Customary international law in the case law of the CJEU: In search of consistency

Takis Tridimas* and Mark Konstantinidis**

1. Introduction

The attitude of EU law towards international law is characterised by a paradox. On the one hand, observance of international law is not only a legal duty under Article 3(5) TEU but also an essential source of EU legitimacy.[1] On the other hand, the prevailing integration paradigm is embedded on a constitutional narrative which asserts the autonomy of EU law and, in part, its primacy over international law. The present contribution seeks to examine the approach of the CJEU (i.e. the Court of Justice (ECJ) and the General Court (GC)) to customary international law (CIL) by particular reference to the 1969 Vienna Convention on the Law of the Treaties (VCLT),[2] in the light of the above tension. It starts by discussing the status of CIL in EU law (Section 2). It then offers a statistical overview of the CJEU's engagement with the VCLT and CIL (Section 3). The case law suggests a measured yet increasing willingness, particularly by the ECJ, to refer to the VCLT. The article then explores the identification and application of CIL by the CJEU. With regard to the identification of CIL, the CJEU's approach is often rudimentary by way of reasoning, though not leading to incorrect outcomes as a matter of international law. As it might be expected, Advocates General have demonstrated greater willingness to identify CIL by more extensive reference to state practice and *opinio juris*. With regard to the application of CIL for the purposes of interpretation, the ECJ's methodology does not seem consistent. Its limited engagement (or lack thereof) with the VCLT may be explained by the judicial objective of maintaining the interpretative autonomy of EU law. Lastly, this article considers the effect of CIL on the EU legal order (Section 4). While the CJEU is hesitant to find an EU measure to be incompatible with international law, this is far from impossible.[3] The CJEU has also recognised a duty of harmonious interpretation, which requires it to interpret EU law in light of international law, including agreements codifying CIL. This can provide much needed flexibility by way of effecting an interpretative reconciliation between EU law and international law.

---

* Professor of European Law, Dickson Poon School of Law, King's College London.
** PhD Candidate and Visiting Lecturer in Law, Dickson Poon School of Law, King's College London.

[1] Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in Paula García Andrade (ed), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2023).

[2] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331. The importance of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM543 (1986) is not underestimated, though it is not yet in force. Our analysis focuses on the 1969 Convention. The CJEU has sometimes referred to the 1986 VCLT, but only alongside the former; see, for instance, Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, para 78.

[3] See T-279/19 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro v Council*, EU:T:2021:639; and Joined Cases T-344/19 and T-356/19 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro v Council*, EU:T:2021:640 (collectively referred to as *Front Polisario II*).

2. Customary international law in the EU legal order

The ECJ has long asserted the *sui generis* nature of the EU legal order, as a system which is autonomous both *vis-à-vis* the domestic legal systems of the Member States and general international law. In *Van Gend en Loos*, it proclaimed that the Union legal order 'constitutes a new legal order of international law',[4] whereas in *Costa v ENEL*, it found that Union law stems from 'an independent source of law', which bestows it with 'its special and original nature'.[5] This marked the genesis of the autonomy of the EU legal order, which has subsequently been elevated to a key, if somewhat nebulous, structural principle. It seeks to safeguard, *inter alia*, the uniform interpretation of EU law and the integrity of the EU system of judicial protection.[6] To these ends, it understands the exclusivity of the CJEU jurisdiction widely and imposes limitations on the competence of the Union and the Member States to conclude international agreements.[7]

In its external relations, the EU is constitutionally committed to 'the strict observance and the development' of international law[8] and 'must respect international law in the exercise of its powers'.[9] International law is thus binding on the EU. This includes international agreements concluded by the EU,[10] agreements concluded by the Member States in areas where the Union can be said to have succeeded them, and CIL.[11] CIL is a source of international law under Article 38(1) of the Statute of the International Court of Justice.[12] The International Law Commission (ILC) considers CIL to be 'unwritten law deriving from practice accepted as law'.[13] Despite a plethora of problems arising in relation to its definition and identification, it is accepted that customary law requires two elements, namely, general –consistent– state practice (*consuetudo*), which is followed out of a sense of legal obligation (*opinio juris sive*

[4] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12; see also Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 629, 631.
[5] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 594.
[6] See, generally, Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Principles of European Union Law - Volume 1: The European Union Legal Order* (Oxford University Press 2018). See also Inge Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic' (2018) College of Europe Research Paper 02/2018, 19 <https://www.coleurope.eu/research-paper/interconnecting-legal-systems-and-autonomous-eu-legal-order-balloon-dynamic> accessed 30 September 2023; and Niamh Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) Nordic Journal of International Law 9.
[7] See e.g. Opinion 2/13 of 18 December 2015, EU:C:2014:2454; Case C-284/16 *Slovak Republic v Achmea BV*, EU:C:2018:158; Opinion 1/17 of 30 April 2019, EU:C:2019:341; and Case C-741/19 *Republic of Moldova v Komstroy LLC* of 2 September 2021, EU:C:2021:655.
[8] Article 3(5) TEU.
[9] Case C-286/90 *Anklagemyndigheden v Poulsen and Diva* [1992] ECR I-6019, para 9.
[10] Article 216(2) TFEU.
[11] Case C-308/06 *The Queen on the application of International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport* [2008] ECR I-4057, paras 48, 51.
[12] Article 38(1)(b) ICJ Statute refers to 'international custom, as evidence of a general practice accepted as law'.
[13] International Law Commission, 'Draft conclusions on identification of customary international law' (2018) A/73/10, 122 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf> accessed 30 September 2023.

necessitatis).[14] Rules of CIL may also be reflected in provisions of international treaties.[15] This includes the VCLT 1969 and VCLT 1986, which codify much of the law of treaties,[16] including rules on, *inter alia*, the observance, application, interpretation and termination of international agreements. Customary rules in specific areas are also expressed, for instance, by many provisions of the United Nations Convention on the Law of the Sea[17] or the 1961 Vienna Convention on Diplomatic Relations.[18]

Peremptory norms, also known as *jus cogens*, are 'universally applicable' and non-derogable norms, which 'reflect and protect fundamental values of the international community'.[19] They are commonly themselves based on CIL, though they enjoy enhanced normative status.[20] Such norms include, for instance, the prohibition of aggression, genocide, and crimes against humanity. The present article focuses on the VCLT and will address *jus cogens* only insofar as it is relevant to the main analysis.

3. CJEU engagement with customary international law and the VCLT: a statistical analysis

This section offers a statistical analysis of CJEU cases where reference has been made to CIL, including the VCLT. An important caveat should be made. It is not easy to determine accurately the substantive engagement of the CJEU with CIL norms. First, there are cases in which a judgment or an opinion of the Advocate General refers to CIL or the VCLT only in citing parties' argument. Such cases have been included since the relevant arguments are likely to have been addressed by the CJEU, even though it has not expressly referred to CIL; and where they have not been addressed, such failure is also a form of (negative) engagement. Secondly, while we have excluded cases where CIL or the VCLT have not been explicitly mentioned in a judgment or an opinion, there may be instances where the CJEU makes indirect references to customary rules of interpretation (implicit or 'silent' references).[21]

---

[14] See, for instance, *Continental Shelf* (*Libya v Malta*) [1985] ICJ Rep 13, para 27; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para 183; and *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 65 *et seq*.

[15] International Law Commission (n 13) 143 *et seq*.

[16] The VCLT 1969 is intended both to codify existing norms of CIL and also contribute to the progressive development of the law of Treaties: see recital 7 of the preamble. Similarly, see recital 5 in VCLT 1986.

[17] See, for instance, *Territorial and Maritime Dispute* (*Nicaragua v Colombia*) [2912] ICJ GL No 124, paras 118, 138-139, 174, 177, and 182.

[18] See for instance, *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) [1980] ICJ Rep, para 45; and Case C-179/13 *Raad van bestuur van de Sociale verzekeringsbank v LF Evans*, Opinion of AG Wahl delivered on 19 June 2014, EU:C:2014:2015, paras 33-38.

[19] International Law Commission, 'Report of the International Law Commission on its Seventy-third session' (2022) A/77/10, 18 <https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf> accessed 30 September 2023.

[20] International Law Commission (n 19) 10-27 and 31 *et seq*.

[21] Thus, for instance, in many cases the ECJ states that an international agreement must be interpreted in the light of its spirit, general scheme and wording without referring expressly to Article 31 VCLT. See e.g. Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129, para 16 ('regard must be simultaneously paid to the spirit, the general scheme and the wording of the [Yaoundé] Convention and of the provision concerned'); Case 270/80 *Polydor and Others v Harlequin and Others* [1982] ECR 329, para 8 ('it is necessary to analyse the provisions in the light of both the object and the purpose of the [EEC-Portugal] Agreement and of its wording'); Case C-478/21 P *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others v Commission* of 21 September 2023, EU:C:2023:685, para 61 ('it is necessary […] to interpret that concept taking account not only of the wording of those provisions in which

We have identified 297 references to CIL and/or the VCLT, since the beginning of the European Communities. These include references contained in GC judgments and orders (including those of its predecessor, the Court of First Instance (CFI)); ECJ judgments, orders, and opinions of Advocates General; opinions delivered under Article 218(11) TFEU and views of Advocates General delivered in Article 218(11) opinions.[22] In all figures below, data have been sorted by reference to the year of initiation of proceedings before the ECJ or the GC.[23] For example, the *Polydor* case,[24] in which judgment was delivered in 1982, has been attributed to 1980, the year when the preliminary reference was introduced to the ECJ.[25]

Figure 1, below, shows that the overwhelming majority of references to the CIL or the VCLT have been made by the ECJ. Out of a total 297 references, 57 (ca 19.2%) have been made in GC judgments and orders; and 240 (ca 80.8%) have been made in ECJ judgments, orders, Advocate General opinions, Article 218(11) TFEU Opinions and Advocate General views. It is to be borne in mind that the GC/CFI is a much younger court, the CFI having been established in 1989. Nonetheless, the overwhelming majority of ECJ references (225 out of the 240) have been made in cases brought to the ECJ after the establishment of the CFI. Thus, the longer life span of the ECJ has only had a limited impact on the difference in the number of references between the two courts. A major driver for the difference is that, in ECJ cases, references by Advocates General are counted separately from references by the Court in its judgment even where the references have been made in the same case. As we shall see below, references to CIL by Advocates General account for the majority of such references by the ECJ.

it is found, but also the context in which those provisions occur and the objectives pursued by the rules of which they form part').

