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The Court of Justice of the EU and CIL Interpretation

Close Encounters of a Third Kind?

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the intellectual prison of custom seems to be gradually transformed into a large dance floor where (almost) every step and movement is allowed

Jean d'Aspremont, 'Customary International Law as a Dance Floor: Part I' (*EJIL:Talk!* 14 April 2014)

1 Setting the Scene

It is uncontested that the European Union (EU) – endowed with distinct international legal personality (pursuant to Article 47 of the Treaty on European Union (TEU)) and being a subject of international law – is bound by relevant norms of customary international law (CIL).[1] Rules of CIL form an integral part of the EU legal order, and the Court of Justice of the EU (CJEU) must use CIL at least as an interpretive tool.[2] The status of CIL within EU law

* The views expressed in this chapter are solely those of the author and its content does not necessarily represent the views or position of the European Union Agency for Fundamental Rights.

[1] See the following rulings from the CJEU's consistent case law: Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019 [9]; Case C-162/96 *A Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655 [24], [45]–[46]; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 [291]; Case C-366/10 *Air Transport Association of America (ATAA) & ors* [2011] ECLI:EU:C:2011:864 [101], [123]; Case C-364/10 *Hungary v Slovakia* [2012] ECLI:EU:C:2012:630 [44].

[2] From well-established CJEU case law, see eg the recent *Front Polisario* rulings (Case C-104/16 P [88]–[89], Case T-279/19 [37], [91]–[92], and Joined Cases T-344/19 and T-356/19 [38], [143], [227]).

does not differ from that of international agreements which are binding on the EU,[3] as a result of which rules of universal CIL likewise prevail over conflicting secondary EU law.

As an international legal entity and an international actor, the EU can exert formative influence on the development of CIL rules, including through interpreting them. As Advocate General Szpunar pointed out, 'so far as customary international law concerns questions pertaining to matters falling within the mandate of international organisations, the practice of international organisations may also contribute to the formation or expression of rules of customary international law'.[4] He also expressed the need for CIL rules in principle – putting aside regional[5] and bilateral[6] custom – to be consistent globally and contain no notable contradictions.[7]

Still, the CJEU's interpretations of CIL norms and the interpretative methods and techniques it employs have received little attention in legal scholarship.[8] Indeed, critical analysis of the interpretation of CIL rules by international courts and tribunals has in general suffered similar neglect – not to mention the United Nations (UN) International Law Commission's awkwardness in addressing this matter in its Draft Conclusions on Identification of Customary International Law[9] – even

[3] A Rosas, 'The European Court of Justice and Public International Law' in J Wouters, A Nollkaemper, and E de Wet (eds), *The Europeanisation of International Law. The Status of International Law in the EU and Its Member States* (TMC Asser Press 2008) 71, 80; PJ Kuijper '"It Shall Contribute to … the Strict Observance and Development of International Law …": The Role of the Court of Justice' in A Rosas, E Levits, and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law/La Cour de Justice et la construction de l'Europe: Analyses et perspectives de soixante ans de jurisprudence* (TMC Asser Press/Springer 2013) 589; P Koutrakos, *EU International Relations Law* (2nd edn, Hart 2015) 228.

[4] Case C-641/18 *LG v Rina SpA, Ente Registro Italiano Navale,* Opinion of AG Szpunar (14 January 2020) ECLI:EU:C:2020:3 [123].

[5] See eg the customary practice of diplomatic asylum in Latin American countries (*Asylum (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266).

[6] Consider eg a bilateral custom between Nicaragua and Costa Rica granting subsistence fishing rights to nationals inhabiting the banks of their boundary river (*Dispute Regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (Judgment) [2009] ICJ Rep 213).

[7] Case C-641/18 *LG v Rina*, Opinion of AG Szpunar (n 4) [125].

[8] Some EU law scholars even purport that CIL is 'not to be assimilated with a source of EU law subject to interpretation from a European perspective' (E Neframi, 'Customary International Law and the European Union from the Perspective of Article 3(5) TEU' in P Eeckhout P and M Lopez-Escuerdo (eds), *The European Union's External Action in Times of Crisis* (Hart 2016) 217).

[9] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 117.

though the questions of both interpretation and customary law are classic topics in international law scholarship.[10]

The CJEU, including its Advocates General, generally finds and identifies rules of CIL in (codification) treaties to which the EU is not a party[11] and/or accepts them as customary norms on the basis of judgments of the International Court of Justice (ICJ)[12] and its predecessor, the Permanent

[10] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 129, 133; O Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235, 235–37, 239–40; P Merkouris, 'Interpreting Customary International Law: You'll Never Walk Alone' in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 347; M Fortuna, 'Different Strings of the Same Harp: Interpretation of Rules of Customary International Law, Their Identification and Treaty Interpretation' in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 393; R Di Marco, 'Customary International Law: Identification versus Interpretation' in P Merkouris, J Kammerhofer, and N Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 416.

[11] The typical example, found in a great number of CJEU rulings, is the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. See also C-364/10 *Hungary v Slovakia* (n 1) (referring to '[customary rules] of multilateral agreements'). There are also cases where a multilateral treaty with EU participation qualifies as reflecting CIL norms, such as the UN Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) 1883 UNTS 3, which is 'an expression of the current state of customary international maritime law' (General Court's judgment in Joined Cases T-344/19 and T-356/19 *Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Front Polisario) v Council of the European Union* [2021] ECLI:EU:T:2021:640 [221]).

[12] See eg the views of AG Sharpston in *Opinion 2/15 (Free Trade Agreement between the European Union and the Republic of Singapore)* [2016] ECLI:EU:C:2016:992 (citing *Interhandel (Switzerland v United States of America)* (Preliminary Objections) [1959] ICJ Rep 6, 27, to find that it is a principle of customary international law that 'before a State gives diplomatic protection to its injured nationals, those nationals must first have exhausted local remedies' [539]); Opinion of AG Sharpston in Case C-158/14 *A and ors v Minister van Buitenlandse Zaken* [2016] ECLI:EU:C:2016:734 (citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, [218]–[219] and *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [78]–[79], both used to identify customary principles of international humanitarian law); Opinion of AG Mengozzi in Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2013] ECLI:EU:C:2013:500 (referring to *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [79], to assert the existence of 'intransgressible principles of international customary law'); the General Court's judgment in Case T-208/11 *LTTE v Council* [2014] ECLI:EU:T:2014:885 (referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, to determine the existence of the customary principle of non-interference under international humanitarian law); Opinion of AG Wahl in Case C-179/13 *Raad van bestuur van de Sociale verzekeringsbank*

Court of International Justice (PCIJ),[13] using the ICJ/PCIJ rulings as a short route for establishing the existence of a CIL rule.[14] But is interpretation needed, then? Put differently, once a CIL norm has been identified, does its content become known? This is where the need for interpretation of such unwritten norms emerges. According to the CJEU, 'interpretation . . . clarifies and defines where necessary the meaning and scope of [a] rule as it must be or ought to have been understood and applied from the time of its coming into force'.[15] In interpretation generally, the CJEU has shown a preference for certain methods – namely, systemic, teleological, and dynamic interpretation – with a view to attaining the objectives of the European integration project as defined by the autonomous EU legal order. As part of EU law, CIL is, in principle, also subject to the same interpretive methods and practices.

This chapter aims to map and understand the ways in which the CJEU interprets CIL rules using its aforementioned toolbox and compares

v LF Evans [2014] ECLI:EU:C 2014:2015 (citing *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Judgment) [1980] ICJ Rep 3 [45], to conclude that some provisions of the 1963 Vienna Convention on Consular Relations on consular privileges and immunities represent customary international law), which reference to the *Tehran Hostages* case was simply echoed in the CJEU's ruling as well (even going further than the ICJ by finding [36] that, at the time of the dispute, the 1963 Vienna Convention had the status of customary international law). For further examples, see J Odermatt, 'The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law' in A Skordas (ed), *Research Handbook on the International Court of Justice* (Edward Elgar 2022) 696.

