding on the Community.' (para. 90); 'the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order.' (para. 93).

[136] Geert De Baere and Timothy Roes, 'EU Loyalty as Good Faith' (2014) 64 (4) ICLQ 829.

[137] Judgment of 30 April 2014, *Tisza Erőmű kft v Comission*, T-468/08, EU:T:2014:235, para. 321.

[138] *Opel Austria v. Council* (n 127) paras. 90-93.

[139] *Certain German Interests in Polish Upper Silesia* (PCIJ Reports 1925) Series A, No. 7, 5.

international law, but a violation of a principle of EU law. The Council argued that Article 18 VCLT and VCLT-IO only applied between sovereign states and international organizations and since they do not confer rights upon individuals, they could not be invoked in order to challenge the validity of EU acts.[140]

Article 18 VCLT sets out an interim obligation not to defeat the object and purpose of the treaty; it is not intended to allow the provisions of the treaty to be valid prior to its entry into force.[141] As Dörr puts it, 'the States concerned are not bound to comply with the treaty, but not to destroy its very essence, thus not to render its entry into force de facto meaningless.'[142] The interim obligation is thus concerned with acts that would make the performance of the treaty difficult or impossible. Did the Regulation in question really defeat the *object and purpose* of the EEA Agreement? One of the purposes of the Agreement was '[to establish] a dynamic and homogeneous European Economic Area.' It is doubtful that the EU's behaviour threatened the Agreement in such a manner.[143] Although *Opel Austria* is one of the very few judicial pronouncements on Article 18 VCLT,[144] it is not a real application of the interim obligation in international law, but an application of the more general principle of good faith.[145]

Other cases demonstrate that the principle of good faith, not the Article 18 obligation, is applied by the CJEU. Cases such as *Danisco Sugar*[146] and *Case T-231/04 Greece v. Commission*[147] involved arguments that there had been a breach of the principle of good faith in international law.[148] Yet the cases show that it is the principle of legitimate expectations in EU law, rather than the Article 18 VCLT interim obligation, that is being applied. Klabbers argues that in these cases, and others ostensibly involving the interim obligation, what is actually being applied is a 'manifest intent' test.[149] Aust points out that '[t]here is virtually

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[140] *Opel Austria v. Council* (n 127) para. 86.
[141] Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 107.
[142] Oliver Dörr, 'Article 18 - Obligation not to defeat the object and purpose of a treaty prior to its entry into force' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 220.
[143] See Peter Fischer, 'Case T-115/94, Opel Austria GmbH v. Council, Judgment of 22 January 1997, [1997] ECR II-39' (1998) 35 (3) *Common Market Law Review* 779.
[144] Jan Klabbers, 'Treaties, Conclusion and Entry into Force' *Max Planck Encyclopedia of Public International Law*, available at: < http://opil.ouplaw.com/home/epil> accessed 12 August 2019, para. 13.
[145] See Dörr (n 134), 222: 'it becomes clear that the Court of First Instance was simply applying the good faith principle as such, and not the interim obligation as one of its concrete emanations.'
[146] Judgment of 27 November 1997, *Danisco Sugar AB v. Allmänna ombudet*, C-27/96, EU:C:1997:563.
[147] Judgment of 17 January 2007, *Greece v. Commission*, T-231/04, EU:T:2007:9.
[148] Ibid para. 71.
[149] Jan Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 *Vanderbilt Journal of Transnational Law* 283 (330) 'if behavior seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of whether anyone's legitimate expectations are really frustrated or can reasonably be said to have been frustrated, regardless of actual proof of bad faith.'

no practice in the application of [Article 18]'.[150] It is doubtful whether these CJEU cases add to this international practice.

Sometimes the CJEU chooses not to refer to the ICJ, but rather references its own case law. As an example, in *SECIL*, Advocate General Wathelet discussed the principle of good faith in international law, quoting from the ICJ in *Gabčikovo-Nagymaros* judgment.[151] The Court's judgment, however, does not mention the ICJ. The Court states that Article 31 VCLT 'provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose'.[152] Rather than citing the ICJ, as the Advocate General does, it cites its own previous case law, namely the *Brita* judgment (and the case law it cites). In order to find authority for this principle of international law, the CJEU prefers to cite its own jurisprudence, rather than refer to another international court. In this way, the international law principle becomes internalised – it is no longer just a principle of international law, but one that has been integrated as a principle of EU law as well.

