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THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION IN LIGHT OF CODIFICATION EFFORTS OF THE INTERNATIONAL LAW COMMISSION

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1. Introduction

Every subject of international law is responsible for an internationally wrongful act. As early as 1963, Special Rapporteur El Erian stated in his report on relations between states and international organizations that: "the continuous increase of the scope of activities of international organizations is likely to give new dimensions to the problem of responsibility of international organizations"[1].

The afore-mentioned prophecy seems to be especially significant with regard to the European Union (EU). There are many reasons to substantiate such an assumption. The EU concludes many international agreements with States and other international organizations. It undertakes broad external activity within the framework of the Common Foreign and Security Policy. Together with its member states, the Union serves as the largest donor of humanitarian and development aid. Traditionally,

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[1] ILC Yearbook 1963, Vol. II, doc. A/CN.4/161, para 172, at p. 184.

given that the European Union was not endowed with international legal personality, earlier analyses concentrated on the external position of the European Community. As regards examinations conducted before the early 1990s, the latter structure did not exist at all. The Lisbon Treaty brought about several important changes to the position of the EU[2]. No longer may the Union be regarded as un-endowed with international legal personality, since this is now expressly granted by means of Article 47 of the Treaty of the European Union[3].

In fact, the responsibility question was regarded as "the most obscure and most difficult problem" of the external relations of the former Community[4]. This remark also holds true for the Union. What may still appear to be a rather theoretical subject[5] has gradually attracted the attention of scholars and practitioners. Thus far, attention has been paid mainly to the distribution of responsibility for non-compliance with mixed agreements[6]. The present contribution aims to shed some additional light on certain more general aspects of the Union's international responsibility.

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13.12.2007, O.J. 17.12.2007 C-306, p. 1.

[3] Consolidated version of the Treaty on the European Union, O.J. 30.03.2010, C-83, p. 13.

[4] P. Pescatore, *Les Relations Extérieures des Communautés Européennes (Contribution à la Doctrine de la Personnalité des Organisations Internationales)*, 'Recueil des Cours de l'Academie de Droit International' 1961-II, Vol. 103, at p. 210.

[5] G. Gaja, *Some reflections on the European Community's international responsibility*, [in:] H.G. Schermers, T. Heukels, Ph. Mead (eds), 'Non-contractual liability of the European Communities', Nijhoff, Dordrecht 1988, at p. 169.

[6] See: Ch. Tomuschat, *Liability for mixed agreements*, [in:] D. O'Keeffe (ed.), 'Mixed agreements', Kluwer, Deventer et al. 1983, at pp.125-132; M. Björklund, *Responsibility in the EC for mixed agreements; Should non-member parties care?*, 'Nordic journal of international law' 2001, Vol. 70, pp. 373–402; J. Heliskoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its member states*, Kluwer Law International, The Hague 2002; E. Neframi, *Les accords mixtes de la Communauté Européenne: Aspects communautaires et internationaux*, Bruylant, Bruxelles 2007, at pp. 524 ff; R.A. Wessel, *The EU as a party to international agreements: shared competences, mixed responsibilities*, [in:] A. Dashwood, M. Maresceau (eds), 'Law and practice of EU external relations', CUP, Cambridge 2009, at pp. 251–187; P.J. Kuijper, *International responsibility for EU mixed agreements* [in:] 'Mixed agreements revisited', Hart, Oxford 2010, at pp. 208 ff.

Special regard is also due to the codification efforts of the International Law Commission (ILC), whose perspective will be used here to expose the legal position of the European Union in terms of international responsibility.

2. Responsibility of international organizations

Legal responsibility is a corollary to personality. Since the international law system is not merely interstate, one may not limit the possibility of being held accountable merely to States. Of course, it has been the traditional stance to consider international responsibility as the expression of the interstate character of international relations. From that perspective, one would conceive of international responsibility as synonymous to State responsibility[7]. No longer may such a perception be retained.

