



City Research Online

City, University of London Institutional Repository

Citation: Odermatt, J. ORCID: 0000-0002-6073-3033 (2017). The Development of Customary International Law by International Organizations. *International and Comparative Law Quarterly*, 66(2), pp. 491-511. doi: 10.1017/S0020589317000112

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/20934/>

Link to published version: <http://dx.doi.org/10.1017/S0020589317000112>

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW BY INTERNATIONAL ORGANIZATIONS

Jed Odermatt*

Forthcoming in *International and Comparative Law Quarterly* (2017) Volume 22,
Issue 2.

Abstract

In his Fourth Report on the Identification of Customary International Law (2016), Special Rapporteur Michael Wood confirmed that ‘[i]n certain cases, the practice of international organizations also contributes to the expression, or creation, of rules of customary international law.’ That the practice of international organizations can be relevant when identifying customary international law is relatively uncontroversial. The issue that is more debated is the extent to which the practice of international organizations *as such* may contribute to the development of customary international law. Using examples from the European Union’s treaty practice and from the Court of Justice of the European Union, this article argues that international organizations may contribute to such practice, not only by representing the collective will of States, but as autonomous actors in their own right.

Keywords: Customary international law, Law of Treaties, International Law Commission, European Union, International Organizations

* Jed Odermatt, Postdoctoral Research Fellow, University of Copenhagen, Centre of Excellence for International Courts (iCourts). Jed.Odermatt@jur.ku.dk. This contribution is based on a paper presented at the 2016 European Society of International Law Research Forum at Koç University Law School and the Center for Global Public Law in Istanbul. I would like to thank the organisers of the conference and the panel participants for their comments and feedback. I would also like to thank those who have commented on earlier drafts, including Marise Cremona, Esa Paasivirta, Thomas Ramopoulos, Miriam Cullen, and Graham Butler.

I. Introduction

In 2012, the International Law Commission (ILC) included the topic ‘Formation and evidence of customary international law’ in its programme of work. It appointed Sir Michael Wood, former Legal Adviser to the United Kingdom’s Foreign and Commonwealth Office, to be the Special Rapporteur for the topic. The Special Rapporteur has to date produced four reports, the Special Rapporteur’s ‘Fourth report on identification of customary international law’ being published in March 2016.¹ These Reports include a number of ‘draft conclusions’, of which the ILC has taken note.

The ILC has dealt with a number of fundamental issues of public international law, such as the law of treaties and international responsibility. Yet until 2012, the issue of how customary international law is formed and identified had not been addressed. The work of the ILC on customary international law is unlikely to break new ground. It confirms the commonly accepted aspects of identification of customary international law, such as the ‘two-element’ approach. The lasting impact of the study may rest more with the way the ILC addressed a number of sub-issues, mainly at the later stages of the study. One of these issues is the extent to which the practice of international organizations (IOs) is relevant to the formation of customary international law. The Special Rapporteur acknowledged from the outset that the practice of IOs could play a part in the formation of customary international law. However, it was not until the two most recent reports that the precise role of international organizations, and the relevance of their practice to the formation of customary international law, was explained and defined in more detail. While the ILC’s attention to IOs should be welcomed, these latest reports still leave a number of questions unaddressed and unexplored, reflecting the inconsistent way in which the ILC has dealt with the place of IOs in international law.

This article addresses the question of how the practice of international organizations may contribute to the development of customary international law. The following part looks at the way in which the ILC has approached the topic of international organizations more generally. While the ILC accepts that the practice of international organizations can be relevant to the formation of customary international law, its work remains somewhat state-centric, and thus it appears that the ILC struggles to conceive of international organizations *as such* contributing to the development of international custom. The ILC’s approach reveals an underlying tension between the view of

¹ ILC, Fourth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, International Law Commission Sixty-eighth session, Geneva, (2 May-10 June and 4 July-12 August 2016), UN Doc A/CN.4/695 (‘Fourth Report’).

international organizations as independent actors in international law, capable of contributing to its formation and development in an autonomous fashion, and the view of international organizations as little more than the collective will of their member States, whose contribution to international law ‘as such’ is negligible at most.

This article does not explore this underlying debate regarding the extent to which international organizations act independently of their members. Instead, it focuses on what the Special Rapporteur describes as the ‘most clear-cut’² example of an international organization contributing to the formation and identification of rules of customary international law ‘as such’: the European Union (EU). While the Special Rapporteur has acknowledged the possibility that the EU’s practice contributes to the formation of customary international law, his reports to date have not detailed the type of organization practice that is relevant, or the kind of rules to which its practice may contribute. The third part of this article addresses these unexplored questions by considering EU practice in two fields. First, it discusses the peculiarities of the EU’s treaty practice, an example of the EU acting in its own right on the international plane. Second, it considers the practice of the Court of Justice of the European Union (CJEU), which may be considered another way in which the EU contributes to the development of customary international law. The EU’s contribution relates mainly to how rules of public international law apply in the relationship between States and international organizations.

The article primarily addresses the issue of the practice of international organizations in the formation of customary international law. The related question of whether that practice is considered ‘accepted as law’ (*opinio juris*) is not addressed. The forms of evidence that may be used to determine whether practice has achieved ‘acceptance as law’ detailed by the Special Rapporteur mostly relate to the practice of States (official statements by governments, diplomatic correspondence, jurisprudence of national courts). Yet these forms of evidence could potentially be applied *mutatis mutandis* to an organization such as the EU. The issue of how international organizations might express *opinio juris* has not yet been addressed by the Special Rapporteur. While this issue is also an important one and requires further study, the present contribution will focus on the issue of IO practice.

² ILC, 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, (‘Third Report’) para 77.

II. The ILC and International Organizations

A. The 'State-Centric' Approach of the ILC

The ILC's approach to the issue of customary international law reflects a broader issue within the ILC, that is, the challenge of approaching the issue of IOs in a systematic and coherent fashion. The ILC has demonstrated a somewhat 'state-centric' approach to issues of international law. This is hardly surprising since it is States that nominate and elect individual members to the ILC. This does not mean that the ILC has ignored international organizations in its work, however. Indeed, from the outset, much of the ILC's work has focused on IOs.³ However, it sees States as the driving force in international lawmaking, and the capacity of international organizations to contribute to the development of international law is reduced to their role in expressing the will of States.

The ILC's state-centric approach is further reflected in the way it has dealt with other issues of international law. Much of its previous work has examined the role of IOs in the international legal order. Typically, the ILC analyses these questions in one of two ways. The first model is to bifurcate its work, addressing separately the issues that arise in relation to States and those that arise in the context of IOs. This was the approach taken, for instance, with regard to the law of treaties, which resulted in two similar but separate codification conventions.⁴ This approach was applied recently with respect to the law of international responsibility, which resulted in a set of draft articles designed to apply to States,⁵ and another that applies to international organizations and States within international organizations.⁶ In the bifurcated approach, the rules applicable to

³ In 1958, the UN General Assembly invited the ILC to take up work on 'the relations between States and intergovernmental organizations' (UNGA Res 1289 (XIII) 5 December, 1958). The ILC first worked on the topic of 'Representation of States in their relations with international organizations' (1963–75) which led to the draft articles forming the basis of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (done 14 March 1975, not yet in force) UN Doc A/CONF.67/16. The second part examined 'Status, privileges and immunities of international organizations, their officials, experts, etc.'. In 1992, the ILC decided that the topic should not be given further consideration unless the UNGA decided otherwise.

