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Like Ships in the Night? The CJEU and the ICJ at the Interface

by

Eva Kassoti & Lisa Louwerse*

Abstract

This contribution explores the question as to whether the CJEU has promoted or, conversely, weakened the coherence of the international legal system through its practice within the broader context of the fragmentation debate. In order to do so, the paper begins by inquiring into the notions of 'fragmentation' and 'coherence' and argues that the two terms are used to connote a wide array of meanings. Focusing on the judicial aspect, the paper continues by examining the extent to which the CJEU is willing to engage with external sources by directly citing to the jurisprudence of the ICJ in cases involving questions of public international law. It is demonstrated, that, in its practice, the Court shows a high degree of deference to the authority of the ICJ by routinely having recourse to the latter's case-law. In this light, the paper puts into question the manner in which the EU courts are often portrayed in the literature: by refusing to make their own bold pronouncements on international law, the EU courts are actually conducive to the coherence of the international legal system. The paper concludes by highlighting that, in order to remain informed and relevant, the fragmentation/coherence debate must also include the 'trans-judicial communication' perspective.

Keywords: Fragmentation, coherence, self-contained regimes, judicial dialogue, EU law, international law, ICJ, CJEU, constitutionalism

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I. Introduction

In the past decade, the question as to whether, and to what extent, international law is a fragmented legal order has been at the forefront of academic discourse. Irrespective of whether or not fragmentation actually exists (and if so, whether it is best perceived as a problem or as the natural outgrowth of a continuously evolving legal order) it remains true that the move from the half-century judicial monopoly of the ICJ to its present co-existence with the CJEU raises a host of questions. The EU's long-standing claim to autonomy and its latest manifestations in the *Kadi*¹ and *Intertanko*² judgments have led a number of lawyers to vociferously criticise the Court for being an 'agent of dualism'—thereby endangering the coherence of the international legal order.³ Nevertheless, critics tend to focus on EU rhetorics and on particular judgments as proof of the EU's contribution to the fragmentation of the international legal order, while, at the same time, ignoring other judgments by the same Court that are undoubtedly 'international law friendly', such as *Brita*⁴ and *ATAA*.⁵ More fundamentally, the fragmentation narrative tends to overlook the existence and extent of judicial dialogue between the two courts.

In this light, the present paper purports to revisit the question as to whether the EU Courts have promoted or weakened coherence in international law through their practice by exploring the place of the ICJ's case-law in the legal disputes of the EU. The paper begins with some preliminary remarks on the relationship between EU and international law. It asserts that, although the interface between the two legal orders is not without problems, there are no irreconcilable, systemic differences between them. More particularly, it is shown that far from constituting a so-called 'self-contained' regime, the EU shows a high degree of deference for international law. In this respect, it is argued that the EU's claim to

¹ ECJ, joined cases C-584/10 P, C-593/10 P, C-595/10P, *European Commission v Yassin Abdullah Kadi* [2013], ECLI:EU:C:2013:518.

² ECJ, case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008], ECR I-04057.

³ See for example WOUTERS Jan, ODERMATT Jed, RAMOPOULOS Thomas, "Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law", Leuven Centre for Global Governance Studies Working Paper, No. 96, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274763, (consulted on 31 August 2015).

⁴ ECJ, case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010], ECR I-01289.

⁵ ECJ, case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011], ECR I-13755.

autonomy is not incompatible with the open-ended structure of the international legal system, which, due to its horizontal and decentralised nature, permits the development of highly specialised sub-systems. The paper continues by mapping out the debate on the fragmentation of international law, as this constitutes the broader *problématique* within which the question of coherence has been raised in recent years. It is shown that fragmentation has both normative (normative fragmentation) and institutional aspects (substantive fragmentation). The discussion focuses on the latter and substantive fragmentation is defined here as the increased risk of divergent interpretations of international law norms due to the recent proliferation of international courts and tribunals.

Against this backdrop, the paper zooms in on the notion of coherence and claims that, in the context of substantive fragmentation, coherence amounts to consistency of *judicial reasoning*, *i.e.* ascertaining whether the CJEU's reasoning is compatible with that of the ICJ in similar cases - irrespective of whether international law is given precedence in a given case or not. It is asserted that an important variable of adjudicative coherence is the extent to which the CJEU is cognizant of, and engages with, the case-law of the ICJ - since the latter remains the only judicial body with universal jurisdiction over all matters of international law. The paper proceeds to examine the patterns of judicial dialogue between the two courts and argues that the CJEU's approach is much more conducive to the unity of the international legal order than it is given credit for. Here, the paper identifies a number of areas where the CJEU makes copious references to the authority of the ICJ and demonstrates that, in recent years, the EU Courts have been increasingly more receptive to external sources. At the same time, the paper exemplifies how the occasional reluctance of the CJEU to engage in depth with complex international law questions may undermine the quality of trans-judicial dialogue between the two courts. The paper concludes by stressing the importance of adding the 'judicial dialogue' perspective to the on-going fragmentation debate. The coherence of the 'incurably plural' world of international legal development cannot be assessed solely in terms of the traditional binaries of validity/invalidity; the level and extent of interaction among bodies embedded in different legal orders need to be also evaluated.

II. International law and EU law: a convoluted relationship

Although the focus of the paper is to examine the extent to which the ICJ and the CJEU engage in inter-judicial dialogue within the overall *problématique* of the so-called 'fragmentation' of the international legal order, it is helpful, from the outset, to offer some preliminary remarks on the relationship between international and EU law. This will provide some background to the discussion that will unfold in the following sections as well as clarify our own vantage point. It is a truism to say that the relationship between international law and

EU law is complicated. However, it must be borne in mind that there is an inherent complexity in conceptualising the relationship between any two given legal orders – especially the relationship between a horizontal, decentralised legal order with weak enforcement mechanisms (international law) and a highly integrated, multi-layered and developed legal order with strong enforcement mechanisms (EU law). The main point advocated in this section is that the level and extent of this complexity is perhaps over-exaggerated: much depends on *who* is looking at the relationship and *what* they are exactly looking at. As a general rule, international lawyers tend to look at EU law merely as a sub-system of international law,⁶ while EU lawyers tend to stress the autonomous and *sui generis* nature of EU law and to overlook its links to general international law.⁷ However, as it will be shown below, once the debate moves from general theoretical points (and thus, beyond disciplinary biases) to the specifics, it becomes apparent that EU law poses little systemic threat to international law. More particularly, the section argues that: a) The EU does not exist in a systemic vacuum. On the contrary, both the EU Treaties and the practice of the CJEU reveal a large degree of *Völkerrechtsfreundlichkeit*; and b) international law, due to its lack of vertical integration, is, by its very nature, amenable to the creation of *leges speciales* – without this endangering its integrity.

First, any discussion involving questions of ‘fragmentation of international law’ presupposes the existence of an *international legal system* – however diffuse and decentralised that may be – the unity of which may (or may not) be threatened by the existence of specialised rules or by the practice of different actors and courts *within that system*.⁸ Thus, it is necessary to provide a rudimentary blueprint of the relationship between international and EU law in order to ascertain whether the latter constitutes a ‘self-contained’ regime, namely a ‘closed legal circuit’ with a complete set of rules and, thus, no need to fall back on rules of general international law.⁹ If EU law is indeed a self-contained regime, then this would render any debate on points of convergence and divergence between EU and international law largely redundant: there is not much point in debating whether certain substantive or institutional aspects of EU law, or of any field of law for that matter, promote or pose a threat to the

⁶ See for example BETHLEHEM Daniel, “International Law, Community Law, National Law: Three Systems in Search of a Framework”, in Koskenniemi Martti (ed), *International Law Aspects of the European Union*, The Hague, Kluwer Law, 1998, pp. 169-196, p. 178.

⁷ See for example the statement by V. Arangio-Ruiz (Special Rapporteur of the ILC on State Responsibility): “Generally, the specialists on Community law tended to consider that the system constituted a self-contained regime. Whereas scholars of public international law shared a tendency to argue that treaties establishing the Community did not really differ from other treaties.” Summary Record of the 2266th meeting, *Yrbk. of the ILC* 1992, Vol. I, p. 76, para. 2. See also WEILER Joseph H. H., “The Transformation of Europe”, *Yale Journal* 1991, pp. 2403-2483, p. 2422; HANCHER Leigh, “Constitutionalism, the Community Court and International Law”, *NYIL* 1994, pp. 259-298, pp. 265-266.

⁸ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13/04/2006, (finalised by Martti Koskenniemi), para. 15, available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, (consulted on 31 August 2015, hereinafter referred to as the Report on Fragmentation).

⁹ SIMMA Bruno, “Self-Contained Regimes”, *NYIL* 1985, pp. 111-136. According to Simma, the term ‘self-contained regimes’ is used to “designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules.” *Ibid.*, pp. 115-116. For an overview of practice and literature pertaining to self-contained regimes, see also the ILC’s Report on Fragmentation, *supra* note 8, pp. 65-100.

coherence of international law, unless the point of departure is that these fields are actually embedded in the same legal system.

Both the EU Treaties and the case-law of the CJEU show a high degree of deference for international law. Art. 216(2) TFEU expressly recognises the binding character of international agreements concluded by the Union and Art. 3(5) TEU stipulates that the Union shall contribute to “the strict observance and development of international law.” The CJEU has consistently held that international agreements binding on the EU form an integral part of the Union legal order and are, thus, directly applicable.¹⁰ Furthermore, in its practice, the Court frequently has recourse to international law, for example in order to establish the international law meaning of terms referred to by EU rules.¹¹ As far as customary international law is concerned, the Court has expressly acknowledged its binding force as a source of EU law.¹² It also merits attention that the EU participated in the ILC’s effort to elaborate a unified set of rules concerning the responsibility of international organisations which culminated in the 2011 Draft Articles on the responsibility of international organisations¹³ and is actively contributing to the Commission’s current attempt to shape a common understanding of the process of identifying customary international law.¹⁴ In this light, it is evident that EU law is by no means ‘clinically isolated’ from general international law: both the Treaties and the Court expressly acknowledge international law as an integral part of the EU legal order. This proposition tallies with the findings of the ILC in its report on fragmentation. Having examined a number of so-called ‘self-contained’ regimes the Commission concluded that “none of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded.”¹⁵

Secondly, a perusal of the literature on the topic readily shows that a number of distinct legal issues (such as the question of fragmentation of international law, the question of the ranking of international law within the EU legal order, as well as the question of direct effects of international law within the EU legal order) are indiscriminately ‘thrown into the

¹⁰ ECJ, case 181-73 R *et V Haegeman v Belgian State* [1974], ECR I-449, para. 5. For an overview of the relevant case-law see generally WOUTERS Jan, NOLLEKAEMPER Andre, DE WET Erika (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, The Hague, T.M.C. Asser Press, 2008.