As stated above, a natural corollary of international personality of international organizations is their responsibility for wrongful acts. It may be borrowed, as bluntly as it goes, from Werner Levi that: "For once it has been agreed that international organizations possess international rights, they must of necessity also have international responsibility"[8]. In the opinion of Ch. Tomuschat, "it would be outright absurd to contend that IOs should enjoy more and better rights under international law than States"[9].

The International Court of Justice (ICJ) considered personality when it passed the famous advisory opinion on the *Reparation for injuries suffered in the service of the United Nations*:

> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights

[7] In that regard see: F. von Liszt, *Das Völkerrecht systematisch dargestellt*, Verlag von O. Haering, Berlin 1898, p. 125 stating that "Nur der souveräne Staat besitzt mit der völkerrechtlichen Geschäftsfähigkeit auch die Deliktsfähigkeit".

[8] W. Levi, *Contemporary International Law: A Concise Introduction*, Westview Press, Boulder, Colorado 1979, p. 249.

[9] Ch. Tomuschat, *The International Responsibility of the European Union*, [in:] E. Cannizzaro (ed.), 'The European Union as an Actor of International Relations', Kluwer Law International, The Hague 2002, at p. 179.

> which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged[10].

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice specified the derivative character of international organizations' personality:

> International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them[11].

In addition to the capacity to bring claims, as stems e.g. from the *Reparations Case*, it is the converse feature that gives rise to the capacity to be held responsible at an international level, notwithstanding immunity from jurisdiction before municipal courts. No longer may there be doubts concerning the extent to which organizations are bound by international law. In a traditional manner, one may refer again to the opinion of the ICJ, where the World Court firmly stated that:

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties[12].

[10] *Reparation for injuries suffered in the service of the United Nations*, I.C.J. Advisory Opinion of 11.4.1949, I.C.J. Reports 1949, p. 174 at p. 179.

[11] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Advisory Opinion of 8.7.1996, I.C.J. Reports 1996, p.66, at p. 78, para 25.

[12] *Interpretation of the Agreement of 25.3.1951 between the WHO and Egypt*, I.C.J. Advisory Opinion of 20.12.1980, I.C.J. Reports 1980, p. 73, para 37, pp. 89–90.

In its advisory opinion on *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the same Court pointed out that, if damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity, "[t]he United Nations may be required to bear responsibility for the damage arising from such acts"[13].

More specifically, in a statement made in 1999, the Secretary-General of the United Nations confirmed the applicability of international humanitarian law to United Nations peacekeeping operations[14]. Another example could be the EU, with Article 216 (2) of the Treaty on the Functioning of the European Union (ex Article 300 (7) TEC) explicitly stipulating that agreements concluded by the Union are binding on the Union and its member States. It is established practice of the Court of Justice of the European Union (formerly the European Court of Justice) to recognize that (then the Community and now) the Union is bound by international law. In this regard, attention might be drawn to the judgment of the same Court of 9.8.1994, where the organization's responsibility was expressly recognized[15].

[13] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Advisory Opinion, I.C.J. Reports 1999, p.62, at pp. 88-9, para 66.

[14] Secretary-General's Bulletin Observance by United Nations forces of international humanitarian law, 6.8.1999, UN Doc. ST/SGB/1999/13.

[15] *French Republic v. Commission of the European Communities*, Case C-327/91, Judgment of the Court of 9.8.1994, ECR 1994 Page I-03641, para 25: "There is no doubt, therefore, that the Agreement [between the Commission and the United States regarding the application of their competition laws] is binding on the European Communities. It falls squarely within the definition of an international agreement concluded between an international organization and a State, within the meaning of Article 2(1)(a)(i) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations. In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level". In *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*, Case C-366/10, Judgement of the Court (Grand Chamber) of 21.12.2011 it was stated: "Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary

It may be safe to assume that the principles of customary international law governing international responsibility states apply *mutatis mutandis* to international organizations[16]. While many authors stress the commonalities between the responsibility of states and that of international organizations, N.B. Krylov underlined the different nature of the latter's responsibility[17].