The Court of First Instance (now: General Court) also dealt with the principle of good faith in *Case T-231/04 Greece v. Commission.*[153] The Commission and certain Member States entered into a Memorandum of Understanding (MOU) related to the sharing of the costs of their representations in Abuja, Nigeria. The Commission took steps to recover amounts that it believed were due to be paid by Greece under the MOU and Greece disputed this amount. The Commission relied, *inter alia*, on the conduct of Greece and the principle of good faith in international law.[154] The CFI noted that the principle of good faith is a rule of customary international law, which had been recognised by the PCIJ in *German Interests in Polish Upper Silesia*.[155] Thus Greece was bound to act in good faith regarding its other memorandum partners.[156] Not only had Greece not informed the other parties of its intention to withdraw from the agreement, it continued to act as a full participant in the project. Therefore, 'by reason of the principle of good faith, the Hellenic Republic could not evade its financial commitments by pleading that it had not ratified the additional memorandum.'[157] On appeal, Advocate General Mazák referred to *Australia v. France* (Nuclear Tests Case)[158]

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[150] Anthony Aust, *Modern Treaty Law and Practice* (1st edn, Cambridge University Press 2000) 94.
[151] Opinion of AG Wathelet, *SECIL*, C-464/14, EU:C:2016:52, para. 124.
[152] Judgment of 24 November 2011, *SECIL*, C-464/14, EU:C:2016:896, para. 94.
[153] *Greece v. Commission* (n 139).
[154] Ibid para. 71.
[155] *German Interests in Polish Upper Silesia (Merits)*, CPJI, Series A, No. 7, 30 and 39, quoted in *Greece v. Commission* (n 139) para. 85.
[156] *Greece v. Commission* (n 139) para. 97.
[157] Ibid para. 99.
[158] *Nuclear Tests Case* (*Australia v. France)* (Judgment) (ICJ Reports 1974) 253.

to support the argument that the principle of good faith is '[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source.'[159] The CJEU found that the Court of First Instance was entitled to invoke the principle of good faith, 'which forms part of general international law'.[160]

6 Conclusion

The relationship between the European Union and international law, or between the CJEU and the ICJ, is sometimes framed in terms of 'coherence' and 'fragmentation' of international law. Kassoti and Louwerse conclude that the CJEU, 'rather than proffering its own interpretation of international law, has consistently chosen to defer to the authority of the ICJ.'[161] Rosas also argues that the CJEU has shown deference to the ICJ, partly because of the ICJ's greater expertise and understanding of public international law issues.[162] According to these authors, the CJEU's references to the ICJ in this manner contribute to the coherence of international law and diminish risks of international law's substantive fragmentation. The willingness of the CJEU to refer to the ICJ jurisprudence does tend to show an open attitude towards international law. Indeed, there are no occasions where the CJEU and ICJ can be seen as diverging on public international law issues. This chapter has argued that the relationship is somewhat more complex than the CJEU showing deference to the ICJ.

First, there are occasions where the CJEU could have referred to the ICJ or to public international law, but sought to resolve the issue on 'EU ground', rather than engaging with public international law. Take, for instance, the judgment in *Wightman* discussed above. Much of the academic debate on this issue focused on questions of public international law, especially Articles 65, 67 and 68 VCLT. Whereas the Opinion of Advocate General Sánchez-Bordona engaged with these provisions in detail, including references to ICJ jurisprudence,[163] the Court resolved the issue entirely within the confines of the EU Treaties.[164] Here the CJEU is not diverging from the ICJ, but simply not engaging with it. This

[159] Opinion of AG Mazák, *Greece v. Commission*, C-203/07 P, EU:C:2008:270, para. 79.
[160] *Greece v. Commission* (n 139) para. 64.
[161] Eva Kassoti and Lisa Louwerse, 'Like Ships in the Night? The CJEU and the ICJ at the Interface' *Geneva Jean Monnet Working Papers*, 06/2016, 20.
[162] Allan Rosas, 'With a Little Help From My Friends: International Case-Law as a Source of Reference for the EU Courts' (2005) *The Global Community Yearbook of International Law & Jurisprudence* 203 (230).
[163] Opinion of AG Sánchez-Bordona, *Wightman*, C-621/18, EU:C:2018:978, para. 54.
[164] Judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, para. 69 (emphasis added).

confirms a more general pattern whereby the Advocates General are much more likely to refer to ICJ cases than the Court.