¹¹ See for example ECJ, case C-63/09, *Axel Walz v Clickair SA* [2010], ECR I- 4239, para. 27. Here the Court referred to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts prepared by the ILC in order to ascertain the concept of ‘damage’ provided for in the 1999 Montreal Convention for the Unification of Certain Rules for International carriage by Air. See also ECKES Christina, “International Law as Law of the EU: The Role of the European Court of Justice”, in Cannizzaro Enzo, Palchetti Paolo, Wessel Ramses A. (eds), *International Law as Law of the European Union*, Leiden, Brill, 2012, pp. 353-377.

¹² See for example ECJ, case C-162/96 *A. Racke GmbH & Co v Hauptzollamt Mainz* [1998], ECR I-3655, para. 46. For a recent confirmation of this principle, see also ECJ, case C-366/10 *supra* note 5, para. 101. See also ROSAS Allan, “The European Court of Justice and Public International Law”, in Wouters Jan, Nollekaemper Andre, de Wet Erika (eds), *supra* note 10, p. 71-85, p. 80; GIANELLI Alessandra, “Customary International Law in the European Union”, in Cannizzaro Enzo, Palchetti Paolo, Wessel Ramses A. (eds), *supra* note 11, pp. 93-110, pp. 95-98.

¹³ Draft Articles on the Responsibility of International Organisations with commentaries, adopted by the ILC in its 63rd session (2011), *Yrbk of the ILC* 2011, Vol. II.

¹⁴ See for example the statement made by the delegation of the EU to the UN at the Sixth Committee on the topic of identification of customary international law, 03/11/2014, available at http://eu-un.europa.eu/articles/en/article_15692_en.htm, (consulted on 31 August 2015).

¹⁵ ILC Report on Fragmentation, *supra* note 8, para. 172.

crucible’ in order to buttress arguments about the (allegedly) irreconcilable, systemic differences between EU and international law.¹⁶ Although this contribution focuses on fragmentation, a few words need to be mentioned at this juncture regarding this ‘crucible approach’ often encountered in theory. It goes without saying that any objective assessment of the interplay between any two given legal orders necessitates that distinct legal questions are not conflated. While the extent to which international law is given direct effects and its ranking within the EU legal order may indeed serve as *indicia* of the degree of openness of EU law to international law, they may not serve as *indicia of the existence of any systemic differences between the two legal orders*. International law does not regulate its own status within the EU legal order, in the same way that it does not regulate its own status within the national legal orders of States or of international organisations.¹⁷ Traditionally, questions of incorporation and of direct effect of international obligations have been regarded as an internal affair; international law being mainly concerned with the result, namely with the question as to whether or not there has been a breach of an international law obligation in a specific case.¹⁸ This much can be deduced from Art. 27 of the Vienna Convention on the Law of Treaties¹⁹ (VCLT) and from the case-law of the ICJ.²⁰ The Court confirmed this position recently in the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*: “The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9) ... Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, *if such an effect is permitted by domestic law*.”²¹

Finally, this introductory section shall conclude with a few general remarks on what - we at least believe - lies at the heart of the debate regarding the interface between the two legal orders, namely the (seemingly) irreconcilable tension between EU and international constitutionalism. Faced with the recent proliferation of actors, processes and normative outputs, a number of international lawyers have attempted to bring some method in the madness so

¹⁶ See for example, D’ASPREMONT Jean, DOPAGNE Frédéric, “Two Constitutionalism in Europe: Pursuing an Articulation of the European and International Legal Orders”, *ZaōRV* 2008, pp. 939-977, pp. 947-950.

¹⁷ WESSEL Ramses A., “Reconsidering the Relationship Between International and EU Law: Towards a Content-Based Approach?”, in Cannizzaro Enzo, Palchetti Paolo, Wessel Ramses A. (eds), *supra* note 11, pp. 7-33, p. 18.

¹⁸ DENZA Eileen, “The Relationship Between International and National Law”, in Evans Malcolm (ed), *International Law*, 4th ed., Oxford, Oxford University Press, 2014, pp. 412-438, p. 416; CRAWFORD James, *Brownlie’s Principles of Public International Law*, 8th ed., Oxford, Oxford University Press, 2012, pp. 57-58.

¹⁹ Vienna Convention on the Law of Treaties, concluded on 23/05/1969, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, (consulted on 31 August 2015). According to Art. 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

²⁰ See the case-law mentioned in NOLLEKAEMPER Andre, *National Courts and the International Rule of Law*, Oxford, Oxford University Press, 2011, pp. 117 *et seq.*

²¹ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, Judgment, ICJ Reports 2009, p. 3, at para. 44. (*Emphasis added*).

to speak and retain the unity of international law by articulating and promoting constitutionalist approaches to international law.²² Although there are different (and often conflicting) accounts of international constitutionalism,²³ mainstream international constitutionalist thinking assumes that certain universal values and principles exist and are shared by all sub-systems of international law - including EU law.²⁴ This seems, on the face of it at least, to conflict with and undermine EU constitutionalism, namely the idea that the EU legal order is an autonomous constitutional legal order.²⁵ Without dwelling on the merits of the international constitutionalist thesis (something that would be well beyond the ambit of the present work), it needs to be stressed that, from an international law point of view, EU constitutionalism is not at variance with the systemic nature of international law. International law is a legal system – albeit a diffuse, horizontal one that allows its subjects to contract out of rules of general application and create functional sub-systems of law.²⁶ Thus, the EU's claim to autonomy is not problematic to the unity of the system since it conforms to a fundamental rule thereof, namely the *lex specialis* rule.²⁷ In the words of Crawford: “[T]he problems posed by self-contained regimes should not be exaggerated. If States wish to enter into comprehensive relationships that, in effect, contract out of the remainder of the law (peremptory norms aside) they are free to do so.”²⁸ The proposition that the autonomy of a particular sub-system does not pose any systemic threats to the whole international law edifice also finds support in the writings of international law constitutionalists. Thus, according to Peters, ‘sector constitutionalization’, namely the constitutionalist claims raised by different sub-systems, such as EU law, is no anomaly since “the various processes of institutionalization on different levels do not exclude each other.”²⁹ In this sense, there is nothing intrinsically incompatible with viewing the EU legal order both as an autonomous, constitutional order and as one embedded in the international legal system.³⁰

²² KLABBERS Jan, “Setting the Scene”, in Klabbers Jan, Peters Anne, Ulfstein Geir (eds), *The Constitutionalization of International Law*, Oxford, Oxford University Press, 2009, pp. 1-44, pp. 18-19.

²³ For an overview see SCHWÖBEL Christine E. J., “Organic Global Constitutionalism”, *IJIL* 2010, pp. 529-553, p. 533.

²⁴ DE BÚRCA Gráinne, “The European Court of Justice and the International Legal Order after *Kadi*”, *Harv. Int’l LJ* 2010, pp. 1-52, pp. 38-40.

²⁵ D’ASPREMONT, DOPAGNE, *supra* note 16, p. 951.

²⁶ The ‘autonomous’ character of the legal orders created by the constituent instruments of international organisations was also acknowledged by the ICJ in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, *ICJ Reports* 1996, p. 66. The Court stated that “... the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of international law endowed with a certain *autonomy*, to which the parties entrust the task of realizing common goals.” *Ibid.*, para. 19. (Emphasis added).

²⁷ SIMMA Bruno, PULKOWSKI Dirk, “Of Planets and The Universe: Self-Contained Regimes in International Law”, *EJIL* 2006, pp. 483-529, p. 500.

²⁸ CRAWFORD James, “Chance, Order, Change: The Course of International Law”, *Recueil des Cours* 2013, pp. 9-389, para. 392.

²⁹ PETERS Anne, “Membership in the Global Constitutional Community”, in Klabbers Jan, Peters Anne, Ulfstein Geir, *supra* note 22, pp. 153-262, p. 202.

³⁰ Such a proposition shows that, to a certain extent, the ‘fragmentation’ discourse is delusive. As Dirk Pulkowski aptly remarks: “A more practical, hands-on approach would be to comprehend ‘unity’ and ‘fragmentation’ as discursive categories (rather than structural characteristics) of international law. Every legal argument, to be convincing needs to refer to the universal system while, at the same time, taking account of the particularity of the regime ... Particularity and unity are, thus, *topoi* of international legal discourse that mutually depend on each other. Even in the world of legal argument, there is no universe without planets and no planet without universe ... In strong regimes, the law of the universe serves as a source of legitimacy, while the rules of the planet provide the kind of operational effectiveness that advances the goals of the regime. In weak regimes, the rules of the planet often embody a superior legitimacy. In this case, lawyers reach out for the law of the universe to increase the effectiveness of the planetary rules.” PULKOWSKI Dirk, “Narratives of Fragmentation: International Law: International Law between Unity and Multiplicity”, *European Society of International Law (ESIL) Florence Agora Papers* 2004, available at http://www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF (consulted 31 August 2015), p. 10.

III. Fragmentation and Its Discontents

The previous section canvassed a few general remarks on the interplay between international and EU law. It was shown therein that the tensions that are often assumed to be inherent in the interface between the two legal orders are largely overstated. More particularly, it was proven that: a) far from being a self contained regime, EU law is embedded in the international legal system to the extent that both the Treaties and the case-law of the CJEU explicitly refer to the applicability of international law rules in the internal EU legal order; and b) that international law being a legal system that lacks vertical integration may very well accommodate the development of highly integrated sub-systems, such as EU law, without this endangering its unity. Against this background, this section endeavours to explore the phenomenon of fragmentation as one of the two key elements of the present framework of enquiry – the other being coherence. It will be shown that the phenomenon has both normative (normative fragmentation) and institutional aspects (substantive fragmentation). This section will further show that although the problems associated with normative fragmentation can be – to a great extent – resolved by the already existing mechanisms of norm-conflict provided under international law, the same does not hold true for substantive fragmentation. It will be argued that substantive fragmentation, which is here defined as the possibility of divergent interpretations by the plethora of international adjudicatory bodies interpreting and applying the same substantive law, poses a great risk to the unity of international law. The section will conclude by stressing the significance of adding the CJEU perspective to the on-going substantive fragmentation debate; a perspective that has hitherto remained largely unexplored.

Although there is no consensus on an exact definition of ‘fragmentation’, the term is used in international legal parlance to describe two (inter-connected) problems closely associated with the recent expansion and diversification of international law. In its normative aspect, fragmentation can be seen as the offshoot of the erosion of general international law through the “splitting up of the law into highly specialised “boxes” that claim relative autonomy from each other and from the general law.”³¹ This erosion carries the risk of the emergence of conflicting norms for the solution of the same legal issue (normative fragmentation).³² Normative fragmentation is a well-trodden topic: the ILC’s voluminous study

³¹ ILC Report on Fragmentation, *supra* note 8, para. 13.

