

THE NEW INTERNATIONAL FRONTIER: THE LEGAL PROFESSION AND THE CHALLENGES OF NEW 'INTERNATIONAL LAW' IN THE NEW MEMBER STATE

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Summary: 'Europeanised international law' has been the subject of many recent academic and political discussions on how the EC and the CJEU should implement and promote international law and what should apply in the case of conflict between EU law and international law. What has been somewhat missing from the debate is how legal professionals in the EU (judges, lawyers and government legal advisers), and in particular the newcomers to the EU legal system, should contend with these international developments which have a direct bearing on their day-to-day work. Following a brief analysis of some case studies, the article suggests some practical means for legal professionals to cope with this great challenge and even to make the most of it. The main argument is that by being aware of the unique and flexible nature of 'EU international law', legal professionals are able not only to optimise legal outcomes but they can also influence its formation at this very early stage, opening up opportunities to exert regional and global legal influence .

1. Introduction

Joining the European Union is a long-term aspiration of many countries in the European geographical region, and even outside it, and as we move forward, more and more countries become likely candidates and eventually Member States. Accession poses significant and dramatic changes for all new 'EU' societies, including the legal sphere and the legal profession.

Most of all, EU accession greatly affects the domestic legal system of the new Member State as its basic concepts are changed, and courts join an almost borderless legal system, with one higher court instance at the

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very top, similar to a national Supreme Court.¹ This has repercussions for jurists (advocates, government legal advisers, and judges alike) in the new Member State, including the opening up of new legal markets.² They now must contend with judgments from other members and EU judicial instances and relate to them as domestic, although this is not absolute, and some courts, especially in new Member States, show resistance to EU judicial decisions.³ This is dramatic, requires much adaptation, and always generates great discussion and debate.

One sometimes forgotten element, which we will focus on, is the required adaptation to a new approach to international law, which in general terms can be termed 'monist', ie as part and parcel of EU law.⁴ While every state is obliged to comply with international law, in most subject matters the EU will have a distinct approach, probably of a much stricter nature as stated in Article 3(5) of the Treaty of the European Union (TEU), 'in its relations with the wider world, the Union shall... contribute... to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. The result is much more emphasis on implementing treaties, decisions and resolutions by international bodies, albeit still under the framework of EU law. In fact, pre-accession candidate countries are even required to renegotiate bilateral treaties with third party states to avoid a conflict with EU law in accordance with the demands of international treaty law.⁵

All this will be apparent for many issues. Advocates will be required to provide advice to clients directly affected, government legal advisers will need to provide different advice to ensure their state acts in accord-

¹ The TEU (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007), for example, determined that the Court of Justice of the European Union (CJEU) has jurisdiction over all criminal matters in EU Member States, although Member States can opt out of this jurisdiction. Theodora A Christou, *European Cross Border Justice: A Case Study of the EAW* (AIRE Centre 2010) 14.

² Many kinds of jurists can be considered members of the legal profession, but for the purposes of this article, the focus will be, as indicated, on advocates, government legal advisers and judges.

³ Understanding the different reactions of national courts to EU judicial decisions is very complex. See Oreste Pollicino, 'The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?' (2010) 29(1) *Yearbook of European Law* 65. For the purposes of this paper, we will assume that in most cases EU judicial decisions are considered overall as controlling.

⁴ Ramses A Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 7, 11.

⁵ Magdalena Lickova, 'European Exceptionalism in International Law' (2012) 19(3) *European Journal of International Law* 463, 473.

ance with the overall EU approach and policy, and judges essentially become EU law judges with new challenges, tools and responsibilities.⁶

At the same time, this change in approach will likely provide new-found opportunities for utilising international law to achieve individual rights and remedies, and the legal profession will be a vital conduit in this regard. Jurists can play a vital role in the increasing trend of global governance and in the globalisation of rights, and all this not only for individual clients or for limited and specific causes.⁷

We begin by looking at the approach EU institutions apply when implementing international law, mapping out the complex structure of EU competence in international issues and the balance with the interests of the Member States,⁸ as well as the resulting changes foreseen in the domestic realm. The second section looks at detailed case studies to highlight the practical issues faced by the legal profession when providing advice.

Subsequently, the discussion will focus on suggestions of ways and means to successfully meet these challenges. First and foremost, there will be a need to gain wider familiarity with the common approaches taken by international law and to utilise unique tools to effect outcomes to best serve the interest of clients, including laypersons, the new Member State government and the domestic legal system.

Developing upon these basic tools, the next section looks at ways for the legal profession to influence international rule-making, considered today to be one of the main sources for international legal development.⁹ International decision-making increasingly attains the characteristic of global governance. As a result, there is greater potential for jurists to become involved. Such involvement will inherently develop ties and networking with colleagues from other Member States, facilitate mutual strategic cooperation on issues of common interest, and create opportunities for sharing best practices, experiences and advice.

⁶ Urszula Jaremba, *Polish Civil Judges as European Union Law Judges: Knowledge and Attitudes*, (Erasmus Universiteit 2012) 5.

⁷ See, for example, in regard to advocates, Jerome J Shestack, 'Globalization of Human Rights Law' (1997) 21(2) *Fordham Journal of International Law* 558, 568.

⁸ The relatively recent changes in EU competence provided for in the TEU attempted to clarify the issue, but some complexities still remain. See Geert De Baere and Ramses A Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences' (The EU's Diplomatic System: post-Westphalia and the European External Action Service' Europe House, London, 19 November 2013) <<http://www.utwente.nl/mb/pa/research/wessel/wesselconf11.pdf>> accessed 14 February 2014.

⁹ This process is termed by some as setting norms 'from below'. See, for example, Ulrich Sieber, 'Legal Order in a Global World: The Development of a Fragmented System of National, International, and Private Norms' (2010) 14 *Max Planck Year Book of United Nations Law* 21.

The analysis focuses on two complementary perspectives: the expected changes in the operation of international law in the new 'EU' legal system of the new Member State, and developing tools for the legal profession to address these changes. Implementing a holistic and focused approach can help the legal profession to safely navigate through the new, and always stormy, 'international' law pathways following EU accession.

2. EU implementation of international law and the domestic legal order

In recent years, scholarship and debate focusing on the EU implementation of international law have greatly increased.¹⁰ Academic interest in the issue can be associated with recent developments in the institutional regulatory framework of the EU, with modifications to the TEU, providing the EU with an international legal personality affecting its relationship with international law.¹¹ Such interest is further enhanced by emerging court jurisprudence on the relationship between international and EU law, sending what some see as mixed signals,¹² and attempts by the CJEU to prevent the creation of new global courts with the goal of limiting international law interpretation of EU law.¹³

Developments in different and varied international subject matters are very interesting and complex, as the research suggests. However, the aim in the following brief analysis is not to describe each and every such development, but to offer some guidance for the legal profession that is newly faced with these issues due to EU accession.

Looking at the basic tenet of the incorporation of international law into EU law, as indicated earlier in the introductory part, the first bright-line rule is that international law is considered part of EU law to be imple-

¹⁰ Theodore Konstadinides, 'When in Europe: Customary International Law and EU Competence in the Sphere of External Action' (2012) 13(11) *German Law Journal* 1178, 1178.

¹¹ Article 47, TEU. See Kateryna Koehler, 'European Foreign Policy After Lisbon: Strengthening the EU as an International Actor' (2010) 4(1) *Caucasian Review of International Affairs* 57, 62-63.

¹² Case C-308/06 *Intertanko* [2009] ECR I-405; Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351; Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501; Joined Cases C-120/06 P and C-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513; Case C-459/03 *Commission v Ireland* [2006] ECR I-4635; Case C-377/02 *Van Parys* [2005] ECR I-1465. These and other examples are cited as more recent statements of the ECJ on the status of international law in EU law and its binding force on the Member States. See Christina Eckes, 'International Law as Law of the EU: The Role of the Court of Justice' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 36.

¹³ Opinion 1/09 (Unified Patent Litigation System) of 8 March 2011, para 81. For a discussion of this decision and its implication, see Matthew Parish, 'International Courts and the European Legal Order' (2012) 23(1) *The European Journal of International Law* 14.

mented and interpreted by EU judicial instances, based on a monistic approach.¹⁴ Despite the fact that this approach was laid out decades ago, it is still a mainstay of EU policy, as indicated by its political commitments to put an emphasis on consistency and harmony with other international actors.¹⁵ Allegedly, this basic rule and policy should not be considered a change for most countries, which during pre-accession also generally follow the monistic approach to international law, as part of the long-standing civil law tradition.¹⁶ Nevertheless, even if the EU declares that international law is EU law, reality is quite different in what is termed by some as the “New-Monism” of EU law.¹⁷

The unique CJEU approach and the basic policy it sets as guidance for EU institutions result in a more limited application of international law. It is perceived as still subject, in some cases, to overall internal policy considerations such as the guarantee of procedural rights.¹⁸ In attempting to simplify the issue to some extent, we can describe the approach as a flexible perspective on the international obligations of the EU and its Member States.

For example, and as a general principle, possible distinctions exist between treaties concluded in accordance with EU law, constituting binding international law,¹⁹ and other international instruments such as customary international law,²⁰ requiring in some cases domestic incorporation in order to be binding.²¹ One more criterion is the question of EU membership in any international agreement, which makes the agreement

¹⁴ Case 181/73 *Haegeman v Belgium* [1973] ECR 449.

¹⁵ Grainne De Burca, ‘The European Court of Justice and the International Legal Order After Kadi’ (2010) 51(1) *Harvard Journal of International Law* 1, 3.

¹⁶ James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 88.

¹⁷ Enzo Cannizzaro, ‘The Neo-Monism of the European Legal Order’ in Cannizzaro, Palchetti and Wessel (n 12) 36.

¹⁸ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi*, judgment of 18 July 2013, para 97-141 (Kadi II).

¹⁹ This is the basic regulatory framework in the TEU, although it might not be applicable in all cases, and depends very much on the EU courts’ interpretation of each case. Jan Wouters, Jed Odermatt, and Thomas Ramopoulos, ‘Worlds Apart? Comparing the Approaches of the Court of Justice of the European Union and the EU Legislature to International Law’ (2012) 5-8 *Leuven Centre for Global Governance Studies Working Paper No 96* <<http://dx.doi.org/10.2139/ssrn.2274763>> accessed 15 February 2014.

