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Article

The integration paradox: an ILC view on the EU contribution to the codification and development of rules of general international law

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Abstract

The contribution of international organisations (IOs) to the process of identification, codification or development of rules of general international law is one still enveloped in a measure of mystery. While the United Nations (UN) International Law Commission (ILC) has long relied on IOs' practice, and the practice of States within IOs, in carrying out its work, it has only recently begun to address the role that IOs might play in the formation or expression of rules of customary international law, *jus cogens* or general principles of law. In this process, the European Union (EU) has long been seen as an 'odd' fit. From the point of view of general international law, EU integration forms an apparent paradox: on the one hand, the degree of transfer of powers to the organisation renders it particularly well suited to be a '*jus generative*' force and a useful source of practice for the ILC's work; on the other, its 'exceptionalism' often militates against the reliance on EU-related practice

as evidence of existing or emerging rules of general application. This article looks at the effects of this 'integration paradox' in the ILC's work by reviewing the references to, and the use of, EU practice in eight distinct codification projects, combined with interviews with ILC members and EU officials. It provides an ILC (outside) view on the relevance of EU practice for the identification, codification, and development of rules of general international law. This view, in turn, has implications for the operation of an EU (inside) foreign policy objective: its ambition to contribute to the development of international law, as expressed in Article 3(5) of the Treaty on European Union (TEU).

Keywords United Nations; International Law Commission; Sixth Committee; European Union; Article 3(5) TEU; codification and development of international law

1. Introduction: the integration paradox

A paradox is an apparent contradiction; a statement that runs counter to one's expectations and seems to carry an inner conflict best explained. The European Union (EU) is not unfamiliar to paradoxes. Legal scholarship has referred to some of the idiosyncrasies of EU integration in these terms. 'Executive federalism', for instance, has been addressed as a paradox of EU external relations, one wherein the organisation's growing autonomy is coupled with an unwavering dependence on its Member States for the performance of the obligations assumed by the organisation on the international plane.¹

This article focuses on a related paradox: that resulting from the effects of EU integration on the relevance or lack thereof of its practice for the process of identification, codification or development of rules of general international law, understood as default rules 'of general application, whether treaty law or customary international law or general principles of law'.² It does so by assessing how the United Nations (UN) International Law Commission (ILC) – the subsidiary body of the UN General Assembly (GA) tasked with the codification and progressive development of rules of general international law³ – has approached the relevance of EU-related practice in its work.⁴ It addresses one overarching question: how does the ILC account for the practice of international organisations (IOs) in its work and to what extent (and how) has it referred to EU practice in this context?

Linking the EU to the development of international law may at first sight seem misplaced. The organisation's *raison d'être* hardly evokes the codification or development of international rules. The European Court of Justice's (CJEU) narrative on the EU forming 'its own legal order' distinct from international law seems likewise divorced from this idea.⁵ Yet Article 3(5) of the Treaty on European Union (TEU) gives legal expression to the EU's ambition to contribute to the development of this legal order.⁶ In fact, while this ambition is uncommon among most IOs and even the constitutional orders of EU Member States,⁷ it has been recurrent in the political rhetoric of EU institutions. The EU is often presented as an

¹Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 35, 41–2.

²Draft conclusions on the identification of customary international law, ILC Annual Report (2018) A/73/10, chapter V, para 65 ('CIL Conclusions'), note 667; Conclusions of the Work of the Study Group on the Fragmentation of International Law (2006) A/61/10, chapter XII, 410, note 1017.

³Statute of the International Law Commission, UNGA Res. 174 (II) of 21 November 1947, last amended by UNGA Res. 36/39 of 18 November 1981 ('ILC Statute'), art 1. See also Arnold N Pronto, 'Codification and Progressive Development of International Law: A Legislative History of Article 13(1)(a) of the Charter of the United Nations' (2019) 13 Florida Law Review 1101.

⁴The term practice is used here in a broad sense, distinct from the objective element of custom. It includes not only the forms of IO practice deemed relevant by the ILC in its CIL Conclusions, but also any additional forms of evidence relied on by the ILC in its work. Regarding the former, these include diplomatic-like acts and correspondence; conduct in connection with resolutions adopted by an international organisation to which it is a party; conduct in connection with treaties; executive, legislative and administrative acts; or judicial decisions. See CIL Conclusions, commentary to conclusion 6, para 7.

⁵Case 26-62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; Case 6-64 *Costa* [1964] ECLI:EU:C:1964:66.

⁶Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 3(5) ('In its relations with the wider world, the Union ... shall contribute to ... the strict observance and the development of international law, including respect for the principles of the United Nations Charter').

⁷Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP 2016) 102–3 (citing art 90 of the Constitution of the Kingdom of the Netherlands as the odd one out).

emerging 'global rule maker'⁸ with an ambition to 'transform rather than to simply preserve the existing [international] system',⁹ to 'shape the global future'¹⁰ and to defend and extend international norms.¹¹ EU legal scholarship has likewise shed light on the different ways through which the EU may 'shape' international law, ranging from its active participation in international agreements or IOs, to its very existence.¹²

This article addresses this EU foreign policy objective from the viewpoint of the 'distinctive community'¹³ to which it relates, in other words, from an outside perspective. By reviewing how the ILC has accounted for EU practice in eight distinct codification projects,¹⁴ the article demonstrates that, as far as rules of general international law are concerned, EU integration is a double-edged sword. On the one hand, the transfer of powers to the organisation has rendered it particularly well suited to 'shape' international rules. As its competences expand, the EU will often have relevant practice to showcase in different fields. On the other hand, the unique features of EU integration, coupled with the ILC's ambivalence regarding IOs' role in the formation or expression of rules of general international law, explain this body's reservations about drafting general rules modelled on EU-related practice. While the EU's 'exceptionalism' has not prevented the ILC from occasionally proposing rules grounded on, or inspired by, the EU legal system or its international practice – where little practice or precedent were available to support the ILC in its work, or where EU-related practices were aligned with the normative aims of a particular project – these attempts at generalisation have often been met with strong objections by States at the Sixth Committee. As a whole, EU practice has, more often than not, been deemed too 'exceptional' to serve as evidence for the codification of rules of general application. Additional factors such as ILC members' familiarity with the EU legal system and the availability (and intelligibility) of EU practice also contribute to this body's approach to the EU.

The article is structured as follows: Section 2 draws from an EU law viewpoint (the inside) to frame EU statements on the ILC work as a manifestation of its ambition to contribute to the development of international law. Sections 3 and 4 contextualise this ambition against the ILC's (outside) understanding of the relevance of IOs' practice in general, and that of the EU specifically, for the identification or development of rules of general international law. Section 3 outlines the working methods of the ILC and discusses how the views and practice of IOs make their way into ILC codification projects. Special attention is accorded to the 2018 Conclusions on Customary International Law (CIL), where a debate emerged concerning the ability of IOs to contribute to the formation or expression of rules of custom. Section 4 applies these considerations to the use of EU practice by the ILC, surveying the references to the EU in eight distinct codification projects. The sample focuses on projects regarding which the EU has made statements at the Sixth Committee (where the ILC annual report is discussed) and which have been adopted by the ILC on second reading.¹⁵ The analysis is further informed by interviews with ILC

⁸The External Dimension of the Single Market Review. Commission Staff Working Document Accompanying the Communication on a Single Market for the 21st Century SEC(2007)1519 final' (20 November 2007).

⁹Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (9 November 2017) 10.

¹⁰European Council, 'A New Strategic Agenda 2019–2024', 6 <<https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf>> accessed 28 September 2020.

¹¹Council of the European Union, '2009 Annual Report from the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament on the main aspects and basic choices of the CFSP', 25.

¹²See, inter alia, Ramses A Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35(1) Yearbook of European Law 533.

¹³Kristina Daugirdas, 'International Organizations and the Creation of Customary International Law' (2019) University of Michigan Public Law Research Paper No. 597, 18 (noting that international law is often described as 'a set of rules that arises from the practices and usages of a distinctive community').