[13] eg the views of AG Sharpston in *Opinion 2/15 (Free Trade Agreement between the European Union and the Republic of Singapore)* (referring to *Mavrommatis Palestine Concessions (Greece v Britain*) (Objection to the Jurisdiction of the Court) [1924] PCIJ Series A No 2, 12, to underpin the CIL nature of certain modalities of exercising diplomatic protection by States [539] n 415); Opinion of AG Maduro in Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI:EU:C:2010:104 (citing *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCJ Series B No 4, 24, to identify the customary principle that 'questions of nationality are in principle within the reserved domain of States' [18]).

[14] R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1994) 10; also quoted by Odermatt (n 12) 9. At times, even the decisions of other international courts or tribunals and the works of the UN International Law Commission are also referenced if the CJEU finds a *consensus generalis* as to the existence of CIL rule deducible from these international legal materials (for more, see F Pascual-Vives, 'The Identification of Customary International Law before the Court of Justice of the European Union: A Flexible Consensualism' in F Lusa Bordin, ATh Müller, and F Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022) 123.

[15] Case 61/79 *Amministrazione delle finanze dello Stato v Denkavit italiana Srl* [1980] ECR 1205 [16].

them to those that exist for the interpretation of treaties under the Vienna Convention on the Law of Treaties (VCLT). First, however, the CJEU's engagement with CIL in general (Section 2) and its general methods interpreting EU law (Section 3.1) will be briefly considered. Then, through a thorough review of relevant case law in Section 3.2, the core of this study, the chapter will seek to reveal what reasons lie behind the CJEU's particular approach, its interpretative choices, and its deviations from mainstream techniques, if any. The enquiry is guided by the following questions: does the CJEU's engagement with CIL interpretation display features that are unique to it? If so, what are they and to what extent is this the case? What factors influence the CJEU's preference for using diverse methods of interpretation of CIL? Is such uniqueness or lack of coherence likely to further fragment international law? And does it strengthen or weaken the authority of the EU Court as an influential judicial actor in this regard. Lastly, Section 4 will critically assess the specificities and challenges of CIL interpretation by the CJEU against the backdrop of the EU as a quasi self-contained regime and the *sui generis* nature of its legal order, its specific integration objectives, and the particularity of the judicial function the CJEU performs.

2 Assessing the Landscape: The CJEU's Engagement with CIL in General

At first sight, among the various sources of public international law codified in Article 38 of the ICJ Statute,[16] and even beyond that,[17] CIL seems to have limited importance from the perspective of EU law, particularly compared to written sources of international law, notably

[16] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

[17] These include legally binding decisions of international organisations and unilateral acts of states (possibly also unilateral acts emanating from other subjects of international law, such as international organisations). These sources have been mostly identified by the ICJ; see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16; *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253, 267–68 [42]–[46]. Consider also ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 161. For a recent scholarly analysis of these 'extra-ICJ Statute' sources, see eg A Pellet, 'Article 38' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2012) [87]–[110] (under Article 38); H Thirlway, *The Sources of International Law* (Oxford University Press 2014) 19–25.

treaties and decisions of international organisations. Yet, it is not ill-founded to argue that CIL rules play a more important role in the EU legal order than in the domestic legal systems of EU member states. The reason for this is that, unlike most states, the EU as a distinct international legal person could not or did not accede to a great number of international conventions that codify certain areas of (customary) international law.[18] As a consequence of therefore not being bound by codified treaty rules, the EU remains bound by parallel existing CIL norms,[19] which have to be applied by the CJEU when confronted with issues of international law in individual cases. Illustrative in this regard is the 1969 VCLT[20]: the CJEU regularly invokes its provisions and relies on its rules as written manifestations of identical CIL rules existing beyond the text itself.[21]

CIL is one of the classic sources of international law, and some of the key rules of the international legal order continue to exist in this unwritten, non-codified form.[22] There are too many to name here; suffice it to say that they can be found in ample numbers in the fields of diplomatic

[18] J Malenovskỳ, 'Le juge et la coutume internationale: Perspectives de l'Union européenne et de la Cour de justice' (2013) 12 LPICT 225.

[19] ibid.

[20] As for its counterpart, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15, leaving aside the fact that it has not entered into force yet, the EU has decided not to become a party to it.

[21] See eg Case C-162/96 *Racke v Hauptzollamt Mainz* (n 1) [53] (as regards the customary rule of terminating/suspending a treaty by reason of a fundamental change of circumstances (*clausula rebus sic stantibus*), codified in art 62(1) VCLT); Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91 [44]–[45] (as concerns the relative effect of treaties (*pacta tertiis nec nocent nec prosunt*), expressed in art 34 VCLT); Case C-613/12 *Helm Düngemittel GmbH v Hauptzollamt Krefeld* [2014] ECLI:EU:C:2014:52 [37] (stating generally that 'rules contained in [the VCLT] apply to an agreement concluded between a State and an international organisation . . . in so far as those rules are an expression of general international customary law.'); Case C–104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973 [86]–[87], [94], [97] (referring to the customary rule governing the territorial scope of treaties as codified in art 29 VCLT and the customary rules of treaty interpretation enshrined in art 31 VCLT).

[22] For an account of selected leading scholarly writings on CIL, see eg Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) (n 10) n 16 and the legal literature cited therein. See also PG Staubach, *The Rule of Unwritten International Law* (Routledge 2018); BD Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010); BD Lepard (ed), *Reexamining Customary international Law* (Cambridge University Press 2017).

law, state responsibility, treaty law, international refugee law, international human rights law and international criminal law, for example.

CIL rules that have been recognised as part of the EU legal order in CJEU jurisprudence include the right of individuals to enter their own country;[23] the right to innocent passage and freedom of navigation under the law of the sea;[24] certain principles of the law of treaties (e.g. rules of treaty interpretation, the relative effect of treaties, their territorial scope);[25] the jurisdictional immunity of states;[26] the status and immunities of heads of state;[27] the right of self-determination and peoples' permanent sovereignty over their natural resources;[28] states' total and exclusive jurisdiction over their airspace; and the freedom to fly over the high seas[29] – and the list continues.[30]

The CJEU employs CIL first and foremost as an interpretative tool when dealing with the acts of EU institutions – for instance, when elucidating the meaning and content of such acts in preliminary ruling proceedings[31] in the light of international law binding upon the Union. Also, CIL has often been used by the CJEU to delimit the material scope and the boundaries of EU law, including the EU treaties.[32] This dynamic process of jointly – and, preferably, harmoniously – applying legal norms of different types and origins necessarily includes the interpretation of CIL rules, too. In theory, CIL can also serve as a ground on which to assess the legality of secondary EU law whose validity has been challenged. However, when private parties seek to invoke customary norms before the CJEU as a standard for reviewing of the legality of a given piece of EU legislation, it must be checked whether the CIL norm at hand is

[23] Case 42/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337.
[24] Case C-286/90 *Anklagemyndigheden v Poulsen and Diva Navigation* (n 1).
[25] Case C-386/08 *v Hauptzollamt Hamburg-Hafen* (n 21) [40]–[43] and the case law cited.
[26] Case C-641/18 *LG v Rina SpA and Ente Registro Italiano Navale* [2020] ECLI:EU:C:2020:349.
[27] Case C-364/10 *Hungary v Slovakia* (n 1).
[28] Case C-104/16 P *Council v Front Polisario* (n 21); Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118.
[29] C-366/10 *ATAA* (n 1).
[30] For a fairly comprehensive list, see eg D Kornobis-Romanowska, 'Effects of International Customary Law in the Legal Order of the European Union' (2018) 8 WRLAE 405, 415–17; see also Malenovskỳ (n 18).
[31] As provided in the Treaty on the Functioning of the European Union [2016] OJ C 202/47, art 267.
[32] JF Delile, 'Les effets de la coutume internationale dans l'ordre juridique de l'Union européenne' (2017) 53 CDE 177–86, 190.

generally accepted; is capable of calling into question the competence of the EU to adopt secondary legislation; and can affect the rights that individuals derive from EU law or creates obligations under EU law in their regard.[33] Given that, in the words of the CJEU, 'a principle of customary international law does not have the same degree of precision as a provision of an international agreement',[34] CIL can thus generally be invoked as a ground to invalidate conflicting EU secondary legislation only in limited circumstances.[35] Given the less precise contours of customary norms, the CJEU has held that the judicial review of a piece of EU secondary legislation in the light of CIL must be limited to the question of whether, in adopting the legal act, the EU institutions made manifest errors of assessment concerning the conditions for applying such a CIL norm.[36]

