An Actor on Multiple Stages: the EU as a Local, Regional and Global Power

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The EU's contribution to the development of international law at the UN International Law Commission: Little Effort or a Tough Crowd?

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Abstract

The EU's aspirations as a global actor have become particularly salient since the Treaty of Lisbon, which codified the EU's aim to "contribute to … the strict observance and the development of international law". Scholarly attention, until recently focused on the EU's reception of international law, is now questioning how the EU might operate not only as a recipient of but also a contributor to the development of international law. In this context, this paper analyses the evolving relationship between the EU and the International Law Commission (ILC), the UN's body entrusted with promoting "the progressive development of international law and its codification", and how the EU has made use of the ILC to operationalize its aim to shape international norms. It argues that, notwithstanding the ILC's State-centric fixation and international law's continued perplexity with the EU, the EU's observations and comments to the Commission's work have left a small but not negligible mark. The EU should build on this precedent and develop a more consistent policy of strategic engagement with this body, putting in a little more effort for a tough crowd.

Key words: EU, International law, UN International Law Commission

I. Introduction

> "The EU is committed to a global order based on international law, which ensures human rights, sustainable development and lasting access to the global commons. This commitment translates into an *aspiration to transform rather than to simply preserve the existing system*."[1]

The EU's aspirations on the global stage are not a novel phenomenon. The link between the European project and the "wider world"[2] was arguably endemic to Robert Schuman's 1950 idealized measure of "contribution which an organized and living Europe can bring to civilization".[3] However, the degree to which these aspirations have been "constitutionalized" in the Treaties and operationalized through specific institutional competences has evolved

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[1] European Union External Action Service (EEAS), 'Shared vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (EUGS 2016), June 2016, 10 (emphasis added), (available at https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf).
[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, OJ C 306, 1–271 ("TEU"), article 3(5).
[3] Declaration by Robert Schuman, French Foreign Minister, 9 May 1950, available at https://www.robert-schuman.eu/en/declaration-of-9-may-1950.

considerably since the 1950s.[4] The adoption of the Treaty of Lisbon, in particular, formalized a number of programmatic EU foreign policy goals,[5] which were in turn supported by an enhanced external-relations institutional arsenal.[6] In the post-Lisbon constellation, the EU's outward engagement is now seen not simply as part of the supra-nationalization of State functions but as an important part of Europe's *raison d'être*.[7]

One of the most emblematic expressions of this outward shift is the list-like articulation of the EU's foreign policy objectives in article 3(5) of the Treaty on the European Union (TEU).[8] Of particular interest is the EU's "self-imposed"[9] commitment to contribute to "the strict observance and the *development* of international law, including respect for the principles of the United Nations Charter",[10] as well as to "consolidate … the principles of international law."[11] This commitment, placed at the end of a long list asserting the EU's "obligation"[12] to contribute to goals as diverse as "peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights", has received less attention than others, possibly on account of its more legalistic

[4] The Treaty of Rome's (1957) conception of the relationship between the European Communities (ECC) and international law was a fundamentally instrumental one. The thirteen articles and single recital reference to the Member States' obligations vis-à-vis international organisations or third States were primarily designed to preserve the integrity of the common market, including when international peace and security were at stake. *See, inter alia*, Treaty Establishing the European Community (Consolidated Version), 25 March 1957, OJ C 325, 33–184 ("Rome Treaty"), article 224.

[5] Articles 3(5) and 21 TEU.

[6] Scarlett 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), 99 (noting that "On the institutional front, the introduction of the High Representative for Foreign Affairs and Security Policy, the 'permanent' President of the European Council and the European External Action Service (EEAS) enable actions to be seen as solely 'European' and create a clearer distinction between action of the Member States and that of the EU.").

[7] Gráinne de Búrca, 'Europe's raison d'être', in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014), 21-37. *See also,* Hermann-Josef Blanke and Stelio Mangiamel, 'Article 3 [The Objectives of the European Union] (ex-Article 2 TEU)' in Hermann-Josef Blanke and Stelio Mangiamel (eds), *The Treaty on European Union (TEU): A commentary* (Springer, 2013), 159 (noting that "the wide range of objectives set out in Art. 3 shows that the EU has meanwhile been transformed, in sociological terms, into a sophisticated political system, although still with limited competences.").

[8] *Supra* (n 5).

[9] 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* (2016), 2.

[10] Article 3(5) TEU (emphasis added).

[11] Article 21(2)(b) TEU.

[12] *See* Bart Van Vooren, Steven Blockmans and Jan Wouters, 'The Legal Dimension of Global Governance: What Role for the European Union? An Introduction' in 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."). *See also*, Hermann-Josef Blanke and Stelio Mangiamel (n 7), 159, 162 (qualifying the objectives included in article 3 TEU as "a specific category of principles", namely, "directive principles referring to policy goals" that impose on the Union's organs and on its MS binding "promotional obligations."); Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP, 2016), 126.

nature. It reflects, however, a peculiar commitment for an international organization (IO), even accounting for the EU's claimed *sui generis* nature.[13]

The proliferation of foreign policy objectives in the EU treaties, while criticized by some,[14] has been likened to a historically defined process of global interconnectedness. Less than an "epidemic", as argued by Jörg Terhechte,[15] it is a common constitutional phenomenon which, although particularly marked at the EU level, is common to the constitutions of most EU Member States (MS) and to constitutional orders beyond the EU.[16] This is certainly the case for the pursuit of foreign policy objectives such as "peace", "security", "solidarity" or "human rights". However, the same cannot be said for the specific goal of contributing to the *development* of international law. While compliance with international law is a common feature in a number of national constitutions, among the EU MS, at least, the Netherlands seems to be one of the few countries that overtly seeks to contribute to the development of the international legal order.[17] A number of questions therefore emerge: Why has the EU imposed upon itself a duty to contribute to the development of international law? What obligations (if any) does this commitment impose on the Union and its MS, and how is this obligation operationalized by the EU?

Questioning how the EU shapes international law is a relatively new and fast-growing field in legal scholarship. Catching up with the extensive international relations (IR) theorization of the EU as a "global actor",[18] legal scholars are now adopting what has been termed the

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[13] The term *sui generis* has been used by the EU itself in qualifying its distinct nature. *See* A/C.6/58/SR.14, UNGA Sixth Committee, Summary record of the 14th meeting, 27 October 2008, Statement by Mr. Ruijper (European Commission), 4, para. 14; A/CN.4/350 and Add.1-6 & Add.6/Corr.1 and Add.7-11, Question of treaties concluded between States and international organizations or between two or more international organizations. Comments and observations of Governments and principal international organizations on draft articles 61 to 80 and annex, Treaties concluded between States and international organizations or between two or more international organizations (1982) YBILC vol. II(2), 146. *See also*, Penelope Nevil, '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, 286-287 (noting that "EU lawyers may describe it as a supranational legal system or 'executive federalism'; international relations scholars as a 'normative civilian power' or 'soft' power; public international lawyers as a regional international or intergovernmental organization (albeit one that has greater powers and depth than any other), a 'legal order', a 'quasi-state', an example of evolving global governance or as a disaggregated sovereignty that serves as a model for a new world order.") (citations omitted).

[14] Foreign policy objectives have been qualified as a mere "wish list for a better world" or "redolent of motherhood and apple pie". *See*, railing against this conception, Joris Larik (n 12), 3 (citing Wiebke Drescher, 'Ziele und Zuständigkeiten' in Andreas Marchetti and Claire Demesmay (eds), *Der Vertrag von Lissabon: Analyse und Bewertung* (Nomos, 2010), 68; René Barents, *Het Verdrag van Lissabon: Achtergronden en Commentaar* (Kluwer, 2008), 181).

[15] Joris Larik (n 12) (citing Jörg Terhechte, 'Kommentierung zum Art. 3 EUV (Ziele der Union' in Eberhard Grabitz, Meinhard Hilf, and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, loose-leaf, 41st supplement (C.H. Beck, 1020) marginal 63).

[16] Ibid., 123-124.

[17] Ibid., 102-103 (citing article 90, Constitution of the Kingdom of The Netherlands).

[18] *See* Christopher Hill and Michael Smith, 'Acting for Europe: Reassessing the European Union's Place in International Relations', in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (2nd edn, OUP, 2011); Van Vooren, Blockmans and Wouters (n 12); Enzo Cannizzarro (ed), *The European*

"unorthodox approach"[19] of inquiring not how international law "influences" or "shapes" EU law,[20] but how EU law shapes international law.[21] A number of contributions look at how the EU shapes international law in fields as diverse as the kaleidoscope of its substantive competences, ranging from migration[22] to trade[23] to the environment.[24] Others approach the subject from the point of view of procedure, rather than substance. They look at the numerous ways in which EU acts are "internationally relevant",[25] taking note of its extensive international treaty practice, the Court of Justice of the EU (CJEU) case law on customary international law principles[26] and *jus cogens* norms,[27] and the EU's active and independent participation in numerous international organizations.[28]

Union as an Actor in International Relations (Kluwer Law International, 2002); Joris Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality' in Van Vooren, Blockmans and Wouters (n 12), 7 (noting that "The international role of the EU and its contribution to global governance have become formidable topics in international relations (IR) scholarship. However, evaluations of both differ widely. One can find learned assessments concluding that the EU is indeed a superpower, a 'freakishly oversized "middle power"', or merely a small power. While some argue that Europe will 'run the 21st century' equipped with its model of integration, others contend that it may be already 'past its peak', facing decline and ultimately irrelevance.").

[19] Kochenov and Amtenbrink (n 7), 2.

[20] The existing literature has resorted to a wide terminological arsenal ranging from "co-shaping" and "influence" to "impact", "interlockedness, and formative influence". How the EU influences, shapes or contributes to international law is generally seen as a combined process of direct and indirect, intended and unintended consequences or "externalities" of the EU's actions and policies. See, *inter alia*, Dimitry Kochenov and Fabian Amtenbrink, 'The active paradigm to study the EU's engagement with the world' in Kochenov and Amtenbrink (n 7); Violeta Moreno-Lax and Paul Gragl, 'Introduction: Beyond Monism, Dualism, Pluralism, The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law' (2016) 35 *Yearbook of European Law* 455–470; Sandra Lavenex and Emek M Uçarer, 'The External Dimension of Europeanization: The Case of Immigration Policies' (2004) 39 Cooperation and Conflict 417, 419.

[21] *See* Ramses A. Wessel, 'The Meso Level: Means of Interaction between EU and International Law - Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35 Yearbook of European Law 533, 534 (noting that it "is not about the effects *of* international law, but about the effects *on* international law").

[22] Laure Delcour, 'The EU: shaping migration patterns in its neighbourhood and beyond' in Kochenov and Amtenbrink (n 7), 261-282; Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 European Journal of International Law 463; Lavenex and Uçarer (n 20); Daniel Thym, 'Towards International Migration Governance? The European Contribution' in Van Vooren, Blockmans and Wouters (n 12), 289-305.