³² ILC Report on Fragmentation, *ibid.*, para. 8; VAN DEN HERIK Larissa, STAHN Carsten, “Fragmentation’, Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the-Box”, in van den Herik Larissa, Stahn Carsten (eds), *The Diversification and Fragmentation of International Criminal Law*, Leiden, Brill, 2012, pp. 21-89, p. 56; ORELLANA ZABALZA Gabriel, *The Principle of Systemic Integration: Towards a Coherent International Legal Order*, Zürich, Lit, 2012, p. 22. The ILC Report offers some characteristic examples of normative fragmentation. In the context of the celebrated *Loizidou* case, the European Court of Human Rights (ECtHR) proclaimed that normal rules on reservations to treaties do not *per se* apply to human rights law. ILC Report, *ibid.*, para. 53; *Loizidou v. Turkey*, Judgment of 23 March 1995, ECHR Series A (1995) No. 310, p. 29. Whereas the *Loizidou* case may be seen as an example of a conflict between general law and special law, normative fragmentation also encompasses cases of conflict between different types of special law. A classic instance of the latter category is the approach adopted by the Appellate Body of the WTO in the 1998 *Beef Hormones* case. In that case, the question arose as to legal status of the ‘precautionary principle’ under WTO law. The Appellate Body opined that whatever the status of the principle under international environmental law, it had not become binding on the WTO. According to the ILC report, such an approach may suggest that

on fragmentation dealt with this very question³³ and it has been also comprehensively treated in the literature.³⁴ It suffices to note here that although this type of fragmentation often carries a negative connotation (as the first step to a dystopian nightmare of a legal order plunged into chaos), the final report of the Commission, as well as the final conclusions of the ILC Study Group on Fragmentation³⁵ offer a different account of normative fragmentation. The emergence of special treaty regimes, including environmental law, human rights law and EU law, is not accidental but seeks to respond to the emergence of new functional needs, such as the need to protect the environment, the need to protect the interests of individuals as well as the need for regional, economic integration.³⁶ Such treaty regimes may deliberately create new rules designed to displace general rules or rules of other specialised regimes in order for them to be effective.³⁷ However, it is important to note that “such deviations do not emerge as legal-technical “mistakes”. They reflect the differing pursuits and preferences of actors in a pluralistic (global) society. A law that would fail to articulate the experienced differences between the interests or values that appear relevant in particular situations or problem areas would seem altogether unacceptable.”³⁸ In this sense, normative fragmentation is to a certain extent inevitable: this type of fragmentation accounts for the expansion of international law into new areas in order to satisfy new needs.³⁹ At the same time, the ensuing problem of norm-collision is not insoluble. International law offers a toolbox of ‘conflict-avoidance devices’ in order to reach a workable solution, including rules of priority, such as rules of hierarchy (*jus cogens*), of specialty (*lex specialis*) and of temporality (*lex posterior*), as well as the principle of systemic integration (set out in Art. 31(3)(c) of the VCLT).⁴⁰

Renowned international lawyers, such as Simma⁴¹ and Crawford,⁴² have also espoused the Commission’s sober and pragmatic approach to normative fragmentation. Both Simma and Crawford perceive this type of fragmentation as the natural corollary of a decentralised and horizontal legal order and find the international law mechanisms in place to deal with its ramifications sufficient.⁴³ As Crawford notes: “Given that international law grew from bilateral relationships, it is difficult to see how anything has become more fragmented than it

“environmental law” and “trade law” may be governed by different principles. ILC Report, *ibid.*, para. 55; *EC Measures Concerning Meat and Meat Products (Hormones)*, 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 123-125.

³³ ILC Report on Fragmentation, *supra* note 8, para. 13.

³⁴ See for example MICHAELS Ralf, PAUWELYN Joost, “Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law”, *Duke Journal of Comparative & International Law* 2012, pp. 349-376; WESSEL, *supra* note 12.

³⁵ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yrbk. of the ILC* 2006, Vol. II.

³⁶ *Ibid.*, para. 10.

³⁷ *Ibid.*

³⁸ *Ibid.*, para. 11.

³⁹ KOSKENNIEMI Martti, LEINO Päivi, “Fragmentation of International Law? Postmodern Anxieties”, *LJIL* 2002, pp. 553-579, p. 560.

⁴⁰ ILC Report on Fragmentation, *supra* note 8, paras. 46-222, 324-449; see also generally PAUWELYN Joost, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge, Cambridge University Press, 2003.

⁴¹ SIMMA Bruno, “Universality of International Law from the Perspective of a Practitioner”, *EJIL* 2009, pp. 265-297.

⁴² CRAWFORD, *supra* note 28.

⁴³ SIMMA, *supra* note 41, pp. 270-277; CRAWFORD, *ibid.*, paras. 303-309.

was at the beginning: it has just become more diverse. Multilateralism never meant complete coherence of treaty practice or State interest. If States are free to join multilateral treaties, they are free to create a partly fragmented system.”⁴⁴ As far as EU law is concerned, there is voluminous writing concerning the role of the EU in the normative fragmentation of international law,⁴⁵ and space limitations do not allow an in-depth exposition of the topic. It suffices to mention here that the *lex specialis* nature of EU law to general international law, as well as the principle of consistent interpretation, create a workable framework for the solution of norm conflicts between EU law and general international law on the one hand, and between EU law and other special regimes on the other.⁴⁶

While normative fragmentation may be viewed as a pathology of the international legal system, and while the system may also provide adequate normative tools to cope with the challenges set thereby, the institutional aspect of the phenomenon is more worrisome. In its institutional aspect, the term is used to describe the ramifications of the recent proliferation of international courts and tribunals.⁴⁷ The recent expansion and diversification of international law have also fostered the mushrooming of new international courts and tribunals. This mushrooming coupled with the lack of any structural co-operation – let alone hierarchy – among the different judicial *fora* carry the risk of divergent (but “equally authoritative”) interpretations of international law (substantive fragmentation).⁴⁸ Two successive Presidents of the ICJ, Judge Schwebel⁴⁹ and Judge Guillaume,⁵⁰ as well as Judge Rosas of the CJEU⁵¹ have warned against the dangers of conflicting interpretations of international law. Similarly, a number of eminent lawyers, such as Higgins⁵² and Charney,⁵³ have been vocal about the (very real) threat posed by substantive fragmentation. And with good reason: the

⁴⁴ CRAWFORD, *supra* note 28, para. 394.

⁴⁵ See for example BROUDER Tomer, SHANY Yuval (eds), *Multi-Sourced Equivalent Norms in International Law*, Oxford, Hart Publishing, 2011; WELLENS Karel C., “Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends”, in Barnhoorn L., Wellens Karel C. (eds), *Diversity in Secondary Rules and the Unity of International Law*, The Hague, Martinus Nijhoff, 1995, pp. 3-38; HANCHER Leigh, “Constitutionalism, the Community Court and International Law”, in Barnhoorn L., Wellens Karel C. (eds), *ibid.*, pp. 259-298; DE WITTE BRUNO, “Rules of Change in International Law: How Special is the European Community”, in Barnhoorn L., Wellens Karel C. (eds), *ibid.*, pp. 299-234; CHARNEY Jonathan I., “Is International Law Threatened by Multiple International Tribunals?”, *Recueil des Cours* 1998, pp. 101-382.

⁴⁶ ROSAS Allan, “International Responsibility of the EU and the European Court of Justice”, in Koutrakos Panos, Evans Malcolm (eds), *The International Responsibility of the European Union*, Oxford, Hart Publishing, 2013, pp. 139-159, pp. 147-151. On the principle of consistent interpretation of EU law in the light of international law binding on the EU, see ECJ, case C-61/94 *Commission v Germany* [1996], ECR I-3989, para. 5; see also VAN VOOREN Bart, WESSEL Ramses, *EU External Relations Law: Text, Cases and Materials*, Cambridge, Cambridge University Press, 2014, pp. 238-239.

⁴⁷ ILC Report on Fragmentation, *supra* note 8, paras. 8, 13.

⁴⁸ CRAWFORD, *supra* note 28, para. 357; WEBB Philippa, *International Judicial Integration and Fragmentation*, Oxford, Oxford University Press, 2013, p. 6; Note that some commentators use different terminology to describe the phenomenon referred to here as ‘substantive fragmentation’. For example, Webb uses the term ‘judicial fragmentation’; see also generally TREVES Tullio, “Fragmentation of International Law: The Judicial Perspective”, *Comunicazioni e Studi* 2007, pp. 821-875; DUPUY Pierre-Marie, “The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice”, *NYU Journal of International Law and Politics* 1999, pp. 791-807.

⁴⁹ Statement by Judge S. M. Schwebel, President of the ICJ, to the Plenary Session of the UN General Assembly, 26/10/1999, available at <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1>, (consulted on 31 August 2015).

⁵⁰ Statement by Judge G. Guillaume, President of the ICJ, to the UN General Assembly, 26/10/2000, available at <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1>, (consulted on 31 August 2015).

⁵¹ ROSAS Allan, “Methods of Interpretation – Judicial Dialogue”, in BAUDENBACHER Carl, BUSEK Erhard (eds), *The Role of International Courts*, Heidelberg, German Law Publishers, 2008, pp. 185-191, pp. 187-188.

⁵² HIGGINS Rosalyn, “A Babel of Judicial Voices? Ruminations from the Bench”, *ICLQ* 2006, pp. 791-804, p. 794.

⁵³ CHARNEY Jonathan I., “The Impact on the International Legal System of the Growth of International Courts and Tribunals”, *NYU Journal of International Law and Politics* 1999, pp. 697-708, p. 699.

famous collision between the ICJ in *Nicaragua*⁵⁴ and the ICTY in *Tadić*⁵⁵ over the question of the degree of control necessary for the attribution of conduct to a State by paramilitary forces present in another proves that the prospect of conflicting interpretations is not a remote one.⁵⁶ While judges, lawyers and the ILC⁵⁷ have stressed the danger of substantive fragmentation, the manifestation of the phenomenon in the interplay between EU and international law remains under-researched. Thus, there is very little literature on whether the CJEU diverges from the ICJ when faced with questions of international law.⁵⁸ Of course, this is, to some extent, to be expected: the primary task of the Court is the interpretation and application of EU law, and not of international law. However, the EU is nowadays, undoubtedly, a major international actor and a party to a multitude of international agreements. Furthermore, as mentioned above, customary international law is making significant inroads into the case-law of the Court. The increased interface between EU and international law means that the potential for deviating practices is great. Thus, it would be very interesting to examine whether, and if so, to what extent, the CJEU is conducive to the fragmentation of international law through its case-law.