[22] Each judgment, order, AG opinion, Article 218(11) opinion and AG view has been counted as one reference, even if it contains references to more than one CIL rules. Our search reflects CJEU case law as of 1 October 2023. We have collected the data by entering search keys referring to CIL (and general international law, where referring to customary norms), the VCLT 1969 and VCLT 1986, and *jus cogens* in the online Curia search form at <https://curia.europa.eu/juris/recherche.jsf >. The search keys used have accounted for variances, such as both 'Vienna Convention on the Law of Treaties' and 'Vienna Convention on the Law of *the* Treaties'. We have then reviewed results individually to verify the references found.

[23] Joined cases have been counted as single entry. For the GC, 'Cases' include judgments and orders. For the ECJ, 'Cases' include, as distinct entries, judgments, Court Opinions and Opinions and Views of Advocates General.

[24] *Polydor* (n 21).

[25] This has been done to provide a more accurate reflection of judicial trends. The opinion of the Advocate General and the ECJ judgment in a case may be issued in different years; for instance, in *Polydor*, they were issued in 1981 and 1982 respectively. The authors considered that if the two references were attributed to different years, that might be liable to give the impression of false upwards or downwards movements in the case law.

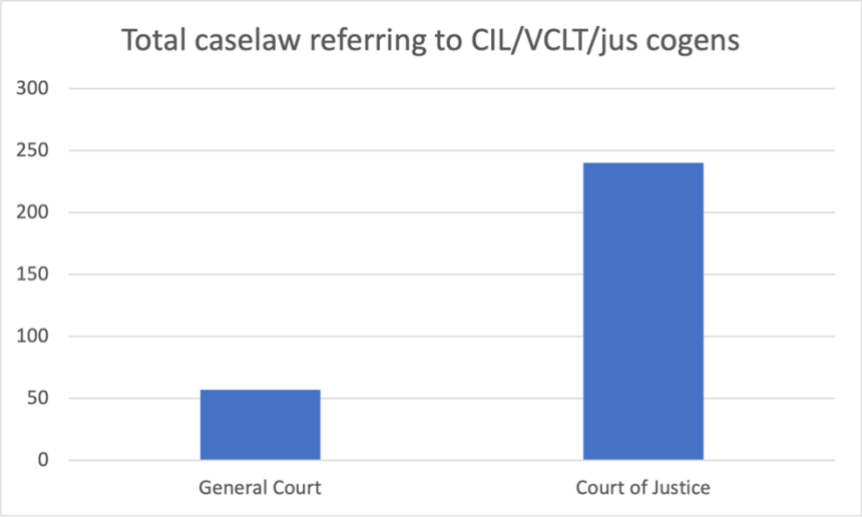

Figure 1

In addition to the ECJ's predominance in terms of absolute numbers, the historical trend of judicial engagement with CIL or the VCLT paints a similar picture. Figures 2 and 3, below, demonstrate the yearly references made by the GC and the ECJ. There is a clear upwards trajectory of the engagement of the CJEU, in particular the ECJ, with CIL. Owing to the fact that we allocate references to the year when the proceedings were introduced, no firm conclusions can be drawn regarding cases brought in 2022 and 2023, as there has not been sufficient time for GC and ECJ to issue judgments and/or opinions in all of them. Therefore, references for 2022 and 2023 remain incomplete. Subject to this disclaimer, we have included those years as some data are already available.

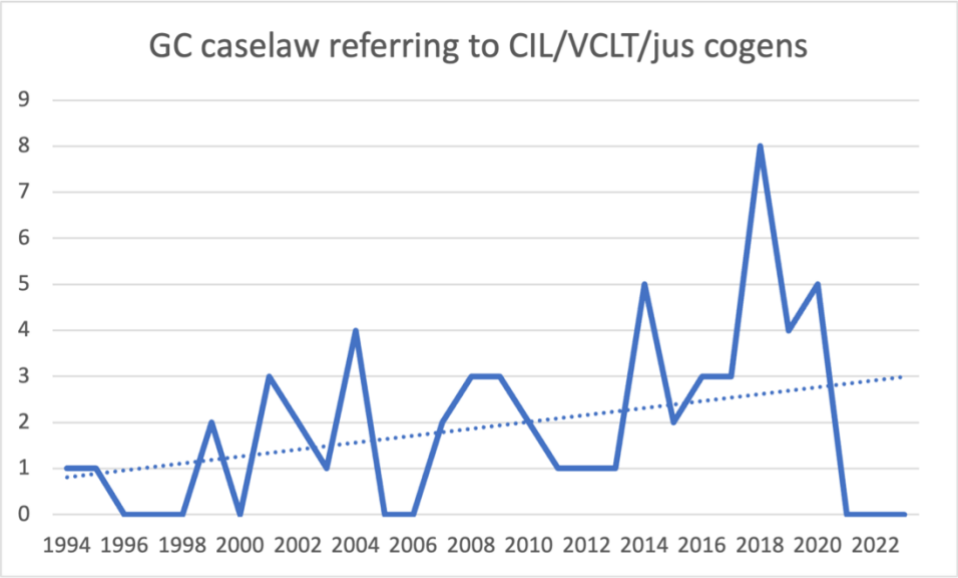

Figure 2

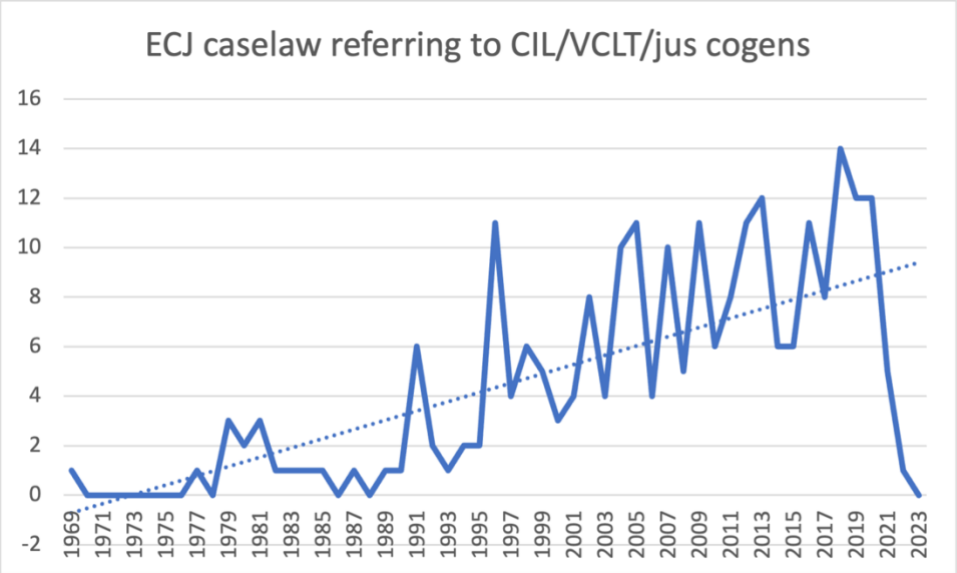

Figure 3

Figure 4, below, represents a breakdown of ECJ references. There are 149 Opinions of Advocates General and Views under Article 218(11) TFEU (ca 62.1% of the total ECJ references); and 91 ECJ judgments, orders and Opinions under Article 218(11) TFEU (ca 37.9%) which refer to CIL and/or the VCLT. As expected, this signals an openness on the part of Advocates General to reflect upon a broader range of legal sources when considering the questions *in casu*.

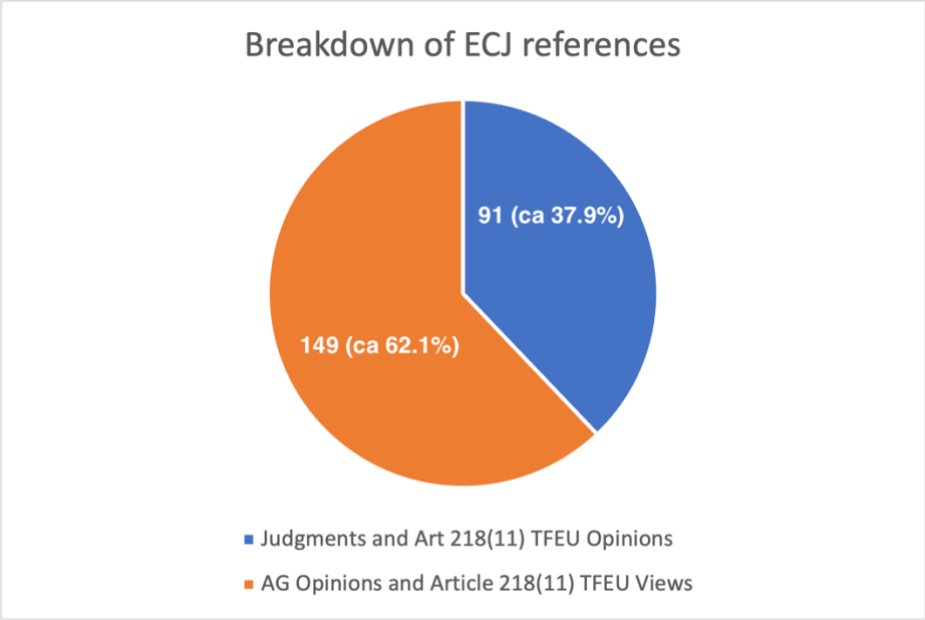

Figure 4

Lastly, the ECJ seems more open to referring to CIL when considering envisaged international agreements under Article 218(11) TFEU. This is owing to the type of jurisdiction it exercises under that provision since *ex hypothesi* it pertains to international agreements. Out

of 28 such Opinions, six refer to CIL and/or the VCLT; additionally, four Views of Advocates General under the same procedure make such references.