[23] Frank Hoffmeister, 'Institutional Aspects of Global Trade Governance from an EU Perspective' in Van Vooren, Blockmans and Wouters (n 12), 145-161; Tilman Krüger, 'WTO's institutional evolution: the EU as a strategic litigant in the WTO', in Kochenov and Amtenbrink (n 12), 169-190.

[24] Cristina Eckes, 'EU climate change policy: can the Union be just (and) green?' in Kochenov and Amtenbrink (n 12), 191-214; Peter Van Elsuwege, 'The EU's governance of external energy relations: the challenges of a 'rule-based market approach' in Kochenov and Amtenbrink (n 12), 215-237.

[25] Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed.), *Developments in EU External Relations Law* (OUP 2008), 42.

[26] *See* C-266-16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para 58; C-386/08 *Brita* [2010] EU:C:2010:91, para. 42; C-162/96 *Racke* [1998] ECLI:EU:C:1998:293, paras. 24, 45 and 46.

[27] Enzo Cannizzaro, 'In Defence of *Front Polisario*: The ECJ as a Global *Jus Cogens* Maker' (2018) 55 Common Market Law Review 569.

[28] *See, inter alia,* Christine Kaddous, *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing, 2015).

This paper, however, adopts a slightly narrower and more positivist approach to this debate, centred on the EU's express "aspiration to transform rather than to simply preserve the existing [international legal] system."[29] It tries to engage with this notion from both an EU and an international law perspective by looking at one discrete form through which its self-imposed commitment to the development of international law can be operationalized: its engagement with a body mandated with the "promotion of the progressive development of [public] international law and its codification",[30] namely, the United Nations (UN) International law Commission (ILC).[31] It explores how the relationship of the ILC with international organizations (IOs) in general, and the EU in particular, has evolved over time, and the role played therein by the EU. It thus analyses the EU's comments and observations to the work of the ILC and how these have been received in the Commission's work. It argues that, notwithstanding the Commission's State-centric view of international law, the EU has been able to leave a tangible mark in the Commission's work.

The paper's findings are based on a content and discourse analysis of the written observations submitted by the European Economic Communities (EEC) - later EU[32] - directly to the ILC,[33] and the oral comments made by the EU or on its behalf at the UN General Assembly (GA) Sixth Committee (legal), where the ILC's annual report is discussed.[34] As discussed below, these observations result from a coordinated effort of the European Commission's Legal Service,

[29] EUGS 2016 (n 1), 10.

[30] Statute of the International Law Commission, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981 ("ILC Statute"), Article 1(1). Article 1(2) of the ILC Statute further notes that "[t]he Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law." However, in the 70 years of its existence "[t]he Commission has not in fact concerned itself with private international law, except incidentally as part of its consideration of questions of public international law (such as in connection with the topic Jurisdictional immunities of States and their property)." Sir Michael Wood, 'Statute of the International Law Commission' (2009), UN Audiovisual Library (available at http://legal.un.org/avl/pdf/ha/silc/silc_e.pdf).

[31] The present contribution deals exclusively with the International Law Commission and may be complemented by semi-structured expert interviews of relevant ILC and EU officials concerning their views on the weight to be accorded to the EU's practice, on the one hand, and the relevance of the ILC in the EU's pursuit of the development of international law, on the other. Further consideration may be given to enlarging the scope of the analysis to the EU's participation in other UN and non-UN bodies expressly mandated with the codification and progressive development of international norms. These bodies include, at the UN level, the UN Commission on International Trade Law (UNCITRAL), the Committee on the Peaceful Use of Outer Space (COPUOS) and the UN Environment Programme (UNEP). Non-UN bodies include the International Law Association (ILA) and the Institut de Droit International. *See* Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP, 2007), 163-166.

[32] For the purposes of this paper and the time period covered therein (1978-2017), the terms EEC and EU are used interchangeably.

[33] The data has been retrieved from the documentation available on the ILC's website "Analytical Guide" (last updated on 19 July 2017), (available at http://legal.un.org/ilc/guide/gfra.shtml).

[34] The data-set is comprised of the observations submitted by the EU or on its behalf to the item "Report of the International Law Commission" discussed at the UNGA Sixth Committee meetings held between 2003 and 2017 (58th to 71st sessions). A total of 21 interventions were reviewed, based on the summary records of meetings available on the Sixth Committee's website (available at http://www.un.org/en/ga/sixth/previous_sessions.shtml), which lists interventions by delegates and observers since 1999.

the Council's Comité Juridique (COJUR) and the EU's delegation in New York. In so far as the analysis encompasses written and oral observations submitted between 1978 and 2017, both the term EEC (for observations submitted prior to 1 November 1993)[35] and the term EU are used throughout the paper. While the frequency of the EU's contributions to the Commission's work can be partially attributed to the development of its external relations arsenal, the analysis does not distinguish between the different stages of evolution of its competences in this regard. In light of its own constraints of time and scope, the paper also does not delve into the intricacies of the full body of the Commission's work[36] or into a comparative analysis of the role played by different international organizations therein. This necessarily imposes some nuances to any findings concerning the EU's contribution to the outcome of the Commission's work. However, without seeking to disregard the multiplicity of contributory forces involved, for the purposes of this paper "contribution" is understood in a narrow sense, distinct from linear causality. The parameter used is based on whether it can be reasonably argued that, if one were to remove the EU's interventions from the process, the outcome of the Commission's work would be markedly different, in timing or in substance.

With these caveats in mind, part II ("The Crowd") addresses the role of the ILC and the UN Sixth Committee in the codification and progressive development of international law, and the ILC's approach to international organizations throughout the course of its work. Part III ("The Effort") turns to the EU's written comments to the ILC's work and the oral observations made to it in the context of Sixth Committee meetings. It shows the nuances in the EU's discourse, shifting between uniqueness and inclusiveness, and moves on to address specific instances where the EU's comments have been incorporated into the Commission's work. Part IV provides some final conclusions.

II. *The Crowd*: The ILC as a forum for the development of international law

1. The interaction between the ILC and the GA Sixth Committee (legal)

The special role of the UN as a platform for the EU to exercise its global governance[37] aspirations has been widely acknowledged both at the political[38] and the academic levels.[39] The

[35] With entry into force of the Treaty of Maastricht on 1 of November 1993, the European Economic Community was integrated, together with the European Community for Coal and Steal (expired in 2002) and Euratom, into the then-created European Union, as the first of its three-pillars. This three-pillar structure, which was comprised of the European Communities (first pillar), the Common Foreign and Security Policy (second pillar), and the Cooperation in Justice and Home Affairs (third pillar), was abolished with the entry into force of the Treaty of Lisbon on 1 December 2009. *See* Treaty establishing the European Community (as amended by the Treaty of Maastricht) (7 February 1992) Official Journal C 224 (31 August 1992), entered into force 1 January 1993; Treaty of Lisbon (n 2).
[36] *See* United Nations, *The Work of the International Law Commission: Vol I* (8th edn, UN Publications, 2012).
[37] A term in itself "dynamic" and "elusive". *See* Joris Larik (n 18), 8-9; Van Vooren, Blockmans and Wouters (n 12), 2-3.
[38] EUGS 2016 (n 1), 8 and 15 (noting that "The EU will promote a rules-based global order with multilateralism as its key principle and the United Nations at its core."); 'EU priorities at the United Nations and the 72nd United Nations General Assembly' (September 2017 - September 2018), 17 July 2017, Doc. Ref. 11332/17, 3 (noting that

value of multilateralism as a legitimate (or legitimating) form of decision-making at the international level, and as a platform for strategic projection of its interests, has not been neglected by the EU. The importance of a strong EU-UN link emerges, for instance, in the disproportionate amount of references to the UN system in the EU treaties, protocols and declarations,[40] and the Union's (controversial but ultimately successful) push for *enhanced* observer status at the UNGA.[41]

As an integral part of the UN system, the ILC was created in 1947 as a subsidiary organ of the UNGA. It was established as a succedaneum to the League of Nations Committee on the Progressive Development of International Law and its Codification to give shape to the Assembly's mandate, enshrined in article 13(1)(a) of the UN Charter,[42] of promoting "the progressive development of [public] international law and its codification."[43] The Commission's mandate generally incorporates research and the "preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed" (progressive development), and the "precise formulation and systematization of rules of international law in fields where there already has been extensive

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"The EU supports the UN as a global convenor and enabler of solutions across all policy areas. There is a unique added-value of the UN to our citizens (…) Therefore, in the coming year the key EU priority will be to uphold, strengthen and reform the UN and the rules based global order.").

[39] *See, inter alia*, Franziska Brantner and Richard Gowan, 'Complex Engagement: the EU and the UN system' in Knud Erik Jorgensen (ed.) *The European Union and International Organizations* (2009), pp. 37-60; Mariangela Zappia, 'The United Nations: A European Union Perspective' in Christine Kaddous (n 28), 25-31.

[40] Wessel (n 21), 536 and note 114 (noting that "the United Nations is referred to nineteen times in the current EU Treaties (including the Protocols and Declarations).").

[41] The EEC was invited to participate as an observer at the UNGA in 1974 (UNGA Res. 3208 (XXIX) 1974, 'Status of the European Economic Community in the General Assembly', 11 October 1974). In 2011, the (now) EU's observer status was "upgraded" through the UNGA Res. 65/276, 'Participation of the European Union in the work of the United Nations', 3 May 2011. This "upgraded" status endows the EU with a set of participatory rights: (a) to present yearly oral observations on behalf of the 28 EU MS, (b) to intervene in the general debate of the GA, and (c) the unique right to present proposals and amendments and to reply to statements addressing the Union's position. European Council Press Office, 'Background: Relations between the European Union and the United Nations', Doc. EU-UN /01 (September 2011), 2 (available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/124604.pdf). *See also* Jan Wouters, Anna-Luise Chané, Jed Odermatt and Thomas Ramopoulos, 'Improving the European Union's Status in the United Nations and the UN System: An Objective Without a Strategy?' in Christine Kaddous (n 28), 45-74.

[42] Charter of the United Nations, 24 October 1945, 1 UNTS XVI ("UN Charter").

[43] Article 1(1), Statute of the International Law Commission ("ILC Statute"), Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Article 1(2) of the ILC Statute further notes that "[t]he Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law." However, in the 70 years of its existence "[t]he Commission has not in fact concerned itself with private international law, except incidentally as part of its consideration of questions of public international law (such as in connection with the topic Jurisdictional immunities of States and their property)." Sir Michael Wood, 'Statute of the International Law Commission', UN Audiovisual Library, 2009, available at http://legal.un.org/avl/pdf/ha/silc/silc_e.pdf.