⁴ These were the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980 ('VCLT') and subsequently the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM 543 (1986), not yet in force ('VCLT-IO').

⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, Volume II, Part I, Documents of the Fifty-Third Session (2001) U.N. Doc. A/56/10.

⁶ Draft Articles on the Responsibility of International Organizations with Commentaries, in Report of the International Law Commission, 63rd sess. (26 April–3 June 3, 4 July 4– 12 August, 2011) UN Doc. A/66/10, at 52; GAOR, 66th Sess., Supp. No. 10 (2011) ('ARIO').

States are fleshed out first, and these are later used as a basis for determining rules applicable to IOs, taking into account the relevant differences between the two.

The second approach has been to deal with States and international organizations together in the same work. For example, the ILC's Guide to Reservations to Treaties confirms that both States and IOs have the capacity to make reservation to treaties.⁷ The ILC decided to develop guidelines that could be applied to the context of both States and IOs.⁸ The ILC's work on the provisional application of treaties also follows this approach.⁹ While there is separate analysis and discussion of the practice of provisional application of treaties by States and by international organizations, the Draft Guidelines deal with States and IOs together.¹⁰ According to this approach, the rules applicable to States and to IOs can be dealt with together in a single system.

With regard to the ILC's work on customary international law, however, this methodological question was never addressed directly. Although the Special Rapporteur's Draft Conclusions and Commentary refer to IOs, those references are not consistent throughout – a criticism that has been acknowledged in the Fourth Report.¹¹ The ILC's work on customary international law suffers from this broader indeterminacy about the role of international organizations in international law.

Another criticism of the work of the ILC regarding IOs is that it has neglected the specific characteristics of supranational organizations, and more particularly the 'unique' nature of the EU and its legal order.¹² States are viewed as the primary subjects capable of developing customary international law. When Special Rapporteur considers the practice of IOs, it is insofar as they are forums for the expression of State practice and *opinio juris*, or where IOs have functionally replaced States in certain fields. This

⁷ Art 1.1, ILC, Guide to Practice on Reservations to Treaties, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, UN Doc A/66/10, para 75.

⁸ 'Although the International Law Commission had some reservations on equating the rules applicable to international organizations to those applicable to states, it was decided in the end to assimilate international organizations to states.' D Verwey, *The European Community, the European Union and the International Law of Treaties* (TMC Asser Press 2004) 129.

⁹ See ILC, Fourth Report on the Provisional Application of Treaties by Juan Manuel Gómez-Robledo, Special Rapporteur, International Law Commission, Sixty-eighth session Geneva (2 May-10 June and 4 July-12 August 2016) UN Doc. A/CN.4/699, para 102.

¹⁰ For example, Draft Guideline 1 sets out that "States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application." ILC, Third Report on the Provisional Application of Treaties by Juan Manuel Gómez-Robledo, Special Rapporteur, International Law Commission, Sixty-seventh session Geneva (4 May-5 June and 6 July-7 August 2015) UN Doc A/CN.4/687, para 131.

¹¹ Fourth Report (n 1) para 19: 'It was also noted that at present the reference to international organizations is not entirely consistent throughout the draft conclusions as a whole, since in places the latter refer explicitly to State practice alone.'

¹² JM Cores Martin, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility' in M Ragazzi (ed) *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill 2013) 192.

represents another symptom of the ILC's state-centric method. This primary focus on States is also evident in other codification projects, most-notably the ILC's recent Articles on the Responsibility of International Organizations (ARIO).¹³ Critics of the ARIO, including the European Commission, argued in this regard that the ILC largely ignored the wide-scale treaty practice of the EU and generally failed to consider the implications that such practice could imply for customary law.¹⁴ This includes, for instance, the now widely used notion of 'Regional Economic Integration Organization' (REIO) in international agreements.¹⁵ The European Commission also argued that a special rule of attribution had emerged in the EU context whereby actions of organs of EU Member States could be attributed to the organization, and that this should be reflected in the ARIO.¹⁶ From the outset of the ILC's project, the European Commission argued that specific rules would have to be developed in relation to the EU since it is an international actor independent from its Member States:

'the EC [European Community] is not only a forum for its Member States to settle or organize their mutual relations, but it is also an actor in its own right on the international scene. The EC is a party to many international agreements with third parties within its areas of competence. Quite often the EC concludes such agreements together with its Member States, each in accordance with its own competencies. In that case the specificity of the EC lies in the fact that the EC and the Member States each assume international responsibility with respect to their own competencies. The EC is also involved in international litigation, in particular in the context of the WTO.'¹⁷

The Draft Articles were thus criticized for, among other things, failing to take due account of 'unique' organizations such as the EU and its international practice.¹⁸ This

¹³ ARIO (n 6).

¹⁴ See P-J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013) 35. E. Paasivirta and P-J. Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations', 36 NYIL (2005) 169, 211-212. F. Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' 21 EJIL 3 (2010) 723.

¹⁵ The 'Regional Economic Integration Organization/Regional Integration' (REIO/RIO) clause is discussed in more detail in Section 'The EU as an International Treaty Actor' below.

¹⁶ 'The special situation of the European Union and other potentially similar organizations could be accommodated in the DARIO articles by special rules of attribution of conduct, so that the actions of organs of member states could be attributed to the organization, by special rules of responsibility, so that responsibility could be attributed to the organization, even if organs of member states were the prime actors of a breach of an obligation borne by the organization, or by a special exception or saving clause for organizations such as the European Community.' Observations of Mr. Kuijper (Observer for the European Commission), Sixth Committee, Summary Record of its 21st Meeting, 18 November 2004, UN Doc. A/C.6/59/SR.21, para 18.

¹⁷ Statement on behalf of the European Union, Professor G Nesi, Legal Adviser of the Permanent Mission of Italy to the United Nations. Sixth Committee, Report of the International Law Commission Chapter IV, Responsibility of International Organizations Item 152, New York, 27 October (2003) <http://eu-un.europa.eu/articles/en/article_2940_en.htm>.

¹⁸ One of the most vocal critics was the EU itself. See Comments of the European Commission, Comments and Observations Received from International Organizations, 14 February 2011, UN Doc.

primary focus on States tends to obscure the way one might conceive international organizations as contributing to customary international law, especially regarding how customary international law might apply to these organizations and their relationships with States.