²⁰ Customary international law is considered to be binding, but states can opt out of its binding force if, before the rule becomes binding, they show persistent objection to its application. Curtis A Bradley and Mitu Gulati, ‘Withdrawing from International Custom’ (2010) 120 *Yale Law Journal* 202, 204.

²¹ Judicaël Etienn, ‘Loyalty Towards International Law as a Constitutional Principle of EU Law?’ (2011) *Jean Monnet Working Paper 03/11* <<http://www.jeanmonnetprogram.org/papers/11/110301.pdf>> accessed 15 February 2014.

override EU law.²² In fact, the EU increasingly signs agreements and promotes the option of joining many others as an entity separate from the Member State.²³ In such cases, the distinction would be much easier, although there will be a need to ascertain that the intent of the EU when concluding the agreement was for it to be directly applicable without the need for implementing acts.²⁴ Making such a choice is not only a legal one, but is rooted in EU policy making, as direct applicability can convey the perception that the matter is perceived by the European Commission (EC) as under its exclusive competence.

Other distinctions include distinguishing decisions by international tribunals or organisations (such as the United Nations) from the obligations under their constituting treaties,²⁵ and the different application of international law according to the relevant subject matter and areas of competence identified by the TEU.²⁶

This brief and simplified analysis presents in broad lines the difficulties of moving from a domestic and familiar legal system to the new EU platform in regards to the application of international law, even if after accession the level of compliance and implementation of EU law could be lower.²⁷ This could be true across the board, as accession now allows Member States to turn to the CJEU to appeal decisions by the EC, which is of great relevance to the government legal adviser in the new Member State.

The main concern for the legal profession is how such change is reflected in the domestic legal order of the Member State in its areas of

²² Case C-366/10 *Air Transport Association of America*, [2012] 2 CMLR 4, para 50; Article 216(2) TFEU.

²³ See, for example, Article 8(1) of the February 2014 draft convention on transparency in treaty-based investor-State arbitration which reads as follows: "This Convention is open until [date] for signature by.... (b) a regional economic integration organization constituted by sovereign States that is a Party to an investment treaty". Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration. Note by the Secretariat - A/CN.9/WGII/WP181 (2013).

²⁴ Szilárd Gáspár-Szilágyi, 'Explaining the Primacy and Direct Effect of International Agreements to Which the EU Is a Party: Could the "Primacy" or "Trigger" Models Apply?' (17 September 2013) <http://ssrn.com/abstract=2346352> or <http://dx.doi.org/10.2139/ssrn.2346352> accessed 18 February 2014.

²⁵ *Kadi II* (n 18).

²⁶ The field of play in this regard is also very flexible and dynamic, as evidenced by the recent debate on the changes in EU competence regarding bilateral investment treaties. See August Reinisch, 'The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements' (2014) 12(1) *Santa Clara Journal of International Law* 111.

²⁷ This is explained by the lack of conditionality after the accession process is completed. Frank Schimmelfennig and Florian Trauner, 'Introduction: Post-accession Compliance in the EU's New Member States' (2009) 13 (Special Issue 2) *European Integration online Papers (EIoP)* <http://www.eiop.or.at/eiop/pdf/2009-SpecIssue-2_Introduction.pdf> accessed 1 June 2014.

activity. Concerns are different for each category of the legal profession, but we will still attempt to translate the theoretical debate into practice for three leading principled issues to be elaborated in section 3, where case studies will be discussed.

2.1 Individual claimants and cause of action

For individual claimants, the basic difference is that for most international agreements of the pre-accession candidate country, they will be able to obtain remedy in the domestic or EU court provided that the agreement was not contrary to EU law, and because it is considered as part of EU law.²⁸ For the legal profession, there are several outcomes: the advocate can use international agreements as a cause for action; the judge can apply them when making judgments; and the government legal adviser is required to give appropriate advice to the government that is now newly exposed to litigation in relation to the implementation of the international agreement.

Taken at face value, the change from accession in this case seems not to be too dramatic, considering that most pre-accession countries are monistic. However, seeing that CJEU case law is ever changing and developing, it could very well be that those opposing the use of international agreements as a basis for a cause of action can argue that the agreements violate EU law, or that there is a need to protect EU law from the application of the international norm.²⁹ Arguably, such kinds of legal avenues would constitute a marked change from pre-accession days, although not in every case. One representative example is Croatia, where, while the constitution mandated the direct application of international law, there was also, in certain circumstances, a way to perceive certain international law provisions as requiring domestic adaptation in order to protect Croatia's internal legal order from international law.³⁰

2.2 Judgments by international tribunals

The basic principle in international law is that judgments by competent international tribunals are binding on disputing parties, and states

²⁸ Konstantinides (n 10); Case C-104/81 *Hauptzollamt Mainz v CA Kupferberg & Cie KG* [1982] ECR 364.

²⁹ Jan Willem van Rossem, 'The Autonomy of EU Law: More is Less?' in Ramses A Wessel, Steven Blockman (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organizations* (Springer 2013) 41-42.

³⁰ Antonija Petricusic and Ersin Erkan, 'Constitutional Challenges Ahead the EU Accession: Analysis of the Croatian and Turkish Constitutional Provisions that Require Harmonization with the *Acquis Communautaire*' (2010) 6(22) *International Law and Politics* (Uluslararası Hukuk ve Politika)133, 139-140.

and international organisations generally comply with them.³¹ Jurisdiction can be based on the ad-hoc consent of the disputing parties, or on bilateral or multilateral treaties.³² This, alongside the proliferation of international dispute resolution mechanisms and disputes, brings to the fore the question of how to address a judgment made by such a tribunal concerning EU law. Some claim that in such cases international tribunals should defer to CJEU rulings by way of citing precedents or a referral mechanism,³³ not unlike the allowing of the primacy of EU law, as interpreted by the CJEU, over national law.³⁴ The question can be crucial to the legal professional faced with such judgments.

Looking at the recent CJEU decisions concerning international judgments, the legal professional will see a transformation from pre-accession days. More and more frequently, the CJEU exercises closer scrutiny of the work of international tribunals, paving the way for much more comprehensive argumentation on the validity of the judgments,³⁵ and of international law in general. Some liken the approach to that taken by US courts when looking at the judgments of the International Court of Justice (ICJ).³⁶

In this direction, the legal professional can turn to EU courts to invalidate the international judgment, even if such a motion will not always be successful. At the same time, it also indicates that government advocates facing an international judgment should take this into consideration, as enforcement is likely to be sought against their Member State. The issue is likely to become even more challenging, as it is yet unknown how the new structures of the TEU will effect enforcement in Member State courts, especially on issues such as investor state arbitration.³⁷

³¹ Joseph Sinde Warioba, 'Monitoring Compliance with and Enforcement of Binding Decisions of International Courts' (2001) 5 Max Planck Year Book of United Nations Law 41, 51-52.

³² Chittharanjan Félix Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International, 2003) 70.

³³ Steffen Hindelang, 'Member State BITs – There is Still (Some) Life in the Old Dog Yet: Incompatibility of Member State BITs with EU Law and Possible Remedies – Position Paper' (2012) Yearbook on International Investment Law & Policy 2010-2011, 217, 233.

³⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585.

³⁵ See, for example, in relation to WTO panel reports (decisions by the dispute settlement boards of the WTO) Pieter Jan Kuiper, 'It Shall Contribute to the Strict Observance and Development of International Law...': The Role of the Court of Justice' in Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (TMC Asser Instituut 2013) 589, 609.

³⁶ Henri de Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice: The Case of LGBT Rights' (2011) 19(3) Michigan State Journal of International Law 639, 649-650.

³⁷ George A Bermann, 'Reconciling European Union Law Demands with the Demands of International Arbitration' (2011) 34(5) Fordham Journal of International Law 1193, 1215-1216.

2.3 International private law implications

Compared to judgments by international tribunals, the impact of private law disputes involving international law is much less significant. This notwithstanding, the frequency of disputes of a private law nature is much higher and more relevant to the daily practice of advocates and judges. Unlike other areas of interaction between EU law and international law, the CJEU has developed flexible principles for incorporating international private law into EU law.³⁸ Such flexibility gives some weight to EU law to override private international law treaties, which could mean some certainty. Nevertheless, the principle of protecting core EU values is still relatively ambiguous, leaving much room for legal manoeuvre and argumentation.

Allegedly, acceding to the recognition and enforcement regime of the European Union (the Brussels regime) should result in similar recognition and enforcement of international (non-EU) judgments in each Member State, but in practice there are different approaches in each national court.³⁹ Although this could indicate that advocates can still make the same 'pre-accession' arguments following accession, the truth could well be the opposite. An advocate can claim, for example, that an applicable internal EU regime should have some effect on the recognition of non-EU judgments as well, depending on the interest in every case.

Such a direction fits well with the argument that advocates are considered to take the lead in private international law issues,⁴⁰ and they certainly have the opportunity to do so in regards to the application of private international law issues in the EU. Advocates from new Member States can potentially find this task much easier, as their domestic courts have yet to develop entrenched EU private international law policies or to face these questions. On this issue, accession would not only affect the substantial aspect of implementation of private international law, but also the process of argumentation. Previously, the only means to petition to contest the methodology of implementation was the domestic Constitutional or Supreme Court. Now, following accession, the mechanism for referral to EU courts is an important additional tool, especially efficient in a field yet to be clearly decided by EU case law, but one which the CJEU is more and more willing to address.⁴¹

³⁸ PA De Miguel Asensio, 'International Conventions and European Instruments of Private International Law: Interrelations and Modifications' in M Fallon, P Lagarde and S Poillot Peruzzeto (eds), *Quelle architecture pour un code européen de droit international privé?* (Peter Lang 2011) 185, 205-211.

³⁹ Yuliya Zeynalova, 'The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?' (2013) 31 *Berkeley Journal of International Law* 150, 174-175.

⁴⁰ Seiber (n 9) 15.