State practice, precedence and doctrine" (codification).[44] In practice, this binary distinction is often criticized[45] and the GA recognizes the "composite"[46] nature of the Commission's work.[47]

In formal terms, the distinction between codification and progressive development is primarily based on the allocation of "the power of initiative".[48] Whereas the ILC may decide to include in its programme of work topics suitable for codification, the identification of areas suitable for progressive development usually results from a recommendation by the GA. Therefore, when the GA refers to the Commission a proposal for the progressive development of international law, the Commission is obligated to appoint a Rapporteur and establish a corresponding work plan.[49] In contrast, the Commission has some margin of discretion in considering whether or not to carry out work further to proposals from UN members and principal organs, specialized agencies and other bodies, submitted to it via the Secretary-General.[50] It also recommends to the GA the list of topics the codification of which it believes "necessary and desirable".[51]

In order to perform its work, the Commission may request, through the office of the Secretary-General, comments and observations not only from the governments of UN member States, but also from "any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions."[52] As a body of thirty-four "persons of recognized competence in international law"[53] tentatively representing "the main forms of civilization and of the principal legal systems of the world",[54] the ILC operates in itself as a potential source of international law pursuant to article

[44] Article 15 ILC Statute.
[45] Wood (n 43), 2. The Commission's difficulty in subsuming its work into one or another category has been apparent since the early stages of its creation. *See* ILC Rep. 1956, A/3159, Chap II, para. 26, YBILC 1956/II 255; Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10, A/51/10 (1996) YBILC vol. II(2), paras. 156-157; Shabtai Rosenne, *The Perplexities of Modern International Law* (Brill - Nijhoff 2003), 56.
[46] United Nations (n 36), 45.
[47] This can be seen, for instance, in the GA's comments on the scope of the ILC's mandate regarding the topic "status, privileges and immunities of international organizations, their officials, experts, etc.". Report of the International Law Commission on the work of its thirty-ninth session, 4 May - 17 July 1987, Official Records of the General Assembly, Forty-second session, Supplement No. 10, A/42/10 (1987) vol. II(2), Chapter V, 'Relations between States and international organisations' (second part of the topic), 51, para. 203(c) and 52, para. 219.
[48] Ian Sinclair, *The International Law Commission* (CUP, 1987), 125.
[49] Article 16 ILC Statute.
[50] Article 17 ILC Statute. While paragraph 1 states that the Commission "shall" consider these proposals, paragraph 2 clearly makes their pursuit conditional upon the Commission's judgment as to the "appropriate[ness] to proceed with [their] study".
[51] Article 18 ILC Statute.
[52] Article 26(1) ILC Statute. It should be noted that, by force of paragraph 2 of the same article, the list of "national and international organizations concerned with questions of international law" is drawn up by the Secretary-General, in consultation with the Commission.
[53] Article 2(1) ILC Statute.
[54] Article 8 ILC Statute.

38(1)(d) of the Statute of the International Court of Justice (ICJ).[55] In turn, by submitting written comments and observations to the ILC, States and international organisations directly "contribute to the shaping and development of international law."[56]

In addition to these written submissions, governments and international organizations make oral observations to the Commission's work in the context of the UN Sixth Committee (legal) sessions, where the ILC's annual report is a permanent item in the agenda. The authoritative nature of the Commission's work is therefore largely a by-product of a constant balance between its internal expertise and representativeness and "the close cooperation and continuous interaction process between the ILC and the Sixth Committee".[57] But the nature and aims of each body are distinct. While the Sixth Committee "approves the codification programme of the ILC, is consulted on its work, and decides whether to convene intergovernmental negotiating conferences for the purpose of revising and adopting draft conventions",[58] it is not the body where progressive development is carried out. The more political and consensus-based nature of the Committee renders it, according to Jan Wouters and Marta Hermez, "not the most appropriate forum for the EU to profile itself as an innovator and instigator of change".[59] In contrast, "[t]he technical approach of the ILC leaves little room for political bargains and compromises, compared with other options available for States [and other actors], like diplomatic conferences or specialized institutional forums. While not apolitical, it is de-politicized as much as possible."[60]

This is not to say that the ILC is the forum where international law is ultimately "shaped". Some have criticized it for often shying away from progressive development, others have questioned whether it should be engaged in progressive development at all.[61] It remains, however, as far as general international law is concerned, the forum that allows for a continuous

[55] Statute of the International Court of Justice ("ICJ Statute"), 18 April 1946, 33 UNTS 993. Article 38(1)(d) ICJ Statute recognises "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".
[56] McArdle and Cardwell (n 6), 87.
[57] Yifeng Chen, 'Structural Limitations and Possible Future of the Work of the International Law Commission' (2010) 9 Chinese Journal of International Law 473, 475. In its address at the anniversary event celebrating the 70 years of the ILC held on 21 May 2018 in New York, the Chair of the UN Sixth Committee qualified this relationship as "an organic and symbiotic relationship that is based on a common objective, which is to support the progressive development and codification of international law and to strengthen the multilateral rules based system". Speech by Mr. Burhan Gafoor, Chairperson of the UN Sixth Committee, 21 May 2018 (available at http://webtv.un.org/search/commemoration-of-the-70th-anniversary-of-the-international-law-commission/5787804822001, minute 42:18-12:27).
[58] Boyle and Chinkin (n 31), 168.
[59] Wouters and Hermez (n 9), 14; Spyros Blavoukos, Dimitris Bourantonis, Ioannis Galariotis and Maria Gianniou, 'The European Union's visibility and coherence at the United Nations General Assembly' (2016) 2:1 Global Affairs 35-45.
[60] Chen (n 57), 478.
[61] *See* ibid., 473 (noting that "it may be claimed that the ILC is not the proper organ to respond promptly to the urgent challenges of present international society"); UNGA Sixth Committee, Summary record of the 20th meeting, A/C.6/69/SR.20, Statement by Ms. Lijnzaad (Netherlands), 21, para. 11, referring to the Commission's work on the topic 'expulsion of aliens' ("Her Government had consistently objected to such progressive development of international law and continued to have serious concerns.").

(and often constructive) dialogue between the study of international law and the actors that shape it. It operates as a barometer of what the international community is ready to accept as forming part of its *acquis*, and thus arguably a constructive *locus* to assess how the EU's practice and discourse are being received by the wider international legal community. Therefore, while the current analysis incorporates observations deriving from both written and oral contributions by the EU at the ILC and Sixth Committee levels (concerning the ILC annual report), it is fundamentally focused on the potential of the ILC as a forum for the EU to engage in more technical and less politicized discussions on the content of international law. Whether it has made use of this space and how, when doing so, it has been received, are the foci of the following sections.

2. *The ILC's relationship with international organizations: pitching to a tough crowd*

In the seven decades of the Commission's existence and the more than fifty topics explored therein,[62] written comments by IOs pursuant to article 26 of the ILC Statute have been requested only with regard to 11 topics.[63] Written comments and observations by governments, in turn, have been directly submitted to the ILC on nearly all topics included in the Commission's programme of work.[64] Furthermore, even when IOs have participated in the process, a small group therein has taken part, described as either "principal international organizations",[65]

[62] For analytical purposes, all sub-topics have been organized on the basis of ten overarching topics: sources of international law, subjects of international law, succession of States, State jurisdiction/immunity from jurisdiction, law of international organizations, the position of the individual in international law, international criminal law, law of international spaces, law of international relations, and the settlement of disputes. For an overview of all the sub-topics that have integrated the Commission's plan of work *see* 'Analytical Guide to the Work of the International law Commission' (last updated 19 July 2017), available at http://legal.un.org/ilc/guide/gfra.shtml.

[63] Comments and observations by international organizations were requested and received with regard to the following topics: treaties concluded between States and international organizations or between two or more international organizations (in 1981 and 1982), the most-favoured-nation clause (in 1978), the effect of armed conflicts on treaties (in 2008), subsequent agreements and subsequent practice in relation to the interpretation of treaties (in in 2015 and 2016), the representation of States in their relations with international organizations (in 1971), the responsibility of international organizations (with comments consistently submitted between 2004 and 2011), the protection of persons in the event of disasters (in 2009 and 2016), the Law of the sea – regime of the high seas (in 1956), the law of transboundary aquifers or 'shared natural resources' (in 2005), and the international liability for injurious consequences arising out of acts not prohibited by international law (in 1984). A reference to a request for observations by intergovernmental organizations is also included in the Commission's work on "the draft code of crimes against the peace and security of mankind" in 1985 (A/CN.4/392 and Add.1–2). However, the relevant documents are not available on the Commission's website.

[64] With the exception of 11 topics: the ways and means for making the evidence of customary international law more readily available, the extended participation in general multilateral treaties concluded under the auspices of the League of Nations, reservations to multilateral conventions, review of the multilateral treaty-making process, the fragmentation of international law, fundamental rights and duties of States (topic discontinued), the succession of States in respect of State responsibility (topic moved to 2017), the status, privileges and immunities of international organizations, their officials, experts, etc. (topic discontinued in 1992), questions of international criminal jurisdiction, and the juridical regime of historic waters, including historic bays (topic discontinued).

[65] Which curiously included the EEC in the Commission's consideration of the topic "treaties concluded between States and international organizations or between two or more international organizations". *See* A/CN.4/339 and Add.1–8, Comments and observations of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations, or between international

"relevant international organizations",[66] or "organs of the United Nations, specialized agencies and other intergovernmental organizations".[67] Particularly striking is the limitation of the Commission's study concerning the "representation of States in their relations with international organizations" to the views of the secretariats of the UN, the specialized agencies and the International Atomic Energy Agency,[68] and the limited number or IOs that have so far submitted written observations to the topic of "protection of persons in the event of disasters".[69] The same has been rightly argued concerning the number of submissions received from IOs on the topic "responsibility of international organizations",[70] although the number of submissions, even if far from representative of modern institutional plurality, is nevertheless more substantial.[71] More than an indication of the Commission's perception of the added value of IOs' input, this practice reflects its primarily State-centric approach to the formation, development and codification of international law.

Notwithstanding this chronic State-centrism, the place of IOs as subjects of international law and potential contributors to such order has not been wholly neglected in the Commission's

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organizations, adopted by the Commission (1981) YBILC vol.II(2); A/CN.4/350, Add.1–6, Add.6 /Corr.1 and Add.7–11 (n 13).

[66] The EU was either not considered relevant or did not consider it relevant to submit observations to the Commission's work on the topic of "shared natural resources (law of transboundary aquifers)", where the only comments received at the ILC level were those of the Center for Environment and Development for the Arab Region and Europe, the International Boundary and Water Commission, and the Niger Basin Authority. *See* A/CN.4/555 and Add.1, Shared natural resources: Comments and observations received from Governments and relevant intergovernmental organizations, 29 April and15 July 2005.

[67] For instance, with regard to the most-favored-nation clause. *See* A/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-favored-nation clause adopted by the International Law Commission at its twenty-eighth session (1978) YBILC vol. II(2).