It was not by coincidence that Article 74 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations also refrained from prejudging:

> [a]ny question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

The International Law Commission's Articles on State Responsibility (ASR) left the question open. According to Article 57, the ASR are also without prejudice to any question of the responsibility under international law of any State for the conduct of an international organization. The latter issue, although formally falling within the scope of the Articles was included in the saving clause, since "they raise[d] controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which [were] better dealt with in the context of the law of international organizations"[18].

Wider analysis, including the governance, was undertaken and comprehensively dealt with by the International Law Association (ILA) "Final Report on the accountability of international organizations of

international law, which is binding upon the institutions of the European Union" [not yet reported, at para 101].

[16] E.J. Arechaga, *International Responsibility* [in:] M. Sørensen (ed.), 'Manual of public international law', Macmillan, London 1968, p. 595; E. Stein, *External Relations of the European Community: Structure and Process*, 'Collected Courses of the Academy of European Law' 1991, Vol. 1, p. 177.

[17] N.B. Krylov, *International Organisations and New Aspects of International Responsibility* [in:] W.E. Butler (ed.), 'Perestroika and International Law', Kluwer Academic Publishers, The Hague 1990, pp. 220 ff.

[18] ASR, Commentary to Art. 57, para 5, YILC 2001, Vol. II, part 2, p. 31 at p. 142.

2004"[19]. The work of the ILA began in 1996 with the establishment of a committee, chaired by Sir Franklin Berman and Professors Wellens and Shaw, acting as co-rapporteurs. The initial report was presented in 1998 at the 68th ILA conference in Taipei[20]. Subsequent reports were presented in New Delhi in 2000[21] and in London two years later[22]. The work of the committee was completed at the 2004 Berlin session of the Association. The ILA considered the topic from a broader perspective, distinguishing three levels of accountability: general internal and external scrutiny, liability and, in third place, responsibility. It also designed the Recommended Rules and Practices (RRPs)[23].

The scope of analysis to be undertaken by the International Law Commission was much narrower. Its work began on the basis of General Assembly resolution 55/152 of 12.12.2000[24].

As early as 2000, when preparing a preliminary study of this topic, Allain Pellet considered the topic to be "the logical and probably necessary counterpart of that of State responsibility"[25]. In a similar vein, the newly-appointed Special Rapporteur on Responsibility of International Organizations, Professor Giorgio Gaja, stated that the topic under consideration constitutes "a sequel to the Articles on State Responsibility"[26].

The pace of the Commission's work was indeed speedy, especially when compared with the time needed to elaborate the Articles on State responsibility. However, regard is due to the complexity of the work on State responsibility and its significance for the elaboration of analogous rules for international organizations.

[19] International Law Association, Berlin Conference (2004), Accountability of International Organisations, Final Report, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/9.

[20] Report of the Sixty-eighth ILA Conference held at Taipei, at pp. 584 ff.

[21] Report of the Sixty-ninth ILA Conference held at London, at pp. 878 ff.

[22] Report of the Seventieth ILA Conference held at New Delhi, at pp. 772 ff.

[23] *Ibidem*.

[24] UN Doc. A/RES/55/152.

[25] Report of the International Law Commission on the work of its fifty-second session, at p. 135.

[26] First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/532, para 20, at p. 11.

Since the ILC relied considerably on its experience from the previous work, it came as no surprise that the Draft Articles on the Responsibility of International Organizations (DARIO) were finished within a time-span shorter than five decades. It took altogether seven years from the decision to include the topic in the ILC's programme of work to the adoption of a set of draft articles ready for the first reading.

Pursuant to its Statute, the Commission decided to transmit this to Governments and international organizations for comments and observations, to be submitted by 1.1.2011. In mid-2011, having considered such comments and observations, together with the eighth report of the Special Rapporteur, the ILC adopted the DARIO upon its second reading, and subsequently the commentaries to the draft articles[27]. Soon thereafter, the Commission decided to recommend that the General Assembly take note of the elaborated draft articles on the responsibility of international organizations and consider, at a later stage, the elaboration of a convention on the basis of draft articles.