3 The CJEU and the Interpretation of CIL: A Peculiar Path

Let us start with a baffling, but basic, preliminary question: why is interpretation – understood as attaching meaning to or elucidating meaning – needed in law? It has become a truism that legal notions have an 'open texture' (to use Hart's words[37]), manifesting themselves in some grey zone beyond the 'core of settled meaning' of a given norm.[38] Interpretation, which is inherent in any adjudicative exercise applying the law and implicit in the life-cycle of every rule,[39] is thus necessary to unpack, specify, and clarify the exact meaning of a particular legal norm and determine its content, irrespective of its source.[40] Not only are CIL

[33] C-366/10 *ATAA* (n 1) [107].
[34] Case C-162/96 *Racke v Hauptzollamt Mainz* (n 1) [52]; C-366/10 *ATAA* (n 1) [110].
[35] See Koutrakos (n 3) 311ff; A von Bogdandy and M Smrkolj, 'European Union Law and International Law' (2011) MPEPIL <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e620> [24].
[36] Case C-162/96 *Racke v Hauptzollamt Mainz* (n 1) [52]; C-366/10 *ATAA* (n 1) [110]. For a criticism of this test, see eg NAJ Croquet, 'The Import of International Customary International Law into the EU Legal Order: The Adequacy of a Direct Effect Analysis' (2013) 15 CYELS 47–81.
[37] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994).
[38] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 607; also cited by Merkouris, 'Interpreting the Customary Rules on Interpretation' (n 10) 134.
[39] Merkouris, 'Interpreting Customary International Law' (n 10) 347, 367.
[40] See also P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill/Nijhoff 2015) 240–45; N Mileva and M Fortuna, 'Emerging Voices: The Case for CIL Interpretation – An Argument from Theory and an Argument from Practice' (*Opinio Juris*, 23 August 2019) <http://opiniojuris.org/2019/08/23/emerging-voices-the-case-for-cil-interpretation-an-argument-from-theory-and-an-

rules no exception; they are par excellence a case in point due to their unwritten character, and all the more so it there is no case law or precedent relating to the situation in which the CIL rule is to be applied.[41] This section will first outline the peculiarities of the interpretative practices and methods the CJEU employs (Section 3.1), and then identify and analyse the patterns revealed in relevant case law where the CJEU has engaged with CIL and its interpretation (Section 3.2).

3.1 The CJEU and Interpretation of EU Law: The Basics, in Brief

Unlike traditional international courts, whose authority to interpret international law is on an equal footing with that of national courts and which in principle do not have compulsory jurisdiction nor operate as part of a co-ordinated scheme, the CJEU is entrusted with the authentic interpretation of EU law and there is clear division of labour between it and the member states' national courts.[42] Also, the CJEU exercises exclusive and compulsory jurisdiction over matters falling under the EU treaties, having in this respect a role resembling to that of states' constitutional or supreme courts.

As a result, the CJEU has rapidly affirmed its interpretative practices and methods, which are somewhat different from those in international law. It applies methods that are similar to the interpretive techniques of a domestic constitutional court,[43] albeit with variations on a number of points. As early as the *Van Gend en Loos* case, the CJEU identified three

argument-from-practice/> accessed 25 June 2022; O Ammann, 'On the Interpretability of Customary International Law: A Response to Nina Mileva and Marina Fortuna' (*Opinio Juris*, 7 October 2019) <http://opiniojuris.org/2019/10/07/on-the-interpretability-of-customary-international-law-a-response-to-nina-mileva-and-marina-fortuna/> accessed 25 June 2022; Di Marco (n 10) 415. In a similar vein, the International Law Association established a study group on the content and evolution of rules of interpretation, whose final report also touched on the interpretation of CIL, albeit only in passing (see ILA, 'Study Groups: Content and Evolution of the Rules of Interpretation' (2022) <www.ila-hq.org/index.php/study-groups?study-groupsID=75> accessed 25 June 2022).

[41] See also Di Marco (n 10) 419.

[42] S Besson and ML Gächter-Alge, 'L'interprétation en droit européen: Quelques remarques introductives' in S Besson, N Levrat, and E Clerc (eds), *Interprétation en droit européen/Interpretation in European Law* (Schulthess 2011) 13–14.

[43] See eg O Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms. To Be or Not to Be a "Domestic" Court?' in S Besson and N Levrat (eds), *L'Union européenne et le droit international/The European Union and International Law* (Schulthess 2015) 153–78; J Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3 CJICL 696, 696–718.

key interpretative methods it employs – namely, giving consideration to 'the spirit, the general scheme and the wording of [the] provisions [of EU law]'[44] – which can be readily equated with, respectively, teleological, systemic, and grammatical interpretation of the law (generally applied in that order of priority in CJEU practice).

3.2 *The CJEU Interpreting CIL: Exploring and Understanding the Patterns*

The intellectual process consisting in interpreting the law must be distinguished from the identification of a CIL rule (i.e. determining the existence of such a norm). In accordance with Merkouris's fundamental distinction, interpretation is a deductive process after a given CIL rule has come into existence, whereas identifying a CIL rule is more of an inductive exercise.[45] Once a CIL norm has come into being (i.e. has implicitly been endorsed by the international community through state practice and *opinio juris*), its subsequent application in particular cases in the course of its lifespan will be subject to the deductive process of interpretation. What is mistakenly called 'interpretation' of state practice (or of both constitutive elements of a CIL norm) – an exercise that would be better termed the 'qualification', 'assessment', or 'evaluation' of the formative elements of CIL – should not be conflated with, and thus needs to be distinguished from, interpretation strictly speaking subsequent to the rule's emergence.[46] 'In this manner, interpretation focuses on how the rule is to be understood and applied *after the rule has come into existence*.'[47] However, some grey zones and overlaps persist. Let us take the example of exceptions under a given CIL rule. It might be debated whether delimiting the scope of particular exceptions is a purely deductive exercise, as such qualifying as *interpretation*; or whether recourse to the two-element test (assessment of state practice and *opinio juris*) is

[44] Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 3, 22.

[45] See Merkouris, 'Interpreting the Customary Rules on Interpretation' (n 10) 134–37. For a different, more permissive approach, employing the term 'interpretation' also for the phase of identifying and assessing the existence of state practice and its generally accepted nature, see Chasapis Tassinis (n 10).

[46] P Merkouris, *Interpretation of Customary International Law: Of Methods and Limits* (Brill Research Perspectives in International Legal Theory and Practice, Martinus Nijhoff/Brill 2022) 16–18.

[47] Merkouris, 'Interpreting the Customary Rules on Interpretation' (n 10) 136 (emphasis in original).

again necessary to determine whether such an exception exists as a self-standing rule, an exercise qualifying as *identification* of a CIL norm that is incidentally an exception to the main customary rule.[48] Another grey area is the dynamic relationship between a rule and its exceptions, which 'may well change and evolve over time or even on a case-by-case basis'.[49]

When the CJEU interprets CIL norms forming an integral part of the EU legal order, its interpretation – given that its rulings are binding *erga omnes* – also binds the member states, and consequently influences their practice and *opinio juris*. In other words, CJEU judgments engaging with CIL rules have a 'multiplying'[50] or 'snowball'[51] effect. Below we discuss four examples of CIL norms dealt with by the CJEU that well illustrate its approach to the interpretation of customary international law.

3.2.1 State Immunity from Jurisdiction

Let us first consider the scope and content of the CIL norm affirming the immunity of states from jurisdiction, which protects them from being sued in the courts of another sovereign state.[52] The ICJ has also engaged with the interpretation of this CIL norm, which demonstrates its importance in the international legal order.[53] The two leading CJEU judgments in this field – *Mahamdia* (C-154/11) and *Rina* (C-641/18) – are worth analysing together, given that the latter builds on and refers to the former. Both cases concerned the interpretation of the CIL rule of state immunity from jurisdiction as part of the EU legal order. In *Mahamdia*, the core legal issue was whether, in view of the jurisdictional immunity of states, it was possible for the dismissal of a worker who had been employed as a driver by a non-EU member state (Algeria) at its embassy in a member state (Germany) to be challenged in the courts of that member state. In *Rina*, the key issue was the application of

[48] For more on exceptions under international law (including within the field of customary law), see L Bartels and F Paddeu (eds), *Exceptions in International Law* (Cambridge University Press 2020).