⁴¹ Jan-Jaap Kuipers, 'Party Autonomy in the Brussels I Regulation and Rome I Regulation

2.4 National courts and 'EU' international law

We previously noted that judges are one of the key members of the legal profession in the accession process. They must obviously change the way they act and adjudicate domestic law disputes, as following accession they become both national and European judges.⁴²

The question relevant to our analysis is whether or not the same applies to adjudicating claims made under international law. This would not have to be necessarily so if international law is part of EU law and 'the powers of the Community [EU] must be exercised in observance of international law',⁴³ and thus the interpretation should not be different from how international law was interpreted prior to accession or to be dependent only on the CJEU case law. Moreover, judges in pre-accession candidate countries should already be familiar with a supranational judicial instance in the form of the European Court of Human Rights (ECtHR).

This argument notwithstanding, a recurring thread in our discussion is that the CJEU case law sees the application of international law to EU law as a complicated balancing act.⁴⁴ In this context, it is also important to bear in mind that the ECtHR's decisions are only binding as a matter of international law and without precedential value.⁴⁵ Quite differently, the CJEU places itself in a position for resolving, with purported finality, legal questions by way of routine referral from Member States, and also for international law issues, in a specialised form of judicial dialogue.⁴⁶

The current flexibility leaves room for the court in the Member States to utilise both avenues of case law and precedent. Differently from an EU or domestic law question, where international law is concerned, a national court can take a risk and look to the traditional sources of international law interpretation, such as those set out in the Statue of the International Court of Justice (ICJ).⁴⁷ By doing so, courts would be fulfilling

and the European Court of Justice' (2009) 10(11) German Law Journal 1505.

⁴² Zdeněk Kůh, 'The Application of European Law in the New Member States: Several (Early) Predictions' (2005) 6(3) German Law Journal 563, 572.

⁴³ Case C-308/06 *The Queen, on the application of Intertanko v Sec'y of State for Transp* (Intertanko) [2008] ECR I-4057, para 51.

⁴⁴ Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) 9 EUI Working Paper AEL 29.

⁴⁵ Recently, the ECtHR has made attempts to promote enforcement of its decisions by making the implication of the decisions clearer. See Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) European Journal of International Law 125, 135-136.

⁴⁶ Francis G Jacobs 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) 38 Texas International Law Journal 547, 548.

⁴⁷ Article 38 of the ICJ statute reads as follows: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a.

their role in the creation of international law,⁴⁸ although a sole decision in itself, especially in cases of conflict with ICJ decisions and persistent case law in other states, could not, and does not, create a new interpretation of international law.⁴⁹

National judges can take several approaches with regard to international law. If they seek to follow the recent flexible CJEU interpretation, as new Member States courts will naturally be inclined to follow CJEU guidance,⁵⁰ this will resemble commitments under the general EU law regulatory framework, supporting the protection of the 'very foundation' of the Community.⁵¹ On the other hand, they can take a stricter approach with international law, providing it with an elevated status, basing their argument on traditional international law application. Choosing this path might be perceived as conflicting with CJEU case law, but it has some merit. Even from a pro EU perspective, a purely international approach corresponds with the EU's policy of integration with the international community, as well as with the need to minimise the fragmentation of international law, which the CJEU arguably contributes to.⁵² A national court can even use this 'way out' to try and preserve its remaining sovereignty in face of the EU court system, an aspiration shared by the courts of some of the most 'European Union' Member States.⁵³

The three cross-cutting issues set out above by no means reflect a comprehensive or exhaustive list, but only some representative examples. One common feature, very relevant to the legal profession, is that

international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

⁴⁸ Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2012) 60 *International and Comparative Law Quarterly* 57, 61-64.

⁴⁹ There are those who argue that this should not be the approach, but rather that even a decision by one court can provide a way for the ICJ to modify existing international law. Gleider I Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'' (2012) 83(1) *British Yearbook of International Law* 13, 55-56.

⁵⁰ This was exemplified by the attempts of Hungarian courts to refer irrelevant questions to the ECJ in the early days of membership, which the ECJ declined to rule on. Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008) 241.

⁵¹ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union* [2005] ECR 11-3533.

⁵² Rossana Deplano, 'Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry' (2013) 6(1) *European Journal of Legal Studies*, 67, 69-71.

⁵³ See for example in the German context Armin Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court: New Guidance on the Limits on European Integration?' (2010) 11(4) *German Law Journal* 367.

international law is an ever evolving issue in CJEU jurisprudence, with unique features compared to ‘regular’ EU law, although the implementation of EU law as treaty-based law in itself is the implementation of international law.⁵⁴

Potentially, such a situation can pose quite a formidable challenge as there are no clear rules on how international law should be applied in the EU Member States, or any clear indication of which institution is primarily responsible for the ‘Europeanisation’ of international law.⁵⁵ However, the legal profession should view this as an opportunity rather than a challenge, and as the case studies in the following section will show, in practice much can be done to maximise its benefits.

3. Case Studies – ‘EU’ international law in action

The three following brief analyses of case studies provide an insight into possible directions for the different sectors of the legal profession, in conjunction with some of the cross-cutting elements discussed in the previous section.

3.1 United Nations targeted sanctions

Seemingly, the most dramatic conflicts between international law and EU law have been the CJEU decisions to vacate regulations in relation to sanctions imposed in Member States as a result of UN Security Council sanctions.⁵⁶ According to international law, these sanctions are mandated by Chapter 7 of the UN Charter, an international agreement binding on all UN member states.⁵⁷ The CJEU decisions in the UN sanctions cases, based on the conclusion that EU procedural rights were not provided for, have been perceived by some as a violation of international law,⁵⁸ although it is important to note that others argue that this diversion should be seen in the light of the ‘international law friendly’ general CJEU approach.⁵⁹

⁵⁴ Timothy Moorhead, ‘European Union Law as International Law’ (2012) 5(1) *European Journal of Legal Studies* 104, 117-118.

⁵⁵ Anna Riddell, ‘Book Reviews: The Europeanisation of International Law: The Status of International Law in the EU and its Member States’ (2009) 58 *International and Comparative Law Quarterly* 741-743.

⁵⁶ See for example Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v Kadi* (ECJ, 18 July 2013) para 97-141 (Kadi II).

⁵⁷ There has been much criticism on the lack of state compliance with the provisions on the use of force in the Charter, when states in some cases do not even attempt to justify their actions on the basis of the Charter provisions. See, for example, Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework* (2002) 36 *New Eng L Rev* 735, 752. However, in the case of economic sanctions, at least on paper, states have generally not objected to their binding nature.

⁵⁸ De Burca (n 15) 2.

⁵⁹ Eckes (n 12) 367-368.

Admittedly, it is quite difficult to know how each new Member State, prior to accession, implemented Security Council sanctions (or how candidate countries do so at this stage).⁶⁰ Even so, this still has significant magnitude, as in today's globalised world many assets are held in states other than the state of primary nationality or citizenship, and the idea is to prevent the use of globalisation as a means to avoid the impact of sanctions by the targeted state.⁶¹

Upon accession, it is likely that holding assets abroad will become much more common. Similarly, following accession, travel to other Member States also becomes much easier. As UN targeted sanctions usually focus on an asset freeze and travel ban, if imposed they could pose significant hardship on the targeted entity or individual.⁶²

The CJEU approach in these cases now makes it possible to challenge de-facto UN sanctions (at least as they relate to their application in the EU Member States) in a way which during pre-accession was likely to be impossible. Considering that the other way to challenge such sanctions is to approach the Security Council itself (either independently or through the application of a UN member state),⁶³ the change has sub-

⁶⁰ Understanding the nature of the domestic implementation of UN sanctions is an extremely difficult task. While some states declare that they comply with the sanctions regime, and it can be assumed that many do, it is very unclear how this is done in practice. See Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development* (Routledge 2013) 66-67.

⁶¹ Globalisation is sometimes viewed as an obstacle to the efficiency of broad sanctions (ie those imposed not according to the listing of individuals), as rogue states can 'shop' for other state actors which do not observe them. Gary Clyde Hufbauer and Barbara Oegg, 'Reconciling Political Sanctions with Globalization and Free Trade: Economic Sanctions: Public Goals and Private Compensation' (2003) 4 *Chicago Journal of International Law* 305, 309.

⁶² See, for example, the Al-Qaida sanctions regime as explained on the relevant Security Council website: 'The Security Council Committee established pursuant to paragraph 6 of resolution 1267 (1999) (hereafter referred to as the Committee) oversees the implementation by States of the three sanctions measures (assets freeze, travel ban and arms embargo) imposed by the Security Council on individuals and entities associated with the Al-Qaida organization. The Committee maintains a List of individuals and entities subject to the sanctions measures. By resolutions 1267 (1999), 1333 (2000), 1390 (2002), as reiterated in resolutions 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011) and 2083 (2012) the Security Council has obliged all States to: freeze without delay the funds and other financial assets or economic resources, including funds derived from property owned or controlled directly or indirectly; prevent the entry into or the transit through their territories....' <http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml> accessed 22 February 2014.

⁶³ United Nations, 'Fact Sheet on De-Listing', The Security Council Committee established pursuant to resolution 1267 (1999), Concerning Al-Qaida and the Taliban Associated Entities and Individuals <http://www.un.org/sc/committees/1267/fact_sheet_delisting.shtml> accessed 24 February 2014. According to a study of the Ombudsman mechanism (allowing for individuals to request delisting), less than half of requests are granted. Sue E Eckert and Thomas J Biersteker, *Due Process and Targeted Sanctions: An Update of the 'Watson Report'* (Watson Institute 2012) 13.

stantial implications for legal strategies to invoke internal due process protections from the sanctions regime, the right to be heard, and judicial review.⁶⁴

Such protection cannot inherently be available under domestic law unless a state chooses to declare, by enacting domestic provisions to that effect, that it wishes to bluntly violate and openly flout the provisions of the UN Charter, which will never be the case unless rogue states are concerned. Admittedly, motioning the ECtHR was probably available in pre-accession days, and recent case law includes cases such as *Nada*,⁶⁵ where the court has determined that in some cases states should be flexible in implementing UN sanctions, and in *Al-Dulimi* where the court held that the state violated the right to a fair trial under the ECHR (Article 6.1).⁶⁶ Still, only the CJEU has recognised due process protections as leading to the invalidation of sanctions regulations, and only its case law has direct applicability and precedential value.⁶⁷

Granted, it will not be often that advocates will be required to provide services to persons or entities on the UN sanctions list, which is inherently a limited one,⁶⁸ numbering a few hundred, so the impact might not be that dramatic. That being said, it is important for private advocates and government legal advisers alike to understand the principle of using EU internal procedures as a tool to challenge international law (including decisions by international bodies) previously shielded under international law. In the same vein, government legal professionals will have to bear in mind that when implementing international law (and decisions), although they must respect the binding nature of international law, they must also at the same time avoid its 'blanket implementation' and preserve basic rights.⁶⁹

⁶⁴ Erika de Wet, 'From Kadi to Nada: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions' (2013) 12 Chinese Journal of International Law 1, 8-14.