All in all, many more references to CIL and the VCLT have been made by the ECJ than by the GC. This is not surprising and may be accounted for by the following factors. First, both the judgment and the opinion of the advocate general may make a reference in the same case; secondly, Advocates General are likely to engage in a more detailed examination of the legal sources that may be relevant in the case in issue, and thus refer to CIL and/or the VCLT; thirdly, the ECJ exercises wider jurisdiction. The range of legal issues that may arise in a preliminary reference is very broad and offers ample opportunity for international law to become relevant. Also, the *ex ante* jurisdiction of Article 218(11) has, by its nature, an international law bias.

4. Making sense of customary international law

The bindingness of CIL *vis-à-vis* the EU has been well-established. The 'entirety' of international law, 'including customary international law', […] is binding upon the institutions of the European Union'.[26] Still, this raises more questions than it answers. In particular: (a) how does the CJEU identify CIL? (b) how does it apply CIL for interpretative purposes? and (c) what is the effect of CIL in the EU legal order? The following sections will examine each of these questions in turn. There is no intention to be exhaustive but to highlight selected aspects.

4.1. *Identification of customary international law*

The CJEU has examined whether provisions of international agreements can be said to reflect customary rules in many cases. Nevertheless, it refrains from justifying its conclusion by considering expressly the elements of general state practice and *opinio juris*.[27] For instance, in *Brita*, the ECJ was asked to interpret a term of the EU-Israel Euro-Mediterranean Agreement. To do so, it applied the VCLT 'in so far as the rules are an expression of general international customary law', noting that 'a series' of its provisions 'reflect the rules of customary international law'.[28] While it did not specify which VCLT provisions it considered as customary, it applied Articles 31 and 34 VCLT.[29] In other cases, the ECJ applies the VCLT without expressly identifying it as customary.[30]

[26] Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission and Others*, Opinion of AG Kokott, EU:C:2015:190, para 86. Such formulations have been used since *Poulsen* (n 9) para 9, including in Case C-346/10 *Hungary v Slovak Republic* of 16 October 2012, EU:C:2012:630, para 44.

[27] In Case T-512/12 *Front Polisario v Council*, EU:T:2015:953 (*Front Polisario I*), the GC briefly referred to those conditions when setting out the claimant's pleas (paras 207-208) but did not examine them expressly as part of its reasoning.

[28] Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289, paras 41-42.

[29] Cf AG Jacobs, who in another case found that Article 65 VCLT does not express a customary rule because it sets out 'procedural requirements' which do not 'precisely […] reflect the requirements of customary international law'; Case C-162/96 *A Racke GmbH v Hauptzollamt Mainz* [1998] ECR I-3655, Opinion of AG Jacobs, para 96.

[30] See, for instance, Opinion 1/91 [1991] ECR I-6079, para 14; and Case C-416/96 *Nour Eddline El-Yassini v Secretary of State for the Home Department* [1999] ECR I-1209, para 47.

In a similarly brief manner, the ECJ has identified the customary nature of the 1958 Geneva Convention on Fishing and the Conservation of the Living Resources of the High Seas. In *Mondiet*, a French court referred questions on the validity of a Council regulation amending fishing rules. The Court stated that the EU's authority to legislate with regard to the high seas is 'established in' the Geneva Convention, 'which consolidates the general rules on this subject enshrined in international customary law'.[31] In *Intertanko*, the High Court of England and Wales asked the ECJ about the validity of a directive in light of, *inter alia*, regulations of an annex of Marpol 73/78, a 1973 international Convention on the Prevention of Pollution from Ships as supplemented by a Protocol. When considering whether Marpol 73/78 bound the EU, it briefly noted that it 'it does not appear that [its Annex Regulations] are the expression of customary rules of general international law'.[32] It did not provide further support for this finding.[33]

In *Poulsen*, the ECJ was asked to interpret a provision of a regulation on the conservation of fishery resources. It did so by, *inter alia*, taking account of the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone, on the High Seas, and on Fishing and Conservation of the Living Resources of the High Seas 'in so far as they codify general rules recognized by international custom'.[34] It did not dwell further on the issue. It also took into account the United Nations Convention on the Law of the Sea 1982 (UNCLOS). The ECJ justified the characterisation of many of its provisions as CIL, by reference to judgments of the International Court of Justice (ICJ).[35] In *Opel Austria*, the GC annulled a Council regulation which withdrew tariff concessions. It noted that Article 18 VCLT codifies the principle of good faith, which 'is a rule of customary international law', and referred to a decision of the Permanent Court of International Justice (PCIJ).[36] References to the case law of the ICJ and the PCIJ are perfectly appropriate, indeed they can be expected, since the International Law Commission (ILC) recognises their decisions as 'subsidiary means' for the identification of customary international law, as they themselves capture state practice and *opinio juris*.[37]

In *Walz*, the ECJ was essentially asked to interpret the term 'damage' under the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. The Court considered the term 'damage' in a broader international law context, by reference to Article 31(2) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.[38] The ECJ noted that that Article 'aims precisely to codify the current state of general international law', but refrained from explicitly recognising it as customary.[39] Arguably, the

[31] Case C-405/92 *Établissements Armand Mondiet SA v Armement Islais SARL* [1993] ECR I-6133, paras 12-13.
[32] *Intertanko* (n 11) para 51.
[33] In her Opinion, AG Kokott similarly found that 'there is no evidence that the relevant provisions of Marpol 73/78 codified customary international law'; Case C-308/06 *Intertanko*, [2008] ECR I-4057, Opinion of AG Kokott, para 39.
[34] *Poulsen* (n 9) para 10.
[35] *Poulsen* (n 9) para 10. For instance, see *Nicaragua v United States of America* (n 13).
[36] *Opel Austria* (n 2) paras 90-91, referring to *Case Concerning Certain German Interests in Polish Upper Silesia* [1926] PCIJ Rep Series A No 7.
[37] International Law Commission (n 13) 149.
[38] Case C-63/09 *Axel Walz v Clickair SA* [2010] ECR I-4239, para 27.
[39] *Walz* (n 38) para 28.

formulation demonstrates that the Court was 'conscious that the ICJ has invoked [the ILC] articles with caution'[40] and only recognised the customary nature of some of them.[41]

In *Air Transport Association of America* (*ATAA*), the ECJ affirmed the customary status of, among others, the principle that 'each State has complete and exclusive sovereignty over its airspace'.[42] It did so by referring to, *inter alia*, decisions of the ICJ, the Geneva Convention on the High Seas, and UNCLOS.[43] *Evans* considered the application of EU law on the calculation of pension entitlements in light of the 1963 Vienna Convention on Consular Relations. By referring to the ICJ Advisory Opinion on *United States Diplomatic and Consular Staff in Tehran*, the Court found that the Convention 'codifies the law of consular relations and states principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions'.[44]

As would be expected, Advocates General have engaged more closely with the international law requirements of identifying customary rules. In *Budějovický Budvar*, on geographical indications protections, AG Tizzano considered whether an agreement between Austria and Czechoslovakia was in force in relation to Austria and the Czech Republic, prior to the former's accession to the EU, in light of the dissolution of Czechoslovakia. Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties provided for the automatic succession of the new state to the treaties in force in respect of the predecessor state. AG Tizzano noted that 'the principle laid down [in Article 34] does not reflect the content of a pre-existing general rule of international law'.[45] He supported this by reference to the Convention's *travaux préparatoires* and academic opinion at the time of the drafting of the Article.[46] However, upon extensively considering subsequent state practice,[47] he concluded that 'a customary rule based on the principle of automatic succession has now been established, albeit with less rigid contents than those which follow from Article 34'.[48] AG Tizzano's Opinion engaged closely with CIL, as he considered not only whether a rule set out in an international convention gives expression to a customary principle, but also the precise scope of the principle in issue.

---

[40] Francisco Pascual-Vives, 'The Identification of Customary International Law Before the Court of Justice of the European Union: A Fexible Consensualism' in Fernando Lusa Bordin, Andreas Th Müller and Francisco Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022) 137. See also *Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, paras 47 and 50; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 177.

[41] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Servia and Montenegro*) [2007] ICJ Rep 43, paras 385, 398 and 407.

[42] Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, paras 103-104.

[43] ibid.

[44] Case C-179/13 *Raad van bestuur van de Sociale verzekeringsbank v LF Evans* of 15 January 2015, EU:C:2015:12, para 36; and *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) (Advisory Opinion) [1980] ICJ Rep 3, para 45.

[45] Case C-216/01 *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* [2003] I-13617, Opinion of AG Tizzano, para 115.