[49] E Methymaki and A Tzanakopoulos, 'Freedom with Their Exception: Jurisdiction and Immunity as Rule and Exception' in L Bartels and F Paddeu (eds), *Exceptions in International Law* (Cambridge University Press 2020) 240.

[50] Malenovskỳ (n 18) 218 n 79.

[51] Ammann (n 43) 170.

[52] Issues pertaining to immunity from execution are not discussed here.

[53] *Jurisdictional Immunities of the State (Germany/Italy; Greece intervening)* [2012] ICJ Rep 99 [55]. In its judgment no 238 of 2014 the Italian Constitutional Court took the view that the ICJ was wrong to interpret state immunity from civil jurisdiction as a customary norm.

the CIL rule of state immunity to private bodies to which a sovereign state (here Panama) has delegated the discharge of duties under international law (certification and classification of ships).

The outcome of the two cases was similar, confirming the relative nature of state immunity (as opposed to the classic understanding of it as absolute), but they touched on different aspects of this complex legal relationship. *Mahamdia* was limited to defining a state's immunity (that of Algeria) in a labour-related dispute: the CJEU found that employment-related court action concerning a member of an embassy's non-diplomatic staff brought in the country where the embassy was located did not fall within the scope of immunity from jurisdiction enjoyed by the embassy's home state before the courts of another country, for the chauffeur's dismissal by the embassy was an act performed *jure gestionis*.[54] The *Rina* ruling approached the question of immunity from another angle when stating that private actors do not enjoy automatic immunity from jurisdiction simply because states have delegated the performance of international obligations to them[55] – an interpretation that also avoids the risk of immunity destroying any legal action whatsoever.[56] In other words, the certification and classification of ships by private law bodies acting on behalf of third states (here Panama) do not qualify as acts performed *jure imperii*. In both of these cases the CJEU limited the *ratione materiae* scope of the CIL rule on immunity from jurisdiction by allowing for certain exceptions, such as disputes over contracts of employment and the activities of classification/certification of ships by private entities.

The CJEU's examination of the material scope of the customary norm of state immunity from jurisdiction was marked by a peculiar division of labour between the Advocates General and the bench of the court. After recognizing a lack of clarity and uncertainties around the customary rule of state immunity, the Advocates General carried out the substantive and in-depth, analysis of the meaning and (possible) material scope of state immunity and its exceptions. The outcome of this legal analysis (i.e. the contextual interpretation of the CIL norm) was in essence taken up by the CJEU in its rulings themselves, which simply refer to the key findings in

[54] On the current position regarding state immunity in employment-related cases under international law, see P Rossi, *International Law Immunities and Employment Claims* (Hart 2021).

[55] Case C-641/18 *LG v Rina* (n 26) [39].

[56] Case 154/11 *Ahmed Mahamdia v People's Democratic Republic of Algeria,* Opinion of AG Mengozzi (24 May 2012) ECLI:EU:C:2012:309 [22].

the opinions of the Advocates General, thereby merely asserting the CIL rule or the meaning the Advocates General accorded to it,[57] rather than citing or referring to any international legal materials supporting this conclusion.

In both cases, the interpretative engagement consisted in the difficult task of distinguishing between state acts performed *jure imperii* and those performed *jure gestionis*. The most intricate question lays in drawing a dividing line between these two types of acts and how to classify certain acts, including when a state acts as an employer and when a state's action is 'to some degree privatised'.[58] The interpretation of the customary principle of state immunity – and the aforementioned division of labour between the Advocates General and the CJEU in this exercise – is well illustrated by Advocate General Mengozzi's compelling comment in *Mahamdia* on the contemporary challenges faced in deciding whether certain acts of states are shielded from legal proceedings before foreign courts:

> The modern State has become a polymorphous actor in law and may act and enter into legal relations without, however, exercising its sovereignty or its public authority in doing so: I am thinking in particular of the State as a trader, but also, of course, the State as an employer. Because these different facets of the State's legal activity are not systematically accompanied by the exercise of powers as a public authority, they tend no longer to justify the automatic recognition of immunity from jurisdiction.[59]

The CJEU subsequently endorsed this interpretation in its judgment by summarily recalling the Advocate General's above observation about the exercise of public powers and its implications.[60]

Against this backdrop, the most intriguing question for present purposes is, what methods did the Advocates General and then the CJEU use to arrive at the conclusions reached? After recalling that state immunity is a corollary of the international law principle *par in parem non habet imperium* (a state cannot be subjected to the jurisdiction of another state),[61] the interpretative exercise focussed on delimiting the boundaries of possible exceptions to the main rule (state immunity), entailing that acts performed *jure gestionis* fall outside the exercise of public powers and

[57] For examples of this technique, see Case 154/11 *Ahmed Mahamdia v People's Democratic Republic of Algeria* [2012] ECLI:EU:C:2012:491 [55]; Case C-641/18 *LG v Rina* (n 26) [57].
[58] Case 154/11 *Mahamdia v Algeria*, Opinion of AG Mengozzi (n 56) [32].
[59] ibid [21].
[60] Case 154/11 *Mahamdia v Algeria* (n 57) [55].
[61] ibid [54]; Case C-641/18 *LG v Rina* (n 26) [56].

do not enjoy immunity. In essence, this exercise involved adducing evidence, of both state practice and *opinio juris*, that would substantiate the existence of such exceptions. In other words, the interpretation of the CIL norm (states enjoy immunity from jurisdiction) consisted not in applying systemic or teleological interpretative methods but rather in proving that certain exceptions exist as special, self-standing 'mini-rules' that still formed part of, and were derived from, the larger CIL principle. This approach can qualify as a sort of logical interpretation, carving out an exception and determining its content and limits within the boundaries of the 'mother' CIL norm, while also refining and chiselling it (states enjoy immunity from jurisdiction save for their *acta gestioni*). In this endeavour to delimit the scope of state immunity (or, conversely, that of permissible exceptions to it), the Advocate General opted for the concept of relative immunity and applied the two-elements method to prove its general acceptance as a custom:

> a rule of customary international law will only exist where a given practice actually exists that is supported by a firm legal view (*opinio juris*), that is to say, where a rule is accepted as law. It is in the light of that principle that it is necessary to determine whether, in accordance with the doctrine of relative immunity, the content of the principle of State jurisdictional immunity is such that the defendants may claim immunity.[62]

With a view to underpinning the concept of 'relative immunity' based on the fundamental distinction between acts performed *jure imperii* and those performed *jure gestionis*, the Advocate General turned to national legislation, domestic (German) case law, the jurisprudence of the ECtHR,[63] some (not widely ratified) conventions (heavily relying on their terms and regulatory logic)[64] and academic publications for evidence.[65] This technique of referring to a range of written instruments and case law which codify/recognize the above variant of the customary norm can be regarded as systemic interpretation.[66] Persuaded that the origins of state immunity lay in the sovereign equality of states, the CJEU

[62] Case C-641/18 *LG v Rina*, Opinion of AG Szpunar (n 4) [108].
[63] *Cudak v Lithuania* App no 15869/02 (ECtHR, 23 March 2010); *Sabel El Leil v France* App no 34869/05 (ECtHR, 29 June 2011).
[64] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181; United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN Doc A/59/508.
[65] See Case C-641/18 *LG v Rina*, Opinion of AG Szpunar, nn 15, 21–23, 27, 31–32.
[66] Merkouris, 'Interpreting Customary International Law' (n 10) 299.

took the above-described assessment for granted and relied on this qualification in both judgments, opting for the relative nature of state immunity with the simple assertion that the doctrine of relative immunity replaced that of absolute immunity in our times.[67] Nonetheless, the CJEU added in *Rina*, as an extra argument corroborating this position, that a recital in a piece of EU secondary law[68] 'bears out the legislature's intention to give a limited scope to its interpretation of the customary international law principle of immunity from jurisdiction with regard to classification and certification of ships'.[69] This statement can also be considered as the expression of the emergence of a regional (European) CIL rule[70] on the matter – given that the EU exercises some of the public powers of its member states and the practice (here, law-making) of the organization may be equated with the practice of the member states.[71] In other words, the EU has functionally replaced the member states in a number of areas, including the one governed by the EU directive containing the recital quoted above, and were EU practice not taken into consideration in its own right as contributing to (regional) CIL norms, then 'Member States themselves would be deprived of or reduced in their ability to contribute to State practice.'[72]

3.2.2 Right of Self-Determination and States' Permanent Sovereignty over Their Natural Resources

The series of cases concerning the legality of extending the application of EU–Morocco trade and fisheries agreements to the territory of Western Sahara – *Front Polisario I*,[73] *Western Sahara Campaign UK*,[74] and *Front*

[67] As recalled in Case C-641/18 *LG v Rina*, Opinion of AG Szpunar [35].