¹⁴These include (i) the draft articles on most-favoured-nation clauses, ILC Annual Report (1978) A/33/10, chapter II, para 74 ('MFN articles'); (ii) the draft articles on the law of treaties between states and international organisations or between international organisations, ILC Annual Report (1982) A/37/10, chapter II, para 63 ('1982 draft VCLT-IO'); (iii) the draft articles on the responsibility of international organisations, ILC Annual Report (2011) A/66/10, chapter V, para 87 ('ARIO'); (iv) the draft articles on the expulsion of aliens, ILC Annual Report (2014) A/69/10, chapter IV, para 45 ('EoA articles'); (v) the draft articles on the protection of persons in the event of disasters, ILC Annual Report (2016) A/71/10, chapter IV, para 48 ('PPED articles'); (vi) the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, ILC Annual Report (2018) A/73/10, chapter IV, para 51 ('SASP Conclusions'); (vii) the CIL Conclusions (2018); and (viii) the draft articles on the prevention and punishment of crimes against humanity, ILC Annual Report (2019) A/74/10, chapter IV, para 45 ('CAH articles').

¹⁵A few additional points on methodology are in order. First, although the EU has submitted statements on other ILC projects and occasional references to these are occasionally made throughout the text, the analysis excludes topics still on first reading at the time of writing (e.g. the Guide on the provisional application of treaties, ILC Annual Report (2018) A/73/10, chap. VII, para 79 ('Guide on PA'), as well as those where no reference to the EU is made in the final set of articles, notwithstanding its statements

members and EU officials, carried out between 2019 and 2020. Section 5 offers some conclusions on how the relevance of EU practice to the codification and development of rules of general international law is seen from the outside, and why integration has rendered it both well suited and, paradoxically, too exceptional to fulfil the ambition underlying Article 3(5) TEU as far as rules of general international law are concerned.

2. An inside objective: the EU commitment to contribute to the development of international law and the role of the ILC therein

Article 3(5) TEU is a legally binding ‘promotional norm’.¹⁶ As argued by Larik, these types of norms impose on the EU institutions and, by virtue of Member States’ obligation of loyalty under the Treaties, on Member States themselves,¹⁷ an obligation to apply their best efforts in the pursuit of (*in casu*) the development of international law, as part of the promotion of a ‘European common good’.¹⁸ What the pursuit of this objective entails, however, is far from clear.

CJEU case law has so far offered little guidance regarding the content of this foreign policy objective. As noted by Milano, the Court ‘is generally concerned with upholding and guaranteeing the consistency and coherence of the EU legal order, rather than contributing to the development of international law or projecting the image of the EU as a *Völkerrechtsfreundlich* actor’.¹⁹ The Court’s reasoning, however, often betrays an understanding of EU law as either part of a larger trend towards a progressive development of international rules²⁰ or as a more developed form of these rules.²¹ In turn, the efforts to be deployed in the fulfilment of this ambition appear to be boundless, at first sight limited only by the organisation’s competences and by the external conditions in which it exercises these powers.

The preparation and delivery of EU statements concerning ILC codification projects are part and parcel of this process. In full exercise of its UNGA observer status,²² the EU has since 1975 participated – somewhat erratically²³ – in the debates concerning the ILC work. It has submitted statements on the

on the project (e.g. the articles on the effect of armed conflicts on treaties, ILC Annual Report (2011) A/66/10, chapter VI, para 89). Second, the absence of EU statements on a particular ILC topic does not necessarily mean that its practice is not accounted for by the ILC. Third, focusing the analysis on the final output of an ILC project does not imply that EU practice was not analysed in the context of Special Rapporteur (SR) reports or ILC debates, having nevertheless been omitted from the final set of articles, conclusions or guidelines. To reduce the object of analysis, however, a choice was made to focus on topics where the EU expressed interest in contributing to the ILC work and on the final texts as adopted by the ILC. Finally, ‘contribution’ is measured here in a formal and narrow sense, by the number of references to EU practice in the ILC work.

¹⁶Larik (n 7) 168. See also Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (OUP 2013) 1 (noting that ‘[t]his role for the Union whereby it “stabilizes” the world and “points the way ahead” is not merely a moral imperative proclaimed by political leaders, but has found its way into EU primary law as a legally binding obligation’).

¹⁷Art 4(3) TEU. See Andrés Casteleiro and Joris Larik, ‘The Duty to Remain Silent: Limitless Loyalty in EU External Relations?’ (2011) 36 *European Law Review* 524; Christina Eckes, *EU Powers Under External Pressure: How the EU’s External Actions Alter Its Internal Structures* (OUP 2019) chapter 2: ‘EU Loyalty. Framing Legal Relationships’, 47.

¹⁸Larik (n 7) 25; Stefan Oeter, ‘Article 21: The Principles and Objectives of the Union’s External Action’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 866.

¹⁹Enrico Milano, ‘*Front Polisario* and the Exploitation of Natural Resources by the Administrative Power’ (2017) 2 *European Papers* 953, 965–6.

²⁰This case law emerged in the early 1980s and addressed the interpretation of art 234 EEC Treaty as regards the application of European Community regulations on the conservation of maritime resources to Spanish vessels, at a time when Spain was not an EC Member State. The Court, largely driven by the arguments raised by the parties, referred to the Community’s scheme for the conservation of the resources of the sea as part of the ‘progressive creation of new reciprocal relations’ at a ‘time when international law in relation to fishing was undergoing profound changes’. Joined Cases 180 and 266/80 *Crujeiras* [1981] ECLI:EU:C:1981:294, paras 8 and 19. See also Case 812/79 *Burgoa* [1980] ECLI:EU:C:1980:231, para 24; Case 181/80 *Arbelaiz-Emazabel* [1981] ECLI:EU:C:1981:295, para 30; Joined Cases 13 to 28/82 *Arantzamendi-Osa* [1982] ECLI:EU:C:1982:376, paras 9–10.

²¹Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 101; Case T-512/12 *Front Polisario* [2015] ECLI:EU:T:2015:953, para 180.

²²The European Economic Community (EEC) became a UNGA observer through UNGA Res. 3208 (XXIX) 1974, ‘Status of the European Economic Community in the General Assembly’, 11 October 1974. This status was ‘upgraded’ by UNGA Res. 65/276, ‘Participation of the European Union in the work of the United Nations’, 3 May 2011.

²³An analysis of EU statements on the ILC work shows a fluctuating level of engagement, measured by reference to the number of statements at Sixth Committee meetings. Following a period of regular statements (1975–83), focused on the MFN articles and the VCLT-IO, there was an interregnum (between 1984–91 and 1996–2002) interrupted only by statements on the establishment of the International Criminal Court (1992–5). EU statements on the ILC work resumed in 2003, addressing the ARIO, and have remained a permanent feature since.

codification and development of rules of general international law in areas as diverse as the responsibility of IOs or the prevention and punishment of crimes against humanity (CAH). Its statements are mostly prepared by the Legal Service of the European Commission and discussed within the Council of the EU Working Party on Public International Law (COJUR), before being sent to the EU Delegation to the UN in New York.²⁴ The choice of whether or not to make a statement follows not only an assessment of the EU competence and relevant practice on the topic, but also of the EU's own perception of the ILC's authority and of the impact of its work on EU external relations. It involves a 'fingertip feel' on whether the matter should be left to the sole consideration of (Member) States – who retain their right to make individual statements – or also include an EU dimension.²⁵

While these EU statements can hardly be qualified as an organisational practice directly contributing to 'the development of international law', they are an important expression of this practice. The EU's participation in these debates is a relevant part of this process in at least three ways. First, by coordinating (internally) a position on questions of public international law among its Member States at the COJUR level, the EU operates as a platform which can reinforce the importance of specific questions of international law or allow for Member States' views to converge around a common *opinio juris*.²⁶ Second, by participating (externally) in Sixth Committee debates on the ILC work, the EU presence (or visibility) is an expression of institutional practice of how an organisation operates in a multilateral context, alongside its Member States.²⁷ Third, EU statements as such can assist in the identification of rules of international law. They convey evidence of the organisation's practice and are an expression of its views on the existence or emergence of international rules.²⁸

As far as gauging how 'significant' the EU contribution is to the ILC work, this is far from consensual. There seems to be some agreement that the ILC 'may form a venue for EU influence on international law-making',²⁹ a fact which in part explains why, within the Sixth Committee, 'the EU seems to attach more importance to providing input to the work of the ILC'.³⁰ In practice, however, the impression is that the EU 'influence' on the outcome of the ILC work, while present, is relatively marginal.³¹ The following sections will address this question from the viewpoint of the ILC. They first outline the working methods and mandate of the ILC, and how this body has relied on (and conceptualised the legal relevance of) the practice of IOs in its work, before distinguishing the EU from this larger category of institutional actors.