⁶⁵ *Nada v Switzerland*, Application No 10593/08, ECtHR [GC], judgment of 12 September 2012.

⁶⁶ *Al Dulimi v Switzerland*, Application No 5809/08 ECHR [GC], judgment of 26 November 2013. The case has been referred to the Grand Chamber and a hearing is expected to take place on 10 December 2014 <<http://echr.coe.int/Pages/home.aspx?p=hearings/gcpending&c=>> accessed 13 October 2014.

⁶⁷ For criticism on the approach taken by the ECtHR in *Nada* and possible responses, see Solene Guggisberg, 'The Nada Case Before the ECtHR: A New Milestone in the European Debate on Security Council Targeted Sanctions and Human Rights Obligations' (2012) 8 Croatian Yearbook of European Law and Policy 411, 433-435.

⁶⁸ For an analysis of the number of persons and entities listed for Al-Qaida related sanctions, see Eckert and Biersteker (n 63) 10-11.

⁶⁹ In regards to sanctions, see the following words of a top UN official: 'Ultimately, it is for Member States and in particular those in the Security Council to ensure respect not only for the mandatory measures and binding obligations under Chapter VII but also, consistent with the relevant Security Council resolutions and the UN Global Counter-Terrorism

3.2 WTO panel decisions in European Union law

In section 2 we discussed the cross-cutting issue of review by the CJEU of decisions by international tribunals changing the international legal landscape for the new Member States post accession. There could be many examples of such kinds of decisions, including by bodies such as the ICJ or the International Tribunal of the Law of the Sea (ITLOS) (including arbitration undertaken under its auspices).⁷⁰ Other kinds of international tribunals include ad hoc arbitration panels, especially investor-state arbitration, which are gaining more prominence in scholarly debate due to recent changes in EU competence. Some even argue that there is a need to institute referral mechanisms from investment arbitration tribunals to the CJEU.⁷¹

Searching for the most appropriate case study on this issue, CJEU case law on the integration of World Trade Organization (WTO) law, and consequently the application of WTO dispute panel decisions, is most interesting, providing great potential for the legal profession to become involved, in a starkly different way from pre-accession days.

Unlike our first case study, it is far less apparent that WTO law, or Dispute Settlement Board (DSB) decisions, should be directly applicable in the internal regimes of its member states, as this is not even a requirement posed by the WTO itself, or by the DSBs.⁷² The result is that private parties cannot usually rely in any case on DSB decisions in domestic courts.⁷³

Strategy, to ensure respect for international human rights and humanitarian law in their efforts to combat terrorism and to maintain international peace and security'. Miguel de Serpa Soares (the United Nations Legal Counsel) 'Opening Statement' (The UN and EU Legal Systems after the Kadi Judgement: Assessment and Way Forward, New York, 1 November 2013) <http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_International_Law_Week_Kadi_and_the_UN-1-Nov-2013.pdf> accessed 24 February 2014.

⁷⁰ See, for example, Case C-459/03 *Commission v Ireland* [2006] ECR I-4635 and an analysis of the ECJ approach which decided that the ECJ, and not another tribunal, had jurisdiction. Nikolaos Lavranos 'Regulating Competing Jurisdictions Among International Courts and Tribunals' (2005) 68 Heidelberg Journal of International Law 575, 582-584.

⁷¹ Konstanze von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and the ECJ? – A Plea for Direct Referral from Investment Tribunals to the ECJ' (2013) 50 CML Rev 1039.

⁷² Ivana Živičnjak, 'Effect of WTO Law in the EU and the Individual's Right to Damages Caused by a Breach of WTO Law' (2012) 8 Croatian Yearbook of European Law and Policy 531, 538.

⁷³ In the US, for example, the preclusion of private remedies is legislated. Section 102(c) (1) of the URAA, 19 USC Section 3512(c)(1) provides that '[n]o person other than the United States ... shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreements' or 'may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement'. As quoted in Jeanne J Grimmett, *WTO Dispute Settlement: Status of US Compliance in Pending Cases* (Congressional Research Service 2012) 6.

The change from pre-accession to accession is that now traders from the new Member States are more exposed to the implications of DSB decisions. Briefly put, if state A loses a WTO case to state B, then in the case of non-compliance of state A, state B can take countermeasures.⁷⁴ When a state joins the EU as a Member State, the process inherently exposes traders in the new Member State to measures taken against the EU in WTO cases, as the EU is a party to significant international trade disputes.⁷⁵ While the effects of broader exposure resulting from accession could be significant, a much more significant factor is that in post-accession days there are open avenues to involve the EU courts in WTO-related issues. In a similar manner to our first case study, this offers great opportunities for the legal professional.

As in the first case study discussed in this section, here too it would be important to closely follow CJEU case law. This will help to understand what tools are provided to the legal professional when a trader is faced with the implications of a DSB decision or even when a trader believes that the EU must take steps to remedy breaches by non-EU WTO member states.⁷⁶ The latter is relevant to the WTO panel analysis, since, if the conclusion is that a DSB decision never has direct effect in EU law, there might be less real justification to pursue that avenue.

Recalling once again the basic emerging principle, which provides the background for our entire discussion, here too the CJEU does not have a one-dimensional view of the applicability of WTO law and DSB decisions in EU law.⁷⁷ In the framework of the general approach to international law, the balanced approach plays a significant role here as well, and any legal argumentation must try and fit into the contours of the CJEU approach.

The basic overall principle set by the CJEU is that WTO law and DSB decisions are not directly applicable in EU law so that reciprocity and EU bargaining power might be preserved,⁷⁸ mainly following the example of the leading EU trading partners such as the US and Japan.⁷⁹ Justifying this approach, the CJEU held that the WTO and DSB structures envisage

⁷⁴ R Rajesh Babu, *Remedies Under the WTO Legal System* (Martinus Nijhoff Publishers 2012) 13.

⁷⁵ See for a brief analysis of the recent cases Anne Thies, *International Trade Disputes and EU Liability* (CUP 2013) 1-5.

⁷⁶ Case C-70/87 *Fediol v Commission* [1989] ECR I-1781. In this case, the CJEU dismissed the trader's claim that the Commission should have taken steps in response to alleged WTO law violations.

⁷⁷ For an overview of the different approaches, see John Errico, 'The WTO in the EU: Unwinding the Knot' (2011) 44 *Cornell International Law Journal* 179.

⁷⁸ Joel P Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 4(10) *European Journal of International Law* 655, 657.

⁷⁹ Allesandra Arcuri and Sara Poli, 'What Price for the Community Enforcement of WTO Law' (2010) *EUI Working Paper* 2010/01, 4.

flexible application by its members and so automatic applicability is not useful in this case.⁸⁰

Creating some leeway, the CJEU also fashioned two main exceptions. When arguing for traders, the legal professional, in the new Member State, should base argumentation on CJEU guidance. Mostly, the arguments will need to show that the WTO measure or DSB decision relates to WTO provisions explicitly enacted in the EU legal regime.⁸¹ Alternatively, the legal professional can claim that EU law mandates that such a measure or decision should be applied as long as there is consistency.⁸² Solutions have been proposed for the difficulties faced by injured traders, such as a no-fault regime allowing compensation without the need to resort to litigation,⁸³ but it is yet unclear whether this solution would in fact be adopted.

This kind of thinking supports once again the conclusion that the legal profession should get used to the idea of the dualist approach to international law, and not only on such 'sensitive' issues as human rights, when arguing EU issues.

As we will see in the next two sections, such a consequence has implications for how the legal profession should think about designing strategies to influence international law outcomes in EU law.⁸⁴ At this stage, it suffices to argue that when preparing for WTO litigation, the most important focus should be on finding an existing linkage between the relevant WTO instruments or DSB decisions and existing EU law. At the same time, the arguments should move away from those pertaining to direct applicability in EU law, which is not likely to be the case in the near future as the CJEU continues to maintain its defences against the binding force of the rulings of other international tribunals.⁸⁵

⁸⁰ Joined Cases C-21/72 & C-24/74 *Int'l Fruit Company NV v Produktschap voor Groenten en Fruit* [1972] ECR I-1219. Paragraph 21 reads as follows: 'This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements" is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogations, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.'

⁸¹ Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (OUP 2013) 230-238.

⁸² Case C-53/96 *Hermès v FHT* [1998] ECR I-3603; Case C-89/99 *Schieving-Nijstad vof and Others v Robert Groeneveld* [2001] ECR I-5851. See also Antonello Tancredi, 'EC Practice in the WTO: How Wide is the "Scope for Manoeuvre"' (2004) 15(5) *European Journal of International Law* 933, 939.

⁸³ Živičnjak (n 72).

⁸⁴ One tool to be further discussed could be engaging with the European Parliament Committee for Legal Affairs (JURI) which is responsible for the 'interpretation and application of international law, in so far as the European Union is affected'. JURI website: <<http://www.europarl.europa.eu/committees/en/juri/home.html>> accessed 28 February 2014.

⁸⁵ The CJEU has been criticised for this approach, as some argue it presents a danger to the autonomy of EU law which should not become an autarkic regime. See Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 381.