States have traditionally been, and remain, the primary law-makers of the international community, and their practice remains the main way in which customary international law is developed. The Special Rapporteur's Third Report underlines the central role of States in the formation of customary international law: 'States remain the primary subjects of international law and, [...] it is primarily their practice that contributes to the formation, and expression, of rules of customary international law.'¹⁹ Nonetheless, it is increasingly acknowledged that IO may also play an important role as law-makers, and the practice of IOs may be relevant in identifying customary international law. Article 38 of the Statute of the International Court of Justice does not include the practice of IOs in its list of sources of international law, yet 'organization practice' may nevertheless contribute to the development of customary international law in a number of ways.²⁰ The Special Rapporteur confirmed in his Fourth Report that '[i]n certain cases, the practice of international organizations also contributes to the expression, or creation, of rules of customary international law.'²¹

There should be nothing controversial about the notion that IOs, alongside States, can contribute to the development of customary international law. This is particularly the case for the practice of international organizations in their relations between other international organizations, or between States, which can develop customary international law governing those relations. The Special Rapporteur gives an example from the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (VCLT-IO)²² which states that where the treaty does not govern a certain issue, customary international law shall apply.²³ Such rules of customary international law are developed, not only by States, but also through the *interaction* between States and international organizations or between international organizations. Some of the fields where such interaction can develop custom include the law of treaties, international responsibility of IOs, and the law of succession between international organizations.²⁴

A.CN.4/637, 8: 'for now the European Union remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations.'

¹⁹ Third Report (n 2) para 70.

²⁰ See J Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2013) 192.

²¹ Fourth Report (n 1) para 20.

²² Fourth Report (n 1) para 20.

²³ The preamble of the VCLT-IO (n4) states that 'rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.'

²⁴ T Treves, 'Customary International Law' in *Max Planck Encyclopedia of Public International Law*, <<http://opil.ouplaw.com/home/EPIL>>, para 51.

In this sense, the practice of IOs, especially their relationship with other subjects of international law (such as third States and international organizations), may help to develop principles regarding how public international law may be applied to entities other than States. If one shifts the focus away from the purely inter-State plane to the relationship between States and IOs, one can see more clearly how the practice of IOs may contribute to the development of customary international law. Nonetheless, there has been resistance to the idea that international organizations may contribute to the development of customary international law in their own right, both from academic commentators and from States themselves.²⁵

Even if one accepts that IOs may contribute to the development of customary international law, there are number of reasons why IO practice may carry less weight. As the Fourth Report rightly pointed out, IOs vary in terms of goals, functions, membership, and powers, and therefore ‘in each case their practice must be appraised with caution.’²⁶ Moreover, in contrast with States, in many cases there is simply less practice by IOs upon which to base rules of customary international law. While States remain the engines for developing customary international law, this does not mean that the practice of IOs should be completely excluded or ignored. The question is not so much *whether* the practice of IOs may contribute to customary international law. Rather, more complex issues emerge when discussing *how* IO practice should be conceived; the type of practice that should be taken into account; the kinds of rules to which IO practice might contribute; and who is bound by such rules. Unfortunately the ILC Reports do not go into detail on these more delicate questions.

III. The ILC and Customary International Law

A. Definition of ‘International Organization’

The Second Report noted that it would be useful to define the term ‘international organization’ for the purposes of the Draft Conclusions.²⁷ The ILC has on a number of occasions sought to define this term for the purposes of its work. For instance, in the ARIIO ‘international organization’ was defined as:

²⁵ See SD Murphy, ‘The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission’, GW Law School Public Law and Legal Theory Paper No. 2015-38 (2015) 9-11.

²⁶ Fourth Report (n 1) para 20.

²⁷ ILC, Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, International Law Commission, Sixty-sixth session, Geneva, (5 May-6 June and 7 July-8 August 2014) UN Doc A/CN.4/672 (‘Second Report’) para 18.

‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.’²⁸

This definition was devised for the specific context of international responsibility, and was not intended to be a general definition. For the purposes of the customary international law study, the Special Rapporteur favoured a more general and broad definition. The ILC considered using the definition that was adopted in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,²⁹ and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations³⁰ which set out simply that the term ‘international organization’ means an ‘intergovernmental organization’. This definition appears in the Commentary, but is not adopted in the Draft Conclusions.³¹

By choosing to use a broad definition, the Special Rapporteur rejected the idea of creating separate categories of IOs. This idea was initially considered, but ultimately rejected, by Special Rapporteur Gaja during the development of the ARIO in favour of the more all-encompassing definition.³² The EU was of the view, however, that such a broad definition would be inadequate, and argued consistently that the draft articles should be more nuanced, taking into account the diversity of international organizations.³³ In the context of customary international law, the EU expressed a similar view:

²⁸ Art 2 (a) ARIO (n 6).

²⁹ Art 1, para 1 (1), 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Doc.A/CONF.67/16 (adopted and opened for signature in Vienna, 14 March 1975), not yet in force.

³⁰ Art 2, para 1 (a)(i), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM 543 (1986), not yet in force (‘VCLT-IO’).

³¹ Third Report (n 2) fn 159: ‘The Special Rapporteur does not at present consider it necessary to include a definition in the draft conclusions, provided that an explanation is given in the commentary. This is a matter which the Drafting Committee may wish to consider further.’

³² ‘The definition of international organizations [...] comprises entities of a quite different nature. Membership, functions, ways of deliberating and means at their disposal vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all intergovernmental organizations, especially with regard to the issue of responsibility into which States may incur for activities of the organization of which they are members. It may be necessary to devise specific rules for different categories of international organizations.’ ILC, Report of the International Law Commission on the work of its fifty-fourth session (29 April-7 June and 22 July-16 August 2002) Official Records of the General Assembly, Fifty-fourth session, Supplement No. 10, UN Doc A/57/10, para 470.

³³ ‘[F]or now the European Union remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organizations such as the European Union, even when account is taken of some of the nuances now set out in the commentaries.’ ILC, Comments of the European Commission, Comments and Observations Received from International Organizations, 14 February 2011, UN Doc. A.CN.4/637, 8.

‘... the European Union considers that relying only on the formal notion of international organisation would not be helpful, but it is rather necessary to take a closer look at the organisations – or categories of organisations – concerned.’³⁴

It seems unlikely, however, that the Special Rapporteur will be dragged into a debate about the different ‘categories’ of IOs and the way in which they each may contribute to customary international law. The EU is often considered to be ‘a rather special international organization’ in the academic literature.³⁵ Yet the ILC seems to have rejected the idea of categorizing international organizations for these purposes.³⁶ There seems to be little reason for the ILC to include the different categories of organizations in the text. This is because, as discussed below, the Special Rapporteur specifically recognizes the diversity of IOs and reflects this in the Commentary.

B. Relevance of ‘Organization Practice’

As discussed above, the Special Rapporteur’s work firmly place States as the central actors in the formation and expression of rules of customary international law. The Draft Conclusions and the Commentary consistently refer to States. The practice of IOs is mentioned, but such practice is only relevant ‘[i]n certain cases’.³⁷ In the Commentary the Special Rapporteur elaborates on what some of these ‘certain cases’ are.