[46] *Budějovický Budvar*, Opinion of AG Tizzano (n 45) paras 116-117.

[47] *Budějovický Budvar*, Opinion of AG Tizzano (n 45) paras 123-142.

[48] *Budějovický Budvar*, Opinion of AG Tizzano (n 45) para 143.

In *Inuit*, the ECJ was concerned with the legality of EU measures setting conditions on the trading of seal products. AG Kokott expressly considered whether there had been 'settled practice' and *opinio juris*[49] with regard to Article 19 of a United Nations Declaration, which provided that states 'shall consult and cooperate in good faith with the indigenous peoples concerned […] in order to obtain their free, prior and informed consent before adopting and implementing […] measures that may affect them'.[50] In light of the Declaration's abstention or rejection by 'some significant States in which indigenous communities live', a settled status could not be identified.[51]

In *Wightman*, AG Sánchez-Bordona considered the issue of the revocability of the United Kingdom's notification to withdraw from the EU under Article 50 TEU by reference to CIL. In particular, he found that Article 68 VCLT, governing states' revocation of notifications or instruments, 'may' be a procedural rule, and hence not codify a customary rule, although he conceded that there were differing views.[52] He further noted that 'the States' recent practice on the revocation of notifications of withdrawal from international treaties does not dispel' the 'uncertainty'.[53] For this reason, he viewed Article 68 VCLT as a 'considerable source of inspiration as regards interpretation', notwithstanding its uncertain customary nature.[54] The ECJ did not take a stance on the status of Article 68 VCLT but briefly considered it, as the VCLT was 'taken into account in the preparatory work for the Treaty establishing a Constitution for Europe'.[55]

The following conclusions may be drawn from the above analysis. The engagement of the ECJ with CIL is technically inconsistent albeit not substantively incorrect. In some cases, the ECJ identifies certain rules as being CIL. In others, it may apply provisions of VCLT without expressly affirming that the provision applied is customary law. Where the ECJ states that a provision is CIL, its analysis tends to be somewhat rudimentary. It does not engage with the conditions that must be fulfilled for a rule to be recognised as CIL, although occasionally it refers to the case law of the ICJ as a justification. References tend to be abstract characterising many provisions of an international treaty as CIL, the inference being that those applied in the specific case are of such a nature. Advocates General engage more closely. The difficulty then is that consideration of the conditions of consistent state practice and *opinio juris* may yield no firm results. In such a case, the VCLT can still be considered as a 'source of inspiration', though it would not strictly be binding on the EU.

4.2 *Application of customary international law in judicial interpretation*

[49] *Inuit*, Opinion of AG Kokott (n 26) para 90.
[50] UNGA Res 61/295 United Nations Declaration on the Right of Indigenous Peoples (13 September 2007) UN Doc A/RES/61/295.
[51] *Inuit*, Opinion of AG Kokott (n 26) para 90.
[52] Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union*, Opinion of AG Sánchez-Bordona delivered on 4 December 2018, EU:C:2018:978, para 74.
[53] *Wightman*, Opinion of AG Sánchez-Bordona (n 52) para 75.
[54] *Wightman*, Opinion of AG Sánchez-Bordona (n 52) para 76.
[55] Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* of 10 December 2018, EU:C:2018:999, paras 70-71.

CJEU case law includes several references to customary international law, in particular, many VCLT provisions. These include, among others, the provisions relating to the definition of 'treaty' (Article 2(1)(a) VCLT), [56] the obligation not to defeat the object and purpose of a Treaty prior to its entry into force (Article 18),[57] the principle of *pacta sunt servanda* (Article 26 VCLT),[58] and the principle of *pacta tertiis nec nocent nec prosunt* (Article 34 VCLT).[59] In this section, we focus on the application of Article 31 VCLT for the purposes of interpreting international agreements.

4.2.1. Article 31 VCLT and the object and purpose of treaties

A prominent early reference is found in Opinion 1/91, where the ECJ considered the compatibility with EU law of the judicial mechanism envisaged under the proposed European Economic Area (EEA) Agreement.[60] The proposed treaty included rules which were textually identical to those of the EEC Treaty with a view to ensuring homogeneity with EU law.[61] The Court found that that similarity was not sufficient: '[a]n international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives. Article 31 [VCLT 1969], stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.'[62] In the subsequent paragraphs, the Court found that, on the one hand, the EEC Treaty aims at facilitating far-reaching economic integration as a means for achieving 'European unity'; it is an international agreement which 'none the less constitutes the constitutional charter of a Community based on the rule of law'.[63] On the other hand, the EEA Agreement would contain more limited economic rules, and, in any event, did not require a 'transfer of sovereign rights to the inter-governmental institutions which it sets up'.[64] Against this 'contradiction', the Court found that the proposed EEA Agreement would 'undermine' the autonomy of the Community legal order 'in pursuing its own particular objectives'.[65]

In Opinion 1/91, the Court applied Article 31 VCLT to establish the importance of 'context' and 'object' when considering the provisions of the proposed EEA Agreement. According to the Court, notwithstanding the textual similarity between the EEA Agreement and the EEC

[56] Case C-327/91 *France v Commission* [1994] ECR I-3641, para 25; and Opinion 1/13 of 14 October 2014, EU:C:2014:2303, para 37.
[57] *Opel Austria* (n 2) paras 90-91.
[58] Case C-66/18 *Commission v Hungary* of 6 October 2020, EU:C:2020:792, para 92, referring to 'the general international law principle of respect for contractual commitments (*pacta sunt servanda*), laid down in Article 26 [VCLT]'.
[59] *Brita* (n 28) para 44, which refers to it as a 'principle of general international law [which] finds particular expression in Article 34 [VCLT]'. For discussions of the above rules expressed in the VCLT, see Pieter Jan Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1959' (1998) 25 Legal Issues of European Integration 1; Pieter Jan Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011); and Jed Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 Cambridge Yearbook of European Legal Studies 121.
[60] Opinion 1/91 (n 30).
[61] Opinion 1/91 (n 30) paras 3-5.
[62] Opinion 1/91 (n 30) para 13.
[63] Opinion 1/91 (n 30) paras 17, 21.
[64] Opinion 1/91 (n 30) paras 15, 20.
[65] Opinion 1/91 (n 30) para 30 *et seq*.

Treaty, significant differences remained. These were not sufficiently mitigated through mechanisms providing for a continued role for the CJEU in the interpretation of the EEA Agreement. Customary international law was thus employed by the ECJ to reinforce its own jurisdiction (in exclusion to that of another international judicial body) and the uniqueness of the Community legal order. The origins of the ECJ's formulation in Opinion 1/91 can be traced back to *Bresciani* and *Polydor*, which also referred to extra-textual factors, including the 'purpose' and 'object' of a provision, as salient considerations for the interpretation of an international agreement.[66] However, the Court had not explicitly referred to the VCLT, or indeed international law, at that stage.[67] In Opinion 1/91 jurisdictional openness (the application of customary international law by the ECJ) contributed to jurisdictional protectionism (the assertion of the Union's distinctiveness). This might appear to be a paradox but the ECJ's reasoning is compatible with Article 31 VCLT.

This approach was followed in subsequent cases. In *Metalsa*, the ECJ interpreted Article 18 of the free trade agreement (FTA) between the EEC and Austria, prior to the accession of the latter.[68] In doing so, it considered whether it should be interpreted similarly to Article 95 EEC Treaty (now Article 110 TFEU), which prohibits fiscal discrimination against intra-Community products, as it was also serving the same objective, *mutatis mutandis*.[69] Again, the Court referred to Article 31 VCLT, emphasising that the provision of the FTA must be interpreted by reference not only to its wording but also its objectives.[70] It did not apply case law that had been developed on the interpretation of Article 95 EEC to the FTA provision, as the latter agreement did not envisage the creation of a common market.[71]

Eddline El-Yassini[72] involved a comparison of the objectives of two association agreements, namely, the EEC-Turkey and the EEC-Morocco agreements. Applying Article 31 VCLT, the ECJ distinguished the two agreements on the basis that the one with Turkey aspired to the progressive introduction of free movement of persons.[73] *Eddline El-Yassini* suggests that the ECJ remains sensitive to the importance of maintaining the uniqueness of EU free movement rights even with one degree of separation. This arguably explains the Court's decision in *Jany*, where it considered whether provisions of the EEC-Poland and EEC-Czech association agreements should be interpreted similarly to Article 52 EEC Treaty (now Article 49 TFEU) on the freedom of establishment.[74] These agreements had the explicit objective of facilitating the accession of those countries to the EEC.[75] On the basis of Article 31 VCLT, the ECJ held that '[t]here is nothing in [their] context or purpose' which would suggest that a difference of interpretation *vis-à-vis* the Treaty was intended.[76] In *Hengartner and Gasser*, the

[66] For more, see n 21.
[67] The main substantive pre-*Polydor* reference to the VCLT seems to have been made by AG Capotorti in Case 812/79 *Attorney General v Juan C Burgoa* [1980] 2787, Opinion of AG Capotorti, in 2810 and 2818.
[68] Case C-312/91 *Metalsa Srl v Gaetano Lo Presti* [1993] ECR I-3751.
[69] *Metalsa* (n 68) paras 8 *et seq*.
[70] *Metalsa* (n 68) para 12.
[71] *Metalsa* (n 68) para 15 and 21.
[72] *Eddline El-Yassini* (n 30) para 47.
[73] *Eddline El-Yassini* (n 30) paras 42 and 47 *et seq*.
[74] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615, para 32.
[75] *Jany* (n 74) para 36.
[76] *Jany* (n 74) paras 35-39.