3.3 EU ‘International’ freedom of religion guidelines

In the third of our case studies, we take a slightly different approach, as the focus turns to some extent to the rather infrequently discussed third element of the legal profession, government legal advisers.⁸⁶ Above, we touched upon some of the expected changes for this sector as well. However, in this case study the focus is on a tool with great relevance to the government legal service in new Member States, although, as will be shown, it does have implications for the two other main members of the legal profession during pre-accession, advocates and judges alike.

The tools in question are the guidelines issued by the EU Commission. Such guidelines are a mechanism used by the Commission in a variety of fields,⁸⁷ including, and most importantly for our discussion, issues related to international law. This case study will discuss the recently adopted 2013 EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief,⁸⁸ which, while not entirely focusing on international law, contain not only a strong international legal element, but also place obligations on Member States to act extraterritorially in relation to the exercise of rights of freedom of religion or belief.⁸⁹

The FoRB Guidelines contain unique features due to their focus on particular freedom of religion and belief issues, but this analysis will focus on the implementation elements with characteristics shared with other international law related instruments. Examples of such instruments, of which some will be used in our brief analysis, include guidelines relating to international human rights and humanitarian law.⁹⁰ Discussing pos-

⁸⁶ When it comes to international law, government legal advice is perceived as unique and requiring a deep understanding of its realities and the consequences of decision making in the international context. This would be especially true when the state undergoes such dramatic changes as accession to the EU. For a discussion from the US perspective, see John R Crook, ‘Address: Practicing International Law for the United States’ (1996) *Journal of Transnational Law & Policy* 1.

⁸⁷ See, for example, the explanation of the use of EC Guidelines in the pharmaceutical context: ‘A guideline is a Community document with explicit legal basis referred to in the legislative framework as intended to fulfill a legal obligation laid down in the Community pharmaceutical legislation’. European Medicines Agency, ‘Procedure for European Union Guidelines and Related Documents within the Pharmaceutical Legislative Framework (Doc Ref EMEA/P/24143/2004 Rev 1 corr, 2009) 4.

⁸⁸ Council of the European Union, ‘EU Guidelines on the promotion and protection of freedom of religion or belief’ (Foreign Affairs Council Meeting Luxembourg, 24 June 2013) (FoRB Guidelines).

⁸⁹ See, for example, the requirement for a Member State representative to attend trials, in third states, of persons persecuted for exercising their right to freedom of religion or belief and to visit those detained for such acts. FoRB Guidelines (n 88) para 45.

⁹⁰ The variety of guidelines includes guidelines on the death penalty, torture, gay and lesbian rights, children’s rights and human rights defenders. According to the EC, the guidelines in this context ‘are not legally binding, but because they have been adopted at ministerial level, they represent a strong political signal that they are priorities for the Union. Guide-

sible tools to meet the challenges of the application of tools such as the Guidelines is important, as the trend in using them to achieve EU 'international law' foreign policy is rising.⁹¹

The element that a government legal adviser has to understand is the legal status of such instruments which are not directives, regulations or decisions, presenting a different kind of EU tool to comply with. Guidelines in themselves do not present laws in themselves ('rules of law') but they become binding on the Commission by virtue of their adoption.⁹² At the same time, the practical effect for pre-accession candidate countries seems to be that they must find ways to adopt them in their domestic legal systems, and policy has to be implemented accordingly.

This approach is relevant to all types of Guidelines, but guidelines referring to international law issues present particular challenges as they relate to the interpretation and application of international law,⁹³ which, as already noted, is an extremely complicated EU law issue. When looking at the FoRB Guidelines, we see that the issue gets even more complex since they impose obligations on the overseas missions of the Member States.⁹⁴ Arguably, such obligations do not contain many substantive elements, as the role is more one of collecting and reporting breaches of freedom of religion and belief.⁹⁵ However, remembering that an ancient

lines are pragmatic instruments of EU Human Rights policy and practical tools to help EU representations in the field better advance our Human Rights policy'. See the website of the European External Action Service <http://eeas.europa.eu/human_rights/guidelines/index_en.htm> accessed 1 March 2014.

⁹¹ See, for example, the Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards [2013] OJ C205/05 and the intended Guidelines on product labeling for products from the West Bank. See Stuart Weiner, 'Full Text of EU Foreign Policy Chief's Letter on Settlement Labeling' *The Times of Israel* (23 July 2013) <<http://www.timesofisrael.com/full-text-of-eu-foreign-policy-chiefs-letter-on-settlement-labeling>> accessed 5 June 2014.

⁹² Case T-59/02 *Archer Daniels Midland Co v Commission* [2006] ECR I-3627, para 43.

⁹³ See, for example, Council of the European Union, 'EU Guidelines on International Humanitarian Law', and the explanation provided by the Commission that 'Guidelines are pragmatic instruments of EU Human Rights policy and practical tools to help EU representations in the field better advance our Human Rights policy'. European Union External Action website, <http://eeas.europa.eu/human_rights/guidelines/index_en.htm> accessed 13 October 2014.

⁹⁴ FoRB Guidelines (n 88) para 47.

⁹⁵ The main role of the overseas missions of the Member States, in the context of the FoRB Guidelines, is outlined as follows: 'EU missions (EU Delegations and Member States Embassies and Consulates) form a key component in early warning. EU missions, in co-ordination with any relevant CSDP missions, will monitor respect for freedom of religion or belief in third countries and will identify and report on situations of concern (including individual cases and systemic issues), drawing on available sources in and outside the country, including civil society, so that the EU can take prompt and appropriate action. Reports from EU Delegations should be taken up in the relevant Council Working Parties and, when appropriate, in the Political and Security Committee (PSC) in order to identify an appropriate response'.

principle of international law is non-interference in the affairs of another state,⁹⁶ the government legal adviser, in a new Member State that is most likely not accustomed to playing a role on the international stage,⁹⁷ will need to produce guidance for diplomats as they fulfil their new role.

More substantially, if, prior to EU membership, the state did not place sufficient attention in its policies, and not just in its legislation, on international treaties related to freedom of religion, such as the International Covenant for Civil and Political Rights, now it will be required to do so in order to align itself with other EU Member States. Augmenting the challenges for the government legal adviser, it could be the case that the EU expectation, especially from the new Member States, would not only be to apply the treaties more firmly, but also to apply the standards set by the ICCPR committee bodies such as the UN Human Rights Committee, which operates by the use of comments.⁹⁸

Just as for the first two case studies, in discussing the FoRB Guidelines it will be important to try and understand how the CJEU will relate to them, as it will be vital for all members of the legal professions (including in the 'older' Member States) to be ready for this. Considering that the Lisbon Treaty provides more potential power to the CJEU to rule on human rights issues in the protection of individuals,⁹⁹ it is possible that as a result of the FoRB guidelines, placing high emphasis on the ICCPR, the court will change its methodology and not solely focus on the ECHR in its judgments.¹⁰⁰

Reviewing the CJEU view of international human rights law or issues related to international law, we see that its rulings can be consid-

⁹⁶ The principle has since evolved, and the past few decades have seen many developments. For an analysis of the state of affairs as early as 1982, see Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32(1) *American University Law Review* 1. However, intervention in the way envisaged by the FoRB is still considered by some states as problematic, as evidenced by the Chinese response to the reports issued in the context of freedom of religion based on US legislation similar to the FoRB. See, for example, 'China Religious Groups Rebut U.S. Report' *China Daily* (New York 13 May 2014) <http://usa.chinadaily.com.cn/china/2014-05/13/content_17502788.htm> accessed 5 June 2014.

⁹⁷ Unlike most of the core Member States of the EU, pre-accession countries or new Member States might have less experience on the global stage.

⁹⁸ The FoRB Guidelines explicitly refer to the Human Rights Committee General Comment 22 which provides detailed guidance on the rights afforded under Article 18 of the ICCPR, para 9.

⁹⁹ This would become reality once the EU accedes to the ECHR, in accordance with TEU Article 6(2).

¹⁰⁰ Currently, even before EU accession to the ECHR, the CJEU sees its provisions as the source of fundamental rights in the EU, very frequently referred to in resolving human rights litigation. See Jörg Polakiewicz, 'EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?' (Speech, 'Fundamental Rights in Europe: A Matter for Two Courts, Oxford Brookes University, 18 January 2013).

ered to present a more expansive interpretation of international law. This could be the case even if the decisions run the risk of interfering with the conduct of foreign policy by the Member States or of setting an advanced interpretation of international law even in cases where it is not supported by overall international practice. Examples include decisions concerning the revocation of EU customs benefits from products imported from the West Bank¹⁰¹ based on the rules of origin (the former), and, just recently, an interpretation of the definition of internal armed conflict wider than that envisioned by the 1949 Geneva Conventions in order to broaden the scope of eligibility of asylum seekers in EU Member States.¹⁰²

The CJEU bases its reasoning in these cases on internal EU law,¹⁰³ so this should not be surprising for the legal profession. It could be argued that knowledge of and familiarity with EU law would suffice, but if the legal perception in the pre-accession country was that when it comes to foreign policy and international human rights law the legal situation is clear, ie non-justiciability and strict interpretation,¹⁰⁴ instruments such as the FoRB are likely to encourage the CJEU to continue farther down the expansive international path. The legal profession in the new Member States must prepare for these developments and implement policy accordingly.

The three case studies, together with the cross-cutting issues, present a picture of complexities and challenges for the legal profession in facing up to the changes in the application of international law in the new Member States. What makes the issue even more complicated is that the EU as an institution (the CJEU, the Commission and other bodies) presents a three-dimensional picture, as it proclaims strict adherence to international law, enacting policies accordingly, and at the same time the CJEU (supported in some cases by the positions of the advocates general) poses severe limits on its application, or interprets it expansively.

¹⁰¹ Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] OJ C100/4. See also Dennis Pump, 'The European Union in Commercial Negotiations with Israel: The Influence of France and Germany within EU Foreign Economic Policy-making' (Bachelor thesis, Universiteit Twente 2014) 28 <http://essay.utwente.nl/64461/1/PUMP_BA_MB.pdf> accessed 2 March 2014.

¹⁰² Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* (CJEU, 30 January 2014).

¹⁰³ The CJEU in *Diakite*, for example, referred to EU internal directives on asylum law.