[68] Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations [2009] OJ L 131/47, recital 16.

[69] Case C-641/18 *LG v Rina* (n 26) [59].

[70] The ILC refers to 'particular customary international law' which applies only among a limited number of states, such as regional customary rules (ILC, 'Draft Conclusions' (n 9) Conclusion 16(1)). With respect to regional custom, the application of the two-element test is stricter. For case law references, see ibid, commentary to Conclusion 16.

[71] See similarly ILC, 'Draft Conclusions' (n 9) 117. On the EU's role and potential in general to contribute to the formation of CIL rules, see eg J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 44–58; J Vanhamme, 'Formation and Enforcement of Customary International Law: The European Union's Contribution' (2008) 39 NYIL 127–54.

[72] ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/682 [77].

[73] Case C-104/16 P *Council v Front Polisario* (n 21).

[74] Case C-266/16 *Western Sahara Campaign UK* (n 28).

Polisario II[75] – serves as another springboard for scrutinising the CJEU's engagement with the interpretation of CIL norms, notably the right of self-determination (of the people of Western Sahara in these particular cases) and states' permanent sovereignty over their natural resources as a corollary thereto.

Chronologically, it was in *Front Polisario I* that an Advocate General first engaged in an interpretation of the CIL principle[76] of states' permanent sovereignty over their natural resources and, to some extent, a people's right of self-determination. In his succinct analysis, the Advocate General did not make it clear whether the former is derived from the latter (which is the position generally accepted among international lawyers[77]); despite his silence on this matter, he nonetheless discussed permanent sovereignty over natural resources, which he considered as being somewhat anchored to the right of self-determination. When interpreting the meaning of the CIL principle of permanent sovereignty over natural resources and exposing its content and implications, the Advocate General relied[78] on the language and formulations of a series of UN General Assembly resolutions,[79]

[75] Case T-279/19 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union* [2021] ECLI:EU:T:2021:639; Joined Cases T-344/19 and T-356/19 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union* [2021] ECLI:EU:T:2021:640.

[76] To lift any ambiguity and avoid confusion, the term 'CIL principle' refers to customary norms being foundational in the edifice of the international legal order (as is the case with the norm under discussion here) and has nothing to do with the 'general principles of law' as per art 38(1)(c) of the ICJ Statute, another source of international law. In a similar vein, the CJEU also used the term 'the principle of permanent sovereignty over natural resources' in this case and, more generally, 'principles of customary international law' in a number of other cases (observed also by Delile (n 32) 162).

[77] See eg N J Schrijver, 'Fifty Years Permanent Sovereignty over Natural Resources: The 1962 UN Declaration as the *Opinio Iuris Communis*' in M Bungenberg and H Stephan (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 15–28; R Pereira, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 Melb JIL 8; M Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 HRLR 628; C Drew, 'The East Timor Story: International Law on Trial' (2001) 12 EJIL 663.

[78] Case C-104/16 P *Council v Front Polisario*, Opinion of AG Wathelet (13 September 2016) ECLI:EU:C:2016:677 [292].

[79] UNGA Res 1803, 'Permanent Sovereignty over Natural Resources' (14 December 1962) UN Doc A/RES/1803/(XVII); UNGA Res 3201, 'Declaration on the Establishment of a New International Economic Order' (1 May 1974) UN Doc A/Res/3201(S.VI); UNGA Res 3281, 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc

following the – criticised[80]– method applied by the ICJ in the *Democratic Republic of the Congo v Uganda* case.[81] Remarkably, however, and without explanation, he saw no *erga omnes* obligations implied in this CIL norm – unlike the two dissenting ICJ judges in the *East Timor* case,[82] the African Union[83] and several commentators,[84] all of whom have embraced the view that permanent sovereignty over natural resources is an essential principle of contemporary international law with *erga omnes* effect. As a consequence of this particular line of reasoning, the Advocate General concluded that permanent sovereignty over natural resources 'cannot establish the liability of the [EU] as the obligation not to recognise as legal a situation resulting from a serious infringement of an *erga omnes* obligation and not to render aid or assistance in maintaining that situation does not apply'[85] and, more broadly, the EU and its institutions cannot even infringe this obligation since they are not bound by it. Without going into a detailed critique of this statement, suffice it to say that this reasoning is hardly reconcilable with the CIL nature of this principle, which as such is an integral part of the EU legal order.

A/Res/3281/(XXIX); 'Activities of Foreign Economic and Other Interests Which Impede the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under Colonial Domination', UNGA Res 46/64 (10 December 1992) UN Doc A/RES/48/46, UNGA Res 49/40 (9 December 1994) A/RES/49/40; UNGA Res 50/33, (6 December 1995) UN Doc A/RES/50/33.

[80] See eg AM Weisburd, 'The International Court of Justice and the Concept of State Practice' (2009) 31 UPJIL 330.

[81] *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)* (Merits) [2005] ICJ Rep 168 [244].

[82] *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, Dissenting Opinion of Judge Weeramantry 142, 197–99, 204 and Dissenting Opinion of Judge Skubiszewski 264, 270, 276.

[83] Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission, 'Legal Opinion on the Legality in the Context of International Law, Including the Relevant United Nations Resolutions and OAU/AU Decisions, of Actions Allegedly Taken by the Moroccan Authorities or Any Other State, Group of States, Foreign Companies or Any Other Entity in the Exploration and/or Exploitation of Renewable and Non-Renewable Natural Resources or Any Other Economic Activity in Western Sahara' (14 October 2015) [56].

[84] FX Perrez, 'The Relationship between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage' (1996) 26 Evntl L 1187, 1192 (quoted by Pereira (n 77) n 61); P Gümplová, 'Restraining Permanent Sovereignty over Natural Resources' (2014) 53 EQdF 96; E Milano, 'The 2013 Fisheries Protocol between the EU and Morocco: Fishing 'too South' Continues . . . ' in M Balboni and G Laschi (eds), *The European Union Approach towards Western Sahara* (Peter Lang 2017) 151, 158–59.

[85] Case C-104/16 P *Council v Front Polisario*, Opinion of AG Wathelet (n 78) [294].

There is in turn no mention of permanent sovereignty over natural resources in the CJEU's judgment, which instead focussed on the right of self-determination, without contemplating the possibility that its force field might extend to the CIL principle of permanent sovereignty over natural resources. Actually, the CJEU refrained from genuinely interpreting the right of self-determination. It essentially restated the basics concerning this right's addressees and beneficiaries (non-self-governing territories and peoples who have not yet achieved independence) and legal nature (a legally enforceable *erga omnes* right),[86] relying on the authority of an advisory opinion and a judgment handed down by the ICJ,[87] along with the 1970 UN General Assembly Resolution on Principles of International Law Concerning Friendly Relations and Co-operation among States.[88] The rest of its engagement with the principle is limited to the application of the norm in the specific context of Western Sahara as a non-self-governing territory, and is irrelevant to the subject under discussion here.

In *Western Sahara Campaign UK* – which was the second episode in this saga – the Advocate General started his analysis with the right of self-determination, which, following the textbook approach,[89] he characterised as a human right. This legal qualification better served the purposes of the EU legal order, as the concept of self-determination was thus squeezed into the category of fundamental rights as 'general principles of EU law'.[90] Through this move, the Advocate General could comfortably resort to the classic, judge-made interpretation techniques employed in unpacking the meaning and content of certain fundamental rights as general principles of EU law – namely, drawing inspiration from the guidelines supplied by international instruments for the protection of human rights 'on which the Member States have collaborated or to which

[86] Case C-104/16 P *Council v Front Poliario* (n 21) [88].