[68] *See* A/8410/Rev.1, Report of the International Law Commission on the work of its twenty-third session, 26 April - 30 July 1971, Official Records of the General Assembly, Twenty-sixth Session, Supplement, No.10 (1971) YBILC vol. II(1).

[69] So far, comments have been received from the following organizations and specialized agencies: the UN Office for the Coordination of Humanitarian Affairs (OCHA) and International Federation of Red Cross and Red Crescent Societies (IFRC), in 2009, and from the Association of Caribbean States (ACS-AEC), the Council of Europe (CoE), the UN Food and Agriculture Organization (FAO), the International Organization for Migration (IOM), the United Nations International Strategy for Disaster Reduction (UNISDR), the World Food Programme (WFP), the Word Bank (WB), and the International Committee of the Red Cross (ICRC) in 2016.

[70] Jan Wouters and Jed Odermatt, 'Are All International Organizations Created Equal? Reflections on the ILC Draft Articles on the Responsibility of International Organizations', KU Leuven, Global Governance Opinions, March 2012, 7.

[71] *See* A/CN.4/545, Responsibility of international organizations: comments and observations received from international organizations, 25 June 2004; A/CN.4/556, Responsibility of international organizations: Comments and observations received from Governments, 12 May 2005; A/CN.4/568 and Add.1, Comments and observations received from international organizations, 17 March and 12 May 2006; A/CN.4/582, Responsibility of international organizations: Comments and observations received from international organizations, 1 May 2007; A/CN.4/593 and Add.1, Responsibility of international organizations: Comments and observations received from international organizations, 31 March and 28 April 2008; A/CN.4/609, Responsibility of international organizations: Comments and observations received from international organizations, 13 March 2009; A/CN.4/637 and Add. 1, Responsibility of international organizations: Comments and observations received from international organizations, 14 February 2011.

work. In fact, since the early days of its creation, the Commission has included in its programme of work the overarching theme of "relation between States and international organizations". Odermatt notes[72] that the Commission's approach towards the codification or progressive development of rules relevant to IOs has followed two distinct approaches: a "bifurcated" model, whereby the application of international norms to IOs is dealt with separately,[73] and a "combined" approach, where similar rules are developed for both States and IOs.[74] The Commission's work on the "law of international organizations", however, has only included a limited number of themes: (i) the "representation of States in their relations with international organizations", (ii) the "status, privileges and immunities of international organizations, their officials, experts, etc." (discontinued in 1992), (iii) "treaties concluded between States and international organizations or between international organizations", and (iv) the codification of rules on the "responsibility of international organizations for internationally wrongful acts".

Even when adopting a "bifurcated" approach and dealing separately with IOs, an internal distinction has been made by the Commission between those of a universal character and so-called regional economic integration organizations (REIO) or regional integration organizations (RIO), a category which the EEC seemed to integrate. While the Commission has shown some openness to the former, it has until recently been fundamentally non-committal to the role of the latter as participants in the formation of international norms.[75] Thus, even though the Special Rapporteur on the topic "representation of States in their relations with international organizations" noted in his Second Report that "[r]egional organizations would not be excluded

[72] Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 International & Comparative Law Quarterly 491, 493-494.

[73] This was the case for the Commission's work on what later became the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as well as for its work on what became the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Both documents were modelled on the Commission's previous work on the same topics limited to States. *See* 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"); Draft Articles on the Responsibility of International Organizations with Commentaries, in Report of the International Law Commission, 63rd session, 26 April–3 June and 4 July-12 August 2011, A/66/10 ("DARIO").

[74] This was the case for the Commission's work on "reservations to treaties" and on "the provisional application of treaties". Most recently, this approach was adopted by the Commission in its conclusions on "the identification of customary international law", where the practice of IOs is deemed as relevant "in certain cases". *See* A/CN.4/L.872, International Law Commission, 68th session, Identification of customary international law, Geneva, 2 May-10 June and 4 July-12 August 2001, Text of the draft conclusions provisionally adopted by the Drafting Committee ("Draft conclusions on the identification of customary international law (2016)), draft conclusion 4[5], paragraph 2.

[75] As much can be seen in the Commission's approach to topics such as the "representation of states in their relations with international organizations" (1063-1975), which lead to the adoption of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (A/CONF.67/16) on 14 March 1975. Pursuant to article 2(2) of the Convention: "The fact that the present Convention does not apply to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention." Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations, vol. II, 14 March 1975. Not yet in force ("Vienna Convention on the Representation of States").

from the actual study; their valuable experience would have to be drawn upon,"[76] the draft articles adopted by the Commission at its 23rd session in July 1971 were ultimately limited to the representation of States to organizations of a universal character, "without prejudice" to the potential application of said rules to other organizations, as customary international law.[77] The same approach was followed in the Commission's work on the "status, privileges and immunities of international organizations, their officials, experts, etc." While in their discussions of the Special Rapporteur's Second and Third Reports the Commission members stressed the need to adopt a "broad approach" to the topic, including the practice of regional organizations,[78] the decision was ultimately taken to deal with them "at a later stage".[79] As for the relevance of the (at time) EEC's practice, not only are the references to the EEC scarce at best in the Special Rapporteur's "detailed examination of the replies to (…) the questionnaire sent to regional organizations on 5 January 1984",[80] but it is also virtually absent from the Special Rapporteur's lengthy discussion on the classification of international organizations.[81] Finally, in the Commission's work on what latter became the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT-IO),[82] the difficulties in fitting the EEC into the general taxonomy of international organizations[83] and of accommodating its practice of "mixed agreements"[84] have largely justified the CJEU's

[76] A/CN.4/195 and Add.1, Representation of States in their relations with international organizations, Second Report on relations between States and Inter-Governmental Organizations by Abdullah El-Erian, Special Rapporteur (1967) YBILC vol. II, 148, para. 94(a).

[77] Commentary to article 2, Articles on the Representation of States in their Relations with International Organizations with commentaries, Text adopted by the International Law Commission at its twenty-third session (1971) YBILC vol. II(1), 287, para. 3.

[78] *See* A/CN.4/391 and Add.1 and Corr.1, Status, privileges and immunities of international organizations, their officials, experts, etc., Second report on relations between States and international organizations (second part of the topic) by Mr. Leonardo Díaz-González, Special Rapporteur (1985) YBILC vol. II(1), 106, paras. 27-28 ("The question whether international organizations should be classified as being of a universal or a regional character and whether, as one member suggested, the Commission should confine itself to organizations which form part of the United Nations system should, in accordance with the view expressed by virtually all the members who took part in the debate on the preliminary report of the present Special Rapporteur, be decided only when the study has been completed."). *See also*, ibid., 107, para. 29 ("Moreover, the legislative sources—whether in the form of international instruments, national law or practice— in the area of regional organizations have become comparatively rich as a result of the increasing network of regional organizations and their subsidiary organs.").

[79] A/CN.4/424 and Corr.1, Status, privileges and immunities of international organizations, their officials, experts, etc., Fourth report on relations between States and international organizations (second part of the topic) by Mr. Leonardo Díaz-González, Special Rapporteur (1989) YBILC vol. II(1), 154, para. 9.

[80] A/CN.4/391 and Add.1 and Corr.1 (n 78), 110, para. 55.

[81] A/CN.4/424 and Corr.1 (n 79), 158-160.

[82] *Supra* (n 71).

[83] The commentaries to the VCLT-IO reflect the difficulty of qualifying the EEC as an international organization *proprio sensu*. *See* Draft articles on the law of treaties between States and international organizations or between international organizations, with commentaries ("VCLT-IO with commentaries") (1982) YBILC vol. II(2), 32. ("there are a certain number of cases in which [questions surrounding IO's reservations to treaties] have arisen. Admittedly the value of these cases is open to question: do the examples to be adduced involve genuine reservations, genuine objections or even genuine international organizations?"). It portrays the EEC, at best, as an organization "sharing certain common features with international organizations". Ibid., 33.

[84] Ibid., para. 2 ("The Commission fully recognizes that special problems arise, particularly as regards matters such as reservations or the effects of treaties on third States or third organizations, when an organization and some or all

exclusive reliance on the earlier 1969 Vienna Convention on the Law of Treaties (VCLT),[85] drafted for States, as the source of customary rules applicable to its international treaty practice.[86]

By the same token, when adopting a "combined approach" of developing rules applicable to both States and international organizations, the relevance of the latter's practice in general, and of regional organizations' practice in particular, are often minimized. A striking example can be found in the Commission's work on "the effects of armed conflicts on treaties". In response to a 2007 request for information circulated to international organizations concerning their relevant practice,[87] the European Commission submitted not only general comments on the topic[88] but also an additional set of supporting documents.[89] Notwithstanding the detailed references to the EU's primary law, practice and relevant case-law concerning the application of customary international law principles in the termination or suspension of international agreements for human rights violations,[90] the commentaries to the draft articles adopted by the Commission at its 63rd session in 2011 make no reference to the EU or its practice. This was a conscious exclusion based on the Commission's decision not to include in its study treaties involving international organizations, on account of "the complexity of giving such an additional dimension to the draft articles, which would likely outweigh the possible benefits of doing so."[91]

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of its member States are parties to the same treaty, but the draft articles cannot be designed to cater exhaustively for all difficulties"). On the lengthy discussions surrounding the Commission's work on the later-abandoned article 36*bis* of the VCLT-IO, dealing with "the effects of a treaty to which an international organization is party with respect to States members of that organization", and the role of the (then) EEC therein, *see* Catherine Brölmann, *The Institutional Veil in Public International Law: International Organizations & the Law of Treaties* (Hart Publishing, 2007), 212-225.

[85] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 ("VCLT").

[86] Case C-410/11, *Espada Sánchez and Others* ECLI:EU:C:2012:747, para. 21 (noting that "even though the Vienna Convention on the Law of Treaties of 23 May 1969 does not bind either the European Union or all its Member States, that convention reflects the rules of customary international law which, as such, are binding upon the EU institutions and form part of the legal order of the European Union"); Case C-386/08 *Brita* ECLI:EU:C:2010:91, para. 42.

[87] A/62/10, Report of the International Law Commission on the work of its fifty-ninth session, 7 May-5 June and 9 July-10 August 2007, General Assembly Official Records, Sixty-second session, Supplement No. 10; A/CN.4/592 and Add.1, Effects of Armed Conflicts on Treaties. Comments and observations received from international organizations, 27 February and 21 April 2008.

[88] A/CN.4/592 and Add.1 (n 87).

[89] European Communities, Commission, 'Protection of the Environment in Times of Armed Conflict', Report established by a Study Group composed of Michael Bother, Antonio Cassese, Frits Kalshoven, Alexandre Kiss, Jean Salmon, and Kenneth R. Simmonds, For official use only, SJ/110/85 (available at http://legal.un.org/docs/?path=../ilc/sessions/60/pdfs/english/annex_ec_contribution_study_group.pdf&lang=E); Communication from the Commission to the Council and the European Parliament, Co-operation with ACP Countries Involved in Armed Conflict, COM(1999)240 final, 19 May 1999 (available at http://legal.un.org/docs/?path=../ilc/sessions/60/pdfs/english/annex_ec_contribution_cooperation_with_acp_countries.pdf&lang=E).