In Resolution 66/100 adopted at the 82nd plenary meeting on 9.12.2011, the General Assembly welcomed the conclusion of the ILC's work on the responsibility of international organizations and, having taken note of the Articles, commended the latter to the attention of governments and international organizations[28]. However, the General Assembly decided to do so without prejudice to the question of the future adoption of the articles or any other appropriate action. This wording came as no surprise, since it had been already used in General Assembly Resolution 56/83 adopted on 12.12.2001 upon the conclusion of the work on Articles on State Responsibility[29].

Furthermore, the General Assembly decided to include in the provisional agenda of its sixty-ninth session in 2014 an item entitled "Responsibility of international organizations", with a view to examining, inter alia, the question of the form that might be given to the articles[30].

[27] Draft articles on the responsibility of international organizations, with commentaries (2011) Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para 88).

[28] UN Doc. A/RES/66/100, operative pars. 1-3.

[29] UN Doc. A/RES/56/83.

[30] UN Doc. A/RES/66/100, operative para 4.

3. Responsibility and the European Union

Before confronting the European Union with the codification efforts of the ILC one should, briefly as it may be, address the Union's own responsibility regime. Within the European legal order, there are several mechanisms which might be used to prevent the international responsibility of the Union from possibly being engaged. Those include the infringement procedure against Member States (Articles 258-9 Treaty on the Functioning of the European Union (TFEU)[31], ex 226-7 TEC), the annulment procedure against acts of the institutions (Article 263 TFEU, ex 230 TEC) and actions for damages against the Union or the Member States (Article 340 TFEU, ex 288 TEC).

The EU is the only international organization possessing a judiciary competent to decide questions of liability. This is true both in respect of contractual and non-contractual liability, as stated in Article 340 TFEU. The former is governed by the law applicable to the contract in question, hence the EU might be sued before the national courts of its Member State. As regards non-contractual liability, the EU is obliged to make good any damage caused, with exclusive competence to decide upon compensation in that regard lying with the Court of Justice of the EU (Article 268 TFEU).

As noted by Jean-Marc Thouvenin, the Union's responsibility mechanism, given its particularities, is not easily comparable to international responsibility[32].

However, those potential remedies could be regarded a reflection of the requirement to exhaust local remedies. The application of such a rule, typical for State responsibility, in the context of International organizations' responsibility has also found support amongst legal scholars[33]. Perhaps for

[31] Consolidated version of the Treaty on the European Union, O.J. 30.3.2010, C-83, p. 47.

[32] J.-M. Thouvenin, *Responsibility in the Context of the European Union Legal Order*, [in:] J. Crawford, A. Pellet, S. Olleson (eds), 'The Law of International Responsibility', OUP Oxford 2010, p. 861 at p. 861.

[33] Ch. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten: zugleich ein Beitrag zu den völkerrechtlichen Kompetenzen der*

that reason, it has been reflected in the provision on the admissibility of claims (Draft Article 45 para 2) of the ILC codification of responsibility of international organizations. This provision was formulated in a very cautious manner and reads as follows:

> When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

The commentaries to DARIO referred in this regard to a statement made on behalf of all Member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization in relation to a dispute between those States and the United States, concerning measures taken for abating noise originating from aircraft. Accordingly, the EU members considered the claim of the United States to be inadmissible, because remedies relating to the controversial EC regulation had not yet been exhausted, since the measure was at the time "subject to challenge before the national courts of EU Member States and the European Court of Justice"[34].

That being said, however, the EU has been vitally interested in the question of responsibility of international organizations and realized that it could have special repercussions for its own activities[35]. For that reason, it demanded special treatment. This contravened the assumption adopted in the 1980s. Accordingly, there was no need to elaborate a special theory for the EC, since the rules on responsibility remain as valid for the Communities as for other international organizations[36]. This opinion has

Europäischen Gemeinschaft, Berlin 2001, at p. 250, L. Grammlich, *Diplomatic Protection Against Acts of Intergovernmental Organs*, 'German Yearbook of International Law' 1984, Vol. 27, p. 386 at p. 398. see also: K. Wellens, *Remedies against international organisations*, CUP, Cambridge 2002, at pp. 66 ff.

[34] DARIO Commentary, Art. 45 para (6), p. 73.