[87] ibid [91], referring to ICJ, *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 [54], [56] and *East Timor* (*Portugal v Australia*) (Judgment) [1995] ICJ Rep 90 [29].

[88] Case C-104/16 P *Council v Front Polisario* (n 21) [90], referring UNGA Resolution 2625, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625(XXV). For more on this declaration, see eg JE Viñuales, *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020).

[89] For an opposing view, see eg Drew (n 77) 663 ('Despite its textbook characterization as part of human rights law, the law of self-determination has always been bound up with the notions of sovereignty and title to territory that what we traditionally consider to be 'human rights').

[90] Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet (10 January 2018) ECLI:EU:C:2018:1 [99]ff.

they are signatories'.[91] For this exercise, he relied on the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the 1975 Helsinki Final Act, and 'several international authorities and instruments and . . . academic literature', as well as the jurisprudence of the ICJ.[92]

The Advocate General then went on to examine the right of self-determination as a (customary) principle of general international law with *erga omnes* effect. What is most interesting here is the way the Advocate General analysed whether this customary rule reflected a 'clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.[93] Under EU law, these represent the criteria according to which a customary norm will have direct effect and hence can serve as a benchmark of legality for secondary EU legislation. To underpin this characterisation, the Advocate General first relied on the CJEU's ruling in *Front Polisario I* and the ICJ's advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[94] followed by a number of international instruments affirming the right of self-determination where 'the content of that right is stated in detail'.[95] As a result of this interpretative analysis, he concluded that, from the viewpoint of its content, the customary law principle of self-determination is unconditional and sufficiently precise. It is thus sufficiently sharp-toothed to operate as a standard of conformity for assessing the validity of an allegedly contradictory piece of secondary EU law. Put differently, the outcome of this interpretative exercise boosted this principle's normativity and raised its judicial enforceability to a higher level.

Turning to the CIL principle of states' permanent sovereignty over their natural resources, the Advocate General rectified his position taken in *Front Polisario I* and held that this customary principle is binding on the EU – which can be seen as an implicit recognition of its *erga omnes* effect, contrary to *Front Polisario I*. In the subsequent analysis, the

[91] First stated in Case 4/73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491. Subsequent examples include Case 44/79 *Hauer v Land Rheinland Pfalz* [1979] ECR 3727; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 [35]; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (n 1) [283].

[92] Case C-266/16 *Western Sahara Campaign UK*, Opinion of AG Wathelet (n 90) [102].

[93] ibid [110] (formula taken from C-366/10 *ATAA* (n 1) [55]).

[94] ibid [110]–[112].

[95] ibid [115]–[122].

Advocate General found interpretative guidance in a new 'source of (soft) law' – a letter of 29 January 2002 from the UN Under-Secretary-General for Legal Affairs to the president of the UN Security Council, seeking to demonstrate that 'the exact legal scope and implications [of the principle of permanent sovereignty over natural resources] are still debatable',[96] including how to determine what constitutes exploitation of natural resources for the benefit of the people of a non-self-governing territory. The Advocate General went on to conclude that despite the uncertainties concerning the exact contours of this obligation inherent in this customary concept,[97] the principle of permanent sovereignty over natural resources is equally a sufficiently clear and precise norm, capable of forming the basis for a judicial review of acts of EU institutions,[98] including decisions concluding international agreements on behalf of the EU. These interpretative developments since the *Front Polisario I* case are noteworthy – although, here again, the Advocate General failed to discuss the ties between the right of self-determination and the principle of permanent sovereignty over natural resources, shedding no light on whether he considered the latter as logically flowing from the former.

Strange as it might seem, the CJEU did not engage with the right of self-determination or its corollary principle of states' permanent sovereignty over their natural resources in this case either. There is just a passing mention of self-determination as a rule of general international law, without any interpretive engagement with this CIL norm[99] – a mere assertion its customary nature based on ICJ case law and select UN General Assembly resolutions. The CJEU's tight-lipped approach to these two applicable CIL rules, which by contrast are discussed at length by the Advocate General, is even more restrained than in *Front Polisario I*. Its highly reserved stance might be explained by the fact that the EU Court had already set out the basic characteristics of the right of self-determination in its earlier ruling relating to the non-self-governing territory of Western Sahara and did not feel compelled to repeat those,

[96] UNSC, 'Letter Dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Addressed to the President of the Security Council' (12 February 2002) UN Doc S/2002/161 [14].

[97] For more on these uncertainties and grey zones, see eg E Milano, 'Front Polisario and the Exploitation of Natural Resources by the Administrative Power' (2017) 2 EP 953, 960–66.

[98] Case C-266/16 *Western Sahara Campaign UK,* Opinion of AG Wathelet (n 90) [133]–[134].

[99] Case C-266/16 *Western Sahara Campaign UK* (n 28) [63].

and could simply refer to its findings in *Front Polisario I* by employing cross-references to this judgment *tout court*.

Most recently, the General Court reiterated the CJEU's statements on the customary character of the right of self-determination in *Front Polisario II*, referring to the same international legal authorities, including the ICJ and select UN General Assembly resolutions, as had been earlier relied upon by the Court of Justice.[100] However, no further interpretation followed: the General Court simply concluded that the people of Western Sahara enjoyed the right of self-determination[101] and then went on to focus on the more specific, technical (EU law) questions of the case without needing to delve further into the CIL character of the norm at hand.

The three cases outlined above show that neither the Advocate General nor the Court of Justice or the General Court have gone much beyond the mere identification of applicable rules of customary international law. There was very little interpretative engagement with the customary norms at issue; the discussion was instead rather technical, referring to international instruments of a general character (as CIL has been codified in quasi-universal conventions or enshrined in UN General Assembly resolutions) or to selected passages from leading ICJ judgments (or those of its predecessor). Consequently, the EU Court did not really engage in the exercise of complex interpretation of a CIL norm, but simply relied on other authoritative international legal materials, which it accepted as sufficiently illuminating on the meaning and (some aspects of) the content of a given CIL norm such as the right of self-determination and its derivative principle of permanent sovereignty over natural resources. With respect to the legal nature and possible legal effects of both CIL norms, greater novelty can be found in the opinions of the Advocates General, who recognised that, given their unconditional and sufficiently precise character, the norms could be invoked by private parties in court proceedings (direct effect).

It is noteworthy that the way the CJEU's apprehends the relationship between the right of self-determination and the permanent sovereignty over natural resources is somewhat similar to the ICJ's approach in deriving a norm from another CIL rule. The CJEU did not take a clear position on the relation between the latter CIL norm and the former, asserting its customary nature by simply invoking some supporting

[100] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council* (n 75) [143].
[101] ibid [144].

international legal materials. There have been cases in which, similarly, the ICJ 'merely derived one legal standard from another without the exposition of specific state practice and *opinio juris*'.[102] Examples include *Questions Relating to the Seizure of Certain Documents*, where a state's right to communicate with its counsel and lawyers in a confidential matter was considered to stem from the principle of sovereign equality of states;[103] and the *Corfu Channel* case, where the specific obligation to give notification of the existence of a minefield in the Albanian territorial waters was held to derive from certain general and well-recognised principles, including every state's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states.[104] In these cases, the ICJ did not make it clear whether the derived, more specific obligations of a CIL nature were self-standing rules in their own right; hence, it did not carry out a full-fledged two-element assessment to determine the existence of these particular customary rules and 'thus freed itself from having to look for new evidence supporting' them.[105] This approach can be defended, though: it would not only be asking too much in every single case where an otherwise general customary concept is applied to individual circumstances, but also shows the power of interpretation of CIL. This argumentative technique finds support in the work of the ILC: the commentaries to the Draft Conclusions on the Identification of Customary International Law likewise acknowledge that:

> The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two-element approach, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law.[106]

Against this backdrop, there is every reason to agree with the illuminating remarks of Chasapis Tassinis in this regard:

> By largely ignoring the concept of interpretation, our operating theories of custom may seem to reduce the complexity of that source by putting virtually all of the emphasis on gathering the appropriate evidence. . . .