¹⁰⁴ This transformation is relevant across the board as many issues become, at pre-accession, matters for adjudication by the courts. See Sinisa Rodin, 'Balancing Free Market and Fundamental Rights in a Post-communist European State: A Mission Impossible?' in In-golf Pernice and Evgeni Tanchev (eds), *Ceci n'est pas une Constitution: Constitutionalisation without a Constitution* (Nomos Verlag 2008) <http://www.ecln.net/documents/sofia_2008/buch/ecln_2008_rodin.pdf> accessed 2 March 2013.

Legal professionals working in such a new environment must adapt both by enhancing their understanding of international law and by trying to follow the different paths taken by the EU, and most of all by the CJEU. So far, the debate has highlighted, albeit briefly, some suggested approaches. The next section will focus exclusively on this important issue from an overall wholesome point of view, trying to provide a useful set of tools for the legal profession.

4. Meeting the challenges of the new EU ‘International Law’ frontier

Discussing the new EU ‘International Law’ frontier facing the legal profession in post-accession days, it is clear that the challenges are substantial. The first step towards understanding how the EU and, in particular, the CJEU view international law is to better grasp what international law really is and what its main elements are.

The first step on this journey is to recognise that international law, unlike national law codified in legislation,¹⁰⁵ or EU law mostly codified in directives, regulations, and decisions, cannot be easily defined. While it is true that there are many international treaties or instruments reflecting binding commitments of states, and these can be somewhat easily searched,¹⁰⁶ still a big and significant portion of international law is not neatly organised or codified, including customary international law (state practice and *opinion juris*) and ‘soft law’ such as UN General Assembly resolutions, UN sponsored guidelines and rules, and recommendations of a wide variety.¹⁰⁷

The practical question facing the legal professional is how to find all these sources in a world where more and more international regulation is developed, including what is now termed Global Administrative Law.¹⁰⁸ Looking again at the ICJ statute, we note that some of the indicated

¹⁰⁵ Efforts to codify international law have been going on for more than half a century, but it is work still in progress and is not likely to be completed. For a description of the experience and challenges of the early years, see H Lauterpacht, ‘Codification and Development of International Law’ (1955) 49 *American Journal of International Law* 16.

¹⁰⁶ One leading database is the United Nations Treaty Collection, an official UN database of international treaties, of which the UN Secretary General is the depositor <https://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml> accessed 3 March 2014.

¹⁰⁷ The use of soft law makes understanding international law and its application very challenging, but it is required in order to allow international actors to reach agreements to facilitate cooperation even in cases where consensus on legal obligations is not attainable. CM Hinkin, ‘The Challenge of Soft Law: Development of International Law’ (1989) 38 *International and Comparative Law Quarterly* 850, 866.

¹⁰⁸ Global administrative law now presents most of the international regulatory framework. See Sabino Cassese and others (eds), *Global Administrative Law: Cases, Materials, Issues* (IRPA and IILJ 2008) xix-xxv.

sources are ‘teachings of the most highly qualified publicists of the various nations’.¹⁰⁹

Such ‘teachings’ have significant value, compared to other legal fields, as in the world of international law, case law is quite limited and day-to-day practitioners are few and far between. Corresponding with this idea, academic interest in the field is ever growing, and scholarly development sometimes fills the gap created by the lack of an international equivalent of domestic, or regional, legislature.¹¹⁰ These elements combined give great prominence to academic writing and research which could assist the legal professional not only in understanding the situation as it currently stands,¹¹¹ but also to understand current trends and future developments. Obviously, here the legal profession must exercise caution, as frequently international legal scholarship inherently entails value judgments,¹¹² reflecting in some cases wishful thinking rather than the pragmatic foreseeability of things to come.

This is all very important, especially for the legal professional faced with the unique approaches of the CJEU, as its international law doctrine is ever developing. In this regard, it might be even easier for the ‘new’ Member State (‘represented’ by a member of its legal professions) to promote ideas for the dynamic interpretation of international law, including binding treaties,¹¹³ in a way which corresponds with its interest.

Admittedly, suggesting ways to achieve increased familiarity with international law might be easier said than done given the large volume of academic research and writings. However, in today’s highly technological world such a task becomes less daunting as not only are there comprehensive databases for locating published articles by leading scholars, as well as a case law of international tribunals,¹¹⁴ but many publications are also made available in accessible electronic form, including, in some cases, free access to large sections of each.¹¹⁵

¹⁰⁹ Article 38, ICJ Statute.

¹¹⁰ This gap is sometimes faulted for the problems faced by international judges in their attempts to develop international law and not to limit themselves to dispute resolution. Samantha Besson, ‘International Judges as Dispute-Settlers and Law-Enforcers: From International Law without Courts to International Courts Without Law’ (2011) 31 *Loyla of Los Angeles International & Comparative Law Review* 33, 49.

¹¹¹ There is an increasing number of general international law guides, such as Malcolm Shaw, *International Law* (6th edn, CUP 2008); Ian Brownlie, *Principles of International Public Law* (7th edn, OUP 2008); and Malcolm Evans, *International Law* (3rd edn, OUP 2010).

¹¹² Gleider I Hernández, ‘The Activist Academic in International Legal Scholarship’ (2013) 2(11) *European Society of International Law Reflections* 1-5.

¹¹³ Christina Voigt, ‘The Role of General Principles in International Law and their Relation to Treaty Law’ (2008) *Retfaerd Argang* 31 2008 NR 2/121.

¹¹⁴ See, for example, databases such as Lexis-Nexis and Westlaw.

¹¹⁵ Google Book Search, for example, usually allows the viewing of large sections of major works on international law.

Complementing scholarly writing, there has been a recent trend in the publication and transparency of the work of international bodies on legal issues and in the development of international law, as academic experts work together with diplomats to negotiate on the creation of new international law instruments. These processes can sometimes be complex experiences,¹¹⁶ but there is great advantage in becoming familiar with this work in the form of reports and studies which in many cases include overviews of the current state of international law in a variety of issues. These can take many forms, such as reports of working groups,¹¹⁷ summaries of practices,¹¹⁸ and *travaux préparatoires* of international treaties.¹¹⁹ The best, and leading, examples are the reports of the International Law Commission, the leading UN sponsored body for international law which frequently publishes reports on its works on a variety of international law topics.¹²⁰

The question which springs to mind is whether this wide variety of sources can provide clear-cut answers and whether their use in argumentation before the CJEU is worthwhile. Unfortunately, the answer to this is also not too precise, as it is sometimes difficult to ascertain the 'correct' interpretation of international law,¹²¹ and, as is evident from our previous analysis, the CJEU has shown less than a consistent approach to this. Nevertheless, from the point of view of legal professionals, and this will not be news to common law practitioners, the flexibility carries with it, along with inherent risks, as those who make use of it are some-

¹¹⁶ For a discussion of the negotiations of the terms of review of the implementation of the United Nations Convention against Corruption, see Mati Jousten and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the United Nations Convention Against Corruption' (2012) 18 *Global Governance* 425.

¹¹⁷ In the context of international trade law, for example, the working groups of the United Nations Commission on International Trade Law (UNCITRAL) issue reports governing a wide variety of international commercial issues reflecting deliberations between government experts, diplomats and leading scholars <http://www.uncitral.org/uncitral/en/commission/working_groups.html> accessed 4 March 2014.

¹¹⁸ See, for example, United Nations Treaty Collection, 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' <https://treaties.un.org/pages/Publications.aspx?pathpub=Publication/SoP/Page1_en.xml> accessed 4 March 2014.

¹¹⁹ See, for example, the *Travaux Préparatoires* of the United Nations Convention against Corruption <<http://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html>> accessed 4 March 2014.

¹²⁰ See, for example, the 2013 ILC Report which included such topics as immunity of state officials, customary international law and treaties. 'International Law Commission Report on the work of its sixty-fifth session' (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-eighth Session Supplement No 10 (A/68/10) <<http://www.un.org/law/ilc>> accessed 5 March 2014.

¹²¹ According to Dworkin, the 'correct' way of interpreting international law is to not only to look at its underlying goals and the need to protect individuals, but also to allow for 'self-governance' by those which it most affects. See Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41(1) *Philosophy and Public Affairs* 2, 21.

times considered to be threatening the rule of law,¹²² great potential. If the legal professionals in the new Member States take a similar approach to using international law, based on the above proposed methodology of study, they would be essentially following in the footsteps of the CJEU.

One important finding from the analysis so far is that familiarity and knowledge of international law will not suffice for the legal profession in the new Member States. This is because the CJEU does not view international law as controlling, even considering that the EU itself sees its role as the protector of rights embodied in international law, as exemplified by the FoRB Guidelines discussed in the previous section. Entering the era following the adoption of the Lisbon Treaty, as more and more international issues are placed under the sphere of EC competence, including the very negotiation of treaties,¹²³ it is becoming increasingly important for the legal profession to understand the application of 'EU international law' in whatever capacity.

Sharing this characteristic with general international law, the EU version is also something which is not clearly codified or identified. Granted, the TEU provisions on international issues can assist in some cases, but in many instances, such as bilateral investment treaties,¹²⁴ it could be argued that the elaborate drafting caused more complication than simplification. Additionally, parallelism (parallel EU and member competence)¹²⁵ could be very challenging, in particular for legal professionals from a pre-accession country or from those states newly joining the EU.

The EU version of international law also lacks a case law, like international law itself, although this is slowly changing as the CJEU ventures more and more into this relatively new frontier. Arguably, as the CJEU has almost gone through most EU law issues, it would see international law as an opportunity to develop new jurisprudence, especially if this provides an opportunity to establish its independence from the international legal system. Such an approach will be especially relevant in the face of possible interventions from other international tribunals in disputes related to EU law.¹²⁶

¹²² Lutz-Christian Wolff, 'Law and Flexibility: Rule of Law Limits of a Rhetorical Silver Bullet' (2011) 11 *The Journal of Jurisprudence* 549, 567.

¹²³ The fact that the application of the Lisbon Treaty in this respect has caused what some term a 'debacle among EU institutions' makes the issue even more challenging, as the way and methodology of the conclusion of international treaties is in many cases vital to their interpretation. For an example in the context of the 2013 Minamata Convention, see Jan Wouters and Thomas Ramopoulos, 'Revisiting the Lisbon Treaty's Constitutional Design of EU External Relations' (2013) Working Paper No 119 –2013, 13, 20.