3. Outside reality: the ILC and international organisations

3.1. The ILC working methods and the role of international organisations

In broad strokes, the ILC mandate can be defined as that of carrying out research and preparing draft conventions which either systematise and clarify well-established rules of general international law, or which propose rules on matters regarding which international practice is considered to be insufficiently developed.³² Both dimensions of this (often criticised) binary distinction between codification and (progressive) development of international law³³ follow a relatively similar methodology: that of surveying existing practice – namely the texts of laws, decrees, judicial decisions, treaties, diplomatic

²⁴ Jan Wouters and Marta Hermez, 'The EU's Contribution to "the Strict Observance and the Development of International Law" at the UNGA Sixth Committee', Working Paper No. 177 (KU Leuven 2016) 4–5.

²⁵ Interviews with EU officials, 6 July 2018, 17 March, 27 March and 9 April 2020.

²⁶ Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 42, 69–71 (on the effect of COJUR-level coordination on Member States' reservations to treaties).

²⁷ Wessel (n 12) 547–9.

²⁸ Official statements of the International Committee of the Red Cross (ICRC) have been considered relevant for the identification of custom, but not as practice 'as such'. See CIL Conclusions, commentary to conclusion 4, para 9 and commentary to conclusion 10(2).

²⁹ Wessel (n 12) 553.

³⁰ Wouters and Hermez (n 24) 14.

³¹ See Penelope Nevill, 'The European Union as a Source of Public International Law Part IV: Developments in European Law' (2013) *Hungarian Yearbook of International Law and European Law* 281, 290; Wessel (n 12) 553–4. Cf. Scarlet McArdle and Paul James Cardwell, 'EU External Representation and the International Law Commission: An Increasingly Significant International Role for the European Union?' in Steven Blockmans and Ramses A Wessel (eds), *Principles and Practices of EU External Representation*, CLEER Working Papers 2012/5, 83.

³² Art 15, ILC Statute.

³³ The fluidity of this distinction has been apparent since the early days of the ILC. See ILC Annual Report (1956) A/3159, chapter II, para 26; United Nations, *The Work of the International Law Commission: Vol I* (8th edn, UN Publications 2012) 45.

correspondence and other documents relevant to the topic³⁴ – and distilling from it rules which reflect either a well-ingrained practice or an evolving and emerging one.³⁵ ILC members therefore see their mandate as one of ‘bringing a degree of consistency to international law’ by ‘codifying custom’ or proposing rules which advance the values of this legal system and develop its vocabulary.³⁶ The output of this work, in turn, operates as a subsidiary source of the very same system it aims to clarify and advance.³⁷

There is an inherently interpretative and selective dimension to this effort.³⁸ It is present in the act of surveying ‘the whole field of international law’ and selecting the topics therein the codification of which is ‘necessary and desirable’;³⁹ in the identification of practice that is not only available but also interpreted as relevant (or legally significant) both by the system and by those making the selection; and in the act of organising it in a manner which proves or disproves the ‘extent of agreement on each point in the practice of States and in doctrine’.⁴⁰ Perhaps in recognition of the subjective dimension of this exercise, the ILC statute requires that this body be comprised of qualified persons representing ‘the main forms of civilization and of the principal legal systems of the world’⁴¹ and that it operate in a collegial and analytically rigorous manner, receiving input not only from within, but also from the larger community of international actors, without.

The ILC statute provides for a number of ways for external input to inform the process of gathering, filtering, interpreting and codifying international norms. The ILC may consult with UN organs, official or non-official international or national organisations, and scientific institutions and individual experts;⁴² it may submit requests for information from governments, organs, specialised agencies and official bodies;⁴³ and it must take into account the comments received.⁴⁴ Each topic is subject to a relatively long-term discussion among ILC members, as well as with States and other international actors represented at the Sixth Committee. In addition, information is also gathered through formalised exchanges between the ILC and a relatively fixed set of juridical bodies of mostly regional intergovernmental organisations. These include the Inter-American Juridical Committee (IAJC) and the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI),⁴⁵ which present their own work and practice of relevance to ILC projects during ILC annual meetings in Geneva.

Beyond a consultative function, the role that IOs and their practice play in the process of formation or expression of general rules has not been absent from the ILC work. While it is a truism to say that international law is State centric as a legal system,⁴⁶ the ILC has often relied on IOs’ practice when discussing rules of general international law.⁴⁷ This was necessarily the case where projects specifically regulated the legal position of IOs, such as the 1982 draft articles on the law of treaties between States and IOs or between IOs (VCLT-IO) and the 2011 draft articles on the responsibility of IOs (ARIO). Where ILC projects adopted instead a ‘combined’ codification method, developing rules on a particular topic potentially relevant to both States and IOs,⁴⁸ the reliance on the practice of States in the context of IOs, or of IOs ‘as such’ in the exercise of their competences in the field subject to regulation, has

³⁴Art 19(2) ILC statute.

³⁵Arts 18(1) and 24 ILC statute.

³⁶Interviews with ILC members, 4 June, 9, 30–31 July 2019.

³⁷Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993, art 38(1)(d).

³⁸On the ILC as an interpreter of international law, see Danae Azaria, ‘“Codification by Interpretation”: The International Law Commission as an Interpreter of International Law’ 31(1) *European Journal of International Law* 171.

³⁹Art 18 ILC statute.

⁴⁰Art 20(b)(i) ILC statute.

⁴¹Arts 2(1) and 8 ILC Statute.

⁴²Arts 16(e), 24 and 26 ILC statute.

⁴³Arts 16(c) and 17(2)(b) ILC statute.

⁴⁴Arts 16(i) and 22 ILC statute.

⁴⁵See ILC Annual Report (1954) A/CN.4/88, para 77 (on the ILC–IAJC cooperation); ILC Annual Report (1997) A/52/10, paras 239–43 (on the ILC–CAHDI cooperation).

⁴⁶As attested by the CIL Conclusions (2018), commentary to conclusion 4, para 2. See also ILC Conclusions on peremptory norms of general international law (*Jus Cogens*) (2019) A/74/10, chapter V, para 56 (‘Jus Cogens Conclusions – first reading’), commentary to conclusion 7, para 2.

⁴⁷A/CN.4/659, ‘Formation and evidence of customary international law: elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat’, 14 March 2013, 23–4.