[90] A/CN.4/592 and Add.1 (n 87), 93-95.

[91] A/66/10, Draft articles on the effects of armed conflicts on treaties, with commentaries, Adopted by the International Law Commission at its sixty-third session (2011) YBILC vol. II(2), 109, para. 4 (commentary to draft article 1 (scope)), 110; commentary to draft article 2 (definitions), 123, para. 2; commentary to draft Annex, 'Indicative list of treaties referred to in article ', para. 22, section (d), 'Treaties on international criminal justice'). *See also* A/CN.4/627 and Add.1, Effects of Armed Conflicts on Treaties, First report on the effects of armed

Finally, an identical approach has so far been followed in the Commission's ongoing consideration of the topic of "subsequent agreements and subsequent practice in relation to treaty interpretation". In 2015, the EU submitted both oral[92] and written observations concerning (a) examples where "the practice of an international organization has contributed to the interpretation of a treaty", and (b) examples "where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty."[93] In the set of 13 draft conclusions and corresponding commentaries adopted by the Commission in 2016[94] there are a total of 3 references to the CJEU jurisprudence.[95] The relevance of the court's practice and of its role as an authoritative interpreter of EU law, in particular, are not even cited as an exception to the contention that "[m]any international organizations share the same characteristic of not providing for an 'ultimate authority to interpret' their constituent instrument."[96] While the draft conclusions acknowledge the potential relevance of IOs practice,[97] they are primarily concerned with the extent to which it "may be indicative of relevant practice by States parties to a treaty."[98]

The brief overview of the weight accorded to IOs practice in the Commission's work reflects a myopic insistence on a classic model of international relations dominated by States as the primary architects of the international legal order. It is also a by-product of the work methods of the ILC, shaped by the input of governments at the Sixth Committee and the political compromises that both constrain the Commission's work and accord it with authoritative value. As the following section demonstrates, however, this State-centric gravitational pull is being gradually relaxed. The relevance of IOs practice, including the practice of regional organizations, is slowly gaining traction within the ILC's discourse. While multiple forces contribute to this effect, the following section analyses the role played by the EU therein. It provides an overview of the EU's observations to the Commission's work and argues that, notwithstanding the EU's insistence on its "uniqueness" and the ILC's continued perplexity with the EU, the latter has

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conflicts on treaties by Mr. Lucius Caflisch, Special Rapporteur, 22 March and 21 April 2010, 93, para. 8, 94, para. 14.

[92] Statement on behalf of the European Union and its Member States by Lucio Gussetti, Director, European Commission, Legal Service, UNGA Sixth Committee, Item 83 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', 4 November 2015 (available at https://papersmart.unmeetings.org/media2/7654698/european-union-cluster-2-statement-2-.pdf).

[93] 'Contribution of the European Union on the topic of subsequent agreements and practice in relation to treaty interpretation', available at 'Analytical Guide to the Work of the International Law Commission, Subsequent agreements and subsequent practice in relation to interpretation of treaties'.

[94] A/71/10, Report of the International Law Commission Sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, General Assembly Official Records, Seventy-first session, Supplement No. 10.

[95] Ibid., 127 note 401, and 217, paras. 12-13.

[96] Ibid., para. 31.

[97] Ibid., 152-153.

[98] Ibid., 153, para. 14.

contributed to reshaping the Commission's discourse concerning the (ir)relevance of IOs practice in the formation of international law.

III. *The Effort*: The EU's observations to the work of the ILC

1. The EU's capacity and interest to contribute to the ILC's work

To date, the EEC/EU has submitted written contributions to the Commission work on six topics:[99] (i) the most-favoured nation clause (1978);[100] (ii) treaties concluded between States and international organizations or between international organizations (1981);[101] (iii) the expulsion of aliens (2011),[102] (iv) subsequent agreements and subsequent practice in relation to treaty interpretation (2015);[103] (v) the effects of armed conflicts on treaties (2008)[104] and, most consistently, on (vi) the responsibility of international organizations for internationally wrongful acts (2004-2011).[105] In addition, oral observations on the Commission's work were also

[99] The dates indicated therein pertain to those of the submission of written comments by the EEC/EU, not to the dates of completion of the work on the topic by the Commission.
[100] A/CN.4/308 & Corr.1 and Add.1 & Corr.1 and Add.2 (n 67), 179-186.
[101] A/CN.4/339 and Add.1-8 (n 65) 201.
[102] The EU submitted detailed observations on the topic through a letter addressed to the ILC, including "a detailed explanation of European Union law and jurisprudence relating to the topic, in addition to copies of relevant legislation and a readmission agreement". In addition, it submitted oral observations to the Commission's work during the course of four UNGA Sixth Committee sessions. These comments were addressed by the Special Rapporteur on the topics 'expulsion of aliens', Mr. Maurice Kamto, in his Eight Report (2012). *See* A/CN.4/651, Eighth report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur, Sixty-fourth session, 7 May-1 June and 2 July-3 August 2012, 9-13, paras. 48-32. For the EU's oral interventions on the topic, *see* A/C.6/65/SR.25, UNGA Sixth Committee, Summary record of the 25th meeting, 29 October 2010, paras. 42-45; A/C.6/66/SR.21, UNGA Sixth Committee, Summary record of the 21st meeting, 27 October 2011, paras. 45-51; A/C.6/67/SR.18, UNGA Sixth Committee Summary record of the 18th meeting, 1 November 2012, paras. 57-68; and A/C.6/69/SR.19, UNGA Sixth Committee Summary record of the 19th meeting, 27 October 2014, paras.69-75.
[103] The work on this topic (initially under the heading 'treaties over time') was initiated by the Commission in 2009 and is still under consideration. The EU submitted a written contribution to the ILC's work, which was assessed during its 67th session (2015). 'Contribution of the European Union on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation' (available at http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/sasp_eu.pdf&lang=E). Oral observations were also submitted during Sixth Committee meetings. *See* A/C.6/71/SR.20, A/C.6/71/SR.20, UNGA Sixth Committee, Summary record of the 20th meeting, 24 October 2016, Statement by Mr. Gussetti (Observer for the European Union), paras. 46-47; Statement on behalf of the European Union and its Member States by Lucio Gussetti (n 90).
[104] A/CN.4/592 and Add.1 (n 87), 93-95.
[105] A/CN.4/545 (n 71), 21; A/CN.4/556 (n 71), 31; A/CN.4/568 and Add.1 (n 71), 127, 133, 135, 139; A/CN.4/582 (n 71), 19; A/CN.4/593 and Add.1 (n 71), 32; A/CN.4/637 (n 71), 7. Oral observations were also submitted during Sixth Committee meetings. *See* A/C.6/58/SR.14 (n 13), paras. 13-14; A/C.6/59/SR.21, Sixth Committee, Summary record of the 21st meeting, 5 November 2004, Statement by Mr. Kuijper (Observer for the European Commission), paras. 16-19; A/C.6/60/SR.12, Sixth Committee, Summary record of the 12th meeting, 25 October 2005, Statement by Mr. Kuijper (Observer for the European Union), paras. 11-14; A/C.6/61/SR.13, Sixth Committee, Summary record of the 13th meeting, 27 October 2006, Statement by Ms. Lehto (Finland), speaking on behalf of the European Union, paras. 24-27; A/C.6/61/SR.16, Sixth Committee, Summary record of the 16th meeting, 31 October 2006, Statement by Mr. Paasivirta (Observer for the European Union), paras. 14-17; A/C.6/SR.22, Sixth Committee, Summary record of the 22nd meeting, 31 October 2008, Statement by Mr. Hetsch (European Commission), paras. 19-24; A/C.6/64/SR.17, Sixth Committee, Summary record of the 17th meeting, 28 October 2009, Statement by Mr.

submitted by the EU or on its behalf in the context of Sixth Committee meetings concerning the topics "protection of persons in the event of disasters",[106] the "provisional application of treaties",[107] the "identification of customary international law",[108] and "the protection of the atmosphere".[109] Thus, of the 56 topics explored by the Commission so far, the EU provided comments to less than one-fifth.

The level of the EU's engagement in the Commission's work can be seen as the result of a combination of factors. It depends not only on whether the ILC perceives the EU as a "relevant" organization from which observations should be sought, but also the EU's own capacity to engage and its interest in doing so. Thus, the first written observations by the (then) EEC to the Commission's work, concerning the most-favoured-nation (MFN) clause,[110] are a clear expression of the EEC's understanding of its position as an "affected party" and of its interest in shaping the discourse on the agreed law. Its comments sought to ensure that the Commission accounted for exceptions to the effects of MFN clauses concerning the reciprocal rights and obligations accorded to each other by members of customs unions and "more advanced" regional economic integration arrangements such as the EEC.[111] They also reflect the growing coordination between EEC Member States on issues of international law, facilitated by the European Political Cooperation (EPC) intergovernmental structure introduced in the 1970s.[112]

With the adoption of the Treaty of Maastricht in 1992,[113] the development and preparation of a common approach to international law issues was allocated to the Comité Juridique (COJUR),

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Hetsch (European Commission), paras. 21-24; A/C.6/SR.18. Sxith Committee, Summary of the record of the 18th meeting, 24 October 2011, paras. 38-39.

[106] *See* A/C.6/66/SR.21 (n 102), paras. 52-57; A/C.6/67/SR.18 (n 102), paras. 69-73; A/C.6/68/SR.23, UNGA Sixth Committee, Summary record of the 23rd meeting, 4 November 2013, Statement by Ms. Cujo (Observer for the European Union), paras. 30-32; A/C.6/71/SR.20 (n 103), paras. 44-45.

[107] *See* A/C.6/68/SR.23 (n 104), paras. 33-34; Statement on behalf of the European Union by Ms. Eglantine Cujo, Legal Adviser, Delegation of the European Union to the United Nations, UNGA Sixth Committee, Item 83 'Provisional application of treaties', 9 November 2015 (available at https://papersmart.unmeetings.org/media2/7654698/european-union-cluster-2-statement-2-.pdf); A/C.6/71/SR.27, UNGA Sixth Committee, Summary record of the 27th meeting, 1 November 2016, Statement by Ms. Cujo (Observer for the European Union), paras. 83-89; A/C.6/72/SR.18, UNGA Sixth Committee, Summary record of the 18h meeting, 23 October 2017, Statement by Mr. Gussetti (Observer for the European Union), paras. 39-53.