[102] Chasapis Tassinis (n 100) 264.
[103] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 147, 153 [27].
[104] *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22.
[105] Chasapis Tassinis (n 10) 264.
[106] ILC, 'Draft Conclusions' (n 9)126, commentary to Conclusion 2, para. (5).

> Factoring interpretation into our analysis of customary international law may thus make identification seem less arbitrary while opening up more productive avenues in legal reasoning about this fundamental source of international law.[107]

3.2.3 Obligation Not to Defeat the Object and Purpose of a Signed Treaty prior to Its Entry into Force

A further situation in which the CJEU engages with the interpretation of CIL is when it acknowledges that a certain principle of EU law that it is developing has its origins in customary (general) international law or states that an existing general principle of EU law is actually a corollary of a very similar CIL norm. The outcome of this interpretative exercise is basically the 'mirroring' or 're-packaging' of the original CIL norm, for the purposes of the EU legal order, into a general principle of EU law, with all the legal implications that follow (e.g. the addressees of the norm are no longer merely states but also individuals and private operators; different legal effects kick in, including supremacy and direct effect, etc.). The case of *Opel Austria*, which concerns the interpretation of the CIL obligation not to defeat the object and purpose of a signed treaty pending its entry into force, is a famous example of that 're-packaging' or 'mirroring' technique.[108]

It is well known that many rules codified in the 1969 and 1986 VCLT reflect CIL. One key customary provision is the obligation laid down in their common Article 18, according to which:

> [a state/international organisation] is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The General Court referred to and applied this principle of a customary nature – which, in essence, is a concrete manifestation of the general

[107] Chasapis Tassinis (n 10) 266.

[108] J Odermatt, 'The European Union as a Global Actor and Its Impact on the International Legal Order' (PhD thesis, University of Leuven Department of Law 2016) 128–29; Odermatt (n 12) 24–25.

principle of good faith – in *Open Austria*,[109] although its reasoning and the operative part of the ruling was in the end not based on this international legal rule setting out a so-called interim obligation. The case concerned the validity of an EU regulation subjecting gearboxes produced by General Motors Austria to 5,9 per cent customs duty. Opel Austria challenged this additional customs levy imposed in response to alleged Austrian state aid, arguing that the contested regulation was in breach of the customary principle of good faith as codified in Article 18 of the 1969 VCLT. The contested regulation was adopted by the Council of the EU in December 1993, after the instruments of ratification of the Agreement on the European Economic Area (EEA) were exchanged[110] but before the EEA Agreement entered into force in January 1994. The EEA Agreement prohibited the imposition of any further customs duties between contracting parties. The General Court accepted the applicant's arguments that the then European Community was bound by this customary interim obligation as codified in Article 18 of the VCLT, which, it found, was the corollary of the EU law principle of the protection of legitimate expectations. Yet, as it was not convinced that private parties could rely directly on this customary principle of international law, it finally based its ruling quashing the contested regulation on the protection of legitimate expectations as a general principle of EU law,[111] which could be invoked by individuals and private operators. Subsequent cases have seen the CJEU clinging to the application of the principles of legitimate expectation and good faith as general principles of EU law, rather than relying on the customary interim obligation enshrined in Article 18 of the VCLT, even if the parties to the dispute based their arguments, at least in part, on this CIL principle.[112] This approach reveals the difficulties and uncertainties that not only contracting parties but also private entities risk encountering when, in a legal dispute, they directly invoke the CIL obligation not to defeat the object and purpose of a treaty.[113]

[109] Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR II-39 [93].

[110] Agreement on the European Economic Area (adopted 2 May 1992, entered into force 1 January 1994) 1801 UNTS 3.

[111] T-115/94 *Opel Austria* (n 109) [94]–[95].

[112] Case C-27/96 *Danisco Sugar AB v Allmänna ombudet* [1997] ECR I-6653; Case C-203/07 P *Hellenic Republic v Commission of the European Communities* [2008] ECR I-8161.

[113] J Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 VJTL 318.

The above reasoning allowed the CJEU to assert the autonomy of EU law, portraying it as an independent legal system that does not derive its authority from international law – and, in its own legal order, to apply general principles of EU law instead.

3.2.4 Territorial Scope of Treaties

The last example is also taken from the realm of the law of treaties. It is noteworthy that the CJEU almost always interprets customary law when resorting to VCLT rules, given that the EU is not bound by the VCLT itself but only by the equivalent customary rules and principles of treaty law that exist in parallel to the written instrument. Leaving aside the practice of the EU judiciary concerning the interpretation of the customary rules of treaty interpretation (as reduced to writing in Article 31 VCLT), an illustrative example from the realm of the law of treaties is where the CJEU (re-)interpreted the CIL rule on the territorial scope of treaties. The customary rule governing the territorial scope of treaties is codified in Article 29 VCLT, in a quite laconic manner, as follows: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'

At first sight, this provision looks straightforward and does not seem to call for further clarification. Yet, the complexities of the *Front Polisario I* and *Western Sahara Campaign UK* cases led the CJEU to engage with this rule and to attempt to deconstruct its components. In this process, the CJEU found support in international treaty-making practice[114] and pointed out that those treaties which apply beyond the territory of a state use the expressions 'under [the] jurisdiction of that State'[115] or 'any of the territories for whose international relations it is responsible'.[116] Given that 'territory of a state' is nowhere defined in international law, but rather thought to be self-explanatory, the CJEU then offered its own construction of 'territorial scope' as follows:

> a treaty is generally binding on a State in the ordinary meaning to be given to the term 'territory', combined with the possessive adjective 'its' preceding

[114] Case C-104/16 P *Council v Front Polisario* (n 21) [96].

[115] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 85 UNTS 1465, art 2(1).

[116] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 23 UNTS 2889, art 56(1).

> it, in respect of the geographical space over which that State exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as a territory likely to be under the sole jurisdiction or the sole international responsibility of that State.[117]

As result of this interpretation, and coupled with the principles of good faith in performing treaties and the relative effect of treaties, the CJEU drew the conclusion that, as a non-self-governing territory, the Western Sahara was by no means under the territorial scope of the EU–Morocco bilateral fisheries agreement.

Some commentators,[118] citing the *travaux préparatoires* of the VCLT,[119] note that the customary rule enshrined in Article 29 VCLT was basically intended to set out a general rule concerning the territories of the state parties which applies as a fall-back clause in situations where a treaty does not define its territorial application. As Odermatt points out, '[t]he CJEU, however, gives much more significance to this provision, interpreting it to mean that a treaty only applies with respect to territory over which a state exercises full sovereign powers, unless there is an express provision providing for its application to other territory'. Does this mean then that the CJEU has re-interpreted a CIL norm, setting out stricter requirements for (EU member) states and the EU itself to follow when determining the territorial scope of their treaties? Kassoti answers affirmatively by insisting that as a result of this interpretation, whenever a treaty concluded by the EU is intended to produce extraterritorial effect its 'territorial scope' clause must be worded in such a way as to expressly provide for this effect.[120]

4 Lessons Learnt and Take-Aways

Any court that applies and interprets CIL rules does so in a specific legal and institutional context, and this goes for the CJEU, too. The way in which the CJEU interprets customary international law is largely influenced by the role customary international law plays in the cases brought

[117] Case C-104/16 P *Council v Front Polisario* (n 21) [95]; also reiterated in Case C-266/16 *Western Sahara Campaign UK* (n 28) [68].

[118] J Odermatt, 'Council of the European Union v Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)' (2017) 111 AJIL 736; E Kassoti, 'Between *Sollen* and *Sein*: The CJEU's Reliance on International Law in the Interpretation of Economic Agreements Covering Occupied Territories' (2020) 33 LJIL 381.

[119] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (4 May–19 July 1966) UN Doc A/CN.4/191, 213, commentary to Article 25 [5].