IV. From Fragmentation to Coherence

The previous section sketched out the fragmentation *problematique* and placed the research question dealt with in this paper within this broader frame of reference. However, before examining whether the CJEU's practice contributes to the substantive fragmentation of international law, it is important, at this point, to establish the usefulness of such an undertaking. In other words, why does it matter whether or not the CJEU plays a role in the fragmentation of the international legal order? Are such inquiries merely an academic exercise or are there any significant practical implications thereof? According to the ILC, attempts to grasp the phenomenon of fragmentation in its multiple manifestations are important since it "puts to question the *coherence* of international law."⁵⁹ Coherence is a desideratum and a standard towards which all legal systems strive – albeit its essence remains rather abstract.⁶⁰ It is noteworthy that, although the concept has, undoubtedly, great epistemic force (as a number of coherence theories of knowledge, truth and ethics have been developed in recent years) no precise or all-encompassing definition may be found in the

⁵⁴ ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua, Judgment*, ICJ Reports 1986, p. 14 at pp. 64–65. In that case the ICJ articulated the 'effective control test' for attributing conduct of private individuals to a State. It is noteworthy that the Court affirmed the validity of this test in the 2007 *Bosnian Genocide case*. ICJ, *Application of the Convention on the Prevention and Punishment of the crime of Genocide, Judgment*, ICJ Reports 2007, p. 43, at p. 410.

⁵⁵ ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Judgment of 15 July 1999, IT-94-1-A, paras. 94 *et seq.* By way of contrast to the 'effective control' test adopted by the ICJ in *Nicaragua*, the ICTY adopted, in that case, the much broader 'overall control' test.

⁵⁶ For a commentary, see CASSESE Antonio, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", EJIL 2007, pp. 649–668.

⁵⁷ Note however that, although the ILC stressed the significance of 'substantive fragmentation', this type of fragmentation was excluded from the ambit of the Commission's work, thus making the question under consideration here all the more important. ILC Report, *supra* note 8, para. 13.

⁵⁸ A notable exception in this respect is the work of Judge Rosas, an avid supporter of judicial dialogue, see fn. 51.

⁵⁹ ILC Fragmentation Report, *supra* note 8, para. 491. (Emphasis added).

⁶⁰ *Ibid.*

literature.⁶¹ Rather, it seems that ‘coherence’ connotes a basic, human desire for intelligibility, for things to fit together and make sense⁶² that can take many forms and thus, have many different definitions, according to the type of ‘unintelligibility’ one is faced with. In this light, it is asserted that, in the case at hand, much depends on the type of fragmentation one wishes to tackle. ‘Coherence’ in the context of normative fragmentation differs from ‘coherence’ in the context of substantive fragmentation. As mentioned above, normative fragmentation refers to situations of norm-conflict, *i.e.* of having two valid and applicable norms that suggest incompatible solutions so that a choice must be made between them. In this scenario, retaining the coherence of the international legal system can be understood as finding a way to “ensure ... or enhance ... the consistency of the rules of international law ... and contribute ... to avoiding conflicts between the relevant rules.”⁶³ The work of the ILC on fragmentation was exactly aimed at tackling such inconsistencies by providing guidelines for making a choice between conflicting norms and for justifying having recourse to one norm instead of another. However, although the abovementioned conflict solution techniques identified by the Commission may help to resolve normative conflicts, there is no guarantee that their application may equally avert conflicting interpretations of international law. Indeed, the lack of a final court of appeal at the international level means that different adjudicative bodies are largely free to give their own rendition of international law and thus, come to inconsistent interpretations thereof. Consequently, answers to the question of coherence in the context of substantive fragmentation must be sought elsewhere.

International lawyers who have extensively dealt with the phenomenon of substantive fragmentation, such as Charney and Webb, have linked coherence in this context to consistency in legal reasoning. Thus, according to Webb, adjudicative coherence “requires that similar factual scenarios and similar legal issues are treated in a consistent manner, and that any disparity in treatment is explained and justified. The desired outcome is harmony and compatibility, which allow for the co-existence of minor variations and of tailoring of solutions for particular cases”⁶⁴ Similarly, in his 1998 Hague Lectures, Charney found that the question of coherence in international adjudication amounted to exploring whether, despite minor variations, international courts are engaged in the same dialectic and render decisions that are largely compatible.⁶⁵ The proposition that coherence, in this context, is synonymous with an integrated approach to legal reasoning also finds support in legal philosophy. According to Dworkin, one of the most influential writers on coherence in law, considerations of fairness require that that like cases must be treated alike and, as such, adjudicative

⁶¹ See generally KRESS Kenneth J., “Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity and the Linear Order of Decisions”, Cal. L. Rev. 1984, pp. 369-402.

⁶² RAZ Joseph, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford, Clarendon Press, 1994, p. 280; WALDRON Jeremy, “The Concept and The Rule of Law”, New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper, No. 08-50, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273005 (consulted 31 August 2015), p. 35.

⁶³ EC- Measures Affecting the Approval and Marketing of Biotech Products, 7 February 2006, WT/DS291-293/INTERIM, p. 299, para. 7.68.

⁶⁴ WEBB, *supra* note 48, p. 5.

⁶⁵ CHARNEY, *supra* note 45, p.137.

coherence is a principle of formal justice, as well as of good adjudication.⁶⁶ In a similar vein, Waldron describes coherence in law as something akin to a “requirement of consistency: people must not be confronted by the law with contradictory demands ... Beyond that, there is a felt requirement essential to law that its norms make some sort of sense in relation to another, ... we should interpret them so that the point of one is not defeated by the point of another.”⁶⁷

There are a number of reasons underpinning the need for judicial integration. One of the main aims of international law is to promote stability and predictability in international relations.⁶⁸ This aim cannot be achieved unless international courts stay within known patterns and deviate therefrom only with a sound justification.⁶⁹ Moreover, in a decentralised legal order with weak enforcement mechanisms much depends on the willingness of its subjects to comply with the obligations they assume. Significant variations in the interpretation of general international law may threaten the legitimacy of the rules of the system. This, in its turn, threatens and undermines the confidence placed by States in the way international law is applied.⁷⁰ Therefore, retaining the uniformity of law at the international level seems to be more important, than in national legal systems with their strong enforcement mechanisms.⁷¹ More importantly, adjudicative coherence fulfils the abovementioned human desire for intelligibility. As each new ruling takes its place in the existing system, the whole system becomes fathomable to our intelligence, thereby enticing compliance.⁷² As Waldron aptly notes: “Above all, law’s systematicity affects the way that law presents itself to those it governs. It means that law can present itself as a unified enterprise of governance that one can make sense of ... In this way, the law pays respect to the persons who live under it, conceiving them now as bearers of individual reason and intelligence.”⁷³

Judicial dialogue, namely receptiveness to and visible engagement with the case-law of other courts,⁷⁴ is undoubtedly an important parameter of adjudicative coherence. It has also become a sort of leitmotif for ICJ judges. According to Judge Schwebel, “judges themselves must realize the danger of fragmentation in the law, and even conflicts of case-law, born of

⁶⁶ DWORKIN Ronald, *Law's Empire*, London, Fontana Press, 1986, pp. 165-167. See also MACCORMICK Neil, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1994, p. 103; RAZ Joseph, *Practical Reason and Norms*, 2nd ed., Princeton, Princeton University Press, 1990, pp. 123-148.

⁶⁷ WALDRON, *supra* note 62, p. 35.

⁶⁸ GRANT Thomas D., “A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law”, FYIL 1998, pp. 145-248, p. 231.

⁶⁹ SCHREUER Christoph, WEINIGER Matthew, “A Doctrine of Precedent?”, in Muchlinski Peter, Orino Federico, Schreuer Christoph (eds), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, pp. 1188-1206, p. 1189.

⁷⁰ WEBB, *supra* note 48, p. 7; CHARNEY, *supra* note 45, p. 360.

⁷¹ CHARNEY, *ibid.*, p. 134.

⁷² WALDRON, *supra* note 62, p. 35.

⁷³ *Ibid.*, p. 37.

⁷⁴ JACOBS Francis G., “Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice”, Tex. Int'l L. J. 2003, pp. 547-556, pp. 553, 556; TZANAKOPOULOS Antonios, “Judicial Dialogue as A Means of Interpretation”, Oxford Legal Studies Research Paper No. 71/2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497519 (consulted 31 August 2015), p. 3; WATERS Melissa A., “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law”, Georgetown LJ 2005, pp. 487-574, p. 490.

the proliferation of courts. A dialogue among judicial bodies is crucial.”⁷⁵ In the same vein, Judge Guillaume stressed that, in order to combat fragmentation, international judges “must inform themselves more fully of the case-law developed by their colleagues, conduct more sustained relationships with other courts, in a word, engage in constant inter-judicial dialogue.”⁷⁶ In his Declaration in *Diallo*, Judge Greenwood opined that “[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, ... it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals.”⁷⁷

Transnational judicial communication may take different forms. From the different taxonomies to be found in the literature,⁷⁸ three main categories may be discerned. First, courts may engage in vertical judicial dialogue. This form of communication refers to the jurisprudential interaction between supranational or national courts within the context of a formal, hierarchical system.⁷⁹ For instance, the interaction between national courts (*e.g.* between the court of first instance, the court of appeals and the supreme court) and between international courts in an institutionalised hierarchical relationship (*e.g.* within the EU: the Court of Justice, the General Court and the Civil Service Tribunal) would fall within this category. Secondly, trans-judicial communication may take place between courts that operate at the same level, or have, more or less, the same status (horizontal judicial dialogue).⁸⁰ Bodies that engage in horizontal dialogue may belong to the same regime (*e.g.* two national courts of appeal), or they may belong to different judicial systems (*e.g.* national courts in different countries).⁸¹ Finally, and more importantly for present purposes, judicial dialogue may concern the interaction between a judicial body called upon to apply a certain set of international rules and the dispute settlement mechanism specifically designed to interpret these rules (semi-vertical judicial dialogue).⁸² This type of dialogue is evidenced by direct citation to the case-law of the main interpreter as the latter constitutes persuasive authority.⁸³ The relationship between the CJEU on the one hand and the ECtHR, the EFTA Court and the ICJ, on the other, are examples of this type of dialogue. Of course, the CJEU is not formally bound by ‘external’ case-law. However, as Rosas aptly notes, “it makes sense to follow, or

⁷⁵ Statement by Judge S. M. Schwabel, *supra* note 49.

⁷⁶ Statement by Judge G. Guillaume, *supra* note 50.