¹²⁴ Article 207, TFEU.

¹²⁵ Kevin Kazimirek, 'The New EU Competence over Foreign Direct Investment and its Impact on the EU's Role as a Global Player' (2012) Jean Monnet Centre for Europeanisation and Transnational Regulation Oldenburg 2012/04, 30.

¹²⁶ According to some, there is no legal impediment for other international tribunals (mainly arbitral tribunals) to adjudicate disputes between EU Member States on EU law issues

Until the CJEU reaches this point, legal professionals can turn to academic and research materials developed by EU law and international law scholars. Naturally, as the EU increasingly ventures into regulating the international legal relations of states, the volume of studies in the field will continue to help the perplexed legal professional to find his or her way.¹²⁷ This development in research also facilitates academic and practitioner oriented seminars and conferences,¹²⁸ which members of the legal profession can take advantage of to better understand how EU law interacts with international law and their own relevant domestic law.

Familiarity with and knowledge of an area of law are just part of the picture, and as has been noted throughout our debate, members of the legal professions, especially advocates and judges in the new Member States, must have a developed strategy when facing international law issues in the EU context.

The content of such a strategy will obviously depend very much on the desired outcome or on the issue in question, but as a general matter the following four main steps can be suggested on the basis of the analysis so far:

1. *Identification of the international law instrument* - such instruments can range from an international treaty, which the Member State is a party to together with the EU or independently (with no EU membership), to customary international law, soft law or decisions by international tribunals.

2. *Defining the relationship between the international instrument and EU law, mainly the proposed normative hierarchy between them* – if there is a need to argue in favour of international law, or base such an argument on judicial reasoning, then one can claim that international law overrides.

3. *Linking international law with existing EU law* – despite the overhaul of EC international law competence, many international law provisions are not explicitly incorporated into EU law so this step might be considered almost impossible. This argument notwithstanding, international law tells us that in some cases treaties, such as the UN Charter,

(although it might be that in practice such tribunals will decline jurisdiction). See Inga Dauksienė, 'Recognition of Jurisdiction of the Court of Justice of the European Union in International Courts' (2012) 19(2) *Jurisprudence* 459, 475.

¹²⁷ Despite the more advanced references to international law in the TEU, there are no clear EU guidelines on the interrelationship between EU law and international law. See Konstantinides (n 10) 1177.

¹²⁸ See, for example, the First Seminar on the Boundaries of European Private International Law (Barcelona 27-28 March 2014) <<http://conflictoflaws.net/2014/first-seminar-on-the-boundaries-of-european-private-international-law>> accessed 7 March 2014.

can be interpreted as a living and breathing ‘tree’.¹²⁹ There is no reason why legal professionals cannot utilise EC policy decisions and guidelines as a source of interpretation of EU law consistent with international law if this leads to the desired outcome.

4. *Avoiding the pitfalls* – most importantly, those legal professionals from the new Member States should avoid, as far as possible, the temptation to stick with traditional monist legal perceptions of international law, or with analogous application theories to EU law, and claim that international law is directly applicable in EU law. As the discussion has shown, the likelihood of the success of this theory, although it is supported by some legal scholarship, is low and might lead the CJEU to determine just the opposite of what the legal argument purported to achieve.

Admittedly, these four strategic steps might not ensure success every time, and the CJEU takes time to progress and develop case law, including its own EU version of international law. It can also be argued that legal professionals from new Member States should hesitate to take risks. However, when looking at the issue from a different perspective, it seems that the members of the ‘EU’ legal profession with the best chances of succeeding to influence the CJEU or judicial outcomes and policies are the ‘new’ members, as they are yet to become entrenched in traditional concepts and views of EU law and it might even be expected from them to be innovative in their approach. At the same time, it should be emphasised that when acting they would need to respect the contours set up by the CJEU in order not to have their positions dismissed outright.

The proposed solutions and strategies can help the legal professionals in pre- and post-accession days, but ultimately these are steps and a means of preparation for existing and developing international law and its EU version. Another way for the legal profession to address these difficult challenges is to take the next stride and try and influence the shaping of international law, as well as ‘EU international law’. In this next section we will discuss how this can be attempted.

5. International law and EU international law: changing from within

As difficult as the suggestions in the previous section are, the challenges faced by the legal profession in pre-accession countries and post-accession new EU Member States in attempting to influence international law, or its Europeanised version, at the stage of creation rather than application, are far greater. At the same time, if successful, the outcomes could be much more comprehensive and significant.

¹²⁹ Thomas Franck, *Recourse to Force, State Action against Threats and Armed Attacks* (CUP 2004) 6.

Legal professionals in new EU Member States are, it can be assumed, no strangers to their role and influence in domestic law. Like advocates, judges and government legal advisers around the world, they too take part every day in law making.¹³⁰ This can be done in different ways, including making arguments in court, rulings, and participating in legislative committees and legislative projects. The process of the drafting of the Lisbon Treaty is claimed by some to serve as an example of the influence of legal professionals in law making and politics, where such professionals are termed politico-legal professionals – entrepreneurs.¹³¹

There are questions as to how this can be done post-accession, as in many areas EU law might prevail, but the main argument is that the principled strategies are familiar. The main question, therefore, is how the legal profession in the new EU Member States can influence international law as it becomes increasingly relevant in EU daily life.

Ever since the early days, international law has been viewed as a creation in the sole realm of state actors, reflecting each state's own commitments.¹³² As the regulation of international relations was viewed as one of the justifications for international law, foreign offices (or prime ministers' and presidents' chambers) had the primary responsibility for the negotiation of international treaties or international law instruments, in what has been termed by some as the foreign office model.¹³³ Today, as the world, and law, become more and more global, so does the creation of international law. Not only does an increasing number of states take part in international law making (although there are questions about how actively most states are in some cases¹³⁴), but more and more actors are also involved, including legal professionals. When it comes to complicated issues such as international commercial and corporate law, some argue that it is the advocates who take a leading role in its creation, while politicians and legislatures play only a technical role.¹³⁵

¹³⁰ This is a relatively new trend, as in the past members of the legal profession were perceived as conservative and playing only a minor role in promoting social change, unlike their political counterparts. See Edgar Bodenheimer, 'The Inherent Conservatism of the Legal Profession' (1948) 3(23) *Indiana Law Journal* 221.

¹³¹ Antonin Cohen, 'Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization' (2010) 4 *International Political Sociology* 107, 108.

¹³² Timothy Meyer, 'From Contract to Legislation: The Logic of Modern International Law-making' (2014) 14 *Chicago Journal of International Law* 559, 567.

¹³³ Anna Cavnar, 'The Foreign Office Model Versus the Global Governance Model: An Introduction' (ILJ NYU Course Material) <<http://iilj.org/courses/documents/GlobalGovernancePaper.pdf>> accessed 10 March 2014.

¹³⁴ The lack of participation and input by states is considered as a flaw in international law making by states. See David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *American Journal of International Law* 857, 865-866.

¹³⁵ Sigrid Quack, 'Legal Professionals and Transnational Law-Making: A Case of Distributed Agency' (2007) 14(5) *Organization* 643, 650.

For legal professionals from new Member States, this development provides an opportunity to actively engage in international law making, with the added advantage of presenting new and innovative approaches. While it is true that this could have been done before accession and even without it, as we have seen in the previous sections, new EU Member States are no longer lone actors on the global stage embroiled in their own narrow region and relationships with bordering countries. They now become international actors with an impact on the global stage, independently or as part of the EU.¹³⁶

In order to facilitate the analysis, different avenues for participation in international law making are identified for each of the categories of legal profession members discussed in the previous sections.

Government legal advisers are still, despite the shift to global governance, best placed to influence international law making, as they can represent their states in international legal forums such as the UN General Assembly Sixth Committee (the legal committee),¹³⁷ the UN Commission on International Trade Law (UNCITRAL),¹³⁸ the Commission on Crime Prevention and Criminal Justice (CCPCJ),¹³⁹ and many others.¹⁴⁰ In a similar vein, negotiations of international treaties are usually open to all member states of the UN, including, of course, the new EU Member States.

Some challenges in taking such an active approach obviously exist.

From the technical perspective, participation in international conferences can be quite costly,¹⁴¹ especially for the new Member States, and sometimes it is difficult for one delegation to truly effect outcomes. Nevertheless, considering that in many cases international law directly affects every country (especially in a globalised world) and its people, and that any impact, reflecting national interests, is important, it seems that government legal advisers should promote national participation in

¹³⁶ One good example in this regard is the effect on the new Member State when it takes its turn to hold the EU presidency. For a discussion in regard to Slovenia, see Sabina Kanjč, 'Effects of EU Enlargements: Slovenia' in Graham Avery, Anne Faber and Anne Schmidt (eds), *Enlarging the European Union: Effects on the New Member States and the EU* (Trans European Policy Studies Association 2009) 41, 43-44.

¹³⁷ See the Sixth Committee (Legal) website <<http://www.un.org/en/ga/sixth>> accessed 11 March 2014.

¹³⁸ See the UNCITRAL website <<http://www.uncitral.org/uncitral/en/index.html>> accessed 11 March 2014.

¹³⁹ See the CCPCJ website <<https://www.unodc.org/unodc/commissions/CCPCJ>> accessed 11 March 2014.

¹⁴⁰ In some cases, not all UN member states are members of the different bodies, but in most cases observer states can also participate in deliberation with little limitation on their ability to influence discussions and conclusions.

¹⁴¹ Caron (n 134) 866.

international legal forums. Admittedly, it would be impossible to be present everywhere and every time, but participation in forums with some relevance to the new Member State will almost always be worthwhile.