⁴⁸Jed Odermatt, ‘The Development of Customary International Law by International Organizations’ (2017) 66(2) *International & Comparative Law Quarterly* 491, 493–4. See, inter alia, commentary to conclusion 7, para 4 and commentary to conclusion 18, para 5, *Jus Cogens Conclusions – first reading* (referring to IOs’ obligation to ‘act, within their respective mandates and when permitted to do so under international law’ to bring to an end serious breaches of *jus cogens* norms); arts 4(2) and 14, CAH articles (referring to States’ obligations to act through IOs in the prevention and punishment of CAH).

also been of relevance. For instance, in drafting rules on the protection of persons in the event of disasters, Valencia-Ospina, Special Rapporteur on the project, relied significantly on the practice of the International Federation of the Red Cross and Red Crescent Societies (IFRC) in the provision of international disaster relief and assistance.⁴⁹ In drafting rules on the expulsion of aliens, in turn, Maurice Kamto turned to EU directives as a source of ‘inspiration’ to formulate general rules governing the conduct of States in this field.⁵⁰

The exact weight and legal relevance accorded to the practice of IOs in this process, however, is difficult to gauge. This question assumed some prominence in the debates surrounding the CIL Conclusions and has been dealt with, more indirectly, in a number of topics recently addressed by the ILC, including on ‘peremptory norms of general international law (*jus cogens*)’ and the preliminary debates on ‘general principles of law’.⁵¹ Combined, these projects reflect a particular understanding, within the ILC, and arguably international law at large, about the role that IOs and their practice might play in the co-creation of rules or principles of general international law and, therefore, their ability to contribute to this system and, as a consequence, to the work of the ILC.

3.2. The practice of international organisations in the formation or expression of rules of general international law

In 2018 the ILC adopted, on second reading, a set of 16 conclusions on the identification of CIL, which included conclusion 4(2), stipulating that ‘[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law’. Simple as it may seem, and perhaps because of it, this conclusion has engendered much debate. This debate pitted two visions on the role of IOs within the fabric of international law against each other: one which denies that IOs might have a role in the formation of rules of international law, and thus views them mostly as ‘objects to be regulated by general international rules developed by states’;⁵² and one that asserts that IOs ‘can and do play’ a role in this process.⁵³ The opinions on conclusion 4(2) shared at the Sixth Committee varied from seeing it as ‘too limited’ to ‘sufficiently reflect the growing participation of universal as well as regional [IOs] in the international relations’⁵⁴ to seeing it as a progressive development of international law focused on the ‘limited experience’ of the EU.⁵⁵ Within the ILC, a similarly wide range of views was expressed:

Some members ...were of the view that the practice of international organizations was not to be taken into account in the process of identification of rules of customary international law. Other members considered that the practice of international organizations was only pertinent to the extent it reflected the practice of States. Some other members, however, agreed with the Special Rapporteur that the practice of international organizations as such could be relevant to the establishment of customary rules, particularly in regards to certain fields of activity within the mandates of those organizations.⁵⁶

What the resulting conclusions tell us about the ILC views, as informed by the views of States and the limited number of IOs which pronounced themselves on this project, is that the practice of IOs may be legally significant to the formation or expression of custom either (i) indirectly (when their conduct

⁴⁹See commentary to art 3 (use of terms), paras 3 and 13; commentary to art 4 (human dignity), para 3; commentary to art 6 (humanitarian principles), paras 6–7; commentary to art 17 (duty of the affected States to seek external assistance), para 5; commentary to art 15 (facilitation of external assistance), para 3, PPEd articles.

⁵⁰A/CN.4/625, Sixth Report on the Expulsion of Aliens (2010), paras 116, 209, 389 and 417. See also Tamas Mólner, ‘EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back’ (2017) *Pécs Journal of International and European Law* 40.

⁵¹See, inter alia, commentary to conclusion 7 (international community of States as a whole), *Jus Cogens Conclusions* – first reading; ILC Annual Report (2019) A/74/10, chapter IX (‘General principles of law’), paras 202, 235 and 523.

⁵²Daugirdas (n 13), 21. See A/C.6/71/SR.20, Statement by Mr Egan (United States of America), Sixth Committee, 24 October 2016, paras 56–8.

⁵³A/CN.4/717, Fifth report on identification of customary international law (2018), para 37 (referring to the position of the Netherlands and Austria).

⁵⁴ibid.

⁵⁵ibid, para 39. See also ILC Annual Report (2014) A/69/10, chapter X [CIL], para 159.

⁵⁶ibid; ILC Annual Report (2015) A/70/10, chapter VI [CIL], para 89.

reflects the collective ‘practice and convictions’ of States or ‘catalyses’ or ‘prompts’ State practice)⁵⁷ or (ii) in ‘certain cases’ directly (as autonomous and independent ‘actors in their own right’).⁵⁸

Both cases are seen through the lens of the State as the primary unit. In the first model, IOs are fully transparent and only indirectly relevant as structures for the expression of the views of States.⁵⁹ In the second, they are seemingly opaque but only (in the ‘certain cases’) where their conduct corresponds to the exercise of State-transferred or State-like powers.⁶⁰ The universe of IOs that can contribute directly to the formation or expression of rules of custom, therefore, is significantly smaller than the universe of IOs in existence.⁶¹ The weight accorded to their practice, in turn, seems to depend as well on additional criteria, including the size of an IO’s membership, ‘the nature of the organization’ and ‘whether the conduct is consonant with that of the member States of the organization’.⁶² This last requirement, in particular, reflects the ILC’s reservations about IOs’ ability to operate as autonomous ‘*jus generative forces*’,⁶³ in lieu of or alongside their member States.

The ‘ambivalence’ that Blokker has ascribed to the ILC’s approach to IOs in its CIL Conclusions is transversal to the ILC projects that have followed, notably those dealing with *jus cogens* norms or general principles of international law.⁶⁴ If the ILC concluded that IOs might contribute to the formation or expression of rules of custom, it indicated the contrary as far as peremptory norms of general international law are concerned.⁶⁵ Conclusion 7 of the ILC work on *jus cogens*, as adopted on first reading (2019), notes that ‘[w]hile the positions of [actors other than States] may be relevant in providing context and for assessing acceptance and recognition [of *jus cogens* norms] ... these positions cannot, in and of themselves, form part of such acceptance and recognition’.⁶⁶ The commentary to the text clarifies that, notwithstanding minority views to the contrary, ‘the current state of international law retains States as the entities whose acceptance and recognition is relevant’.⁶⁷ In the ILC’s work on general principles of law, ongoing at the time of writing, Special Rapporteur Vázquez-Bermúdez has also drawn the ILC’s attention to the need to discuss ‘whether international organizations could also contribute to the formation of general principles of law’.⁶⁸

Ultimately, what these ILC projects show is a growing, if ‘modest’, recognition of the relevance of IOs in the fabric of international law.⁶⁹ ILC members have noted that they do not want to be viewed as downplaying the role of IOs, but still approach this role with the reserved caution warranted by the State-centric system they have been appointed to serve.⁷⁰ While discussions have shifted from whether IOs might contribute to the formation or development of rules of (customary) international law to how or when they do so,⁷¹ their participation in this system remains secondary to that of States.

⁵⁷ A/CN.4/682, Third report on identification of customary international law (2015), paras 74–5; CIL Conclusions, conclusions 6(2), 10(2) and 12, all of which refer to the practice and *opinio juris* of States in the context of IOs.

⁵⁸ CIL Conclusions, commentary to art 4, para 4 (understood as ‘practice that is attributed to [IOs] themselves, not practice of States acting within or in relation to them’); A/CN.4/717, Fifth report on identification of customary international law (2018), para 44.

⁵⁹ Catherine Brölmann, *The Institutional Veil in Public International Law* (Hart 2007).

⁶⁰ Examples of powers functionally equivalent to those of States include the conclusion of treaties, serving as treaty depositaries, deploying military forces (e.g. for peacekeeping) or administering territories. CIL Conclusions, commentary to art 4, para 6.

⁶¹ Daugirdas (n 13) 39–40.

⁶² ILC Annual Report (2016) A/71/10, chapter V [CIL] 89, draft commentary to conclusion 4, para 8. See also CIL Conclusions, commentary to conclusion 4, para 7.

⁶³ Theodore Konstadinides, ‘Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?’ (2016) 35(1) Yearbook of European Law 513, 530.

⁶⁴ Niels Blokker, ‘International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?’ (2017) 14 International Organizations Law Review 1, 5; A/CN.4/682, Third report on identification of customary international law (2015), para 76.