⁷⁷ Declaration by Judge C. Greenwood in *Ahmadou Sadio Diallo*, ICJ Reports 2012, p. 391, at para. 8. See also HIGGINS Rosalyn, “The ICJ and the ECJ: Two Courts in Europe”, ICLQ 2003, pp. 1-20.

⁷⁸ ROSAS Allan, “The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue”, EJLS 2007, pp. 1-16; SLAUGHTER Anne-Marie, “A Typology of Transjudicial Communication”, U. Rich. L. Rev. 1994 pp. 99-137. On grounds of completeness, it needs to be mentioned that Slaughter has identified a further category of judicial dialogue. Mixed vertical-horizontal communication occurs when a supranational body, such as the ECtHR, serves as a conduit for the dissemination of national legal practices. SLAUGHTER, *ibid.*, pp. 111-112. Apart from the categories mentioned here, Rosas has also identified two further categories of trans-judicial communication. One category concerns the special relationship which exists between the CJEU and national courts when the latter are faced with problems of interpretation or validity of EU law, while the other concerns situations of overlapping jurisdiction between two international courts. ROSAS, *ibid.*, pp. 6, 12.

⁷⁹ ROSAS, *ibid.*, p. 6; SLAUGHTER, *ibid.*, pp. 106-107.

⁸⁰ ROSAS, *ibid.*, p. 13; SLAUGHTER, *ibid.*, pp. 103-105.

⁸¹ ROSAS, *ibid.*; SLAUGHTER, *ibid.*

⁸² ROSAS, *ibid.*, p. 8.

⁸³ SLAUGHTER, *supra* note 78, pp. 124-125. On the concept of ‘persuasive authority’ see GLENN H. Patrick, “Persuasive Authority”, McGill L. J. 1987, pp. 261-298, p. 294.

at least be inspired of, what this other dispute settlement mechanism is producing”⁸⁴ – especially, since these courts have been specifically set up to interpret the international rules that the EU has committed itself to applying.

To sum up, this section explored another key element of the fragmentation debate, namely the notion of coherence. It was shown that coherence lends itself to different interpretations and its exact definition varies according to the context within which it is used. The section continued by arguing that, within the context of substantive fragmentation, coherence is associated with consistency in the legal reasoning across different courts and tribunals, namely with treating similar legal issues in a consistent manner. Judicial dialogue, that is engagement with the jurisprudence of other international judicial bodies, was identified as an important factor contributing to adjudicative coherence. The section briefly introduced different categories of transnational judicial communication and concluded that, for the purposes of the present work, the semi-vertical dialogue between the CJEU and the ICJ is of particular importance. In the section to follow, the paper will examine the question as to whether the CJEU is conducive to the fragmentation, or, conversely, to the coherence of the international legal order, by examining the extent of judicial dialogue between the two courts as evidenced by the direct citation of ICJ judgments by the CJEU.

V. The CJEU and the ICJ: Patterns of Judicial Dialogue

A survey of the ever-burgeoning CJEU jurisprudence reveals that the EU courts, when faced with questions of international law, show a high degree of deference to the case-law of the ICJ and use it as an authoritative interpretation of international norms that are of relevance to their work. This is especially the case when they are faced with questions of customary international law - chiefly relating to international law of the sea and to international treaty law.⁸⁵ In *Poulsen*, the Court relied on a number of ICJ judgments in order to establish that certain provisions of the 1958 Geneva Conventions and the 1982 United Nations Convention on the Law of the Sea reflect customary international law. According to the Court:

In this connexion, account must be taken of the Geneva Conventions of 1958 ... in so far as they codify general rules recognized by international custom, and also of the United Nations Convention of 10 December 1982 on the Law of the Sea ... It has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law (see judgments of the International Court of Justice in the Delimitation of the Maritime Boundary in the Gulf of Maine Region Case, *Canada v United States of America*, ICJ [1984], p. 294, paragraph 94; *Continental Shelf Case, Libyan Arab Jamahiriya v Malta*, ICJ [1985], p. 30, paragraph 27; *Military and Paramilitary Activity in and against Nicaragua Case, Nicaragua v United States of America*, substantive issues, ICJ [1986], p. 111-112, paragraphs 212 and 214.⁸⁶

⁸⁴ ROSAS, *supra* note 51, p. 190. See also ECKES Christina, “The Court of Justice’s Participation in Judicial Discourse: Theory and Practice”, in Cremona Marise, Thies Anne (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford, Hart Publishing, 2013, pp. 183-207, pp. 185-188.

⁸⁵ For earlier, detailed accounts of the extent of trans-judicial communication between the CJEU and the ICJ, see ROSAS Allan, “With a Little Help From My Friends: International Case-Law as a Source of Reference for the EU Courts”, *The Global Community Yrbk. of International Law & Jurisprudence* 2005, pp. 203-230; HIGGINS, *supra* note 77.

⁸⁶ ECJ, case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Corp.* [1992], ECR I-6048, para. 10.

Similarly in *Weber*, the Court expressly referred to the *North Sea Continental Shelf* judgment in order to establish the legal regime applicable to the continental shelf; a question of international law that was relevant for determining whether work carried out in the continental shelf area is to be regarded as work carried out in the territory of a Member State. The Court stressed that:

[T]he International Court of Justice has ruled that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea exist *ipso facto* and *ab initio* by virtue of the State's sovereignty over the land and by extension of that sovereignty in the form of the exercise of sovereign rights for the purposes of the exploration of the seabed and the exploitation of its natural resources (judgment of 20 February 1969 in the so-called *North Sea Continental Shelf* cases, Reports, 1969, p. 3, paragraph 19).⁸⁷

More recently, in the *Salemnik* case, the question of the applicability of EU law to an individual working on a platform on the continental shelf of a Member State was raised again before the Court.⁸⁸ The ECJ relied on the passage from the *North Sea Continental Shelf* judgment quoted above⁸⁹ in order to prove that a Member State has sovereign rights over the continental shelf adjacent to it and that, therefore, work carried out on installations on the continental shelf is to be regarded as work carried out in the territory of that State for the purposes of applying EU law.⁹⁰

Another area of customary international law where the CJEU has sought the guidance of the ICJ is that of treaty law. It is noteworthy that this field of law is of particular importance to the EU since the Union is not a party to the 1969 or 1986 Vienna Conventions on the Law of Treaties.⁹¹ In *Opel Austria* the General Court was faced, *inter alia*, with the question as to whether a regulation that introduced customs duties to car gearboxes produced in Austria and which was issued a few days before the EEA Agreement came into force was compatible with the Agreement.⁹² The applicant argued that the adoption of the regulation infringed the public international law principle of good faith.⁹³ The Court observed that “the principle of good faith is a rule of customary international law recognized by the International Court of Justice (see the judgment of 25 May 1926, *German Interests in Polish Upper Silesia*, CPJI, Series A, No. 7, pp. 30 and 39)”⁹⁴, before concluding that “... the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which ... forms part of the Community legal order”⁹⁵ and on which “any economic operator to whom an institution has given justified hopes may rely.”⁹⁶

⁸⁷ ECJ, case C-37/00 *Herbert Weber v Universal Ogden Services Ltd.* [2002], ECR I-2032, para. 34.

⁸⁸ ECJ, case C-347/10, *A. Salemnik v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* [2012], ECLI:EU:C:2012:17, paras. 13-27.

⁸⁹ *Ibid.*, para. 32.

⁹⁰ *Ibid.*, paras. 33-35.

⁹¹ ROSAS, *supra* note 85, p. 223.

⁹² CFI, case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997], ECR II-43, paras. 1-68.

⁹³ *Ibid.*, para. 89.

⁹⁴ *Ibid.*, para. 90.

⁹⁵ *Ibid.*, para. 93.

⁹⁶ *Ibid.*

The international law principles of good faith and of the protection of legitimate expectations were also central to the 2004 dispute between Greece and the Commission.⁹⁷ The dispute concerned an agreement between the Commission and several Member States, including Greece, on the sharing of costs relating to the housing of representations in the Commission's offices in Abuja, Nigeria.⁹⁸ Having decided that Greece had not paid its share of the costs according to the agreement, the Commission, in 2004, proceeded to recovery by offsetting the relevant sums.⁹⁹ Greece brought an action for annulment against the act of offsetting and argued, *inter alia*, that it was not bound by the agreement in question since it had not ratified it.¹⁰⁰ The Court, however, ruled that, not only the act of ratification, but also Greece's conduct and more particularly the expectations that its conduct led others to entertain were relevant in assessing the case at bar.¹⁰¹ In that regard, the Court relied, once more, on the principles of good faith and of the protection of legitimate expectations. The Court repeated almost verbatim the abovementioned passage from the *Opel Austria* case and cited to the *German Interests in Polish Upper Silesia* case in order to substantiate the finding that the principles of good faith and of the protection of legitimate expectations form part of customary international law.¹⁰² On this basis, the Court concluded that Greece's conduct had raised legitimate expectations to its partners, and thus, Greece was precluded from claiming that it had not accepted the financial obligations stipulated in the agreement.¹⁰³

Finally, it needs to be mentioned that, more recently, the international law principles of good faith and of the protection of legitimate expectations were invoked by the applicant in the context of the 2014 *Eromu* case.¹⁰⁴ The case concerned an action for annulment against a decision of the Commission declaring the State aid granted by Hungary on certain electricity generators illegal as incompatible with the common market.¹⁰⁵ The applicant, a Hungarian electricity generator, claimed that the Commission's decision infringed international law since it, allegedly, infringed the principle of good faith and the principle of the protection of legitimate expectations.¹⁰⁶ More particularly, the applicant submitted that it had a legitimate expectation that its investment would be protected by both the Commission and the Hungarian State.¹⁰⁷ The Court confirmed that the principles invoked by the applicant are part of the customary international law that it is bound to apply citing both

⁹⁷ CFI, case T-231/04 *Hellenic Republic v Commission of the European Union* [2007], ECR II-66.

⁹⁸ *Ibid.*, paras. 7-44.

⁹⁹ *Ibid.*, para. 44.

¹⁰⁰ *Ibid.*, para. 55.

¹⁰¹ *Ibid.*, para. 84.

¹⁰² *Ibid.*, paras. 85, 87.

¹⁰³ *Ibid.*, paras. 97-99.

¹⁰⁴ General Court, case T-468/08, *Tisza Eromu v European Commission* [2014], ECLI:EU:T:2014:235.

¹⁰⁵ *Ibid.*, paras. 1-52.

¹⁰⁶ *Ibid.*, para. 305.