There are areas where ICJ case law is conspicuously absent. The ICJ is rarely mentioned, for instance, regarding principles of international responsibility. ICJ/PCIJ case law has been cited in passing to support the international law principle that the breach of an engagement involves an obligation to make reparation in an adequate form.[165] This absence of engagement with the ICJ in this field arguably demonstrates how the CJEU sees the system of responsibility in the EU context as distinct from that of international law. Similarly, the CJEU rarely refers to ICJ case law regarding the law of international institutions.[166] This also accords with the CJEU's view that the EU legal order is an autonomous one, and law regarding international organizations is not generally applicable to that of the EU.

Second, even where the CJEU and Advocates General refer to or engage with ICJ jurisprudence, the CJEU may nevertheless put its own spin on international law issues. This is understandable given the very different functions of international law before the two courts. The CJEU is focused on resolving questions of EU law – public international law is thus dealt with as a subsidiary means of interpreting and applying EU law and the EU Treaties. International law and ICJ jurisprudence are distorted as they pass through the prism of EU law. It may appear, therefore, that the CJEU's references to ICJ jurisprudence contribute to the unity and coherence of international law – but upon closer inspection, there are subtle changes that take place when passing through this prism.

Third, issues of public international law can be slowly transformed into issues of EU law, and that references to ICJ jurisprudence will be replaced by previous CJEU judgments. It is interesting to see how concepts that originate in public international law, such as those relating to nationality, are transformed into principles of EU law. The principle of good faith, a recognised principle of customary international law, is transformed and given expression as EU law principles of loyalty and the protection of legitimate expectations. Once transformed into principles of EU law, the CJEU can then interpret and apply these principles autonomously, without the need to refer to the original ICJ/PCIJ

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[165] Opinion of AG Tesauro, *Brasserie du pêcheur*, C-46/93, EU:C:1995:407, para. 38, referring to *Case concerning the Factory at Chorzów* (CPGI Reports 1927) Series A, No.21 and *The Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion of 30 March 1950) (CGI 1950) 228 (emphasis added).

[166] AG Bobek examined practice regarding access to judicial documents in the EU Member States as well as the practice of international courts, in *Commission v. Patrick Breyer*, Case C-213/15 P, EU:C:2016:994, para. 110: AG Bobek looked at the ICJ, among other international courts, and Art. 53 of the ICJ's Rules of Court, which provides that the Court may make pleadings and documents available, upon ascertaining the views of the parties.

jurisprudence. By using public international law principles to develop concepts of EU law, the CJEU still has a subtle effect on the development of international law.

The courts of The Hague and Luxembourg operate in different worlds. Yet the CJEU is no longer, if it ever really was, solely an economic court, and now deals with questions related to sovereignty, the law of the sea, migration, trade, sanctions and terrorism. These issues, by their very nature, touch upon questions of public international law. One might expect that as the EU becomes more globally active, and that more cases deal with public international law issues, the CJEU would also cite and discuss ICJ jurisprudence. The other trend, however, is towards the CJEU asserting the autonomy of EU law, especially towards the international legal order. This means that the CJEU will refer to the ICJ, but that it will have a relatively minor role in the CJEU's overall legal reasoning. It may be used to fill gaps, to support certain legal arguments, but it is not followed as if it were a hierarchically superior court. Moreover, it should be noted that the CJEU's practice of citing ICJ jurisprudence is far from consistent. Whether the ICJ is mentioned at all appears to depend on the preference of the judges or Advocates General, or whether the parties to the case used ICJ judgments in their legal argumentation.

The CJEU and Advocates General occasionally refer to ICJ judgments, but this is not done habitually, and principles that are developed at the international level can soon be absorbed into the EU legal order. Yet, if the EU is to truly respect international law in the exercise of its powers, and to uphold and enforce international law, this will require a more thorough engagement with the ICJ's reasoning, rather than casual (and random) references to particular ICJ judgments.