ECJ also heavily relied on the objectives of the Agreement between the European Community and Switzerland on the free movement of persons in order to interpret its provisions.[77]

The ECJ's approach as it emerges from the above case law 'constitutes an attempt to base the *exceptional* character of the [Union] legal order on *normal* rules of treaty interpretation'.[78] Prior to Opinion 1/91, the ECJ had not grounded the distinct character of the EU legal order by reference to international law. The Court's subsequent engagement with Article 31 VCLT, even if seen as representing 'a "European" approach' to the law of treaties,[79] is an effort to accommodate the Union's uniqueness within the ordinary framework of international law. As such, the Court's approach can be said to accord with the twin objectives of 'observing' and 'developing' international law, under Article 3(5) TEU.

4.2.2. Engagement and disengagement with Article 31 VCLT

Article 31 VCLT has been applied not only in determining whether a provision of an international agreement should be interpreted in the same way as the equivalent provision of the EU Treaties. It has also been resorted to where the Court examines the compatibility of an EU act with an international agreement; and for the purposes of interpreting EU measures based on international treaties concluded by the EU.

In *IATA and ELFAA*, the ECJ was asked whether a provision of Regulation 261/2004 on the rights of air passengers[80] was compatible with the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.[81] The EU is party to the Montreal Convention, which, thus, under Article 216(2) TFEU binds the Union and the Member States, and is an integral part of EU law.[82] By applying Article 31 VCLT, and bearing in mind the Convention's consumer protection objective set out in the preamble, the Court found that the Convention does not prevent EU action which seeks to 'redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience' of a long delay or cancellation of a flight for passengers.[83] Articles of the Montreal Convention were interpreted in a similar context in *Wallentin-Hermann*.[84] In *Western Sahara Campaign UK*, the Court examined whether the Fisheries Partnership Agreement (FPA) between the EU and Morocco was compatible with international law, including the law of treaties and the UNCLOS.[85] To answer that question, it interpreted the FPA by applying Article 31 VCLT. It found that the FPA is not applicable to waters which are 'adjacent to the territory of Western Sahara' on the ground that they are not covered by the FPA's expression 'waters falling within the sovereignty

[77] Case 70/09 *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg* [2010] ECR I-7233.
[78] Kuijper 1998 (n 59) 3. Emphasis in original.
[79] Odermatt (n 59) 122.
[80] Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1.
[81] Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-403.
[82] See Case 181/73 *Haegeman v Belgium* [1974] ECR 449, paras 4-5.
[83] *IATA and ELFAA* (n 81) paras 40-45.
[84] Case C-549/07 *Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA* [2008] ECR I-11061, para 17, though the VCLT is not explicitly mentioned.
[85] 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*, EU:C:2018:118, para 41.

or jurisdiction of the Kingdom of Morocco'.[86] Hence, the issue of the validity of the FPA, which was predicated on such applicability, did not arise.[87]

In the above cases, the ECJ was able to interpret the international obligations of the EU in a way that accommodated the EU's policy choices (Rights of Air Passengers Regulation cases) or at least avoided conflict between EU and international law (*Western Sahara*).

In *Walz*,[88] *Air Baltic Corporation*[89] and *Laudamotion*,[90] the Court was asked to interpret the Montreal Convention but the questions referred did not question the compatibility of EU law with international law. Its interpretation was requested in the context of disputes between airlines and passengers to determine the scope liability under its provisions, since the Convention had been signed by the EU and implemented by EU law. In *Walz*, the Court held that, in the light of its aims, the term 'damage' in the Convention must be given a uniform and autonomous interpretation, notwithstanding the different meanings given to that concept in the domestic laws of the Contracting Parties. [91] In *AEBTRI*, the Court offered extensive analysis of provisions of the Convention on International Transport of Goods Under Cover of TIR Carnets (TIR Convention), considered in their context and in light of their object and purpose, with no apparent diversion from international interpretative orthodoxy.[92] Similarly, in *ÖBB-Infrastruktur*, it engaged in an extensive discussion of the 'context' of a provision of an Appendix to the Convention concerning International Carriage by Rail (COTIF), for the purposes of interpreting it in accordance with Article 31 VCLT.[93]

The context in which the VCLT is applied may be relevant. Where the ECJ is called upon to interpret an international agreement for the purposes of reviewing the compatibility of an EU act with its provisions, the way it applies Article 31 may be influenced by its wish to avoid conflict. If, on the other hand, the ECJ interprets an international agreement without the compatibility of EU law being at stake, it approaches the interpretation of international law unburdened by 'hierarchy anxiety': its interpretational perspective can perhaps be less distinctly 'European'[94]. This is not to say that the interpretation of Article 31 VCLT in *IATA and ELFAA* or *Western Sahara* was incompatible with the way an international tribunal would understand that provision. The point made is that the interaction between international law and EU law is dialectical: to avoid conflict, not only EU law must be interpreted so as to fit in with international law, but the latter may also need to be interpreted so as to fit in with EU law.

[86] *Western Sahara Campaign UK* (n 85) paras 84-85.
[87] ibid.
[88] *Walz* (n 38) para 23.
[89] Case C-429/14 *Air Baltic Corporation AS v Lietuvos Respublikos specialiųjų tyrimų tarnyba*, EU:C:2016:88, para 24.
[90] Case C-111/21 *BT v Laudamotion GmbH* of 20 October 2022, EU:C:2022:808.
[91] *Walz* (n 38) para 21. See, to the same effect, *Laudamotion* (n 90) para 21.
[92] Case C-224/16 *Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (AEBTRI) v Nachalnik na Mitnitsa Burgas*, EU:C:2017:880, paras 55-88. This approach was seemingly followed in Case C-15/17 *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos*, EU:C:2018:557, paras 66-79, with regard to the meaning of the expression 'coastline or related interests' in the Montego Bay Convention, which has been incorporated in Directive 2005/35.
[93] Case C-500/20 *ÖBB-Infrastruktur Aktiengesellschaft v Lokomotion Gesellschaft für Schienentraktion*, EU:C:2022:563, paras 54-66.
[94] Cf Odermatt (n 59) 122, as in n 79. Still, even where the compatibility of EU law with an international law is not at stake, the interpretation of an international agreement may be coloured by the ECJ's methodological preferences and its perception of the EU public interest.

Article 31 is an interpretational command that offers some flexibility. It provides for certain elements in accordance with which treaties must be interpreted, but the meaning of each element and the relative weight to be accorded to each of them are to be determined by the court that applies Article 31. Conflict avoidance may be given more prominence where issues of compatibility between EU and international law arise. In fact, both Member State courts and the ECJ follow similar techniques to avoid conflict between EU and national law.[95]

Sometimes, the ECJ omits references to the VCLT altogether. In *Komstroy*, the Paris Court of Appeal sought clarification of the definition of 'investment' under the Energy Charter Treaty (ECT).[96] The judgment has been strongly criticised for finding, by way of *obiter dictum*, that intra-EU investment arbitration under the ECT is not compatible with EU law.[97] For our purposes, it may seem striking that the ECJ proceeded to interpret the ECT without making any reference to CIL. This appears to be at odds with case law like *Brita*, which noted that Article 31 VCLT is binding on the EU when interpreting international agreements.[98] In *Komstroy*, the ECJ interpreted the concept of 'investment' under the ECT in almost exclusively textual terms,[99] only briefly referring to the ECT's objectives. It found that a claim on the basis of an electricity supply contract is not an investment within the meaning of the ECT. This is neither a misapplication nor a misinterpretation of CIL;[100] it rather represents a judicial approach of non-engagement with international norms. The interpretative outcome reached by the ECJ is by no means an indefensible conclusion from an international law standpoint. Nevertheless, an explicit invocation of the VCLT is not purely about outcome. It is also illustrative of the CJEU's attitude towards international law and its own jurisdictional limits.

In *Komstroy*, Advocate General Szpunar took a different approach, finding that granting ECT protection to the contractual claim in issue in the proceedings would risk conflating 'investment' with a 'mere commercial activity'.[101] Having referred to Article 31 VCLT,[102] he also relied on the *Salini* criteria which arbitral tribunals generally accept as authoritative for the purposes of defining 'investment' in investment treaties.[103] The ECJ, by contrast, conspicuously abstained from any reference to international law sources.[104]

---

[95] For examples of such dialectical conflict avoidance, see the conversation between the ECJ and the Italian Constitutional Court in C-105/14 *Taricco and Others,* EU:C:2015:555; and C-42/17 *M.A.S.*, EU:C:2017:936; and between the ECJ and the Greek Council of State in Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis* [2008] ECR I-9999, and the subsequent ruling of the Council of State in judgment 3470/2011.

[96] *Komstroy* (n 7).

[97] See, for instance, Alan Dashwood, '*Republic of Moldova v Komstroy LCC*: arbitration under Article 26 ECT outlawed in intra-EU disputes by *obiter dictum*' (2022) 47 European Law Review 127; and Paschalis Paschalidis, 'Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in *Republic of Moldova*' (2022) 7 European Investment Law and Arbitration Review 3.

[98] *Brita* (n 28) para 42.

[99] *Komstroy* (n 7) paras 67-85.

[100] See Panos Merkouris, 'Interpretation of Customary International Law: of Methods and Limits' (2023) TRICI-Law Research Paper No. 001/2023, 50 *et seq* <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf> accessed 30 September 2023.

[101] Case C-741/19 *Republic of Moldova v Komstroy LLC*, Opinion of AG Szpunar, EU:C:2021:164, para 120.

[102] *Komstroy*, Opinion of AG Szpunar (n 103) para 109.