¹⁰⁷ *Ibid.*, para. 320.

the ICJ and its own case-law.¹⁰⁸ However, the Court found that there had been no infringement of the principles in question since the applicant had never received any assurance whatsoever that the State aid granted to it was compatible with the EU rules on State aid.¹⁰⁹

In *Racke* the German Federal Finance Court referred to the Court for a preliminary ruling a question concerning the validity of a regulation suspending certain trade concessions provided for by the Cooperation Agreement between the EEC and Yugoslavia.¹¹⁰ The Court was asked whether the unilateral suspension of the Agreement complied with the conditions for the termination and suspension of treaties on the ground of fundamental change of circumstances (*rebus sic standibus*).¹¹¹ The Court tackled the question by first establishing, with reference to the case-law of the ICJ, that the *rebus sic standibus* clause is part of customary international law.

By way of a preliminary observation, it should be noted that even though the Vienna Convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty. Thus the International Court of Justice held that '[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the subject of termination of a treaty relationship on account of change of circumstances' (judgment of 2 February 1973, Fisheries Jurisdiction (United Kingdom v Iceland), ICJ Reports 1973, p. 3, paragraph 36).¹¹²

Having established the customary law status of the *rebus sic standibus* principle, the Court concluded that the EU was allowed to suspend the treaty concluded with Yugoslavia by reason of a fundamental change of circumstances.¹¹³ However, the Court was anxious to stress the exceptional character of the plea of fundamental change of circumstances in relation to the *pacta sunt servanda* principle; a fundamental principle of international law.¹¹⁴ Again, the exceptional character of the *rebus sic standibus* clause in relation to this principle was justified with reference to the jurisprudence of the World Court. According to the Court the importance of the *pacta sunt servanda* principle "has been underlined by the International Court of Justice, which has held that 'the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases' (judgment of 25 September 1997, Gabsikovo-Nagymaros Project (Hungary v Slovakia), at paragraph 104...)." ¹¹⁵

One of the latest instances in which the ECJ turned to ICJ case-law as a shortcut to ensuring that a rule indeed reflects customary international law is the 2015 *Evans* case.¹¹⁶ The case concerned a request for a preliminary ruling on the applicability of Regulation 1408/71 on

¹⁰⁸ *Ibid.*, para. 321. The Court cited to its relevant dictum from the *Opel Austria* case.

¹⁰⁹ *Ibid.*, paras. 322-324.

¹¹⁰ ECJ, case C-162/96 *Racke*, *supra* note 12, paras. 1-23.

¹¹¹ *Ibid.*, paras. 18-23.

¹¹² *Ibid.*, para. 24.

¹¹³ *Ibid.*, paras. 49-61.

¹¹⁴ *Ibid.*, paras. 49-50.

¹¹⁵ *Ibid.*, para. 50.

¹¹⁶ ECJ, case C-179/13 *Raad van bestuur van de Sociale verzekeringsbank v L. F. Evans* [2015], ECLI:EU:C:2015:12.

social security schemes to a national of a Member State employed at a consular post within the territory of another Member State.¹¹⁷ Since the case involved consular staff, the 1963 Vienna Convention on Consular Relations¹¹⁸ was of relevance to the Court.¹¹⁹ In order to ascertain the customary law status, and hence the applicability, of the 1963 Vienna Convention the Court referred to the *Tehran Hostages* case.

As the Advocate General observed in point 52 of his Opinion, the idea of being ‘subject to the legislation of a Member State’, as referred to in Article 2 of regulation No 1408/71, ought to be interpreted in the light of the relevant rules of customary international law ..., namely the Vienna Convention of 1963, which 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 (see judgment of the International Court of Justice of 24 May 1980, case concerning the diplomatic and consular staff of the United States of America in Tehran (*United States v. Iran*), *Reports of Judgements, Advisory Opinions and Orders* 1980, p. 3, paragraph 45).¹²⁰

A case where one of the parties relied on the case-law of the ICJ, but this was rejected by the EU Courts was *Anastasion*.¹²¹ Here, the Commission argued that the *de facto* acceptance of certificates of products issued by the authorities of the Turkish Republic of Northern Cyprus (TRNC) did not amount to recognition of the entity in question as a State.¹²² The Commission based its argument on the *Namibia* Advisory Opinion.¹²³ This claim was rejected by the ECJ which was quick to point out that the legal and factual situation of Cyprus and that of Namibia were radically different and thus, not comparable.

In addition, as regards the interpretation which the Commission draws from the Advisory Opinion of the International Court of Justice on *Namibia*, ..., and which is said to have influenced its Application of the Association Agreement, suffice it to say, ..., that the special situation of *Namibia* and that of Cyprus are not comparable from either the legal or the factual point of view. Consequently, no interpretation can be based on an analogy between them.¹²⁴

The celebrated *Kadi* judgments¹²⁵ relating to sanctions against terrorist activities also prompted references to ICJ jurisprudence. The facts underpinning the dispute are well known and thus, they will not be recounted here. It is important to note, however, that citations to the case-law of the World Court abound in the passages of the CFI judgment discussing the question of the primacy of the UN Charter and of SC decisions over other international agreements.

As regards, second, the relationship between the Charter of the United Nations and international treaty law, that rule of primacy is expressly laid down in Article 103 of the Charter which provides that, ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of

¹¹⁷ *Ibid.*, paras. 1-31.

¹¹⁸ Vienna Convention on Consular Relations concluded on 24/04/1963, available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf, (consulted on 31 August 2015).

¹¹⁹ Case C-179/13, *supra* note 116, paras. 35-36.

¹²⁰ *Ibid.*, para. 36.

¹²¹ ECJ, case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food ex parte S. P. Anastasion (Pissouri) Ltd. and Others* [1994], ECR I-3116.

¹²² *Ibid.*, para. 34.

¹²³ *Ibid.*, para. 35.

¹²⁴ *Ibid.*, para. 49.

¹²⁵ CFI, case T-315/01 *Yassin Abdullah Kadi v Council of the European Union* [2005], ECR II-3659; CFI, case T-306/01 *Abmed Ali Yusuf and Al Barakaaat International Foundation v Council of the European Union* [2005], ECR II-3544.

the Charter of the United Nations (judgment of 26 November 1984, delivered in the case concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*), *ICJ Reports* 1984, p. 392, paragraph 107).¹²⁶

That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the members of the United Nations agree to accept and carry out the decisions of the Security Council. According to the International Court of Justice, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement (Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States of America*), *ICJ Reports*, 1992, p. 16, paragraph 42, and Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*), *ICJ Reports*, 1992, p. 113, paragraph 39).¹²⁷

Moreover, the CFI quoted the *Nuclear Weapons* Advisory Opinion in its discussion of the content and scope of the notion of peremptory norms of international law (*jus cogens*).

The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, in some circumstances, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute ‘intransgressible principles of international customary law’ (Advisory Opinion of the International Court of Justice of 8 July 1996, *The Legality of the Threat or use of Nuclear Weapons*, Reports 1996, p. 226, paragraph 79; ...).¹²⁸

References to the case-law of the ICJ are also to be found in the text of the *LTTE* judgment,¹²⁹ one of the more recent cases involving counter-terrorism measures. The Liberation Tigers of Tamil Eelam (LTTE) brought an action for annulment of the act under which they were added to the EU’s list of terrorist organisations.¹³⁰ One of the arguments made by LTTE was that, by placing it on the list in question, the EU breached the customary international law principle of non-intervention.¹³¹ The Court rejected this plea and argued, citing the *Nicaragua* case, that the principle only applies to sovereign States and not to other entities, including liberation movements.

As for LTTE’s reference to the principle of non-interference which, in its opinion, the Council infringed by placing it on the list relating to frozen funds, it should be noted that that customary international law principle, also called the principle of non-intervention, concerns the right of any sovereign State to conduct its affairs without external interference and constitutes a corollary of the principle of sovereign equality of states (judgment of the International Court of Justice of 26 November 1984 in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), on competence and admissibility, *ICJ Reports* 1984, p. 392, paragraph 73, and of 27 June 1986, on the substance, *ICJ Reports* 1986, p. 96, paragraph 202). As the Council points out, that principle of international law is set out for the benefit of sovereign States, and not for the benefit of groups or movements. Contrary to LTTE’s submissions, the placing on the list relating to frozen funds of a movement – even if it is a liberation movement – in a situation of armed conflict with a sovereign State, on account of the involvement of that movement in terrorism, does not therefore constitute an infringement of the principle of non-interference.¹³²

Nevertheless, the Court annulled the contested act since it found that the Council had not followed the appropriate procedure under EU legislation on terrorist designations which

¹²⁶ Case T-315/01, *ibid.*, para. 183; Case T-306/01, *ibid.*, para. 233.

¹²⁷ Case T-315/01, *ibid.*, para. 184; Case T-306/01, *ibid.*, para. 234.

¹²⁸ Case T-315/01, *ibid.*, para. 231; Case T-306/01, *ibid.*, para. 282. The ECJ *Kadi* judgment overturning the CFI ruling has been subjected to fierce criticism for allegedly threatening the unity of the international legal order. For an overview of the relevant literature see POLI Sara, TZANOU Maria, “The Kadi Rulings: A Survey of the Literature”, in Cremona Marise, Franconi Francesco, Poli Sara (eds), *Challenging the EU Counter-Terrorism Measures through the Courts*, EUI Working Paper AEL 2009/10, available at <http://cadmus.eui.eu/handle/1814/12879> (consulted 31 August 2015), pp. 139 *et seq.*

¹²⁹ General Court, joined cases T-208/11 and T-508/11 *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* [2014], ECLI:EU:T:2014:235.

¹³⁰ *Ibid.*, paras. 1-39.

¹³¹ *Ibid.*, para. 44.

¹³² *Ibid.*, para. 69.

required there to be a decision of a competent authority identifying the LTTE as a terrorist organisation.¹³³

This section attempted to illustrate the extent of judicial dialogue between the CJEU and the ICJ. The practice of the EU Courts explored herein shows that, when confronted with questions of public international law, the CJEU, rather than proffering its own interpretation of international law, has consistently chosen to defer to the authority of the ICJ. As a result, the CJEU has made extensive use of the latter's case-law as a tool for the interpretation of international law norms relevant for carrying out its tasks. This conclusion tallies with the observations made ten years ago by Judge Rosas. In his article tackling the same question dealt with here, Rosas found that "[w]hile the case-law of international courts and tribunals is not formally binding on the EU Courts, their practice seems to be based on the idea that it makes sense to take this case-law into account as much as possible, as the EU Courts are not necessarily well-equipped to "know better" than the international dispute settlement bodies set up to apply and interpret public international law."¹³⁴ Furthermore, it has been also demonstrated, that in the past decade, the EU Courts have shown greater openness to the jurisprudence of the ICJ. While in the past the CJEU sought the guidance of the ICJ mainly for the purposes of ascertaining the customary international law status of norms pertaining to the law of the sea and to treaty law, recent practice shows that the EU Courts are making knowledgeable references to the case-law of the ICJ in order to settle a wider gamut of international law questions. These include: the question of the customary law status of the 1963 Vienna Convention on Consular relations; the question of the primacy of the UN Charter and of SC resolutions over other international agreements; questions of *jus cogens*; as well as questions relating to the scope and content of the principle of non-intervention.