⁶⁵ Pointing out this inconsistency, Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019) 124–6.

⁶⁶ Jus Cogens Conclusions – first reading, conclusion 7(3).

⁶⁷ Jus Cogens Conclusions – first reading, commentary to conclusion 7, para 2.

⁶⁸ ILC Annual Report (2019) A/74/10, chapter IX (General principles of law), paras 220 and 242.

⁶⁹ Catherine Brölmann, ‘Capturing the Juridical Will’ in Sufyan Droubi and Jean d’Aspremont (eds), *International Organisations, Non-State Actors, and the Formation of Customary International Law* (Manchester University Press 2020) 42.

⁷⁰ Interviews with ILC members, 9, 17 and 19 July 2019 (noting that the ILC needs to make sure that its work is consistent with the dominant practice and *opinio juris* of States, not of an ‘international bureaucracy’). See also A/CN.4/SR.3501, Provisional summary record of the 3501st meeting, 6 August 2019, 10 a.m., Geneva, 10–11, Jus Cogens Conclusions – first reading (2019), debate on (draft) conclusion 7 (‘International community of states as a whole’).

⁷¹ Odermatt (n 48) 493–4; Daugirdas (n 13) 18.

The question then becomes: where does the EU fit in all this? Conclusion 4(2) of the CIL project seems at first sight rather felicitous for the organisation.⁷² The EU is the single actor referred to in the commentary to this conclusion as a 'clear-cut' example where 'the relevance of practice is difficult to deny'.⁷³ If relevance is gauged by the transfer of powers to the organisation, EU integration places it at a particular advantage. Its growing competences mean that the EU will often have relevant practice to showcase in different fields of activity, from the conclusion of international agreements to the protection of persons from natural or manmade disasters. At the same time, this degree of integration also renders it rather 'unique'. How does this 'uniqueness' affect the reliance on EU practice in the identification, codification or development of rules of *general* international law? The following section addresses this question by reviewing the use of EU practice in eight distinct codification projects. It shows how the singularities of the EU system are both well fitted to contribute to international law, and often too exceptional to do so.

4. The ILC approach to the EU and its practice

4.1. The EU and its statements on the ILC work

For a body reliant on information from States and IOs for the adequate pursuit of its mandate, active participation of the EU in Sixth Committee debates is far from unwelcome; quite to the contrary, the ILC has often regretted the limited engagement of States and IOs with its work.⁷⁴

As far as EU participation is concerned, the dominant perception seems to be that, when the EU speaks at the Sixth Committee, it voices a well-crafted and intensely coordinated position, reflecting the compromise agreement between its Member States.⁷⁵ But while there is an overall convergence between the views expressed by the EU and those of its members,⁷⁶ with the latter at times referring first to the EU statements before adding to them,⁷⁷ this convergence is not always absolute.⁷⁸ When the EU speaks, its position is mostly accounted for as (just) 'one more view', not that of (now) 27 States, and as such as the view of an IO.⁷⁹ In a process where the views accounted for are, first and foremost, those of States,⁸⁰ some ILC members have noted that the shift from statements voiced by a State on behalf of the EU to those of the EU *qua* organisation⁸¹ brought with it a measure of weakness of no longer being dressed in the cloak of statehood.⁸²

The substance of EU statements, in turn, has received mixed reviews. These have varied from detailed comments on specific draft articles to rather vague remarks on the objectives pursued by an ILC project.⁸³ From the ILC side, EU statements have been seen as everything from 'extremely useful'⁸⁴ or 'very constructive...not just formalistic but also substantive',⁸⁵ to generally 'useful'⁸⁶ or 'of an extraordinary emptiness' reflecting a 'pathetic input' at times left unnoticed.⁸⁷ While some ILC members

⁷²CIL Conclusions, commentary to conclusion 4(2), para 6.

⁷³A/CN.4/682, Third report on identification of customary international law (2015), para 77; A/CN.4/695 and Add.1, Fourth Report on the identification of customary international law (2016), para 20.

⁷⁴See Concepción Escobar-Hernández, 'The Relationship between the International Law Commission and the Sixth Committee of the General Assembly: Some Methodological Reflections and Proposals' in *Seventy Years of the International Law Commission* (Brill Nijhoff 2021) 86.

⁷⁵Interviews with ILC members, 19 and 30 July 2019.

⁷⁶Spyros Blavoukos, Dimitris Bourantonis, Ioannis Galariotis and Maria Giannou, 'The European Union's Visibility and Coherence at the United Nations General Assembly' (2016) 2(1) *Global Affairs* 35–45.

⁷⁷See, e.g., A/C.6/33/SR.33, Statement by Mr Hilger (Federal Republic of Germany), Sixth Committee, 27 October 1978, para 28.

⁷⁸See, e.g., A/CN.4/670, Ninth report on the expulsion of aliens (2014), para 56 and notes 158–9.

⁷⁹Interviews with ILC members, 4 June and 19 July 2019.

⁸⁰Interviews with ILC members, 19 July and 8 August 2019.

⁸¹See Wouters and Hermez (n 24), 6–7.

⁸²Interviews with ILC members, 9, 19 and 30 July 2019. See also Wessel (n 12) 29 ('the outcome of the intra-EU decision-making process may be a far less rich contribution to the development of international law than the various opinions and actions by individual States').

⁸³Cf. the EU statements on the ARIO (e.g. A/C.6/63/SR.22, Statement by Mr Hetsch (European Commission), Sixth Committee, 31 October 2008, paras 19–24, with those on the CAH articles ('Crimes against humanity. Comments and observations received from Governments, international organizations and others' (2019) A/CN.4/726, 128–30).

⁸⁴Interview with ILC member, 8 August 2019.

⁸⁵Interview with ILC member, 7 August 2019.

⁸⁶Interview with ILC member, 8 August 2019; interviews with UN Secretariat officials, 31 July 2019.

⁸⁷Interview with ILC member, 4 June 2019.

have noted that they did not experience particular difficulties in understanding the intricacies of EU practice of relevance to a particular project, others have noted that the complexity of the EU legal system is far from helpful.⁸⁸ Some ILC members noted that a greater investment in making EU practice of relevance to the ILC work more readily 'available' would assist in this process. The former habit of publishing a survey of EU practice of relevance to international law in specialised issues of academic journals was remarked as a particularly helpful one, and one which might be revisited.⁸⁹

The conceptualisation of the EU and its legal system have likewise varied significantly in ILC projects and among the ILC membership. The EU has been described as 'a hybrid union of States' similar to an intergovernmental organisation,⁹⁰ an 'obviously unique phenomenon',⁹¹ an IO with 'some supranationalisms',⁹² an 'interesting innovation' or a legal 'experiment' in governance,⁹³ or something akin to 'a federation of states'.⁹⁴ Under the draft rules on the expulsion of aliens, EU practice is understood as the practice of 'a community of states'.⁹⁵ In the draft articles on the protection of persons in the event of disasters, it is interchangeably used as the expression of the practice of a regional (integration) organisation or as the regional practice of its members.⁹⁶ The EU legal order, in turn, has been described as everything from a 'regional order'⁹⁷ or a 'special regime',⁹⁸ to 'a peculiar legal system'⁹⁹ akin to 'the domestic law of a large federal state',¹⁰⁰ or a 'sub-system' of international law.¹⁰¹ While in more recent ILC projects this 'difference' is approached in a rather routine fashion, being acknowledged somewhat matter-of-factly,¹⁰² it gave rise to some debate in ILC projects in the 1970s.¹⁰³

This conceptualisation, and ambivalence, have not been without consequence.¹⁰⁴ As the next section shows, the EU's 'exceptionalism' has warranted distinct results as far as the codification of rules of general international law is concerned.