Before dealing with each of the ‘certain cases’, it is worthwhile noting that the Special Rapporteur perceived two limitations on how the practice of an IO is relevant to customary international law. First, the Special Rapporteur underlines the point that the practice of States *within* an organization should not be equated with that of the organization. It is important, therefore, to distinguish ‘state practice’ and ‘organization practice’ as separate elements, although this is admittedly easier said than done.³⁸ The second limit concerns what kind of ‘organization practice’ is relevant. The Special Rapporteur emphasizes in this regard that only the *external* practice of the organization is relevant, that is, the practice involving the organization’s relationships with third States and organizations. While internal practice may be relevant in developing the ‘rules of the organization’, it is not relevant when contributing to the development of rules of customary international law.³⁹

³⁴ Statement on Behalf of the European Union and its Member States by Lucio Gussetti, Director, European Commission Legal Service at the General Assembly Sixth Committee on Item 83, ‘Identification of Customary International Law’, United Nations, New York, 4 November 2015, para 5.

³⁵ N Blokker and RA Wessel, ‘Introduction: First Views at the Articles on The Responsibility of International Organizations’ 9 IOLR (2012) 1, 5.

³⁶ See J Wouters and J Odermatt, ‘Are All International Organizations Created Equal?’ 9 IOLR (2012) 7-14.

³⁷ Fourth Report (n 1) para 20.

³⁸ Third Report (n 2) para 71.

³⁹ Third Report (n 2) para 72.

The Special Rapporteur has identified three main ways in which IOs can contribute to customary international law.

1. States acting through International Organizations

The first method is when States act through an IO. In these cases, the IO is a forum in which States act, and thus States develop practice or express *opinio juris* via the organization's organs. In this method, IOs provide merely facilitate State action. The *Third Restatement of the Law, Foreign Relations Law of the United States*, for example, sets out that '[t]he practice of states that builds customary law takes many forms and includes what states do in or through international organizations.'⁴⁰ This includes, for example, the practice of the UN General Assembly (UNGA), where States may contribute to the development of customary international law through the Assembly's resolutions, declarations, and statements. Whether such behaviour should be regarded as sufficient state practice depends on a number of factors, including how widely supported the resolution or declaration was, and whether it has been supported by subsequent practice. When the UNGA adopts or takes note of the work of the ILC, for example, it may be more likely to be considered a reflection of customary international law.⁴¹ It is readily acknowledged that UNGA resolutions may, under certain circumstances, provide evidence for the expression of *opinio juris*.⁴² This, however, is a reflection of the views of individual members of the UNGA, and not the UNGA as a separate actor in international law.

Draft Conclusion 12 relates to the 'Resolutions of international organizations and intergovernmental conferences' and sets out that a resolution of an international organization cannot itself create a rule of customary international law. Rather, such a resolution may only 'provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.'⁴³ This first method is the most common way in which IOs contribute to the development of customary international law. Yet scholars have cautioned against too easily equating

⁴⁰ American Law Institute. *Restatement of the Law, Third, the Foreign Relations Law of the United States* (American Law Institute Publishers 1987) Section 102 (Sources of International Law) Reporters' Notes 2.

⁴¹ See FL Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' 63 ICLQ (2014) 535-567 arguing that courts and tribunals have increasingly cited ILC codification conventions and draft articles as reflections of customary international law.

⁴² Resolutions of the UNGA may 'in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.' *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 70. See also the discussion on 'Resolutions adopted by international organizations and at international conferences' in the Third Report (n 2) 31 and footnote 114 and the authorities cited therein.

⁴³ Draft Conclusion 12, point 2.

organization practice with state practice, since state practice through an organization may be ‘distorted’.⁴⁴

2. International Organizations as ‘Catalysts’ of State Practice

The second method is when the acts of an IO serve to ‘catalyse’ state practice.⁴⁵ The examples given of this method include instances where IOs develop draft texts on which States are called upon to provide their responses. This debate, spurred by the activity of IOs, can then lead to the development of customary international law. Another example is when IOs call upon States to act in a certain way, such as adopting certain national laws, which in turn can contribute to relevant practice. This form of contribution is closely linked with the first method described above. It accepts that, in addition to looking at the practice of IOs, such as declarations, it is also important to examine closely the practice of States that led to their adoption.

3. Contribution of International Organizations ‘as such’

The third method identified by the Special Rapporteur is when an IO contributes to customary international law ‘as such’, that is, as an independent actor in international law, rather than a vehicle of its member States. This form of contribution is more controversial, and the Special Rapporteur provides fewer examples of this phenomenon than the two instances above. The Special Rapporteur supports the concept that IOs, as subjects of international law possessing international legal personality, can also contribute to the development of customary law in their own capacity, independently of their members. While the Report provides numerous references from academic literature to support this argument,⁴⁶ it does not refer to judicial practice that confirms it.⁴⁷

The Third Report argues that there is one ‘clear cut’ case where an IO can contribute to the formation and identification of rules of customary international law in its own right, that is, where States have assigned competences to an organization in a particular field. The Report puts forward the EU as an example. The EU is an organization that has functionally replaced the Member States in many fields of international relations and the Special Rapporteur concludes that in these fields, ‘such practice may be equated with the practice of States.’⁴⁸ If such practice were not equated with that of States, the Special Rapporteur argues, not only would the organization’s practice not be taken into account, but ‘Member States would themselves be deprived of or reduced in their ability

⁴⁴ J Wouters and P De Man, ‘International Organizations as Law-Makers’ in J Klabbers and A Wallendahl (eds), *Research Handbook on International Organizations Law: Between Functionalism and Constitutionalism* (Edward Elgar 2011). See Third Report (n 2), fn 169 and the academic literature cited.

⁴⁵ Third Report (n 2) para 75.

⁴⁶ Third Report (n 2) fn 179.

⁴⁷ Murphy (n 25) 7.

⁴⁸ Third Report (n 2) para 77.

to contribute to State practice.’⁴⁹ The EU also considers that this conclusion ‘makes practical and legal sense.’⁵⁰ In certain fields of EU competence, the EU Member States may even be legally prevented from taking a position in international fora. This is especially the case when the EU has adopted a position on a certain subject, and the EU Member States, based on the duty of loyalty under European Union law, may be prevented from putting forward separate views on the topic.⁵¹ The EU Member States should not be deprived of the opportunity to contribute to the development of customary international law because it was an IO, and not a State, acting at the international level.

It should be noted that this third category of contribution is far less common than the other two, and much more disputed. There are few examples of States conferring such extensive powers to an IO. As Murphy points out ‘[s]uch an example may well be valid, though the European Union is a rather unique international organization (often described more as a ‘supra-national’ organization), and thus may not be exemplary of international organizations generally.’⁵² Nonetheless, the practice of an IO acting in the field of competence conferred to it is rightly included in the Commentary. In areas such as the law of the sea and international fisheries, where the EU exercises significant competences conferred by its Member States, the EU can and does contribute to the development of customary international law.⁵³

While areas of EU exclusive competences may be most visible, one need not limit this form of contribution to fields of exclusive competence. The EU contributes to the formation of custom in these fields due to its independent existence in the international legal order, and as such, it may contribute to the development of custom in other fields in which it has competence. It is not so much the fact that the EU has replaced the EU Member States with respect to certain policies, but that the EU exercises a certain independent will and function on the international level. The issue of competence remains relevant, however, since the EU can only contribute to customary international law to the extent that a lawmaking function has been transferred to it. The ILC tends to restrict its analysis to whether there has been such a transfer of competences.⁵⁴ It does not fully explore the circumstances under which the EU might be considered as acting as an organization in its own right. EU action is most likely to be considered as

⁴⁹ Third Report (n 2) para 77.