The increasingly frequent reliance on the jurisprudence of the ICJ proves that, contrary to the manner in which it is often portrayed in the literature, the CJEU is actually contributing to the coherence of the international legal system, as this term was defined above. Rather than making bold pronouncements on international law, the CJEU's reliance on existing jurisprudence guarantees that the risk of conflicting interpretations of international law norms is mitigated. Thus, the practice of the EU Courts goes a long way towards diminishing the risks of the substantive fragmentation of international law.¹³⁵

¹³³ *Ibid.*, paras. 137-229.

¹³⁴ ROSAS, *supra* note 85, p. 230.

¹³⁵ The same conclusion was reached by ROSAS. See *ibid.*

VI. The CJEU and the Coherence of the International Legal Order: Some Further Thoughts and Frustrations

The previous section showed that the CJEU has gradually become more receptive to guidance by its sister court in The Hague in matters falling within the ambit of international law - as evidenced by the increasing number and scope of references to the ICJ's case-law. To the extent that direct citation to the jurisprudence of other courts and tribunals constitutes proof of 'inter-judicial dialogue' and thus, a factor contributing towards adjudicative coherence, it is safe to assume that the conclusions reached above hold true. At the same time, one may very well question whether the use of the term 'dialogue' in this context accurately reflects the current practice of the CJEU. Both in common parlance and in legal terminology, 'judicial dialogue' connotes some type of visible, active engagement with the case-law of other bodies.¹³⁶ However, the previous exposition showed that the Court has shied away from delving too deeply into international law. It is noteworthy that, in none of the cases discussed above, did the Court take a proactive stance by exploring the relevant questions beyond the ICJ's *dicta*: it merely, unquestioningly deferred to the latter's authority. In this sense, the CJEU has proven, so far at least, a shy disciple, rather than an enquiring peer – a fact that somewhat diminishes the quality of judicial dialogue between the two courts.

The Court's hesitation to engage in depth with ICJ jurisprudence, and with international law more generally, is evinced by its extremely cautious handling of international law questions that are not as well-settled as the ones explored above. The 2014 *Parliament and Commission v Council* judgment¹³⁷ is a case in point. The case concerned, amongst other things, the legal status of a Council Decision authorising Venezuelan fishing vessels to fish in EU waters off the coast of French Guiana on the condition that they comply with applicable EU law.¹³⁸ Although all parties involved in the dispute conceded that the Decision was legally binding as a matter of international law, its exact legal status was unclear. While both the Parliament and the Spanish Government treated the Decision as a unilateral juridical act¹³⁹ (*i.e.* an act of unilateral origin with binding effects in international law), France considered it as having culminated into the conclusion of an international agreement between the EU and Venezuela and the Council seemed to oscillate between these two positions.¹⁴⁰ It needs to be pointed out that, from an international law point of view, the doctrine of unilateral juridical acts first propounded by the ICJ in the *Nuclear Tests* case¹⁴¹ remains somewhat elusive. According to the ICJ's judgment, unilateral declarations publicly made that

¹³⁶ See *supra* notes 82,83.

¹³⁷ ECJ, joined cases C-103/12 and C-165/12 *European Parliament, European Commission v Council of the European Union* [2014], ECLI:EU:C:2014;2400.

¹³⁸ *Ibid.*, paras. 23-25.

¹³⁹ On the doctrine of unilateral juridical acts in international law, see generally ECKART, Christian, *Promises of States under International Law*, Oxford, Hart Publishing, 2012.

¹⁴⁰ Opinion of Advocate General Sharpston in joined cases C-103/12 and C-165/12, *supra* note 137, para. 69.

¹⁴¹ ICJ, *Nuclear Tests Case*, Judgment, ICJ Reports 1974, p. 250.

manifest an intention to be bound may create legal obligations for their authors without any need of acceptance or reliance on behalf of the addressee.¹⁴² However, despite subsequent judgments of the Court confirming the validity of the principle enunciated in the *Nuclear Tests* case¹⁴³ and a decade long study of the ILC on the topic,¹⁴⁴ disagreement still reigns over the normative status of these instruments.¹⁴⁵ The Opinion delivered by Advocate General Sharpston bears the hallmark of true inter-judicial dialogue. The Advocate General provided a rigorous analysis of the juridical character of both international agreements and unilateral acts in international law and critically examined both the relevant case-law of the ICJ and the work of the ILC before concluding that the Decision in question constituted in fact a unilateral juridical act.¹⁴⁶ Unfortunately, the Court did not espouse the Advocate General's enthusiastic approach. Instead of examining whether the Decision could be viewed as a unilateral act, it quickly came to the conclusion that it was a treaty – even in the absence of clear evidence of acceptance on behalf of Venezuela.¹⁴⁷

The fact that the CJEU is not quite at home when confronted with complex questions of public international law is further corroborated by its confusing stance on non-State actors. As seen above, the Court argued in *LTTE* that non-State entities, including national liberation movements, may not rely on the principle of non-intervention since it only applies to States. However, in *Brita*,¹⁴⁸ a case that involved, *inter alia*, an agreement between the EC and PLO, the Court treated the agreement in question as a treaty within the meaning of Art.2 of the 1969 VCLT without exploring whether, and if so, under which conditions, a non-state entity, such as the PLO, may enjoy treaty-making powers.¹⁴⁹ Again, the question of the treaty-making capacity of non-State actors, other than international organisations, is fiercely debated in international legal literature¹⁵⁰ and the hesitation of the Court to address it head-on is, thus, understandable. The *Frente Polisario* judgment¹⁵¹ constitutes the latest manifestation of the Court's tendency to eschew complex international law questions. In this case, the Court was confronted with the question as to whether Frente Polisario, the national liberation movement for Western Sahara, had standing to seek the annulment of

¹⁴² *Ibid.*, para. 43

¹⁴³ See for example ICJ, Case concerning the Frontier Dispute, Judgment, ICJ Reports 1986, p. 554, para. 39; Case concerning Armed Activities on the Territory of the Congo (New Application: 2002), Judgment, ICJ Reports 2006, p. 6, para. 50.

¹⁴⁴ Analytical Guide to the Work of the ILC, Unilateral Acts of States, available at http://legal.un.org/ilc/guide/9_9.shtml. The final product of the ILC's work on the topic was a set of ten Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yrbk of the ILC* 2006, Vol. II.

¹⁴⁵ See generally RUBIN Alfred, "The International Legal Effects of Unilateral Declarations", *AJIL* 1977, pp. 1-30; THIRLWAY Hugh, *The Sources of International Law*, Oxford, Oxford University Press, 2014, p. 51.

¹⁴⁶ Opinion of Advocate General Sharpston, *supra* note 140, paras. 79-87.

¹⁴⁷ ECJ, joined cases C-103/12 and C-165/12, *supra* note 137, paras. 68-72.

¹⁴⁸ ECJ, case C-386/08 *Brita* [2010], ECR I-01289.

¹⁴⁹ *Ibid.*

¹⁵⁰ On the treaty-making capacity of non-State actors in international law see generally D'ASPREMONT Jean (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, London, Routledge, 2011; NOORTMANN Math, REINISCH August, RYNGAERT Cedric (eds), *Non-State Actors in International Law*, Oxford, Hart Publishing, 2015.

¹⁵¹ General Court, case T-512/12 *Front Polisario v Council of the European Union* [2015], ECLI:EU:T:2015:953. On the history of the Western Sahara conflict and the emergence of Polisario as the national liberation movement representing the Sahawari people, see Human Rights Watch Report, Keeping it Secret: The United Nations Operation in Western Sahara, October 1995, available at <https://www.hrw.org/reports/1995/Wsahara.htm>.

the EU Council Decision adopting the EU-Morocco Agreement on agricultural, processed agricultural and fishing products.¹⁵² Both the applicant, on the one hand, and the Commission and the Council, on the other, framed the question of legal standing as inexorably linked to the question of Frente Polisario's international legal personality. The applicant submitted that, as the representative of the Sahawari people, it enjoyed legal personality in international law as a national liberation movement.¹⁵³ The Council questioned whether the limited legal personality granted to national liberation movements under international law could be equated with the capacity to bring claims before the Court,¹⁵⁴ whereas the Commission submitted that the applicant enjoyed, at most, limited legal personality on the international plane.¹⁵⁵ Despite the international legal context of the case, as well as the submissions of the parties, the Court swiftly brushed aside the question of Frente Polisario's international legal personality and chose to stay within familiar terrain by applying the *Sinochem* test.¹⁵⁶ Although not technically incorrect, the Court's inward-looking approach in *Frente Polisario* is somewhat disappointing. Here, the Court clearly missed an opportunity to utilise and build upon the *Reparation for Injuries* advisory opinion¹⁵⁷ and thus, to contribute to the progressive development of international law. By failing to do so, the Court signalled its reluctance to move away from the entrenched pattern of semi-vertical dialogue and to engage in a horizontal dialogue with the ICJ. Arguably, the Court's cautious approach is justified to the extent that the doctrine of international legal personality and its exact contours still remain somewhat elusive.¹⁵⁸ Yet, the Court's occasional reluctance to actively engage with international law leaves something to be desired. While following closely the jurisprudence of the ICJ may help avert the risk of conflicting interpretations, the CJEU's lack of self-confidence as to its capabilities in international law also undermines the quality of inter-judicial dialogue between the two courts.

Quite distinct from the CJEU's hesitation to delve into deep international waters is the degree of its *Völkerrechtsfreundlichkeit*, i.e. the degree of openness of the EU legal order and its courts towards international law. A detailed account of the Court's approach to all matters pertaining to international law would be beyond the ambit of the present contribution; however, a brief excursus thereon is necessary since the topic seems to have captured the imaginations of international and EU lawyers alike and references to the CJEU's *Völkerrechtsfreundlichkeit* abound in the literature.¹⁵⁹ Klabbers describes *Völkerrechtsfreundlichkeit* as

¹⁵² *Ibid.*, paras. 1-33.

¹⁵³ *Ibid.*, para. 37.

¹⁵⁴ *Ibid.*, paras. 42-43.

¹⁵⁵ *Ibid.*, paras. 44-45.

¹⁵⁶ *Ibid.*, paras. 46-54. For the definition of 'legal personality' in the context of actions for annulment, see CFI, case T-161/94 *Sinochem Heilongjiang v Council of the European Union* [1996], ECR II-655, para. 31.