[108] *See* A/C.6/68/SR.23 (n 104), paras. 35-38; Statement on behalf of the European Union and its Member States by Lucio Gussetti, Director, European Commission, Legal Service, at the GA Sixth Committee, Item 83 'Identification of customary international law', 4 November 2015 , https://papersmart.unmeetings.org/media2/7654697/european-union-cluster-2-.pdf; A/C.6/71/SR.20 (n 103), para. 45.

[109] *See* A/C.6/71/SR.24, UNGA Sixth Committee, Summary record of the 24th meeting, 29 November 2016, Statement by Mr. Gussetti, paras. 52-57; A/C.6/72/SR.22, UNGA Sixth Committee, Summary record of the 22nd meeting, 26 October 2017, Statement by Mr. Gussetti (Observer for the European Union), paras. 54-62.

[110] A/CN.4/308 & Corr.1 and Add.1 & Corr.1 and Add.2 (n 67), 182-183.

[111] A/CN.4/309 and Add.1 and 2, Report on the most-favoured-nation clause, by Mr. Nikolai A. Ushakov, Special Rapporteur (1978) YBILC vol. II(1), 23, paras. 182-183, 239.

[112] Wouters and Hermez (n 9), 3.

[113] Treaty establishing the European Community (as amended by the Treaty of Maastricht) (7 February 1992) Official Journal C 224 (31 August 1992), entered into force 1 January 1993.

a since-then permanent working group of the Council.[114] The work of the ILC and the preparation of the EU's observations at the Sixth Committee form an important part of the COJUR's work, which is carried out in coordination with the European Commission's Legal Service in Brussels and the EU delegation to the UN in New York.[115] In the two months separating the launch of the ILC annual report from Geneva (August) and the start of the Sixth Committee session in New York (October or November), the Legal Service of the Commission identifies the topics within the ILC report of concern to the EU, which are then discussed at the COJUR level prior to the adoption of a statement of behalf of the EU.[116] This statement is also informed by the work of the EU delegation in New York, which ensures "the day-to-day coordination of the EU common position, including the final drafting of EU statements and refinement of EU positions on resolutions and other draft texts".[117] The EU's observations to the ILC's work are therefore the result of a carefully orchestrated institutional coordination, part legal acumen part diplomatic groundwork. How this coordination converges into a single EU position and how it conditions its substance, and its reception, are the focus of the following section.

2. The EU's discourse and the ILC's response: exceptionalism and (mostly) rejection

From the outset of its interventions concerning the Commission's work, the EU's discourse has been consistent about the prevailing inadequacy of international norms to regulate the *sui generis* or "special nature of [its] regional integration process".[118] In its first observations to the Commission's work concerning the MFN clause, the (then) EEC stressed the need to account for its "distinctive international character"[119] and railed against the draft articles neglect of the "growing tendency throughout the world to establish regional integrated areas".[120] This rhetoric was later heightened in the context of its multiple observations to the ILC's work on the Draft Articles on the Responsibility of International Organizations (DARIO).[121] The (then) EU repeatedly presented itself as "a rather specific organization"[122] going "well beyond the normal parameters of classical international organizations as we know them".[123] It portrayed itself as

[114] *See* Frank Hoffmeister, 'Comite Juridique (COJUR)', Max Plank Encyclopedia of Public International Law, Oxford Public International Law.
[115] Wouters and Hermez (n 9), 4-5. The authors thus poignantly describe the EU's work at the UN Sixth Committee as "a tale of two cities" reflecting the coordination of the EU's action in Brussels and in New York.
[116] Ibid., 4-5.
[117] Ibid., 5.
[118] A/CN.4/308 & Corr.1 and Add.1 & Corr.1 and Add.2 (n 67), 180, para. 1.
[119] Ibid., 184, para. 16.
[120] A/CN.4/309 and Add.1 and 2 (n 111), 68, para. 9.
[121] DARIO (n 71), 52. *See also*, A/C.6/58/SR.14 (n 13), paras. 13-14; A/C.6/59/SR.21 (n 105), para. 16; A/C.6/60/SR.12 (n 105), para. 11; A/C.6/61/SR.13 (n 105), para. 24; A/C.6/61/SR.16 (n 105), para. 15; A/C.6/64/SR.17 (n 105), para. 21.
[122] A/CN.4/568 and Add.1 (n 71), 127.
[123] 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).

specially-affected by the Commission's work, as the organization "most impacted" by the rules on international responsibility in light of the EU's level of international action.[124]

This narrative of "otherness"[125] or "exceptionalism",[126] however, has not stemmed from the EU alone. The ILC itself has artfully made use of the EU's own discourse of autonomy to exclude it from the dialogue. For instance, in addressing the exceptions to the effects of MFN clauses in the case of customs unions, Nikolai Ushakov, Special Rapporteur on the topic in 1978, distinguishes the EEC as an "obviously unique phenomenon",[127] adding:

> "What, for example, is [the] EEC? A customs union, a free-trade area, a financial union, an integration community, or all these together, and something more? Most probably the latter, and it is still constantly changing".[128]

The ILC has been adamant about its methodological approach of developing rules of an abstract and general character, with a distinct aversion for carving out exceptions to accommodate "anomalies" such as the EU. In the name of generality, the ILC has adopted a number of strategies to avoid dealing with the EEC/EU as a matter of principle: (i) avoidance, by accounting only for universal organizations as generators of "relevant" practice, (ii) omission, by limiting the references, and thus the relevance, of the EU's practice to that of an anomaly in an otherwise largely uniform system of practice, and (iii) aversion, by expressly rejecting the development of special rules to reflect the reality of the EU's practice, while not ignoring its existence.

This was the narrative underlying the Commission's rejection of special rules to accommodate the EEC in the VCLT-IO, where it noted that "the draft articles cannot be designed to cater exhaustively for all difficulties."[129] The rejection of suggestions applicable "in too exclusive a manner to a case as special as that of the European Communities" were presented as "an objection of principle"[130] in the Commission's work. This was also the approach followed by the Commission regarding DARIO. From the possible methodological approaches available to the ILC to deal with this topic[131] – focusing exclusively on intergovernmental and universal

[124] The wording varies between "special repercussions" and "considerable implications" of the draft articles to the EU's position. *See* A/C.6/58/SR.14 (n 13), para. 13. Alternatively, the EU often perceives itself as a "key actor" (e.g., regarding measures on 'the protection of persons in the event of disasters', A/C.6/66/SR.21 (n 102), para. 52) or emphasizes its "particular role" (e.g., regarding 'the formation of customary international law', A/C.6/68/SR.23 (n 104), para. 37).
[125] Stéphanie Laulhé Shaelou, 'The European Union's Shaping of the International Legal Order by Dimitry Kochenov and Fabian Amtenbrink (eds)' (2015) 34 Yearbook of European Law 379.
[126] Ličková (n 22).
[127] A/CN.4/309, Add.1 and Add.2 (n 111), 21, para. 208.
[128] Ibid., 21, paras. 213.
[129] VCLT-IO with commentaries (n 81), 18 (commentary to article 2, 'use of terms').
[130] Ibid., 44, note 107, 46, para. 44.
[131] *See* Odermatt (n 72), 493-494.

organizations[132] or developing rules specific to different types of organizations[133] – the ILC opted for the codification of secondary rules of a general character[134] and for a broad definition of IO.[135] Thus, while the Special Rapporteur initially entertained the idea that the diversity of international organizations might warrant "specific rules for different categories of organizations",[136] the final draft adopted in 2011 is largely modeled on the rules on State responsibility and refers to the "diversity" of international organizations in a single paragraph to the articles' commentary.[137] The articles' insufficient deference to the principle of speciality has thus been one of the most often voiced criticisms to the Commission's work.[138]

As the next section shows, however, the EU's discourse has not shown the unbridled exceptionalism most ascribe to it, nor has the ILC's posture been fully uncompromising.

3. Beyond exceptionalism: inclusiveness and (some) acceptance

Notwithstanding the fractious relationship between the ILC and the EU, symptomatic of a larger difficulty of international law to describe the EU in its international legal vernacular, an analysis of the written contributions by the EU to the Commission and the role played by the EU's practice in the latter's work reveals growing fissures in the self-referring or impermeable nature of both regimes. Not only has the ILC demonstrated a greater openness to the role of regional organizations and the EU in the formation of international norms, the EU's discourse has also not been that of unbridled exceptionalism some might lead us to believe. Through its observations to the Commission's work, the EU has championed the cause of international (regional) organizations as actors in their own right and has left a small but not negligible mark on the final outcome of the discussions on a number of topics.

As early as 1982, the (then) EEC emphasised the role that international organizations should play in the Commission's work and its intentions to be an active participant therein:

> "[T]he Community welcomes the extent to which the international organizations to which the draft articles are to apply have been given the opportunity to play an active role in the elaborating of the present draft. The Community looks forward to the

[132] As it did in its treatment of the relationship between states and international organizations (both topics). *See supra* 12-13 and accompanying notes.
[133] An idea also explored at the early stages of the Commission's work. *See* A/57/10, 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, para. 470.
[134] *See* Alain Pellet, 'International Organizations Are Definitely Not States. Cursory Remarks on the ILC Article son the Responsibility of International Organizaitons' in M. Ragazzi, *Responsibility of International Organizations: Essays in Memory of Ian Brownlie* (Martinus Nijhoff, 2013), 41, 49.
[135] Article 2(a) DARIO.
[136] A/57/10 (n 133), para. 470.
[137] DARIO, 47, para. 7.
[138] Pellet (n 134), 46. The excessive modeling of ARIO on ARSIWA was also criticized by the EU, among others. *See, inter alia*, A/C.6/61/SR.16 (n 105), 4, para. 15 (noting that "such borrowing form the articles on responsibility of States deserved close scrutiny".).

> continuation of an equally *active role of full participation* in this process through the final elaboration of the draft articles and subsequent procedures for transforming them into a suitable international instrument, which may take the form of an international treaty."[139]

Beyond "exceptionalistic", the EU's discourse has also been one of strategic inclusiveness. It often couched the need for international rules apt to govern its situation as part of a wider need for international law to accommodate the growing reality of regional integration. Already in 1978, the EEC noted that it represented only "one example among many of the growing tendency throughout the world to establish regionally integrated areas".[140] Similarly, in its ultimately rejected[141] push for DARIO to include "special rules of attribution of conduct, so that actions of organs of member states could be attributed to the organization",[142] Pieter Jan Kuijper, Observer for the European Commission addressing the Sixth Committee, emphasized not only the position of the EU and its MS, but of "other potentially similar organizations,"[143] although no examples of such organizations were provided. Even if self-interested, the EU's discourse has repeatedly pushed for the relevance of IOs practice in the formation of international law, and for the role of regional organizations therein.[144]

The EU's openness to international law and its applicability to it as an IO are also often neglected when characterizing its discourse concerning the ILC's work. For instance, the comments submitted by the EU to the Commission regarding the "effects of armed conflicts on treaties"[145] express the EU's acceptance of the Commission's work with "little need to broaden the scope of the study and to adapt the present draft to the special situation of the European Community."[146] Similarly, the EU's comments and observation to the Commission's ongoing

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[139] A/CN.4/350 and Add.1-6 & Add.6/Corr.1and Add.7-11 (n 13), 146 (emphasis added). *See also*, regarding the ILC's work on "the identification of customary international law", A/C.6/68/SR.23 (n 104), para. 38 ("The European Union stood ready to contribute to the work on the topic").