⁵⁰ Statement on Behalf of the European Union (n 34) para 5.

⁵¹ J Larik and A Delgado Casteleiro, ‘The Duty to Remain Silent: Limitless Loyalty in EU External Relations’ 36 ELR (2011) 524-541, 540: ‘the duty of sincere cooperation in external relations manifests itself indeed rather often as a duty for the Member States to keep silent, unless told to speak by the EU institutions.’ See M Cremona, ‘Defending the Community Interest: the Duties of Cooperation and Compliance’ in M Cremona and B de Witte, *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008).

⁵² Murphy (n 25) 8.

⁵³ See e.g. E Paasivirta ‘Four Contributions of the European Union to the Law of the Sea’ in J Czuczaj and F Naert (eds.), *The EU as a Global Actor – Bridging Legal Theory and Practice. Liber Amicorum in Honour of Ricardo Gosalbo Bono* (forthcoming Brill 2016).

⁵⁴ Third Report (n 2) para 77.

‘organization practice’ for the purpose of contributing to the formation of customary international law in the scenarios discussed below. These include where the EU exercises its capacity to enter into international agreements in its own right, and through the jurisprudence of the CJEU.

While the Commentary discusses these three main modes of contribution to customary international law (outlined above), the Special Rapporteur decided that Draft Conclusion 4 [5], paragraph 2 (Requirement of practice) as provisionally adopted by the Drafting Committee in 2014,⁵⁵ need not set out each of the three modes specifically.⁵⁶ However, the EU argued that, in order to capture fully the third method of contribution, the following statement should be added to the Draft Conclusion: ‘Same applies mutatis mutandis to an international organization in so far as the organization exercises such functions on the basis of competences conferred on it by its member States in the founding treaties.’⁵⁷ This would clarify the notion, as explained in the Commentary, that organization practice can be equated with state practice in certain situations. It is unlikely, however, that the ILC will adopt such a change, particularly since it is highly reluctant to insert ‘special rules’ for regional integration organizations such as the EU. The Commentary already discusses this type of contribution,⁵⁸ and there is little reason for it to be included in the Draft Conclusions themselves. Draft Conclusion 4 (2) reads ‘In certain cases, the practice of international organizations also contributes to the expression, or creation, of rules of customary international law.’⁵⁹ One benefit of using such general language in the Draft Conclusions is that it does not limit the ways in which IOs can contribute to customary international law, and is conceivably open to other methods if they develop.

Yet these three categories do not capture the full range of ways that the EU can do contribute to the development of customary international law. When the Union acts in its own right, its practice further develops principles regarding how international law applies to entities that are not States. The next section will further elaborate this argument, providing some examples of how the EU may contribute to the development of customary international law, not as a collective of its Member States, but as an organization acting in its own right.

⁵⁵ ILC, Identification of customary international law, Statement of the Chairman of the Drafting Committee, Mr. Gilberto Saboia, 7 August 2014, Draft Conclusion 4 [5], para 2: ‘In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.’

⁵⁶ Third Report (n 2) para 79.

⁵⁷ Statement on Behalf of the European Union (n 34) para 11.

⁵⁸ Third Report (n 2) para paras 68-79.

⁵⁹ Fourth Report (n 1) Annex, Draft conclusion 4.

IV. EU Contribution to Customary International Law

The Treaty on European Union (TEU) sets out that the EU ‘shall contribute ... to the strict observance and the development of international law.’⁶⁰ While there has been analysis regarding how the EU ‘observes’ international law,⁶¹ there has been far less discussion about how it can be considered to ‘contribute’ to the development of international law. One might find discussions about how the EU has influenced the law in certain fields, such as international environmental law or the law of the sea.⁶² In these fields, the EU seeks to influence international developments so that international law aligns with its own policies, values and interests. There has been less focus, however, on how the EU might contribute, not just to the development of particular rules or policies at the international level, but in a more fundamental way to the development of the international legal order. It does so primarily by contributing to practice whereby principles of international law, many of which were developed in the inter-State context, need to be ‘adapted’ to the unique nature of the EU and its international relations.⁶³ The EU’s international treaty practice, its practice as a member of (other) international organizations, its practice before international dispute settlement bodies, as well as the jurisprudence of the CJEU, may contribute in this way to the development and identification of customary international law.

The statements by the EU on the topic of customary international law seem to acknowledge this form of contribution, although not explicitly. For example, statements have emphasised how the EU is a party to a growing number of bilateral and multilateral treaties, is a member of other international organizations in its own right, and participates in international dispute settlement procedures.⁶⁴ As the ILC acknowledges

⁶⁰ Treaty on European Union (as amended by the Treaty of Lisbon) (13 December 2007) Official Journal C 326 (26 October 2012), entered into force 1 December 2009.

⁶¹ The Court has interpreted this to mean that ‘when [the Union] 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.’ Judgment in *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. See P-J Kuijper, ‘It Shall Contribute to ... the Strict Observance and Development of International Law’ The Role of the Court of Justice’ in A Rosas, E Levits, Y Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (TMC Asser Press 2013).

⁶² An example of such a work is F Hoffmeister, ‘The Contribution of EU Practice under International Law’, in M Cremona (ed) *Developments in EU External Relations Law* (OUP 2008). Regarding the Law of the Sea, see Paasivirta (53), S Boelaert-Suominen, ‘The European Community, the European Court of Justice and the Law of the Sea’, 23 *The International Journal of Marine and Coastal Law* (2008) 643–713.

⁶³ Regarding the adaptation of the law of treaties to the context of the EU, see D. Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague, TMC Asser Press, 2004), J Odermatt, ‘The Use of International Treaty Law by the Court of Justice of the European Union’ (2015) 7 *Cambridge Yearbook of European Legal Studies* 121.

⁶⁴ See Statement on behalf of the European Union by Eglantine Cujo, Legal Adviser, Delegation of the European Union to the United Nations, at the Sixth Committee on Agenda item 78 on Identification of customary international law.

in the ARIO, the EU can be found to be responsible for internationally wrongful acts.⁶⁵ The ARIO are based, in part, on the practice of international organizations, including multiple references to practice involving the EU. For example, in relation to Article 9 (Conduct acknowledged and adopted by an international organization as its own), the Commentary discusses practice involving the European Community before the WTO Dispute Settlement Body.⁶⁶ Such practice has further developed the law of responsibility of international organizations. Regarding the provisional application of treaties, Special Rapporteur Juan Manuel Gómez-Robledo cites the Third report on identification of customary international law to support the inclusion of IO practice in his analysis.⁶⁷ The practice of IOs in relation to the provisional application of treaties, including the extensive practice of the EU,⁶⁸ contributes to customary international law in this field.