Substantively, an additional challenge is the need, in some forums, to coordinate positions with the other 27 Member States and with the EC. Usually, EU coordination meetings take place during the meetings in order to facilitate common positions,¹⁴² but this is still quite a difficult task, especially at a time, as has been evident throughout our analysis, when EC competence over international law issues is increasing, and when 'mixed' or 'parallel' competences make things very complex.¹⁴³ As noted earlier, negotiations over the Minamata Convention brought such complexity to the fore, promoting a compromise which created complex guidance for delegations of states and the EC, where the EC had powers to decide on common positions only on issues relating to EU competence.¹⁴⁴

The challenge here is significant, but as the situation is still very open or 'grey', and Member States are still quite reluctant to give up their autonomy to the EC in international negotiations, government legal advisers could still have an influence on international law making, reflecting national interests. We should note that in taking such an approach there could be political repercussions from the EC or from such Member States which support a more Europeanised negotiation process, but at the same time there could be benefits from creating alliances with those other Member States who believe that autonomy in international negotiations should be preserved. Considering that EU coordination meetings can sometime lead to changes in the common positions and that such meetings help in creating shared ideas and interests,¹⁴⁵ there is also great benefit for government legal advisers from the new Member States to support the common position or to influence it.

Advocates and judges, as we have seen previously, can employ international law strategies in individual cases (generally and in conjunction with EU law), which could in some cases affect the creation and development of international law, although as noted, such an effect can be quite limited.

¹⁴² See Mikaela Gavás, 'The EU and Global Public Goods: Challenges and Opportunities' (2013) Danish Institute of International Studies Report, 24.

¹⁴³ Some argue that such mixed competence sometimes helps efficiency, while others believe it places obstacles on the ability of the EU and EU Member States to conduct international negotiations. For a brief analysis, see Louise Van Schaik, *EU Effectiveness and Unity in Multilateral Negotiations: More than the Sum of its Parts* (Palgrave Macmillan 2013) 49.

¹⁴⁴ Council Decision on the participation of the Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), doc 16632/10, 6 December 2010.

¹⁴⁵ Gavás (n 142).

In the context of the wider influence of international law making, they are relatively new actors on this international playing field.¹⁴⁶ Globalisation in this sense increasingly supports the idea of the wider participation and inclusion of different groups in international negotiations, and advocates and judges are best positioned to be involved.

Reviewing current practice, two main models can be identified: participation in international legal forums as observers,¹⁴⁷ or in some cases as legal experts acting on behalf of governments,¹⁴⁸ and the submission of studies and reports on international law.¹⁴⁹ Such involvement is not free of obstacles as, when the international organisation appoints an expert, there could be potential tensions between the appointed experts and the home state (mostly in cases where there could be diverging views),¹⁵⁰ and a backlash from the state could occur when such observers are considered too influential, since states fear losing control of the outcomes.¹⁵¹

Taking these, and other, obstacles into account, there is still the notion that there is increasing willingness from states and international organisations to seriously engage with non-governmental legal experts with practical experience (sometimes missing from deliberations between

¹⁴⁶ While a relatively new idea on the international plane, lawyers have played a significant role in developing the legal structure of the European common market and emphasising a supranational legal order to facilitate international trade. See Antoine Vauchez, 'Brokering Europe Euro-Lawyers and the Making of a Transnational Polity' (2013) LSE Law, Society and Economy Working Papers, 19/2013.

¹⁴⁷ In UNCITRAL discussions, for example, NGOs are frequent observers, and in some of the cases they are represented by lawyers. For a description of the framework of participation for NGOs in UNCITRAL, see the Report of the United Nations Commission on International Trade Law, A/68/17 (2013) paras 257-261.

¹⁴⁸ United Nations Commission on International Trade Law, 'A Guide to UNCITRAL: Basic Facts on the United Nations Commission on International Trade Law' (United Nations 2013) para 20.

¹⁴⁹ See, for example, International Fund for Animal Welfare, 'Report of the International Panel of Independent Legal Experts On: Special Permit ("Scientific") Whaling Under International Law' (2006).

¹⁵⁰ In one case, in 1987, a Romanian expert was requested by the United Nations to report on human rights and the then government of Romania refused to grant him a travel permit to present his finding to the relevant UN human rights forum, due to his harsh criticism of the regime. The ICJ ruled that Romania had acted in violation of the 1946 United Nations Convention on Privileges and Immunities. See International Court of Justice, 'Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations (the Mazilu case)', Advisory Opinion, 1989 ICJ Rep. 177; 'Romania Wants Critical UN Report Withdrawn from Circulation' *Associated Press* (New York, 2 September 1989). In the Mazilu case, the then communist government of Romania objected to a report issued by a Romanian expert appointed by the UN which also referred to the human rights situation in Romania.

¹⁵¹ In the context of UNCITRAL, see Claire R Kelly, 'The Politics of Legitimacy in the UNCITRAL Working Methods' in Tomer Broude, Marc L Busch and Amelia Porges (eds), *The Politics of International Economic Law* (CUP 2011) 106, 120.

diplomats).¹⁵² Legal professionals from the new Member State should use this opportunity to get involved. Such involvement would not only provide a platform for influence, as well as obtaining important information and education, but also allow them to become part and parcel of transnational legal networks, considered today to be the driving force behind trade and development.¹⁵³

Coming back to the idea which is a recurring thread in the analysis, international law in itself does not completely integrate into EU law and there are many applicable modalities. For this reason, the legal profession in the new Member States must not be satisfied with exerting influence on international law at the global level, but should identify similar venues of operation at the EU level. One such forum, briefly noted earlier, is the European Parliament Committee for Legal Affairs (JURI) which includes international law and the relationship to EU law in its portfolio.¹⁵⁴ In practice, JURI holds public hearings (including on relationships between EU law and international law or obligations), where legal professionals can participate and give expert testimony when appropriate.¹⁵⁵ Work in such forums on Europeanised international law is likely to increase as more and more interaction between EU law and international law will occur. Legal professionals from the new Member States should monitor these developments closely to see how they can best become involved in areas of particular interest to them.

Much like the challenges faced at the international level, influence at the EU level would be difficult to obtain. One way to mitigate these hardships is to be active in the representative organisation of the legal profession. For advocates, the Council of Bars and Law Societies of Europe (CCBE),¹⁵⁶ where EU Member States, as well as pre-accession countries,¹⁵⁷ are represented, serves as an organisational vehicle to promote issues related to EU and international law, as evident in the re-

¹⁵² Jousten and Graycar (n 116) 426.

¹⁵³ Harold Hongju Koh, 'Opening Remarks: Transnational Legal Process Illuminated', in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (CUP 2002) 327, 331.

¹⁵⁴ The portfolio is defined as follows: 'the interpretation and application of international law, in so far as the European Union is affected' <<http://www.europarl.europa.eu/committees/en/JURI/home.html>> accessed 14 March 2014.

¹⁵⁵ See, for example, a public hearing on the 'Regulatory Coherence and the Implementation of EU Law in the Context of the Transatlantic Trade and Investment Partnership', which took place on 11 February 2014. For a video recording, see <<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20140211-0900-COMMITTEE-JURI>> accessed 8 March 2014.

¹⁵⁶ CCBE website <<http://www.ccbe.eu/index.php?id=12&L=0>> accessed 14 March 2014.

¹⁵⁷ The Bar Association of Serbia, for example, was granted associate membership in the organisation on the same day as formal EU accession negotiations were initiated (21 January 2014) <<http://www.ccbe.eu/index.php?id=403&L=0>> accessed 14 March 2014.

cent statement supporting EU accession to the 2005 Hague Convention on Choice of Courts Agreements.¹⁵⁸ There are similar organisations for judges (although attempts at influencing the creation of Europeanised international law could be more institutionally sensitive if there were a need to criticise ECJ rulings),¹⁵⁹ and for government legal advisers.¹⁶⁰

Looking at the different avenues of influence by the legal profession, we come full circle. If at the beginning we saw how difficult understanding the application of international law to EU law could be, leaving the legal professional from the new Member State perplexed, we now see that there are tools and strategies in place. Effective utilisation of such ideas will obviously not provide the answer in each and every case, and many unforeseen developments can occur. Even so, taking such measures will likely bring the legal profession a few steps closer to becoming a full-fledged participant in the EU international law system, a vital component of any kind of EU legal practice in the years to come.

5. Conclusion

Legal professionals (advocates, judges and government legal advisers) face dramatic and drastic changes and challenges when the Member State accedes to the EU. Naturally, the tendency could be for members of the profession to first get a grip of substantive EU law and the way it affects their working life, and not to be concerned with what could be seen as 'extras', such as international law. Our analysis and findings show that taking this approach is misdirected and misguided.

Recent changes in the TEU and CJEU case law all point to the emergence of a Europeanised version of international law in almost every legal field. The result is that international law post-accession will, in most cases, be very different from what it was before. In a globalised world, the ramifications are significant, and members of the legal profession frequently face international legal challenges, and specific strategies must be developed to successfully overcome them.

Discussing the various developments in EU perspectives on international law, several different strategies have been offered, mainly aimed at providing practical tools for the legal profession to optimise outcomes ac-

¹⁵⁸ See CCBE Statement on the Hague Convention on Choice of Court Agreements, 27 February 2014 <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/05032014_ENC-CBE_Sta1_1394008622.pdf> accessed 14 March 2014.

¹⁵⁹ Examples include the Association of European Administrative Judges (AEAJ) <<http://www.aeaj.org>> accessed 14 March 2014; and the European Judges and Prosecutors Association <<http://www.amue-ejpa.org/index.php?lang=ukn>> accessed 14 March 2014.

¹⁶⁰ One example is CHADI, the Council of Europe Committee of Legal Advisers on Public International Law <<http://www.coe.int/web/cahdi>> accessed 14 March 2014.

ording to the different interests involved. At the same time, suggestions have also been made of ways to influence EU international law at the very point of its creation, whether as general international law or when it is translated into EU 'legal language'.

Accordingly, the proposals should be mainly used at the practical level. However, this does not mean to preclude those wishing to influence EU international law for other purposes, for example to protect important values or to promote social and political agendas. Some modification will be required, and future research might be required in that direction, but the frameworks presented could potentially provide a very good starting point.

Accession to the EU in many cases represents the crowning achievement of the new Member State, with a mostly positive implication for its nationals. Inherently, it brings with it not only great changes to the legal system but also to the role of the new Member State on the international legal global stage. Successfully weathering these changes can place the members of the legal profession of the new Member State on the global stage and transform the domestic challenges of the new 'international frontier' into global opportunities.