[140] A/CN.4/309 and Add.1 and 2 (n 111), 9, para. 68. *Against see* the opinion of Special Rapporteur expressed in the same report, to the effect that "'Supranational organizations' are, to say the very least, an extremely new phenomenon in the modern world. The Special Rapporteur knows of only one example of such an organization. He also doubts whether, in contemporary international law, there are any firmly established generally recognized rules applicable to "supranational organizations.". Ibid., 8, para. 66.

[141] G. Gaja, Special Rapporteur, International Law Commission, Second Report on Responsibility of International Organizations, 2 April 2004, A/CN.4/541, 5-8.

[142] A/C.6/59/SR.21 (n 105), para. 18. The European Commission proposed two options concerning the distinction between responsibility and attribution: the development of "special rules of attribution" or the inclusion of a "special exception or saving clause for organizations such as the European Community". Ibid.

[143] Ibid., 5, para. 18.

[144] *See*, in particular, the EU statement on the Commission's work on "the protection of persons in the event of disasters", A/C.6/66/SR.21 (n 102), para. 57 ("welcomed the Commission's recognition of the role of international organizations and other humanitarian actors in the protection of persons in the event of disasters (…) [H]e suggested that regional integration organizations should be expressly mentioned in the draft articles or that their inclusion should be made clear in the commentaries."). This position was consistently repeated by the EU in its interventions at the Sixt Committee. *See* A/C.6/67/SR.18 (n 102), para. 73; A/C.6/68/SR.23 (n 104), para. 32; A/C.6/69/SR.19 (n 102), para. 75.

[145] A/CN.4/592 and Add.1 (n 87), 93-95.

[146] 'Ibid., 95, para. 15.

work on "subsequent agreements and subsequent practice in relation to treaty interpretation", show a degree of deference to international law:

> "despite its autonomous character, the Union law is not an absolutely closed or impermeable legal order; quite to the contrary, it is open to other legal orders, to which it refers to fill its own lacunae, one of those legal orders being international law."[147]

In turn, the initial perplexity of the ILC with the EU as a subject of international law capable of contributing to its formation and development, most vividly expressed in Ushakov's words in the late 1970s,[148] has been gradually, albeit reluctantly, replaced by an express acceptance of the relevance of IOs practice, in particular that of the EU, as a relevant source of international law. Aside from the obvious recognition of IOs treaty practice in the VCLT-IO, one of the guiding trends behind the Commission's work on the "status, privileges and immunities of international organizations, their officials, experts, etc.", even if ultimately unaddressed, was the growing realization of the risks of side-lining regional organizations in light of the richness of their legislative practice and their growing role in the development of international law.[149] Similarly, the Commission's work on "subsequent agreements and subsequent practice in relation to treaty interpretation" recognizes the relevance of "the practice of the organization as such, meaning its 'own practice', as distinguished from the practice of the member States"[150] in the interpretation of its constituent instrument(s), "at a minimum … as supplementary means of interpretation".[151] Even if the draft conclusions largely ignore the EU's practice[152] and retain a State-centric approach to the formation of international norms, they nevertheless recognize that "[s]tatements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty".[153]

In addition to a general change in the Commission's approach to the relevance of IOs practice to the formation of international law, which can in part be attributed to the growing relevance of the EU as an actor in its own right, the EU's influence on the Commission's substantive and methodological choices, it is argued, is not a negligible one. A number of specific positions voiced by the EU ultimately made it to the ILC's final drafts, even if in a diluted form. Five of these cases are worthy of mention.

First, the EU's insistence on a broad definition of "rules of the organization" and its inclusion throughout the Commission's work with implications for IOs can be partially accounted for in

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[147] 'Contribution of the European Union on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation' (available at http://legal.un.org/ilc/sessions/67/pdfs/english/sasp_eu.pdf).
[148] A/CN.4/309, Add.1 and Add.2 (n 111), paras. 66, 208, 213.
[149] *See* A/CN.4/391 and Add.1 and Corr.1 (n 78), 106, paras. 19, 27-28, 107, para. 29.
[150] A/71/10, para. 26.
[151] A/71/10, para. 32.
[152] *See supra*, 14-15.
[153] A/71/10 (n 92), 152-153.

multiple provisions of the VCLT-IO[154] and the DARIO.[155] In its written comments to the Commission's work on what later became the VCLT-IO, the (then) EEC emphasised the importance of retaining the definition of "rules of the organization" in the articles' final draft and welcomed "the Commission's decision to solve various essential questions by reference to the constituent instruments, relevant decisions and resolutions, and established practice of the organization".[156] The broad definition of "rules of the organization" adopted in the VCLT-IO,[157] which reproduces article 1(34) of the earlier 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[158] was criticized by some EEC MS[159] but welcomed by the EEC and foreign governments on the basis that they allowed for the necessary flexibility to deal with the impossibility of "once and for all, [making] a list of the areas in which [the] EEC has or does not have the capacity to conclude treaties with third States".[160] The DARIO, in turn, adopts largely the same definition as that included in the VCLT-IO, adding to it "other acts of the organization" and giving "considerable weight to [organizational] practice".[161] This can in part be seen as the ILC's tentative accommodation of the diversity of international organizations, including that of the EU.[162]

Second, the EU's multiple written and oral observations to the Commission's work on "the expulsion of aliens"[163] and its extensive practice in this field are reflected in the Special Rapporteur's strong reliance on EU legislative and jurisprudential sources throughout the course of his work,[164] a fact strongly objected by some governments.[165] While the EU's practice was ultimately seen mostly as *de lege ferenda*[166] and references to EU law are nearly non-existent in

[154] Articles 5, 7, 27, 36, and 46 VCLT-IO.
[155] Articles 2(b), 6(2), 10(2), 22(2.b), 22(3), 32, 40, 52(1.b), 52(2), 58(2), 59(2), 64, and 65 DARIO.
[156] A/CN.4/339 and Add.1-8 (n 65), 202.
[157] Article 2(1)(j) VCLT-IO (n 71) ("'rules of the organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization").
[158] Vienna Convention on the Representation of States (n 75).
[159] *See* in particular the position of the Romanian government. A/CN.4/339 and Add.1-8 (n 65), 189.
[160] Ibid., 182-183, para. 5 (comments by the Canadian government). *See also*, ibid., para. 195-196, para. 6 (on the position of the Yugoslav government).
[161] DARIO with commentaries (n 71), 51, paras. 16-17; Article 2(b) DARIO ("'rules of the organization' means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization").
[162] It should be noted, however, that the EU pushed for a slightly revised version of the definition of "rules of the organization" in the DARIO. It suggested that the term "established practice" be changed to "generally accepted practice", thus placing "less stress on the time element, and by adding a reference, either in the text or in the commentary, to the general principles of law of the organization and to the case law of an organization's tribunal." A/C.6/59/SR.21 (n 105), para. 19. These suggestions were not included in the draft articles adopted in 2011, nor in their commentaries.
[163] *See supra* (n 102).
[164] *See* A/CN.4/625 and Add.1–2, Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur; A/CN.4/651 (n 102), paras. 32-48.
[165] A/C.6/65/SR.25 (n 102), para. 7 (noting that "the ILC should not seek to codify new rights or to import concepts from such regional bodies as the European Commission").
[166] A/CN.4/651 (n 102), para. 42 (noting that EU legislation contained "extremely progressive provisions on such matters that are far more advanced than the norms found in other regions of the world").

the draft articles and the commentaries thereto adopted by the Commission on second reading on 5 August 2014,[167] the Commission's work on the topic was initially largely inspired by EU policy and legislation, namely the EU Return Directive.[168] In addition, the commentary to draft article 14 (prohibition of discrimination) expressly notes that the inclusion of the words "any other grounds impermissible under international law" is intended to preserve "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".[169] Similarly, the commentary to the second paragraph of draft article 26 (procedural rights of aliens subject to expulsion) specifies that the procedural rights listed therein "are without prejudice to other procedural rights or guarantees provided by law", such as the right to legal assistance provided for under EU law.[170]

Third, although the impact of the EU's multiple interventions to the Commission's work on the DARIO has been questioned[171] and the EU was largely unsatisfied with the final result,[172] the inclusion of a *lex specialis* provision[173] in draft article 64 should be seen as a tangible result of the EU's contribution. The inclusion of a *lex specialis* provision formed a substantial part of the European Commission's interventions concerning the ILC's work.[174] It sought to ensure not only that "the draft articles allowed sufficient room for the specificities of a regional integration organization" like the EU,[175] but also that they did "not stunt the development of further international rules on the subject."[176] Importantly, the only example given in the commentary to draft article 64 is that of the EU.[177] Thus, Scarlett McArdle and Paul James Cardwell conclude that this particular provision is a reflection of the EU's "actual influence" in the development of international norms:

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[167] Draft articles on the expulsion of aliens, with commentaries, Adopted by the International Law Commission at its sixty-sixth session, in 2014 (A/69/10) ("DAEA with commentaries").
[168] *See* A/C.6/69/SR.19 (n 102), paras. 70-71.
[169] DAEA with commentaries (n 168), 21, para. 5 and note 94.
[170] Ibid., 44, para. 8 and note 181.
[171] *See* Nevil (n 13), 290 (attributing the "marginal" impact of the EU on the Commission's work to the EU's "resistance (both literally and figuratively) to classification as any particular type of legal entity").
[172] A.CN.4/637 (n 71), 8 ("for 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.").
[173] Article 64 DARIO ("These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.").
[174] *See* A/C.6/64.SR.17 (n 105), 5, para. 23; A/C.6/66/SR.18 (n 102), para. 39.
[175] A/C.6/64.SR.17 (n 105) para. 21.
[176] A/C.6/64.SR.17 (n 105), para. 23
[177] DARIO with commentaries, 102, para. 2 ("By way of illustration, it may be useful to refer to one issue which has given rise in practice to a variety of opinions concerning the possible existence of a special rule: that of the attribution to the European Community (now European Union) of conduct of States members of the Community when they implement binding acts of the Community.").