How do principles developed primarily to apply to States, such as the rules of international responsibility, the law of treaties, jurisdiction, nationality, succession and so on, apply to a regional integration organization such as the EU? The answer to these questions can be found largely by looking at international practice that involves the EU acting on the international plane. This not only includes the practice of the EU itself, but also of the EU Member States and the reaction by non-EU member States. Over time, this international practice helps to develop rules of customary international law pertaining to how entities such as the EU fit within the wider international legal order.

When the EU contributes to customary international law in this way, it does so as a separate legal actor in international law. This practice should not be equated with state practice, as the Special Rapporteur suggests, since to do so would deny the separate and distinct legal personality of the EU. It has been pointed out that '[t]o depict [EU acts] as State practice would deny one of the main features of the [EU], i.e., its autonomous functioning on the basis of the legislative, executive and judicial powers delegated to it by the Member States.'⁶⁹ The EU is considered at the international level to be legally distinct entity, separate from the Member States, and may contribute to the formation of customary international law as such.

A. The EU as an International Treaty Actor

⁶⁵ ARIO (n 6).

⁶⁶ Commentary to Article 9 ARIO (n6) (Conduct acknowledged and adopted by an international organization as its own).

⁶⁷ Third report on the provisional application of treaties (n 10) para 123.

⁶⁸ Fourth report on the provisional application of treaties (n 9) paras 156-161, providing examples of the provisional application of treaties by the EU.

⁶⁹ J Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution', 29 NYIL (2008) 131.

The main way in which the EU could be considered as contributing to the development of customary international law is through its distinctive treaty practice. The EU is a party to a long and ever-expanding list of multilateral and bilateral treaties. According to the EU's Treaties Office Database, the EU is party to some 890 bilateral treaties and 259 multilateral treaties.⁷⁰ It is not only the number of agreements that is important; the type of agreements to which the EU has become a party has given rise to important questions under public international law. In 2010, the EU became a party to the UN Convention on the Rights of Persons with Disabilities (CRPD),⁷¹ the first time the EU, or any international organization, has joined an international treaty focused solely on human rights protection.⁷² The EU is going through the long and difficult process of becoming a Contracting Party to the European Convention on Human Rights (ECHR), which would make the EU the Convention's first non-State party.⁷³ As the EU becomes a more active treaty partner, and joins treaties in fields once exclusively dominated by States, this has given rise to questions under public international law. In addition to the EU's 'State-like' treaty practice, another unique aspect is the fact that in most cases the EU will join a treaty alongside its Member States, another issue which raises questions under public international law.

How does EU treaty practice contribute to the development of customary international law? First, it challenges the traditional distinction on which modern treaty law is based, that is, the dichotomy between States and (traditional) international organizations. The two Vienna Conventions on the Law of Treaties are premised on this distinction. One may argue that, since the EU is an international organization, the 1986 VCLT-IO represents the relevant set of rules applicable to the EU's treaty practice. The CJEU has generally applied the provisions of the 1969 Vienna Convention on the Law of Treaties, however, when interpreting agreements to which the EU is a party. The Court justifies this approach on the basis that its provisions represent customary international law.⁷⁴ In *Brita*, the CJEU explained why it applies the rules in the 1969 VCLT, to the extent that they represent customary international law, regarding agreements of the EU:

'Under Article 1 thereof, the Vienna Convention applies to treaties between States. However, under Article 3(b) of the Vienna Convention, the fact that the Vienna Convention does not apply

⁷⁰ See European Union, Treaties Office Database. Available at <<http://ec.europa.eu/world/agreements/default.home.do>>. Statistics as of 11 January 2017. This includes an inventory of all agreements to which the European Union (EU), the European Community (EC), the European Economic Community (EEC), or the European Atomic Energy Community (EURATOM) is a party.

⁷¹ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

⁷² European Commission, 'EU ratifies UN Convention on disability rights', Press Release, 5 January 2011. <http://europa.eu/rapid/press-release_IP-11-4_en.htm>.

⁷³ These plans have been derailed by *Opinion 2/13* in which the Court held that the Draft Accession agreement designed to allow the EU become as an ECHR contracting party was not consistent with the EU Treaties. *Opinion 2/13* of 18 December 2014, *Accession of the EU to the ECHR*, EU:C:2014:2454.

⁷⁴ *Racke v Hauptzollamt Mainz*, C-162/96, EU:C:1998:293.

to international agreements concluded between States and other subjects of international law is not to affect the application to them of any of the rules set forth in that convention to which they would be subject under international law independently of the convention.’⁷⁵

The Court rejects the idea that the provisions of the 1986 VCLT-IO are relevant when examining the EU’s treaty practice. This reflects the notion that, although the EU is not a State, the rules contained in the 1969 VCLT are more relevant to the types of agreements to which the EU is a party. In reality, the customary law of treaties has to be ‘adapted’ to the unique context of the EU.

Another related way that EU treaty practice might contribute to the development of customary international law is through the use of so-called ‘EU-specific’ clauses in international agreements. These are clauses that are included in order to take into account certain peculiarities of the EU and its legal order, often to satisfy the conditions laid out by the CJEU to preserve the autonomy of the EU legal order. Some of these clauses are required in order to allow the EU to participate in the international agreement or international organization. For example, the so-called ‘Regional Economic Integration Organization’ or ‘Regional Integration Organization’ (‘REIO/RIO’) clause is now a common method to allow the EU to participate alongside States in a multilateral convention. A RIO clause is used in the CRPD to allow regional integration organizations to become parties to the Convention.⁷⁶ While these clauses are worded in a broad way, and would allow other regional organizations to join such treaties, nearly all practice relates to the EU. According to the EU Treaties Database, 80 international agreements, including major conventions such as the UN Convention on the Law of the Sea,⁷⁷ include a ‘REIO/RIO’ clause. Such widespread acceptance of this type of provision over many years, among a wide variety of treaty partners, confirms the practice of accepting regional organizations as parties to multilateral agreements. Given this widespread and settled practice, it would now be difficult for a State to legally object to the participation of the EU in a new international agreement.

While the REIO/RIO clause itself may not cause serious legal difficulties, questions arise when an agreement to which the EU is a party employs ‘state-centric’ language in its provisions. Often the treaty will include a clause setting out that terms like ‘State’ in the treaty are to be read as referring to the REIO/RIO, where appropriate. For example, the draft Accession Agreement that was designed to allow the EU to accede to the ECHR included a clause that would mean that the terms ‘State’ or ‘State Party’ in

⁷⁵ *Brita v Hauptzollamt Hamburg Hafan*, C-386/08, EU:C:2010:91, para 40.

⁷⁶ Article 44 of the Convention on the Rights of Persons with Disabilities (CRPD), New York, 13 December 2006, entry into force 28 May 2008, UNTS 2514, 3 allows participation by regional economic integration organizations. It defines a REIO as ‘an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.’