4.2. References to and use of EU practice in ILC projects

References to the EU have featured, to varying degrees, in SR Reports, ILC annual reports, and the commentaries to ILC draft articles, guidelines or conclusions. The forms of practice cited have included bilateral and multilateral treaties to which the EU is a party¹⁰⁵ or its practice in the context of treaties;¹⁰⁶

⁸⁸Interviews with ILC members, 4 June and 7 August 2019.

⁸⁹Interview with ILC member, 4 June 2019. A section on 'International Practice of the European Communities: Current Survey', including the main CJEU decisions relevant to international law, featured in the *European Journal of International Law* between 1990 and 1997. See, inter alia, Christoph Vedder, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law' (1990) 1 *European Journal of International Law* 365.

⁹⁰A/CN.4/293 and Add.1, Seventh report on the most-favoured-nation clause (1976) 115, para 19.

⁹¹A/CN.4/309 and Add.1 and 2, Report on the most-favoured-nation clause (1978) 21, para 73.

⁹²Interviews with ILC members, 4 June and 7 August 2019. See also A/CN.4/309 and Add.1 and 2, Report on the most-favoured-nation clause (1978) 9, para 65.

⁹³Interview with ILC member, 30 July 2019.

⁹⁴Interview with ILC member, 4 June 2019.

⁹⁵A/CN.4/670, Ninth report on the expulsion of aliens (2014), paras 37, 46.

⁹⁶See A/CN.4/662, Sixth Report on the protection of persons in the event of disasters (2013), para 103; A/C.6/66/SR.25, Statement by Mr Valencia-Ospina (Special Rapporteur on the protection of persons in the event of disasters), Sixth Committee, 31 October 2011, para 60; Commentary to art 9, para 5, PPED articles.

⁹⁷Interview with ILC member, 19 July 2019.

⁹⁸Commentary to art 14, para 5, and commentary to conclusion 12, para 42, EoA articles.

⁹⁹Interview with ILC member, 9 July 2019.

¹⁰⁰Interviews with ILC members, 4 and 9 July 2019.

¹⁰¹Interview with ILC member, 19 July 2019.

¹⁰²A/CN.4/683, Third report on subsequent agreements and subsequent practice in the interpretation of treaties (2015) para 28.

¹⁰³A/CN.4/309 Add.1 and Add.2, Report on the most-favoured-nation clause (1978) para 213.

¹⁰⁴See Jed Odermatt, 'Unidentified Legal Object: Conceptualising the European Union in International Law' (2018) 33 *Connecticut Journal of International Law* 215. See also George Nolte and Helmut Aust, 'European Exceptionalism?' (2013) 2(3) *Global Constitutionalism* 407; Magdalena Lišková, 'European Exceptionalism in International Law' (2008) 19(3) *European Journal of International Law* 463.

¹⁰⁵See, e.g., commentary to art 4, para 6 and note 77, MFN articles (referring to the 1963 Yaoundé Convention concluded by the EEC with 18 'associated African states and Madagascar', and the EEC association agreements with Arusha, Rabat and Tunis).

¹⁰⁶See, e.g., commentary to art 15, note 658, CAH articles (referring to the EU declaration on art 66 of the UN Convention on Corruption).

and EU primary law¹⁰⁷ as well as secondary law.¹⁰⁸ In addition, references include acts of EU institutions such as Council Conclusions¹⁰⁹ or European Commission policy and legislative proposals,¹¹⁰ unilateral acts or statements,¹¹¹ EU practice as a participant in IOs, including its statements therein,¹¹² EU external action in monitoring missions,¹¹³ CJEU case law¹¹⁴ and, significantly, references to cases in which the EU has acted as a party, namely within World Trade Organization (WTO) dispute settlement proceedings.¹¹⁵

The majority of these references are included in footnotes. Express references to the EU in the commentaries to texts adopted by the ILC on second reading vary between a single reference in the articles on the protection of persons in the event of disasters (2016),¹¹⁶ the CIL Conclusions (2018)¹¹⁷ or the draft CAH articles (2019),¹¹⁸ to a total of 12 references in the commentaries to the ARIO (2011).¹¹⁹ There appears to be little correlation between the number of EU statements on a particular topic and the number of references to its practice ultimately included in ILC drafts. For instance, while the ILC articles on the expulsion of aliens (2014) relied at first heavily on EU practice¹²⁰ and the EU made statements at the Sixth Committee on five distinct occasions,¹²¹ the final draft refers to EU practice in three footnotes and the commentary to two draft articles,¹²² a fact not left unnoticed by the EU delegation.¹²³

What becomes clear from the review of the use of EU practice in the ILC work is the degree to which this practice is perceived as exceptional, and the different results that this ‘otherness’ or ‘exceptionalism’ have produced. EU practice has been used as evidence for the codification of general rules in situations where (alternative) practice and precedent were lacking, as a subsidiary source confirming the established practice of States or IOs, as the illustration of a legal regime comprising more detailed rules, or as the example of a ‘unique’ case inapt to serve as evidence of or inspiration for the formulation of rules of general application.

The first of these approaches has mostly been reserved for the codification of rules regulating the legal position of IOs. For instance, the inclusion in the 1982 draft VCLT-IO of a rule on reservations to treaties by IOs notes that the majority of ‘precedents concern the European Economic Community’

¹⁰⁷Limited to a single reference to art 300(7) EC Treaty in the ARIO (commentary to art 62, para 7, note 366), two references to the EU Charter of Fundamental Rights in the EoA articles (art 16 (obligation to protect the right to life of an alien subject to expulsion), note 98, and commentary to art 18 (Obligation to respect the right to family life), para 3), and to two references in the CAH articles (commentary to art 5 (*non-refoulement*), para 5, note 260, and commentary to art 11 (fair treatment of the alleged offender), para 7, note 491).

¹⁰⁸See, e.g., commentary to art 9 (reduction of the risk of disasters), para 5, PPED articles (referring to Decision 1313/2013/EU of the European Parliament and of the Council on the establishment of a EU Civil Protection Mechanism); commentary to art 10 (*aut dedere aut judicare*), para 8, note 469, and commentary to art 13 (extradition), para 1, note 560, CAH articles (referring to Council Framework Decision of 13 June 2002 on the European Arrest Warrant).

¹⁰⁹See, e.g., commentary to conclusion 12 (constituent instruments of international organizations), para 12, SASP Conclusions (referring to the Madrid European Council Conclusions, EU Bulletin No. 12 (1995)).

¹¹⁰See, e.g., commentary to art 9, para 5, PPED articles (referring to the European Commission Action Plan on the Sendai Framework for Disaster Risk Reduction 2015–2030); commentary to art 21 (departure to the State of destination), para 2, note 13, EoA articles (referring to the European Commission proposal for a Return Directive (1 September 2005)).

¹¹¹See, e.g., commentary to art 42 (particular consequences of a serious breach of an obligation under this chapter), para 7, ARIO (referring to the European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991).

¹¹²See, e.g., commentary to art 2(a), para 14, note 76, ARIO (referring to modifications to the FAO Constitution to allow for EU membership); commentary to art 49(3), para 11, ARIO (referring to oral statements of the EU at the Sixth Committee).

¹¹³See, e.g., commentary to art 20 (consent), para 3, ARIO (referring to the consent by Indonesia to the deployment of the EU Aceh Monitoring Mission, with reference to the preamble of EU Council Joint Action 2005/643/CFSP of 9 September 2005).

¹¹⁴See, e.g., commentary to conclusion 2 (general rule and means of treaty interpretation), paras 41–3, SASP Conclusions (referring to case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91 as subsidiary evidence of the customary law status of art 31 Vienna Convention on the Law of Treaties (VCLT)).

¹¹⁵See, e.g., commentary to art 9 (Conduct acknowledged and adopted by an international organization as its own), para 3, ARIO (referring to European Communities – Customs Classification of Certain Computer Equipment [1998] WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R).

¹¹⁶Commentary to art 9, para 5, PPED articles.

¹¹⁷Commentary to conclusion 4, para 6, CIL Conclusions.

¹¹⁸Commentary to art 13, para 36, CAH articles.