[103] *Komstroy*, Opinion of AG Szpunar (n 105) para 115 and, generally, paras 110-120; *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Award (23 July 2001) para 52; also see *Masdar Solar and Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) paras 195 *et seq*.

[104] In contrast to *Komstroy*, the ECJ has applied the VCLT where the questions referred do not concern international agreements directly. In *B S and C A*, the referring court asked the ECJ to interpret EU regulations

Komstroy reveals the Court's sensitivity to the broader signalling implications of referring to principles of international law: doing so might be perceived as amounting to a qualification of the interpretative or conceptual autonomy of EU law. In light of the ECJ's concerns regarding the operation of investment tribunals in intra-EU relations,[105] reference to international law could be seen as a (partial) concession of the Court's own jurisdiction. [106] Such reference is thus avoided, although its absence does not necessarily result in outcomes which are incompatible with international law.

4.3. *Binding effect of customary international law*

The recognition of CIL as binding means that acts adopted by the Union (and, insofar as they fall within the scope of EU law, acts of the Member States) must be interpreted in the light of CIL norms. It also means that, where such an act runs counter to a CIL norm, it is inapplicable. If it is an EU act, it is liable to be declared invalid by the CJEU. It is important to note however that, in most cases, CIL is unlikely to arise in isolation and will be part of a wider international law normative context which will include international treaties.

4.3.1. Duty of harmonious interpretation

In *Poulsen*,[107] the ECJ held that, since the EU must respect international law in the exercise of its powers,[108] the regulation in issue had to be interpreted, and its scope limited, in light of the relevant international agreements insofar as they codified or expressed customary international law.[109]

There is a duty of harmonious interpretation analogous to that established in *Von Colson*[110] and *Marleasing*,[111] whereby national courts must seek to interpret national law consistently with EU law. In *Commission v Germany*, the Court noted that, similarly to the *Marleasing* duty, 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is

with a view to determining whether a French decree relating to the cultivation and trading of cannabis and cannabis-derived products was compatible with EU law. The ECJ applied Article 31 VCLT because the 1961 Single Convention on Narcotic Drugs is mentioned in a Council Framework Decision that applied in that case; Case C-663/18 *B S and C A (Commercialisation du cannabidiol (CBD))*, EU:C:938, paras 65 *et seq*.

[105] *Achmea* (n 7). Note also that the Court did not refer to the VCLT in *Achmea*, although the questions referred did not concern directly the interpretation of an international treaty but its compatibility with EU law.

[106] For more, see Jed Odermatt, 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the EU Legal Order' (2021) 6 European Papers 1255.

[107] *Poulsen* (n 9) para 9.

[108] *Poulsen* (n 9) para 9.

[109] *Poulsen* (n 9) paras 9-10; and see *Mondiet* (n 31) paras 12-15, where the ECJ invoked CIL to circumscribe the limits of EU competence.

[110] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paras 11 and 28.

[111] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 9 *et seq*.

possible, be interpreted in a manner that is consistent with those agreements'.[112] This has been confirmed in relation to the TRIPS[113] and many other agreements.[114]

This interpretative duty has a broad scope of application. It arises not only in relation to agreements which express customary rules and agreements concluded by the EU but also in relation to agreements to which Member States (but not the EU) are parties. In *Intertanko*, the Court noted that the fact that Marpol 73/78 'binds the Member States' […] is liable to have consequences for the interpretation of […] provisions of secondary [EU] law'.[115] In such a case, in light of the 'customary principle of good faith, […] it is incumbent upon the Court' to interpret secondary EU law taking account of a rule in an international agreement which does not directly bind the EU.[116] The objective of this duty is 'to avoid, so far as possible, interpreting EU law in a manner that makes it impossible for the Member States to fulfil their international law commitments.'[117]

The intensity of the interpretative duty applicable in relation to international law is unclear. That duty cannot justify a *contra legem* interpretation of EU law. Whether it is as intense as the *Marleasing* duty borne by national courts remains open. *Pfeiffer* holds that a national court is 'require[d] […] to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure' the full implementation of EU law.[118] This is a prescriptive formulation which is not found, for instance, in *Commission v Germany*.[119] Notably, in *Pfeiffer*, the Court emphasised that harmonious interpretation ensures the effectiveness of EU law and the remedies established therein. The *Marleasing* duty is powered by the effectiveness rationale which flows from the doctrine of primacy and the conception of EU law as constitutional system. But is there an equivalent constitutional imperative in relation to international law?

In contrast to other areas, the duty of consistent interpretation has been formulated more intensely in relation to the Aarhus Convention. Article 9(3) requires parties to ensure that individuals have access to administrative or judicial procedures enabling them to challenge private or public acts or omissions relating to environmental law. In the *Brown Bears* case, the ECJ held that, although Article 9(3) does not have direct effect, a national court must interpret, 'to the fullest extent possible', the national procedural rules governing administrative or judicial proceedings in accordance with the objectives of Article 9(3) and the objective of

[112] Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52.
[113] Case C-53/96 *Hermès International v FHT Marketing Choice* [1998] ECR I-3603, para 28.
[114] See e.g. C-363/12 *Z v A Government department, The Board of management of a community school* of 18 March 2014, EU:C:2014:159, para 72; and Case C-265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, and Others* of 8 September 2020, EU:C:2020:677, para 62; but the EU Treaties need not be interpreted in the light of international agreements as they rank higher: Joined Cases C-212/21 P and C-223/21 P *European Investment Bank and Commission v ClientEarth*, Opinion of AG Kokott, delivered on 15 December 2022, EU:C:2022:1003, para 69.
[115] *Intertanko* (n 11) para 52.
[116] *Intertanko* (n 11) para 52.
[117] Case C-158/14 *A and others v Minister van Buitenlandse Zaken*, Opinion of AG Sharpston delivered on 29 September 2016, EU:C:2016:734, para 100.
[118] Joined cases C-397/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Waldshut* [2004] ECR I-8835, para 118 and, generally, paras 110-118.
[119] *Commission v Germany* (n 112).

effective judicial protection.[120] The same approach has been followed in subsequent ECJ judgments,[121] AG Opinions[122] and GC orders,[123] in relation to Article 9(3) and (4) of the Aarhus Convention.[124] The Aarhus Convention case law does not concern the interpretation of EU law but national procedural rules relating to the effectiveness of EU law.[125] The Court's approach is coloured by the need to provide effective judicial protection as required by Article 47 of the Charter. That line of case law does not appear to establish, in general, an interpretative duty of *Pfeiffer* intensity in relation to the interpretation of all EU measures in the light of international law.

In relation to WTO law, Advocate General Ćapeta has taken the view that the reasons which necessitate a restrained approach towards the judicial review of EU acts on grounds of incompatibility with WTO law, also call for a restrained approach in the pursuit of consistent interpretation between EU law and WTO law.[126] This is so as not to deny to the EU institutions the necessary space for political manoeuvring.[127] In some respects, the duty of consistent interpretation may be more flexible in relation to CIL. To the extent that CIL norms are more vague and allow for a range of interpretations, it is reasonable to assume that the interpretation closer to the text and objectives of the EU act in question will be preferred.

4.3.2. Customary international law as a ground of review

Although international agreements binding on the Union take precedence over Union acts, the case law restricts the extent to which such agreements can be used as grounds of review. In contrast to higher ranking EU rules, invocability of international agreements is subject to direct effect. An international agreement can be relied upon as a ground of annulment of an EU measure only where 'the nature and the broad logic' of the agreement do not preclude such

[120] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255, para 51.
[121] C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* of 20 December 2017, EU:C:2017:987; C-470/16 *North East Pylon Pressure Campaign Ltd and Maura Sheehy* of 15 March 2018, EU:C:2018:185; Case C-167/17 *Volkmar Klohn v An Bord Pleanála* of 17 October 2018, EU:C:2018:833; and C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* of 8 November 2022, EU:C:2022:857.
[122] C-401/12 P *Council, Parliament and Commission v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Opinion of AG Jääskinen delivered on 8 May 2014, EU:C:2014:310; C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín*, Opinion of AG Kokott delivered on 30 June 2016, EU:C:2016:491; Case C-352/19 P *Région de Bruxelles-Capitale v Commission*, Opinion of AG Bobek delivered on 16 July 2020, EU:C:2020:588; and C-252/22 *Societatea Civilă Profesională de Avocaţi AB & CD v Consiliul Judeţean Suceava and Others*, Opinion of AG Medina delivered on 13 July 2023, EU:C:2023:592.
[123] T-565/14 *European Environmental Bureau v Commission* of 17 July 2015, EU:T:2015:559; and T-685/14 *European Environmental Bureau v Commission* of 17 July 2015, EU:T:2015:560.
[124] Similarly to Article 9(3), Article 9(4) requires parties to provide 'adequate and effective' remedies and to ensure that administrative or judicial procedures relating to environmental matters are 'fair, equitable, timely and not prohibitively expensive'.
[125] cf Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-3673, para 41, where the ECJ found that an EU directive 'must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention'.
[126] Case C-123/21 P, *Changmao Biochemical Engineering v Commission*, Opinion of AG Ćapeta delivered on 17 November 2022, EU:C:2022:890, para 100.
[127] *Changmao*, Opinion of AG Ćapeta (n 126) para 101.

reliance and, in addition, the specific provisions of the agreement relied upon are unconditional and sufficiently precise.[128]