⁷⁷ Article 305(1)(f), United Nations Convention on the Law of the Sea (‘UNCLOS’), signed at Montego Bay, 10 December 1982, entry into force 16 November 1994, UNTS 1833, 3: ‘This Convention shall be open for signature by international organizations, in accordance with Annex IX.’

certain parts of the Convention and Protocols should be understood as referring also to the EU.⁷⁸ This may be straightforward in some contexts, but in others it may be difficult to apply state-centric language – terms such as ‘jurisdiction’, ‘territory’, ‘territorial integrity’ – to the context of a regional organization. The adaptation of state-centric language to the context of the EU may also further develop practice in this field.

Another category of ‘EU-specific’ clause is the so-called ‘Declaration of Competence’ clause. Such provisions are often included in mixed agreements, and require the EU to make a declaration at the time of signature, ratification, acceptance, approval or accession, setting out the extent to which the EU or the Member States have competence with respect to the matters governed by the treaty.⁷⁹ Such clauses have the effect of turning a previously internal EU law matter (the balance of competences) into an issue at the international level.⁸⁰ Such declarations are rarely written with a great deal of specificity, and due to the dynamic nature of EU law they are often soon out-of-date. Although the EU is often under an obligation to communicate updates regarding the distribution of competences to the other treaty parties, there is to date only one example of the EU ‘updating’ its declaration of competences, that is, in regard to its membership in the Food and Agriculture Organization.⁸¹ Declaration of competence clauses for this reason may not fulfil their intended purpose, that is, to communicate to non-EU States the extent to which the EU, the Member States, or both, are responsible for fulfilling certain obligations under the treaty. While some have questioned the continued utility of these clauses, especially since the Treaty of Lisbon,⁸² their widespread use may also play a role in the development of customary law. Such clauses demonstrate how international obligations under a treaty can be met concurrently by multiple treaty partners, such as by the EU together with its Member States. Rather than specifying in a pre-defined manner which party is responsible for which obligations under the treaty, the declaration of competence clause demonstrates

⁷⁸ Art 1, para 5. Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, ‘Final report to the CDDH’, 47+1(2013)008rev2, Strasbourg, 10 June 2013, Appendix I ‘Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’.

⁷⁹ E.g. Art II, (5), Constitution of the Food and Agricultural Organization (with Annexes) (adopted 16 October 1945, entered into force 16 October 1945) 145 BSP 910.

⁸⁰ See J Heliskoski, ‘EU Declarations of Competence and International Responsibility’ in M. Evans and P Koutrakos, *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 189.

⁸¹ Draft Declaration of competences by the European Union in respect of matters covered by the Constitution of the Food and Agriculture Organization of the United Nations (FAO), in Communication from the Commission to the Council, The role of the European Union in the FAO after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States, COM(2013) 333 fin, annex 2, 13.

⁸² See P-J Kuijper and E Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’, in M Evans and P Koutrakos, *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 70.

a certain flexibility in international treaty law, taking into account the dynamic nature of EU law and the issue of competences.

The examples discussed above relate to some of the innovative methods that have been developed to allow the EU to participate in the international legal order as a treaty partner in its own right. The continued use of 'EU-specific' clauses has been accepted over a number of decades by a wide range of treaty partners. The use of these types of clauses indicates a certain acceptance by third States that a degree of flexibility is needed in these agreements to allow the participation by the EU. This interaction between the EU, the EU Member States and third States could be seen as further developing customary international rules pertaining to the relationship between supranational organizations and third States.

B. Court of Justice of the European Union

Another way that the EU may contribute to the development of customary international law is through the jurisprudence of the CJEU. In a statement at the UN General Assembly's Sixth Committee (Legal), the Delegation of the EU made this argument, and observed that 'it is far from exceptional or rare for the EU judiciary to deal with public international law issues.'⁸³ The CJEU regularly faces a wide variety of questions relating to public international law including the interpretation of treaties, the identification of customary international law, as well of questions relating to territory, nationality, and so on.⁸⁴ Yet in order to identify more precisely what impact these judgments can have on the development of customary international law, it is first important to understand what type of judicial body the CJEU is.

The Reports of the Special Rapporteur acknowledge that courts can and do contribute to the identification of customary international law. Draft Conclusion 13 relates to the decisions of courts and tribunals and considers that international jurisprudence, particularly that of the International Court of Justice (ICJ), is to be considered a *subsidiary* means for the determination of rules of customary international law. Domestic courts on the other hand play a 'dual role'. First, the decisions of national courts may be considered as part of 'state practice'. Second, the decisions of national courts, especially those dealing with questions of public international law, can develop customary international law since they are considered 'judicial decisions' that form a subsidiary means for the determination of rules of law under Article 38(1)(d) of the ICJ Statute.⁸⁵ It is acknowledged in the Third Report that the role of national courts in this second category should be approached with a certain amount of caution, especially

⁸³ Statement on Behalf of the European Union (n 34) para 8.

⁸⁴ See, for instance, the *Oxford Reports on International Law in EU Courts* <<http://opil.ouplaw.com/page/ILEC/oxford-reports-on-international-law-in-eu-courts>> which compiles and analyses key judgments of EU courts dealing with questions of international law.

⁸⁵ Third Report (n 2) para 58.

given the way that national courts view their role with regard to international law differently than international courts.

The question arises whether the CJEU would fall into the category of an international court or a national one for these purposes. The practice of the CJEU is much closer to that of a domestic court. Unlike international courts, it is not responsible for providing authoritative interpretations of public international law.⁸⁶ While the Commentary does not clarify this issue, it is likely that CJEU jurisprudence will be viewed as decisions of a national court. In order to clarify this issue, the EU has argued that where ‘decisions of national courts’ are referred to in the Draft Conclusions (Conclusions 6(2); 10(2); 13(2)) the term ‘and other judicial decisions’ should be added, in order to recognize the role of the CJEU.

It may be problematic, however, to treat the CJEU’s jurisprudence as that of a domestic court. While the CJEU resembles a domestic court in many ways, it also functions as the court of an international organization, and its jurisprudence, and the way in which it contributes to customary international law, reflects this important difference.⁸⁷ Moreover, while the CJEU can contribute to the development of customary international law, the relevance of its jurisprudence is limited by its function as a court of regional organization:

Clearly decisions of judicial organs, such as the International Court of Justice and the Court of Justice of the European Union, contribute to the development of the law of treaties including principles of interpretation as well as general international law. The specialized function of such bodies may naturally limit their contribution to the latter.⁸⁸

The CJEU, much like a domestic constitutional court, also can apply international law in a somewhat ‘selfish’ manner.⁸⁹ The CJEU applies international law through an ‘EU law lens’; its primary role is to solve issues of European Union law and is less concerned with the consistent interpretation of public international law, which will limit the extent to which the CJEU’s jurisprudence can be considered as developing customary law.

Due to its hybrid nature, the CJEU may be capable of developing customary international law in ways that differ from the domestic court of State. One way that it does so is by applying ‘state-centric’ concepts to the context of a regional organization.