¹¹⁹Commentary to arts 9, 17, 20, 25, 32, 45, 48, 49, 51, 61, 62 and 64, ARIO.

¹²⁰See A/CN.4/625, Sixth Report on the Expulsion of Aliens (2010), paras 116, 209, 389 and 417; Tamas Mólár (n 50).

¹²¹At the Sixth Committee’s 66th–68th and 71st sessions. See, inter alia, A/C.6/71/SR.20, Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, 24 October 2016, paras 44–5.

¹²²Commentary to art 14, para 5, and commentary to art 18, para 3, notes 98, 131 and 181, EoA articles.

¹²³A/C.6/69/SR.19, Statement by Mr Gussetti (Observer for the European Union), Sixth Committee, 17 November 2014, para 71.

(EEC).¹²⁴ In the ARIIO, a text largely cast as an exercise in progressive development,¹²⁵ the inclusion of a rule recognising IOs' right to invoke responsibility for the breach of obligations owed to the international community as a whole was grounded on the caveat that 'practice in this regard is not very indicative ... The most significant practice appears to be that of the European Union.'¹²⁶ In these cases, EU practice, exceptional or not, was deemed both useful and sufficient to serve as evidence for general rules. Beyond IO-specific rules, the clearest example of the use of EU practice as evidence of the existence of a general rule is perhaps that found in the 1978 draft articles on most-favoured-nation (MFN) clauses in trade agreements, a matter squarely within EU exclusive competence. Here, the EEC-ACP Lomé Convention (together with the 1975 Bangkok Preferential Trade Agreement among Asian developing countries) was used as evidence of a rule excluding preferences granted between developing countries *inter se* from the operation of MFN clauses in multilateral treaties concluded between developed and developing countries.¹²⁷

Unsurprisingly, EU practice has also featured as subsidiary evidence in the identification of general rules. For instance, CJEU case law has been used to confirm the view that Article 31 VCLT has customary law status,¹²⁸ and Council conclusions and European Commission acts have been used as evidence of the 'widespread practice of States reflecting their commitment to reduce the risk of disasters'.¹²⁹ On other occasions, the singular features of the EU legal system and international practice have instead been referred to as illustrations of a more detailed system of rules. In the CAH articles, for instance, the EU Charter of Fundamental Rights serves as an example of a legal instrument with 'more specific standards binding upon States', as do the criteria for dealing with multiple requests for surrender found in the European Arrest Warrant Framework Decision.¹³⁰

The integration of these rules into general norms, however, has been addressed with caution. Rules which refer 'in too exclusive a manner to a case as special as' the EU have often been rejected for lack of support in general practice.¹³¹ Both States at the Sixth Committee and ILC members themselves have at different points in time expressed reservations about 'attempt[s] to formulate provisions valid for only one organization, whose character was basically different from that of the great majority of international organizations'.¹³² Most emblematically, the ILC rejected the EU's request for the codification of special rules of attribution for regional economic integration organisations (REIOs) – a 'code-name' for the EU¹³³ – within the ARIIO on the basis 'of the practical relevance [of such rules] only for a limited number of international organizations'.¹³⁴ Concerns about the reliance on EU practice as evidence of general rules were also expressed in the debates on the draft articles on the expulsion of aliens. The United States delegation, in particular, cautioned the ILC not to 'seek to codify new rights, or to import concepts from such regional bodies as the European Commission or the European Court of Human Rights'.¹³⁵

The choice not to draft rules of general application along the lines of EU practice, however, has also at times reflected larger normative concerns about the implications of EU practice for specific principles of international law, or a judgment on the desirability or lack thereof of EU integration. The latter was most prominent in the early years of the EEC and the ILC debates on the draft articles on MFN clauses. In this context, the ILC dismissed an EEC-backed rule recognising an automatic exemption of intra-custom unions' benefits from the reach of MFN clauses on account of the absence of 'compelling evidence' of the benefits of regional economic integration among developed nations.¹³⁶ Later projects

¹²⁴Commentary to section 2 (reservations), 33, para 5, 1982 VCLT-IO.

¹²⁵General Commentary, para 5, ARIIO.

¹²⁶Commentary to art 49 (invocation of responsibility by a State or an international organization other than an injured State or international organization), paras 8 and 9, ARIIO.

¹²⁷Commentary to art 24 (MFN clause in relation to arrangements between developing States), paras 11–13, MFN articles.

¹²⁸Commentary to conclusion 2 (general rule and means of treaty interpretation), para 4, SASP Conclusions. See also *ibid*, commentary to conclusion 10 (agreement of the parties regarding the interpretation of a treaty), para 19, note 438 (referring to Case C-104/16 P *Council v Front Polisario* [2016] ECLI:EU:C:2016:973).

¹²⁹Commentary to art 9, para 5, PPED articles.

¹³⁰Commentary to art 11 (fair treatment of the alleged offender) and commentary to art 13 (extradition), CAH arts.

¹³¹ILC Annual Report (1982) A/37/10, chapter 2 (commentary to art 36bis), 46, para 10.

¹³²A/C.6/35/SR.55, Statement by Mr Konrad (Hungary), Sixth Committee, 20 November 1980, para 48.

¹³³Esa Paasivirta and Pieter Jan Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) XXXVI *Netherlands Yearbook of International Law* 169, 211.

¹³⁴A/CN.4/553, Third report on the responsibility of international organizations (2005) 11, para 15.

¹³⁵A/C.6/65/SR.25, Statement by Mr Simonoff (United States of America), Sixth Committee, 29 October 2010, para 7.

¹³⁶See A/CN.4/286 and Corr.1, Sixth report on the most-favoured-nation clause (1975) 19, paras 59 and 62; A/CN.4/293 and Add.1, Seventh report on the most-favoured-nation clause (1976) 122, para 58.

have expressed some concerns about the compatibility of EU treaty practices with the principle of State consent. The inclusion of a reference to the prohibition on invoking the internal rules of the organisation as a justification for a failure to perform a treaty in the ILC guidelines on provisional application (PA) of treaties, for instance, has been cast as a reaction to the EU's practice of defining the scope of PA of mixed agreements rather broadly, by reference to 'matters falling within the Union's competence', to the detriment of the position of EU treaty parties.¹³⁷

Recalling that 'general principles are not stated as non-derogable rules',¹³⁸ the ILC has often accounted for the EU (and the institutional diversity of IOs more generally) through a variety of codification techniques. These have included 'without prejudice' clauses,¹³⁹ clarifications to a project's use of terms,¹⁴⁰ the indication of the non-exhaustive nature of certain provisions,¹⁴¹ the indication that a project's particular provision 'does not attempt to express a clear-cut view on the issue',¹⁴² deferring the regulation of certain essential questions to the rules of the organisation,¹⁴³ and ultimately, the codification of a *lex specialis* clause. The well-known example of the latter is Article 64 ARIIO, the commentary to which refers expressly to the EU.

This choice has not been without criticism. Some authors have ventured that the ILC might adopt a more methodological appraisal of the legal relevance of IOs' practice or overcome its reservations to recognising the existence of different rules for different types of organisations.¹⁴⁴ Ultimately, as far as the EU is concerned, the ILC has accounted for its views and its practice with ponderation but reservation, a reservation otherwise extended to IOs at large.

5. Conclusions

In 'The Logic of Paradox', Graham Priest suggests, rather unorthodoxically, that one should learn to live with certain paradoxes.¹⁴⁵ By explaining how the ILC relies on the practice of IOs in its work, and how it has conceptualised the legal relevance of this practice to the formation and expression of rules of general international law, this article laid bare a paradox of integration, one with which the EU must live when making statements on the work of the ILC.