[120] Kassoti (n 119) 380.

before it. As pointed out in Section 2, a CIL rule is traditionally applied before the CJEU for the purpose of interpreting and elucidating the meaning of provisions of secondary EU legislation.[121] Interpretation to ensure the consistency of EU law with CIL is a limited form of interpretive engagement by the CJEU with a particular CIL norm, for normally it is not the CIL rule that is at the centre of attention in the interpretative process but an EU law provision. As a result, the main task for the CJEU is not to interpret the CIL rule (which occupies a subsidiary position in this scenario) but, once it has found a relevant international legal rule and identified it as being of a customary nature, to use that rule as broader legal context, also binding on the Union, for the interpretation of the EU law provision at hand. A typical example of such use of a customary rule is when the CJEU is confronted with questions treaty law when dealing with an EU agreement and employs the VCLT 'rulebook' largely reflective of CIL. In other words, this is a sort of an interpretation of customary rules by proxy: the CJEU essentially interprets a VCLT provision not as a treaty rule – as the EU is not bound by the VCLT, it cannot legally engage with it as such – but as its customary law equivalent. The ruling in *Opel Austria* went even further by re-packaging the customary rule of not defeating the object and purpose of a signed treaty prior its ratification and, for the purposes of Union law, mirroring, as it were, its content in a general principle of EU law – namely, the protection of legitimate expectations. Likewise, when interpreting the CIL rule relating to the territorial scope of a treaty, the EU Court opted for a significant (restrictive) change to its meaning, reformulating the customary rule as crystallised in Article 29 of the VCLT and redefined it with more stringent requirements.

A specific form of employing CIL as an interpretive tool to clarify the meaning of EU law came up in the *Mahamdia* and *Rina* cases, where identifying the relevant CIL norm (the jurisdictional immunity of states) was not the most crucial task. The peculiar character of this CIL principle in procedural terms – i.e. denying the injured private party access to justice, which touches on a foundational value in the EU legal order: the right to an effective judicial remedy – required that the meaning, the boundaries, and the exceptions of state immunity be thoroughly examined before the CJEU could answer the questions

[121] See eg Case C-366/10 *ATAA*, Opinion of AG Kokott (6 October 2011) [109] ('customary international law has, up to now, been called upon only in relation to the interpretation of provisions and principles of EU law').

concerning the interpretation of certain provisions of the Brussels II Regulation on exercising jurisdiction in civil and commercial matters. Despite the key role of this CIL rule, it was the Advocate General alone who engaged in a proper interpretation of the norm, opting for its systemic and evolutive interpretation, the outcome of which was taken up by the CJEU as a pre-cooked finding.

In theory, the interpretation of a CIL norm could play a more central role before the CJEU when (private) parties rely on it as the review standard for challenging the validity of a legal act adopted by the EU institutions. This scenario, which occurred for the first time in the *ATAA* case, forces the CJEU to interpret the invoked CIL rule, and notably to run the two-pronged test developed in CJEU case law to determine the direct effect of the CIL rule – that is, whether the customary norm at hand is capable of calling into question the competence of the EU to adopt a given piece of secondary legislation and whether it may affect the rights that individuals derive from EU law.[122] The CJEU was faced with this question in the series of cases where Front Polisario relied on the customary right of self-determination and the permanent sovereignty over natural resources as grounds for invalidating the contested bilateral agreements between the EU and Morocco. Again, despite lengthy and illuminating legal analyses of the meaning and content of these CIL rules by the Advocates General, the CJEU opted for a different (and somewhat evasive) line of reasoning, resorting to the rules of treaty interpretation so as to avoid having to assess the legality of the contested EU acts against these customary norms of key significance.

What can one distil from the above observations? The selected rulings we have discussed demonstrate that the CJEU has been reluctant to undertake its own investigation into state practice and *opinio juris* in order to interpret a given norm of customary international law, most often stopping long before by simply asserting the existence of the CIL norm without conducting a deeper analysis. (It must be admitted that avoidance of the two-element test is not unusual in the case law of international and domestic courts.[123]) Instead, the CJEU preferred to refer to the case law of other international courts and tribunals,

[122] Case C-366/10 *ATAA* (n 1) [107]. See also Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and ors v Commission* (*Woodpulp*) [1993] ECLI:EU:C:1993:120 [14]–[18].

[123] S Choi and M Gularti, 'Customary International Law: How Do Courts Do It?' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 117–47.

particularly the ICJ,[124] and occasionally select instruments of international law enshrining the customary rule in question (such external referencing can been regarded as a co-ordination technique to ensure consistency[125]). Other avoidance techniques on the part of the EU Court can also be observed. They include merely copying and pasting, in condensed form, the main findings of the interpretive analysis carried out by the Advocate General (*Mahamdia* and *Rina*); replacing the CIL norm in question with a corresponding general principle of EU law (*Opel Austria*); or simply looking for 'safer' avenues of legal reasoning, notably 'interpreting away' vital issues of CIL by using the toolbox of treaty interpretation and not touching on questions of interpretation of substantive customary rules of fundamental importance (such as the right of self-determination and the permanent sovereignty over natural resources) (*Front Polisario I-II* and *Western Sahara Campaign UK*).

Analysing the CJEU's judicial practice is an opportunity to explore the possible reasons and motivations behind the CJEU's guarded approach to the interpretation of CIL rules once they have been included in the set of legal norms applicable to a particular case. These reasons are manifold. First, the CJEU perceives its role as being more that of a domestic court than an international court, as a result of which it displays restraint when engaging with the interpretation of CIL that lies outside its comfort zone. Similar discomfort and hesitation can be seen in domestic courts,[126] where CIL norms raise difficulties in terms of ascertainment and legitimacy. Second, the EU Court's unease may be linked to a lack of resources and specialised knowledge in public international law,[127] which is compounded by the fact that in certain cases the CJEU has to prove the existence of state practice and *opinio juris* not only at the EU level but also in the international arena,[128] which is usually unchartered territory for the CJEU. A third explanatory factor is that, unlike the treaties to which the EU is a party, the EU has not given its explicit consent to CIL norms and may have had no role in their development. Customary international law is thus seen as something developed 'outside' the EU legal order and should therefore be 'mistrusted'.[129]

[124] Odermatt (n 108) 119; Ammann (n 43) 171.
[125] Pascual-Vives (n 14) 146.
[126] Ammann (n 43) 172, 173, citing also PL Hoffmann, 'The 'Blank Stare Phenomenon': Proving Customary International Law in U.S. Courts' (1996) 25 GJICL 181, 181–90.
[127] Malenovskŷ (n 18) 233.
[128] Ammann (n 43) 172.
[129] Odermatt (n 108)125.

To sum up, the CJEU's engagement with the interpretation of CIL and its interpretation techniques – unlike the approach of the Advocates General in a number of instances – remain underdeveloped. There is thus room for improvement, including with a view to enhancing the CJEU's output legitimacy. This author agrees with those scholars who argue that the CJEU's application of CIL will be fully legitimate procedurally only if the accompanying interpretative reasoning is significantly improved.[130] Boldly asserting certain CIL rules without additional refinement and substantiation fails to convince other interpreters of international law. As most perceptively observed by Higgins, the CJEU's caution when it comes to CIL stands 'in marked contrast to the confidence shown as to its capabilities in international law shown by the Court in other cases'.[131] With the expansion of the EU's treaty-making activities[132] and its rising profile as a major (legal) actor on the global stage,[133] the number of cases before the CJEU pertaining to international law will continue to grow, which will make it all the more desirable for the EU Court to deal with these issues, including the interpretation of CIL, with greater confidence and authority.

This is the case in particular when several CIL rules are to be applied simultaneously and their relationship needs to be determined. A similar need arises, in a more dramatic fashion, where conflicting CIL norms apply in one and the same case before the CJEU. The time is ripe for a deeper and more convincing engagement with CIL on the part of the CJEU through reliance on a conceptually and methodologically sound framework for interpretation that will strengthen the unique judicial function it performs.

[130] Ammann (n 43) 172–73, 178.

[131] R Higgins, 'The ICJ, the ECJ and the Integrity of International Law' (2002) 52 ICLQ 9.

[132] Consider, for instance, the European External Action Service database of international treaties to which the EU is a party: it covers more than 1,300 bilateral and multilateral agreements (with many references to international legal standards and principles). See Eur-Lex, 'Treaties Currently In Force' (2022) <http://ec.europa.eu/world/agreements/viewCollection.do> accessed 25 June 2022.

[133] See eg D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2014); B van Vooren, S Blockmans, and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013).