> "The inclusion of [the *lex specialis*] principle is able to show two significant developments in the external identity of the EU. The first of which is the way in which the opinions of the EU on this show a distinct view on behalf of the European Union and move away from any consideration of the EU simply voicing the opinions of a collection of States. The second of these developments is the influence that the comments of the EU had. These are comments that were distinctly those of the EU, and furthermore, they were responded to, showing an actual influence of the EU in the development of international law."[178]

Fourth, throughout its interventions at the Sixth Committee concerning the Commission's work on "the protection of persons in the event of disasters",[179] the Observer for the European Union repeatedly stressed the need to include regional integration organizations either in the draft articles or in their commentaries,[180] which was later reflected in the commentary to draft article 1 ("scope") of the set of draft articles adopted by the Commission on second reading in 2016.[181] This inclusion, together with the articles' applicability to "complex emergencies", were welcomed by Lucio Gussetti, Observer for the European Union, in his statement to the Sixth Committee on 24 October 2016:

> "While not all of the comments and observations it had submitted were reflected in the draft articles and the commentaries thereto, the European Union was pleased that the commentaries contained a reference to regional integration organizations and that they envisaged the possibility of the draft articles being applied in the context of complex emergencies, as it had suggested."[182]

Finally, even though no comments have so far been sought from IOs in the context of the Commission's ongoing work on "the identification of customary international law",[183] the relevance of IOs practice in the formation of customary international law has been expressly recognized in a number of the Special Rapporteur's reports.[184] Draft conclusion 4 [5]

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[178] McArdle and Cardwell (n 6), 91.
[179] *See supra* (n 106).
[180] *See* A/C.6/66/SR.21 (n 102), paras. 52-57; A/C.6/67/SR.18 (n 102), paras. 69-73; A/C.6/68/SR.23 (n 106), paras. 30-32; A/C.6/71/SR.20 (n 103) paras. 44-45.
[181] Draft articles on the protection of persons in the event of disasters, with commentaries, Adopted by the International Law Commission at its sixty-eighth session, A/71/10 (2016) YBILC, vol. II(2), 3, commentary to article 1 (scope), para. 3. Ibid., 13, commentary to article 5 (human rights), para. 3.
[182] A/C.6/71/SR.20 (n 103), para. 44.
[183] The topic was included in the Commission's plan of work in 2012 (sixty-fourth session). At its 68th session in 2016, the Commission adopted a set of 16 conclusions and commentaries thereto on first reading. Comments by Governments to the ILC's work were submitted by Governments at it 66th (2014), 67th (2015), 68th (2016) and 70th (2018) sessions. For a full summary of the Commission's work on this topic *see* http://legal.un.org/ilc/summaries/1_13.shtml. *See also*, Draft conclusions on the formation of customary international law (2016) (n 74).
[184] *See* A/CN.4/672, International Law Commission, Sixty-sixth session, 5 May-6 June and 7 July-8 August 2014, Second report on identification of customary international law by Michael Wood, Special Rapporteur, para. 43; A/CN.4/682, International Law Commission, Sixty-seventh session, 4 May-5 June and 6 July-7 August 2015, Third report on identification of customary international law by Michael Wood, Special Rapporteur, paras. 76;

("requirement of practice"), adopted by the Commission on first reading in 2016,[185] notes in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law". The Special Rapporteur identifies three ways in which the practice of IOs might be of relevance for the formation of international custom:[186] (i) organizational practice which reflects the collective "practice and convictions" of States and thus serves as a vehicle for the expression of States' practice,[187] (ii) organizational conduct which "catalyses" or "prompts" State practice,[188] and (iii) the external practice of the IO "as such", as autonomous and independent from its members.

While the caveat of "in certain cases" reflects the strong reticence expressed by governments concerning the independent role of IOs in the formation of custom,[189] the practice of the EU emerges as the "clear-cut"[190] example where "the relevance of practice is difficult to deny".[191] The EU is presented as the archetypical case where, by force of the transfer of powers by MS to the organization, the latter's practice is "equated with the practice of States".[192] Admittedly, the justification provided to confer relevance upon such practice is fundamentally a State-centric one.[193] In the Special Rapporteur's view, "if one were not to equate the practice of such international organizations with that of States, this would mean not only that the organization's practice would not be taken into account, but also that its Member States would themselves be deprived of or reduced in their ability to contribute to State practice".[194] Nevertheless, even

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A/CN.4/695, Fourth report on identification of customary international law, International Law Commission Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016, para. 20.

[185] Draft conclusions on the formation of customary international law (2016) (n 74).

[186] Odermatt (n 72), 499-502.

[187] A/CN.4/682 (n 185), para. 74.

[188] Ibid., para. 75.

[189] A/CN.4/703, Report of the International Law Commission on the work of its sixty-eighth session (2016), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat, International Law Commission Sixty-eighth session, Geneva, 1 May-2 June and 3 July-4 August 2017, Doc., para. 83 ("According to some delegations, the text of paragraph 2 was an exercise in progressive development, since the practice of international organizations could not be expressive of customary international law and could never be equated with the practice of States. It was remarked that such practice could only be relevant to rules of customary international law pertaining to international organizations. According to some delegations, the practice of international organizations could only be deemed relevant if it were in fact either the practice of States composing the organization or conduct carried out on behalf of States."). *See also*, A/CN.4/717, International Law Commission, Seventieth session, New York, 30 April–1June 2018 and Geneva, 2 July-10August 2018, Fifth report on identification of customary international law by Michael Wood, Special Rapporteur, paras. 38-39. The Fifth Report refers, in particular, to the positions of Australia, Singapore, Turkey, Israel, Argentina, the Russian Federation, the Unites States, Mexico, Iran and New Zealand.

[190] A/CN.4/682 (n 185), paras. 77.

[191] A/CN.4/695, International Law Commission, Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016, Fourth report on identification of customary international law by Michael Wood, Special Rapporteur, para. 20.

[192] A/CN.4/682 (n 185), paras. 77.

[193] On the ILC's confused approach to international organizations' practice as relevant to the formation of customary international law *see* Neils Blokker, International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?' (2017) 14 International Organizations Law Review 1-2.

[194] A/CN.4/682 (n 185), paras. 76; A/CN.4/672 (n 185), para. 44.

accounting for the EU Observer's dissatisfaction with the Commission's understanding of IOs practice and the role of the EU therein,[195] it is clear that the discourse no longer turns on "*whether* the practice of international organizations may contribute to customary international law [but rather on] *how* international organization practice should be conceived".[196] The relevance of IOs practice and of the EU as a contributing actor is now a *fait accompli*.

The forgoing examples support the conclusion that "[i]n the areas surrounding the ILC, at least, there has been a [growing] acceptance of the EU voicing its opinions and in contributing to and helping to shape the development of international legal principles".[197]

IV. Conclusion: From perplexed to clear-cut

In his Fifth Report on the identification of customary international law, Special Rapporteur Sir Michael Wood noted that, "a great effort will be needed to [meet] the concerns of all sides".[198] The difficulty of international law in acknowledging the role of IOs as actors in its formation, illustrated here through the discussions held in Geneva and New York on the work of the ILC, certainly points toward a long road ahead. As this paper shows, however, the path is already being trailed and the EU has played an important role therein.

This paper has shown how the EU's engagement with the ILC has allowed it to shape or at least co-contribute to the codification of (draft) international norms in fields as diverse as the law of treaties, international responsibility, the expulsion of aliens, and the protection of persons in the event of disasters. It has argued that, notwithstanding the ILC's reluctant acceptance of IOs as subjects of and contributors to the formation of international law, the EU has been able to leave a small but not negligible mark in the Commission's work, where the discourse has turned from general perplexity[199] to a "clear-cut",[200] albeit reserved, acceptance of the value of the EU's practice.

A little more effort may still be warranted from both parties. The ILC could certainly relax its conservative grip on a State-centric paradigm of international law and show a greater openness towards the subjective pluralism of modern international relations, if not to carve out exceptions then to codify reality. The EU, in turn, could trade some of its exceptionalism for a more consistent engagement with the wide variety of subjects covered by the ILC. As shown in this

[195] A/C.6/71/SR.20 (n 103), para. 44 ("As an organization that participated in a large number of multilateral and bilateral treaties, the European Union expected the Commission's output to reflect its potential to contribute to customary international law, including in such areas as fisheries and trade. The European Union saw merit in including such a reference in either the draft conclusions or the commentaries thereto."). Acknowledged by the SR in his Fifth Report. *See* A/CN.4/717 (n 179), para. 36.
[196] Odermatt (n 72), 497.
[197] McArdle and Cardwell (n 6), 85.
[198] A/CN.4/717 (n 179), para. 41.
[199] A/CN.4/309, Add.1 and Add.2 (n 111), paras. 208, 213.
[200] A/CN.4/682 (n 175), paras. 77.

paper, it has so far been rather selective in this regard. As the Commission's work moves gradually beyond the classic building-blocks of international law – subjects, sources and jurisdiction – to areas such as environmental law and migration,[201] the EU will arguably have a greater role to play as a "specially effected" party operating on an ever-growing number of fields. Consistent engagement may therefore yield better results than substantive cherry-picking.[202] The EU's ability to operate as a "fully fledged international actor"[203] would also benefit greatly from greater internal coherence of its own discourse. The EU institutions often send out mixed signals concerning the EU's engagement with international law.[204] With respect to the ILC, the EU oscillates between exceptionalism and inclusion, between a push for a more progressive approach to international law and a conservative stance against its progressive development.[205]

In order to fully operationalize its legal obligation to contribute to "the development of international law", the EU must engage not only in the practices that form it but also in the debates that ultimately shape it, for international scholars and practitioners alike. While the ILC is far from the easiest crowd to pitch to, it provides the EU with a less politicized forum to convey the relevance of its practice and to articulate it in the international law vernacular in which the conversations on the development of international law are being held. As this paper has shown, by complementing its political visibility and international practice with consistent engagement in the legal debates held in Geneva and New York on the rules informing the international legal order, the EU has come closer to squaring the circle on its "imperfectible"[206] pursuit of international law development.

[201] Against the ILC's engagement in more "politicized" topics *see* Chen (n 57), 483-484.
[202] A/C.6/68/SR.23 (n 106), para. 33 (regarding the EU's interest on the topic of "the provisional application of treaties").
[203] Wouters and Hermez (n 9), 15.
[204] Discussing the mixed messages resulting from the EU's interventions at the Sixth Committee and the discourse of the CJEU, *see* ibid., 12-13.
[205] A/C.6/67/SR.18 (n 102), para. 68 (regarding the "expulsion of aliens"). The EU has also demonstrated a preference for "guidelines" or "framework principles" rather than conventions. *See* A/C.6/67/SR.18 (n 102), paras. 68 and 73 (regarding the topics "expulsion of aliens" and "the protection of persons in the event of disasters", respectively); A/C.6/68/SR.23 (n 106), para. 33 (regarding "the provisional application of treaties"). The EU's position regarding the form to be given to the Commission's draft articles on the protection of persons in the event of disasters later changed from the support for framework principles to an eagerness to seems eager to transform the draft articles into a convention. *See* A/C.6/71/SR.20 (n 103), para. 44.
[206] Joris Larik (n 12), 38.