As the international debate currently stands, the practice of IOs is relevant for the identification, codification or development of rules of general international law in rather distinct ways. It will necessarily be relied upon by the ILC when codifying or developing rules regulating the position of IOs as treaty parties or as respondents for international wrongs. It will also be relevant where IOs are particularly active in a field the ILC seeks to systematise through general rules, be this crisis management or atmospheric protection. Conceptually, the ILC concluded in 2018 that the practice of IOs might co-contribute, 'in

¹³⁷Merijn Chamon, 'Provisional Application of Treaties: The EU's Contribution to the Development of International Law' (2020) 31 European Journal of International Law 883, 901.

¹³⁸A/CN.4/553, Third report on the responsibility of international organisations (2005) 11, para 15.

¹³⁹Commentary to art 26 (procedural rights of aliens subject to expulsion), para 8, note 181, EoA articles (referring to art 12 of Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents, and the right to legal aid therein, when noting that the EoA articles 'are without prejudice to other procedural rights or guarantees provided by law').

¹⁴⁰Such as the clarification offered to the notion of 'circumvention' in the ARIIO, which takes into account the EU position that in case of 'equivalent protection' of human rights between the EU and Council of Europe systems, the transfer of powers by Member States to the organisation does not amount to circumvention of an international obligation or, in the ILC view, it implies the non-existence of a breach to begin with (commentary to art 17 (circumvention of international obligations through decisions and authorizations addressed to members), para 6, ARIIO; commentary to art 61 (circumvention of international obligations of a State member of an international organization), para 4 and note 357, ARIIO).

¹⁴¹Commentary to art 14, para 5, EoA articles (the reference to 'any other grounds impermissible under international law ...preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union').

¹⁴²Commentary to art 10 (existence of a breach of an international organization), para 5, note 171 and para 7, ARIIO (alluding to the difficulties of qualifying EU obligations as international obligations and simply concluding that '[b]reaches of obligations under the rules of the organization are not always breaches of obligations under international law').

¹⁴³See arts 5, 7, 27, 36 and 46, 1982 VCLT-IO; arts 2(b), 6(2), 10(2), 22(2.b), 22(3), 32, 40, 52(1.b), 52(2), 59(2), 64 and 65 ARIIO.

¹⁴⁴Janina Barkholdt, 'The Contribution of International Organizations to the Formation, Interpretation and Identification of International Law: Questions Arising from the Work of the International Law Commission' (2020) International Organizations Law Review 1–45 (arguing that States' reservations as to the recognition of IOs' norm-generating power is more the result of a lack of conceptual clarity as to which forms of IO practice are relevant to this process, than an objection of principle); Bordin (n 65) 116 (noting that 'there is no reason why differences between international organizations should not be a major driving force for future legal development').

¹⁴⁵Graham Priest, 'The Logic of Paradox' (1979) 8 Journal of Philosophical Logic 219.

certain cases', to the formation or expression of custom (general practice and *opinio juris*) on a particular point of law. These cases include instances where States have transferred to IOs relevant powers in a particular field. The more powers are transferred, the more likely an IO is to have had 'the opportunity or possibility of applying the alleged rule',¹⁴⁶ and thus the more its practice might be relied upon in the identification, codification or development of rules of general international law. The EU is, in the ILC's view, a 'clear-cut' case of this phenomenon. But it is also a particularly unique one at that.

The idea that the EU is *sui generis* is far from a novel one.¹⁴⁷ At the Sixth Committee, the EU delegation itself has often revisited this narrative. It has routinely stressed that the EU is 'a rather specific organization' at 'an advanced stage of integration'.¹⁴⁸ In proposing the formulation of general rules reflecting these specificities, the EU has often argued, with limited success, that these rules might be of relevance not only for the special case of the EU, but also for IOs at large, should these find themselves at a similar stage of integration.¹⁴⁹ The ILC has not been particularly favourable to this vision. By reviewing how the ILC has relied on EU practice in its work, and how it understands the relevance of this practice, this article provided an overview of where the EU stands as far as the codification, and at times the progressive development, of rules of general international law are concerned. It did so from the perspective of the ILC and its work, not that of the EU and its ambitions.

What becomes apparent from the review of the references to, and the use of, EU practice in the eight codification projects surveyed is that the ILC's approach to the EU is, much like its approach to IOs at large, a rather ambivalent one. Some projects approach EU practice as that of 'a community of states', others as evidence of the practice of an IO. EU statements at the Sixth Committee, in turn, are perceived both as the consensus of a block of (now) 27 States, or as the views of a single organisation. The EU as such has been described primarily as a subject best placed under the umbrella of IOs, but one occupying a category of its own. EU practice, in turn, has been relied upon in the codification of rules regulating the position of IOs, notably where limited alternative practice or precedent were available. The 'exceptionalism' of rules emerging from the EU system has not prevented some Special Rapporteurs from relying on them as 'inspiration' for the progressive development of international law – this use has, however, often been met with stern protest by State delegations at the Sixth Committee. Unsurprisingly, EU practice has also served as additional evidence supporting the codification of general rules on topics as distinct as the protection of persons in the event of disasters or the prevention and punishment of crimes against humanity. The reliance on EU-related practice, however, has been approached with caution.

Inimical to single actor contributions in the development of international law in general,¹⁵⁰ and cognisant of the particularly unorthodox features of the EU specifically, the ILC has avoided proposing rules which refer 'in too exclusive a manner to a case as special as' the EU.¹⁵¹ Even where a rule ultimately reflected a view expressed by the EU delegation at the Sixth Committee, the ILC has anchored its authority on the practice of the UN rather than on EU precedents.¹⁵² Decisions against the generalisability of EU rules or international practice, in turn, have at times also betrayed larger concerns about the effects of these practices on structural principles of the international legal system, notably that of State consent. Often recalling that general rules are 'not stated as non-derogable', their regime being displaceable by more specialised systems, the ILC has instead accounted for variations to established practice or to the preferred normative direction of its projects by referring to these variations in the commentaries to its texts or by safeguarding them through 'without prejudice' or *lex specialis* clauses.

¹⁴⁶Commentary to conclusion 8, para 2–4, CIL Conclusions.

¹⁴⁷Nevill (n 31) 286–7.

¹⁴⁸See, inter alia, A/C.6/31/SR.16, Statement by Mr Dubois (European Economic Community), Sixth Committee, 13 October 1976, para 1; A/C.6/64/SR.17, Statement by Mr Hetsch (European Commission), Sixth Committee, 28 October 2009, para 21.

¹⁴⁹A/CN.4/308 & Corr.1 and Add.1 & Corr.1 and Add.2, 'Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session' (1978) European Economic Community, 181, para 7; A/CN.4/637 and Add.1, 'Responsibility of international organizations. Comments and observations received from international organizations' (2011) European Commission, 168, para 2.

¹⁵⁰James R. Crawford, 'Universalism and Regionalism from the Perspective of the International Law Commission' in *International Law on the Eve of the Twentieth Century: Views from the International Law Commission* (UN Publications 1997) 99, 113.

¹⁵¹ILC Annual Report (1982) A/37/10, chapter 2 (commentary to art 36bis), 46, para 10.

¹⁵²For instance, the reference in the commentary to art 14 of the draft articles on the expulsion of aliens to the prohibition of discrimination on the grounds of sexual orientation in cases of expulsion is supported on Human Rights Committee's reports, not on the EU rules relayed to the ILC by the EU delegation in its statements at the Sixth Committee. Commentary to draft art 14 (prohibition of discrimination), para 4, EoA articles.

From the viewpoint of general international law (and the ILC's own mandate), therefore, integration comes with a paradox: it renders an IO such as the EU more likely to have relevant practice, and often too unique to serve as evidence for general rules. The EU's 'advanced stage of integration' has been both a source of useful evidence for the ILC's work, and one to be approached with care and reservation. This, in turn, has implications for the fulfilment of the EU's ambitions underlying Article 3(5) TEU as far as rules of general international law are concerned. While the EU might be the 'clear-cut' case the ILC has recognised it to be, it is unlikely that it will be a driver of general rules unless it is convincingly established that EU practice is part of a larger and well-established practice, or that it should be.

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