The conditions under which a private party may rely on CIL principles are, at least in some cases, less onerous than those conditioning reliance on international agreements. In *ATAA*, the ECJ was concerned with the principle that each State has complete and exclusive sovereignty over its airspace; the principle that no State may validly purport to subject any part of the high seas to its sovereignty; and the principle of freedom to fly over the high seas. It held that those principles can be relied upon by a private party to contest the validity of a Union act in so far as, firstly, the CIL principle in issue is capable of calling into question the competence of the Union to adopt the contested act; and, secondly, that act is liable to affect rights which the individual derives from Union law or to create obligations under Union law.[129]

Under those conditions, it appears that it is not necessary to establish that the CIL rule that is being invoked is intended to grant a right to the applicant. Even a CIL principle that creates reciprocal obligations between States may be relied upon.[130] Thus, an important hurdle that needs to be overcome to rely on an international treaty does not appear to apply, at least in the case of the CIL principles stated above.[131] Nonetheless, the absence of direct effect as a pre-condition of reliance is counter-balanced by the erection of another obstacle. The case law posits that, since CIL principles do not have the same degree of precision as provisions of an international agreement, judicial review is limited to the question whether, in adopting the act in question, the EU made a manifest error of assessment concerning the conditions for applying the CIL principles in issue.[132] The manifest error test is linked to discretion and is better suited to situations where the CIL principle imposes obligations on the Union. By contrast, where the CIL rule in issue gives rise to a right, it has *ex hypothesi* already passed the test of being precise and unconditional. The enquiry would then centre on whether that right has been violated. Also, where the CIL obligation is clear and precise, it is more difficult to see why the breach must be manifest. Notably, in *Front Polisario II*, the GC acknowledged but did not appear to place any reliance on the condition of manifest error.[133]

The manifest error test was first laid down in relation to CIL in *Racke* where a company challenged the suspension of trade concessions provided to Serbia by the Cooperation Agreement between the EEC and Yugoslavia.[134] The EU sought to justify the suspension by claiming a fundamental change in the circumstances following the onset of the war in former Yugoslavia. The Court held that the principle of *rebus sic stantibus*, as stated in Article 62

[128] *Intertanko* (n 11) para 45; *IATA and ELFAA* (n 81), para 39; Joined Cases C-120/06 P and C-121/06 P *Fabbrica Italiana Accumulatori Motocarri Montecchio* [2008] ECR I-6513, para 110.
[129] *ATAA* (n 42) para 107.
[130] *ATAA* (n 42) para 109.
[131] These less onerous conditions should therefore also apply in relation to provisions in international treaties that reflect those CIL principles. Indeed, as the ECJ pointed out in *ATAA* (n 42), the CIL principles in issue in that case had been codified in international agreements: see para 104. *Intertanko* (n 11) paras 45, 46 and 50, read in conjunction with each other, may appear to give the impression that the dual requirement that the nature and the broad logic of the agreement must not preclude reliance and that the provisions in issue must be unconditional and sufficiently precise apply also in relation to treaty provisions that reflect CIL but that would be too much to read in those dicta.
[132] *ATAA* (n 42) para 111; Case C-162/96 *A Racke GmbH v Hauptzollamt Mainz* [1998] ECR I-3655, para 52.
[133] T-279/19 *Front Polisario II* (n 3) paras 343-344; and Joined Cases T-344/19 and T-356/19 *Front Polisario II* (n 3) para 344.
[134] *Racke* (n 132).

VCLT, is a principle of CIL that could be relied upon but, because of its 'complexity' and 'imprecision', judicial review was limited to assessing the existence of a manifest error.[135] It then examined whether the conditions under which, pursuant to Article 62 VCLT, a contracting party may avoid its treaty obligations owing to a fundamental change of circumstances were fulfilled. It came to the conclusion that the Council had not committed a manifest error in determining that the pursuit of hostilities made for a radical change in the conditions under which the Cooperation Agreement was concluded. Wouters and Van Eeckhoutte have strongly criticised the judgment, arguing that the manifest error test is premised upon a 'misconception and oversimplification' of CIL, insofar as it is cast as inherently uncertain; *inter alia*, this arguably disregards the fact that many customary rules are codified in international agreements, such as the VCLT, thereby gaining 'similar characteristics to a treaty provision'.[136]

In any event, the manifest error test gives to the CJEU some jurisdictional autonomy to apply CIL. This autonomy will vary depending on the precision of the rule in issue and also the existence of a *corpus* of case law by the ICJ or other international tribunals clarifying the rule in issue.

The first condition for reliance on CIL stated in *ATAA* is whether the rule invoked is 'capable of calling into question the competence of the European Union to adopt [the contested] act'.[137] This condition is unclear. It was laid down in *ATAA* and although, in support of it, the ECJ referred to two earlier judgments, neither of them provide precedent.[138] In none of the cases where the Court has referred to that condition has it clarified its meaning or explained why it should be a general condition. Virtually all of those cases referred to the principle of territoriality.[139] A CIL rule would be capable of calling into question the competence of the Union to adopt the contested act, for example, when it delimits *ratione personae* or *ratione loci* the competence of the Union. EU law is presumed not to have extraterritorial effect. The Union must respect international law in the exercise of its powers, and EU measures must be interpreted, and their scope delimited, in the light of the relevant rules of international law.[140] However, more broadly, any CIL rule which is binding on the Union institutions limits their powers to adopt an act in that the act must conform with those rules, and is thus capable of calling into question the competence of the Union.

---

[135] *Racke* (n 132) para 52.

[136] Jan Wouters and Dries Eeckhoutte, 'Giving Effect to Customary International Law Through European Community Law' (2002) KU Leuven Institute for International Law Working Paper No 25, 22-23 <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf> accessed 30 September 2023.

[137] *ATAA* (n 42) para 107.

[138] At *IATA and ELFAA* (n 81) para 107, the ECJ referred to Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* [1988] ECR 5193, paras 14 to 18, and *Mondiet* (n 31) paras 11 to 16. The cases referred to the principle of territoriality in competition and fisheries respectively.

[139] See, for instance, C-561/20 *Q, R, S v United Airlines* of 7 April 2022, ECLI:EU:C:2022:266, paras 47-51. Cf Joined Cases C-401/12 P to C-403/12 P *Council, Parliament and Commission v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Opinion of AG Jääskinen, EU:C:2014:310, para 66, which concerned the Aarhus Convention but referred in passing to the *ATAA* competence condition. Also, in Case T-65/18 RENV *Venezuela v Council*, EU:T:2023:529, para 88, the GC referred to that condition when considering the alleged breach by the Council of the customary principle of non-interference in the internal affairs of a sovereign state (though that principle also reflects, at least partly, concerns of extraterritoriality).

[140] See *ATAA* (n 42) para 123; and *Poulsen* (n 9) para 9.

This condition was examined by the GC in *Front Polisario II*. In the *Front Polisario II* judgments,[141] the GC, for the first time, found Council measures to be in breach of CIL.[142] Front Polisario, an organisation fighting for the independence of Western Sahara, sought the annulment of Council decisions approving trade and fisheries agreements concluded between the EU and Morocco, which intended to apply to the territory of Western Sahara. In essence, the claimants argued that the decisions violated the customary principles of self-determination and of the relative effect of treaties,[143] as they were adopted without the consent of the Sahrawi people. Whereas in *Front Polisario I* the GC had annulled the contested decision owing to the Council's failure to examine its compatibility with EU fundamental rights,[144] in *Front Polisario II*, it upheld the claimant's international law arguments, finding that the Council had not gained the consent of the Sahrawi people. The *Front Polisario II* judgments are currently under appeal before the ECJ.[145]

The GC based its finding on the ECJ's *Front Polisario I* judgment, which, although it rejected Front Polisario's action as inadmissible, noted that, according to the UN Charter and the case law of the ICJ, the customary principle of self-determination is 'applicable to all non-self-governing territories and to all peoples who have not yet achieved independence'.[146] In this respect, self-determination 'forms part of the rules of international law applicable' to EU-Moroccan relations.[147] The GC emphasised the Council's obligation to comply with the ECJ's earlier interpretation of international law.[148]

In *Front Polisario I*, the ECJ held that the right to self-determination constituted a legally enforceable right *erga omnes* and one of the essential principles of international law.[149] It also held that, if the Association Agreement between the EU and Morocco were interpreted as applying to Western Sahara, that would be contrary to the principle of the relative effect of treaties reflected in Article 34 VCLT.[150] This is because Western Sahara was a third party which had not given its consent. In *Front Polisario II*, the GC understood the ECJ judgment in *Front Polisario I* as inferring 'from the principle of self-determination and from the principle of the relative effect of treaties clear, precise and unconditional obligations' in relation to Western Sahara, namely an obligation to respect its separate and distinct status and an

[141] T-279/19 *Front Polisario II* (n 3); and Joined Cases T-344/19 and T-356/19 *Front Polisario II* (n 3).
[142] The cases form part of the *Front Polisario* dispute. For earlier judgments, see Case C-104/16 P *Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro*, EU:C:2016:973 (*Front Polisario I*); and *Western Sahara Campaign UK* (n 85). For more on these cases, see Eva Kassoti, 'The ECJ and the art of treaty interpretation: *Western Sahara Campaign UK*' (2019) 56 Common Market Law Review 209; and Jed Odermatt, 'The EU's economic engagement with Western Sahara: the *Front Polisario* and *Western Sahara Campaign UK* cases' in Antoine Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Routledge 2020).
[143] This is expressed in Article 34 VCLT, which provides that a treaty 'does not create either obligations or rights for a third State without its consent'.
[144] *Front Polisario I* (n 27). This was set aside by the ECJ in *Front Polisario I* (n 142) on the ground that Front Polisario lacked standing.
[145] Case C-798/21 P *Council v Front Polisario*; and Case C-799/21 P *Council v Front Polisario*.
[146] *Front Polisario I* (n 142) para 88.
[147] *Front Polisario I* (n 142) para 89.
[148] T-279/19 *Front Polisario II* (n 3) paras 268 *et seq* and 279-280.
[149] See *Front Polisario I* (n 142) para 88.
[150] *Front Polisario I* (n 142) para 107.