⁸⁶ As Rosas argues, ‘it should be recalled that the ECJ, or the other EU courts, including the national courts of the Member States, are not international courts primarily called upon to deliver authoritative interpretations of public international norms.’ A Rosas, ‘International Responsibility of the EU and the ECJ’ in M Evans, P Koutrakos, *The International Responsibility of the European Union* (Hart 2013) 159.

⁸⁷ Arguing that the CJEU plays a dual role, see J Odermatt, ‘The Court of Justice of the European Union: International or Domestic Court?’ 3 *CJICL* (2014).

⁸⁸ Crawford (n 20) 194.

⁸⁹ HP Aust, A Rodiles, P Staubach, ‘Unity or Uniformity? Domestic Courts and Treaty Interpretation’ 27 *LJIL* 1 (2014) 75, 100 arguing, ‘[i]t has become more and more common, however, to regard the ECJ as being functionally equivalent to a municipal court.’

A good example of this is the CJEU's case law in which it deals with principles of territoriality and jurisdiction. Unlike a State, the EU does not strictly possess 'territory'.⁹⁰ In multiple judgments, the CJEU has been asked to define the territorial scope of European Union law, and in so doing has had to apply principles of territory to the context of a regional organization. For example, the decision in *Woodpulp* involved the European Commission applying European competition law in respect to conduct, the establishment of a price cartel, which took place outside the territory of the EU.⁹¹ The Court found that the European Commission had not violated international law because its jurisdiction 'was covered by the territoriality principle, as universally recognized by public international law.'⁹² In its earlier *Dyestuffs* case,⁹³ the CJEU also avoided the issue of limits to its jurisdiction based on customary international law. The question arose more recently in *Air Transport Association of America*, in which the Court was called upon to assess, *inter alia*, whether EU legislation establishing an emission allowance-trading scheme, as applied to airlines,⁹⁴ violated certain principles of customary international law, in particular due to the alleged 'extra-territorial' scope of the legislation. In that judgment, the Court referred to *Woodpulp*⁹⁵ and *Commune de Mesquer*⁹⁶ to support the argument that European Union law may deal with acts that occur partly outside the EU, referring in its reasoning to the so-called 'effects' doctrine.⁹⁷ While the Court based its decision on the territorial principle (the fact that the flights originated or landed in an EU Member State), it also considered that such activity taking place outside the EU has a substantial effect within the EU. In these cases, the Court is grappling with questions about how state-centric doctrines like territory and jurisdiction apply to the context of a regional organization. Over time, the way in which the CJEU deals with these questions will further develop rules about how such state-centric doctrines apply to the context of REIOs.

The CJEU continues to be confronted with novel questions about how international law applies to entities such as the EU. For example, in *Venezuelan Fishing Rights*⁹⁸ the CJEU was called upon to decide what legal effect to give to a so-called 'unilateral binding statement' made by the EU. Unlike States, there is little practice of IOs making

⁹⁰ Rather, Article 52 TEU sets out that the EU Treaties shall apply to the EU Member States.

⁹¹ Judgment in *Ahlström Osakeyhtiö and Others v Commission* ('*Woodpulp*'), Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1993:120, paras 14–18.

⁹² *ibid.*, para 18.

⁹³ Judgment in *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48-69 EU:C:1972:70.

⁹⁴ 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.

⁹⁵ *Woodpulp* (n 91).

⁹⁶ Judgment in *Commune de Mesquer*, C-188/07, EU:C:2008:359.

⁹⁷ *Air Transport Association of America* (n 61) paras 125-130. See G De Baere and C Ryngaert, 'The ECJ's Judgment in *Air Transport Association of America* and the International Legal Context of the EU's Climate Change Policy' 18 *European Foreign Affairs Review* (2013) 389, 400.

⁹⁸ Judgment in *Parliament v Council and Commission v Council*, Joined Cases C -103/12 and C -165/12, EU:C:2014:2400.

such unilateral binding statements.⁹⁹ In order to determine whether the statement should be deemed as an ‘agreement’ under European Union law, the CJEU looked towards the public international law definition of a treaty. This is an example of how the CJEU is faced with questions that are not often dealt with by purely ‘national’ or ‘international’ courts, that is, questions about how principles of public international law apply to legal subjects other than States.¹⁰⁰ While the CJEU’s ability to contribute to the development of customary international law may be limited, especially given its specific role within the EU legal order, it can contribute to the development of these rules. Importantly, it does so alongside other international, regional and domestic courts that are faced with similar legal issues.

V. Conclusion: International Organizations as Autonomous Actors in International Law

The previous section provided only a snapshot of the ways that the international legal practice of the EU might be viewed as contributing to the development of customary international law. In addition to the three modes of contribution that have been discussed already by the ILC, IOs can also contribute to the development of customary international law as autonomous and independent legal actors on the international plane. This practice does not consist solely of EU action, but is developed over time through the EU’s constant interaction with States and other international organizations.

It is accepted that IOs can play a role as independent international actors, and as such can participate in the development of international law alongside States.¹⁰¹ However, the way in which IO practice contributes to the development of customary international law had not been articulated clearly. The work of the Special Rapporteur has helped shine a light on this important question, outlining three main ways that IO practice may contribute to customary international law. These methods mainly view IOs as forums in which member States act. There is less discussion, however, about how IOs may contribute to customary international law in their own right. This article pointed to some of the ways in which the practice of the EU may be considered as developing customary international law. Through its external practice, particularly as party to international treaties, the EU contributes to the development of rules about how public international law concepts apply to supranational organizations. The CJEU, which does not fall neatly into the category of a national or an international court, may also contribute to

⁹⁹ D Verwey (n 8) 93. *Nuclear Tests Case* (New Zealand v. France) [1974] ICJ Rep 457, para 46.

¹⁰⁰ See J Odermatt, ‘The Use of International Treaty Law by the European Court of Justice’ 17 *Cambridge Yearbook of European Legal Studies* (2015) 121.

¹⁰¹ As Brölmann points out, ‘[o]rganisations are involved in almost all fields of human cooperation, where they present themselves not only as institutional fora for states, but also as independent international actors.’ C Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties*, (Hart 2007) 1.

customary international law, especially when it applies state-centric concepts to the context of an international organization.

The work of the ILC has overlooked some of these other potential forms of contribution by international organizations. One reason for this is that in the approach taken by the ILC, States are viewed as the main engines of international law-making, and the role of IOs acting in their own right is given less attention. The ILC continues to make a clear dichotomy between States and international organizations. Its work on the law of treaties, and its more recent work on international responsibility, for example, is premised on this distinction. One particular criticism is that ‘such projects [VCLT-IO and ARIO] suggest an approach by the Commission previously that separates rules relating to states from rules relating to international organizations, not a mixing of the two into a single system.’¹⁰² One may question whether it is still appropriate to continue with this sharp distinction when examining the issue of sources of international law. While States continue to be the main subjects of international law, and their practice remains central to the development of customary international law, this approach tends to obscure the contribution that international organizations may make in their own right.