¹⁵⁷ The 1949 *Reparation for Injuries* Opinion remains the most authoritative pronouncement on subjecthood to date. See ICJ, *Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports, p. 174, at pp. 178-179.

¹⁵⁸ SHAW Malcolm, *International Law*, 7th ed., Cambridge, Cambridge University Press 2014, pp. 190-193.

¹⁵⁹ See for example ECKES Christina, *supra* note 11; KUIJPER Peter Jan, "Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law", in WOUTERS Jan, NOLKAEMPER Andre, DE WET Erika (eds), *supra* note 10, pp. 105-106.

“an open attitude towards rules of international law, a willingness not only to respect international law on the international plane but also to apply it in the internal legal order if and when appropriate.”¹⁶⁰ According to this understanding of international law friendliness, the narrative that international law and EU law constitute a ‘happy family’ does not comport with reality.¹⁶¹ Authors of this persuasion criticise the CJEU for its alleged unwillingness to pay due deference to international law. According to them, the CJEU’s rejection of the supremacy of international law undermines international law and is a cause for concern.¹⁶² The denial of direct effects of WTO law in the EU legal order as well as the review of SC resolutions by the CJEU are two commonly adduced examples to buttress this line of argumentation.¹⁶³

This particular understanding of *Völkerrechtsfreundlichkeit* rests on certain assumptions, the validity of which is doubtful. First, the proposition that the EU and its courts should yield to international law carries with it the implicit assumption that the international legal order is morally superior to that of the EU, or, at least, that international law is better suited to protect certain universally shared values than EU law. This quixotic vision of international law is not vindicated by practice as attested to by the human rights and due process shortcomings of the UN terrorist designation procedure.¹⁶⁴ Secondly, this proposition rests on the assumption that the supremacy of international law is dictated by the international legal system itself and that by refusing to accord supremacy thereto, EU law undermines the coherence and unity of international law. As Skordas notes, Klabbers’ worry for the “consistent downplaying of the relevance, or even applicability, of international law” signals the latter’s preference that “supranational law should accept the supremacy of international law and adopt a *völkerrechtsfreundlichkeit* monist doctrine.”¹⁶⁵ However, the assumption that international law asserts its own supremacy over other legal orders is not borne out by evidence and it seems to merely reflect individual conceptualisations of how the interplay between the two legal orders ought to occur. As seen above, international law does not prescribe the manner of its reception into other legal orders, being primarily concerned with questions of result. Different legal systems show different degrees of deference to international law,¹⁶⁶ without this posing a threat to the whole edifice of the international legal system. Criticising the EU for not adopting a particular model of reception of international law into its own legal order seems to ignore the plurality of ways in which international law can be given effect in different legal systems. Following this line of reasoning, all dualist

¹⁶⁰ KLABBERS Jan, “*Völkerrechtsfreundlichkeit? International Law and the EU Legal Order*”, in KOUTRAKOS Panos (ed), *European Foreign Policy*, Cheltenham, Edward Elgar Publishing 2011, p. 98.

¹⁶¹ *Ibid.*, pp. 95-96.

¹⁶² *Ibid.*, pp. 101-108; DE BURCA Grainne, “The European Court of Justice and the International Legal Order After *Kadi*”, Harv. Int’l L. J. 2010, pp. 1-50.

¹⁶³ *Ibid.*, pp. 101-108; DE BURCA Grainne, *ibid.*

¹⁶⁴ See the statement by the Special Rapporteur on Human Rights and Counter Terrorism, Martin Sheinin, 29 June 2011, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E>.

¹⁶⁵ SKORDAS Achilles, “*Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers*”, in KOUTRAKOS Panos (ed), *supra* note 160, p. 115.

¹⁶⁶ DENZA Eileen, “*Placing the European Union in International Context: Legitimacy of the Case-Law*”, in ADAMS Maurice et al. (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice*, Oxford, Hart Publishing 2013, p. 177.

systems could be criticised for jeopardising the coherence of international law. More importantly, the concept of adjudicative coherence propounded above as essential for sustaining the coherence of the international legal system is much narrower than Klabbers' concept of *Völkerrechtsfreundlichkeit* and thus, more in keeping with the horizontal and diffuse nature of international law. Adjudicative coherence does not necessitate that international law and EU law form a 'happy family'; it merely requires avoiding conflicting interpretations of the law. In this sense, Skordas' conceptualization of EU *Völkerrechtsfreundlichkeit* as comity, namely as a systemic effort to avoid significant conflict between the two legal orders,¹⁶⁷ is more congruent with the reality on the ground of international practice.

In light of the above, it seems that the oft-cited criticism regarding the CJEU's lack of *Völkerrechtsfreundlichkeit* is somewhat exaggerated. As far as the jurisprudential denial of direct effects of WTO law is concerned, it needs to be noted that Article XVI:4 of the Agreement establishing the WTO does not prescribe that national legal systems accord direct effect to WTO law and it merely creates an obligation of result.¹⁶⁸ By the same token, the avalanche of criticism that descended upon the Court post-*Kadi* for allegedly failing to uphold international law by indirectly reviewing SC resolutions seems to largely stem from an erroneous reading of the *Lockerbie* judgment.¹⁶⁹ The ICJ's judgment in *Lockerbie* is riddled with ambivalence regarding the possibility of reviewing SC resolutions since the Court refrained from clarifying whether it would be prepared to review the SC resolution at hand at the merits stage.¹⁷⁰ Furthermore, the CJEU is by no means the first international adjudicatory body that has indirectly reviewed SC resolutions. The ICTY in its jurisdiction decision in *Tadić* also engaged in an indirect form of review over the Council.¹⁷¹ It is quite paradoxical that, while the CJEU's judgment in *Kadi* elicited fierce criticism from scholars due to its alleged lack of *Völkerrechtsfreundlichkeit*, the earlier decision by the ICTY did not cause much stir. As the previous section exemplified, the CJEU has never set itself on a direct collision course with the ICJ. On the contrary, it has sought to emulate the latter's approach to a plethora of issues falling within the ambit of international law, albeit somewhat inconsistently and with varying degrees of success. In reality, the outright defiance of ICJ judgments by certain national courts (such as the 2014 judgment by the Italian Constitutional Court,¹⁷² whereby the Italian judges refused to follow the ICJ's ruling in *Jurisdictional Immunities*)¹⁷³ seems to threaten the coherence of the international legal order much more than the alleged CJEU's *Völkerrechtsfreundlichkeit* deficit.

¹⁶⁷ SKORDAS Achilles, *supra* note 165, p. 125.

¹⁶⁸ *Ibid.*, p. 129.

¹⁶⁹ ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Judgment, ICJ Reports 1998, p. 115. For literature on the criticism directed at the ECJ after its *Kadi* ruling, see *supra* note 128.

¹⁷⁰ DE WET Erica, The Chapter VII Powers of the United Nations Security Council, Oxford, Hart Publishing 2004, p. 73.

¹⁷¹ ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-A.

¹⁷² For a brief summary of the Italian Constitutional Court's Judgment, No 238/2014, see <http://www.qil-qdi.org/summary-prepared-by-the-editorial-board-of-qil-qil-will-devote-in-the-following-weeks-a-zoom-out-to-the-legal-issues-arising-from-the-italian-constitutional-court-no-2382014/>.

¹⁷³ ICJ, *Jurisdictional Immunities of the State*, Judgment, ICJ Reports 2012, p. 99.

VII. Conclusions

This paper demonstrated that the pluralisation of modern international relations has brought along the danger of the fragmentation of the international legal order by threatening its coherence. It has also been shown that ‘fragmentation’ and ‘coherence’ are multi-faceted concepts. They are used to describe a wide array of inter-related problems and goals and, therefore, any discussion involving these concepts needs to carefully differentiate among the various aspects thereof. More particularly, this contribution showed that substantive fragmentation, namely the danger of conflicting pronouncements on international law due to the recent proliferation of international courts and tribunals tasked with interpreting the same substantive law, poses a threat to adjudicative coherence, namely the need for consistency in judicial reasoning. It has been further shown that judicial dialogue, in the sense of active engagement with the jurisprudence of other courts, is an important factor in counteracting substantive fragmentation. The paper examined the extent of judicial dialogue between the CJEU and the ICJ by identifying whether and to what extent the former takes into account the jurisprudence of the latter - since the ICJ’s judgments are persuasive authority in the field of international law. In this respect, it was proven that the EU Courts have shown a great degree of deference to the authority of the ICJ. Instead of advancing their own interpretation of international law, they have closely followed the guidance of the ICJ by making a number of direct references to the latter’s rulings. It has been also demonstrated that the CJEU has increasingly shown greater willingness to open up to external sources. While initially the jurisprudence of the ICJ was mainly used to settle questions of customary international law relating to the law of the sea and to treaty law, in recent years, the Court has taken into account the jurisprudence of the ICJ in a number of other cases pertaining to international law. On this basis, it was concluded that the practice of the CJEU is conducive to the coherence of the international legal system. At the same time it was also pointed out that the pattern of inter-judicial dialogue between the two courts is occasionally frustrated by the CJEU’s reluctance to go into uncharted territory and its tendency to follow closely the ICJ’s pronouncements. While this tendency may minimise the risk of divergent interpretations, it somewhat diminishes the quality of inter-judicial dialogue between the two courts.

The overall conclusion reached here casts doubt on the commonly assumed view that the CJEU undermines the coherence of international law – which has gained prominence in the literature especially after the ECJ’s pronouncement on the *Kadi* case. In the light of the present findings, it is submitted that this view is erroneous to the extent that it does not take into account all the parameters of coherence defined above. Traditionally, accounts of

coherence in international legal theory examine whether the CJEU gives precedence to international law norms by invalidating conflicting EU legislation.¹⁷⁴ However, as shown here, coherence is a complex notion: by limiting our enquiry to the traditional binary of validity/invalidity we ignore the increasing complexities faced by a court called upon to function in a setting where the global, regional and national directly intersect. Fragmentation and coherence debates may not discount the extent of judicial discourse and interaction among international dispute settlement bodies. For, as Higgins suggests, the best way to avoid the fragmentation of international law in practice is “for us all to keep ourselves well informed. Thus the European Court of Justice will want to keep abreast of the case law of the International Court ... And the International Court will want to make sure it fully understands the circumstances in which these issues arise for its sister court in Luxembourg.”¹⁷⁵

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¹⁷⁴ See for example KLABBERS Jan, “The Validity of EU Norms Conflicting with International Obligations”, in Cannizzaro Enzo, *supra* note 10, pp. 111-131.

¹⁷⁵ R. Higgins, *supra* note 77, p. 20.

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