obligation to ensure that its people consented to the implementation of the Association Agreement in that territory.[151]

In the view of the authors, although this inference does not necessarily flow from the judgment of the ECJ, it represents the correct understanding of the effect of the principle of self-determination and the principle of the relative effect of treaties in EU law. In the light of the case law of the ICJ[152] and the UN General Assembly resolutions on Western Sahara referred to by the ECJ,[153] the above principles are best understood as commands that are sufficiently specific and impose enforceable obligations in the context of the dispute in issue and not as principles that operate merely at a plane of international law dissociated from the validity of EU action. They bind the EU as an integral part of EU law, and the Union has the obligation to incorporate them in the conduct of its common commercial policy.[154] Their legal effects follow, first, from the fact that they are fundamental principles of international law which are intended to protect specific parties; and, secondly, the fact that, in the context of Western Sahara, the principle of self-determination has been established by specific UN General Assembly resolutions and by the ICJ. In the context of the dispute, they are principles which contain clear and precise obligation which are not subject, in their implementation or effects, to the adoption of any subsequent measure.[155] Also, as the GC stated in *Front Polisario II*, the lawfulness of the contested Council decision could be examined in light of those principles given that Article 3(5) and Article 21(1) TEU commit the EU to respect international law.[156]

In *Front Polisario II*, the Council, the Commission and other parties argued that the applicant could not rely on the principle of self-determination and the principle of the relative effect of treaties, *inter alia*, because, under the *ATAA* test, the first condition of reliance is that the CIL rule invoked must be capable of calling into question the competence of the Union to adopt the contested act.[157] In particular, the Commission's argument was that infringement of the right to self-determination cannot be relied on against an act of the Council and also that the principle of the relative effect of treaties can only render an international agreement unenforceable against a third party but cannot call its validity into question.[158] The GC correctly dismissed those arguments. It distinguished the *ATAA* case on several bases. In *ATAA*, the applicants were transport undertakings for whom the CIL principles on which they relied did not create rights. The CIL principles invoked only created obligations between states. Their situation therefore was not comparable to the applicant in *Front Polisario II*.[159] Also in contrast to the situation in *ATAA*, the contested decision in *Front Polisario II* was adopted not within the framework of the internal powers of the EU but within the framework of its external action,

[151] See T-279/19 *Front Polisario II* (n 3) para 281.
[152] See the ICJ authorities referred in *Front Polisario I* (n 142) para 88.
[153] *Front Polisario I* (n 142) paras 90-91.
[154] See T-279/19 *Front Polisario II* (n 3) para 278; and Opinion 2/15 of 16 May 2017, EU:C:2017:376, paras 142-147.
[155] These are the requirements of reliance, see T-279/19 *Front Polisario II* (n 3) para 281 and the case law cited therein.
[156] T-279/19 *Front Polisario II* (n 3) paras 277-278.
[157] See T-279/19 *Front Polisario II* (n 3) paras 251 to 258. The arguments, as summarised by the GC in its judgment, are not particularly clear.
[158] T-279/19 *Front Polisario II* (n 3) para 254.
[159] T-279/19 *Front Polisario II* (n 3) para 288.

which is based, particularly under Article 21 TEU, on compliance with the principles of the UN Charter and of international law.[160]

In fact, the comparison with the *ATAA* case somewhat obfuscates the enquiry. It follows from *Front Polisario II* that, according to the GC, reliance on a CIL rule is possible where it creates clear, precise and unconditional obligations on the EU and reliance is intended to ensure respect for the rights of a third party to an agreement which are liable to be affected by the breach of those obligations.[161] This should be considered as correct. In fact, as stated above, the first condition laid down in *ATAA* is unclear and liable to create confusion.

Thus, the conditions under which reliance may be placed on CIL as a ground of review are context and rule-specific.[162] The CJEU will take into account the importance of the rule, its specificity, whether it has been elaborated in a specific context by the ICJ and/or UN resolutions, the identity of the applicant, and the circumstances in which the rule is relied upon. Specific CIL obligations may give rise to implied rights of actions enforceable in EU law. Interestingly, in *Western Sahara Campaign UK*, the Court had merely noted, without reference to additional conditions, that 'the Court has jurisdiction, both in the context of an action for annulment and in that of a request for a preliminary ruling to assess whether an international agreement concluded by the European Union is compatible with the Treaties […] and with the rules of international law which, in accordance with the Treaties, are binding on the Union.'[163]

As far as the position of CIL in the normative hierarchy of EU is concerned, the issue remains open. A lot will depend on the specific CIL rule in question. According to the case law, international agreements concluded by the Union rank higher than EU acts but below the EU Treaties.[164] CIL enjoys at the very least the same ranking as international agreements. Also, since all Member States are bound by *jus cogens*, so is the EU. The treaties founding the EU, as international treaties, must comply with *jus cogens*. In practice, things are less clear-cut. Since, within the EU legal order, the ECJ is at the apex of its jurisdiction, it has the responsibility to interpret and apply *jus cogens* and thus plays a role not only as a taker of the peremptory rules of international law but also as a shaper of those rules.[165]

5. Conclusion

[160] T-279/19 *Front Polisario II* (n 3) para 290.
[161] T-279/19 *Front Polisario II* (n 3) para 291; and Joined Cases T-344/19 and T-356/19 *Front Polisario II* (n 3) para 290.
[162] In his Opinion in *Achmea*, AG Wathelet suggested that they may amount to 'conditions which in reality are impossible to meet', drawing a 'parallel' with conditions imposed by national courts on the reliance of investors on international law; Case C-284/16 *Slovak Republic v Achmea BV*, Opinion of AG Wathelet, EU:C:2017:699, para 206 and footnote 159 thereof.
[163] *Western Sahara Campaign UK* (n 85) para 48.
[164] *Commission v Germany* (n 112) para 52; *Intertanko* (n 11) para 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras 306-307.
[165] *Jus cogens* was applied by the Court of First Instance in T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, but its approach gives rise to several problems. First, given that *jus cogens* had not been relied upon by any of the parties, it should have given them the opportunity to present observations before assessing the compatibility of sanctions with them. Secondly, it is doubtful whether the rules applied, namely the right to property and related process rights, can be seen as *jus cogens*. Sadly, they do not enjoy universal recognition. Essentially, by framing its analysis in terms of *jus cogens*, the CFI applied the rules which would have applied if it had decided that EU fundamental rights were applicable only by exercising a lighter standard of scrutiny.

There is an upward trend in judicial references to CIL and the VCLT. This reflects the growing engagement of the EU as an international actor. As the competence of the EU expands and as it engages more actively in the negotiation and conclusion of international agreements, the importance of international law as a source of EU law can be expected to increase. Most references to CIL have been made by the ECJ and its Advocates General, rather than the GC, but this is explained by jurisdictional factors. As *Front Polisario II* illustrates, the GC has made its own independent input on the legal effects of CIL in EU law. In applying CIL, the ECJ performs a balancing act between jurisdictional coherence and normative openness. While it recognises in abstract terms the important role and effect of CIL, it may abstain from clarifying its input in concrete terms. In some cases, it identifies certain rules as being CIL. In others, it may apply provisions of VCLT without expressly affirming that the provision applied is customary law. Where the ECJ states that a provision is CIL, its analysis tends to be somewhat rudimentary. It does not engage with the conditions that must be fulfilled for a rule to be recognised as CIL, although it may refer to the case law of the ICJ as a justification. References tend to be abstract, often characterising, in general, many provisions of an international treaty as CIL, the inference being that those applied in the specific case are of such a nature. As expected, Advocates General engage more closely with the conditions that a rule need to fulfil to qualify as CIL.

The CJEU may apply CIL in various contexts. It may do so for the purposes of interpreting international agreements, interpreting EU acts, or determining their compatibility with international law. Its approach is context-specific and not always consistent. Where the compatibility of EU law is at stake, the need for conflict avoidance will be an important factor: to avoid conflict, both EU law and international law must be interpreted so as to fit with each other. In a different context, *Komstroy* betrays a lack of engagement with international norms, probably in an effort to assert the autonomy of EU law. It is an example of defensive constitutionalism which, however, does not necessarily lead to outcomes incompatible with international law.

CIL generates a duty of harmonious interpretation which, in general, has been expressed in terms that fall short of the asphyxiating obligations of *Marleasing*. This affords the CJEU some flexibility in pursuing the objective of interpretative harmony between EU and international law. The intensity of that duty, however, may be context specific. CIL may also serve as a ground of review of EU measures. It is likely that CIL will be invoked together with other sources of international law so, to determine how open the CJEU is to international law, one would need to assess its approach to all international law norms. The conditions under which a litigant may rely on CIL to contest the validity of a Union act appear to be both context and rule specific. The case law has vacillated and is not characterised by clarity, but the openness displayed by GC in *Front Polisario* should be welcomed. The *Front Polisario* dispute is in fact one of the few cases where the CJEU has intervened not only as a receiver but also as a shaper of CIL interpretation. The approach of the GC in *Front Polisario II* should be welcomed. In the context of that case, the principle of self-determination and the principle of relative effect of treaties are best viewed as imposing specific obligations which can be relied upon to contest the validity of EU action.