[35] Statement of Mr. Ruijper on behalf of the European Commission within the Sixth Committee, 27.10.2003, UN Doc. A/C.6/58/SR.14, at p. 4, para 13.

[36] J. Groux, Ph. Manin, *Die Europäischen Gemeinschaften in der Vökerrechtsordnung*, Brüssel 1984 , at p.144.

also been reflected by current writers.[37] Faced with diverging opinions, one may be tempted to cast a closer look at the particularities of the European Union and contrast them with other international organizations.

4. Applicability of the ILC Articles to the EU

As early as his first report, the Special Rapporteur Giorgio Gaja paid attention to "the great variety of existing international organizations" that "would make it difficult to state general rules applying to all types of organization"[38]. Therefore, a rather limited scope of operation has been suggested, as to "address questions relating to a relatively homogeneous category of international organizations"[39].

The view holds true especially given the vast differences amongst organizations as regards their institutional and operational character. Organizations differ in terms of their structure, conferred powers, activities, funding etc. Such diversity posed one of the most serious threats for attempts at codification. Another challenge was the absence of customary rules in that domain. In other words, the ILC could not rely on its experience gained from the codification of State responsibility.

From its outset, the Working Group recommended that the Secretariat approach international organizations with a view to collecting relevant materials, especially regarding questions of attribution and of responsibility of Member States for conduct attributable to an international organization[40].

The EU has actively participated in the preparation of the Articles by the International Law Commission. Yet this feature alone marks a significant change in the formation of international law sources. Of course, it is quite natural to pay attention to positions of those whose

[37] See N.M. Blokker, *Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously? A mid-term view*, [in:] J. Klabbers, Å. Wallendahl (eds), 'Research Handbook on The Law of International Organizations', E. Elgar Publishers, Cheltenham 2011, p. 313, at pp. 335-6.

[38] First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/532, para 20, at p. 11.

[39] *Ibidem*.

[40] Report of the working group, ILC Report UN Doc. A/576/10, p. 236, para 488.

activities are to fall within the very domain of the regulation. Conversely, however, there have not been many precedents of such behaviour, which in itself mirrors a qualitative change in the approach adopted by the Commission.

When compared to other international organizations, there are several specific features of the European Union. Those idiosyncrasies were consequently underlined by the Union's representatives when the ILC prepared the Draft Articles. Those statements were presented by the European Commission.

Astonishingly enough, the comments provided by the European Commission did not refer to the Common Foreign and Security Policy. Instead, they would reflect the traditional approach to the question of responsibility.

The first comments sent by the European Commission stressed the differences between the (then) European Communities and the "'classical' model of an international organization". Accordingly,

> [t]he EC is not only a forum for its member States to settle or organize their mutual relations, but it is also an actor in its own right on the international scene. The EC is a party to many international agreements with third parties within its areas of competence. Quite often the EC concludes such agreements together with its member States, each in accordance with its own competencies. In that case the specificity of the EC lies in the fact that the EC and the member States each assume international responsibility with respect to their own competencies. The EC is also involved in international litigation, in particular in the context of the WTO.

The other argument dealt with its own legal order establishing a common market and organizing the legal relations between its members, their enterprises and individuals. In that regard, the EC again went "well beyond the normal parameters of classical international organizations as we know them" and postulated that the ILC be required to specially consider the notion of a "regional economic integration organization" when dealing with substantive questions in the subsequent ILC draft articles.

The general remark was concluded with rather a balanced view, that:

> [w]hile the EC is in many ways *sui generis*, it is clear that all international actors, be they States or organizations, need to recognize their international responsibility in the event of any wrongful acts. This does not exclude the possibility of taking differences into account in the course of the future work of the ILC concerning the responsibility of international organizations. Above all, common sense practical solutions are needed in order to cover a wide variety of situations and to cover the activities of organizational structures in a range of fields[41].

In an increasing number of cases, the Union is ascribed the status of a regional economic integration organization (REIO). Alongside States, REIOs are at present more frequently adhering to various conventions. The term has been referred to and defined e.g. in the Energy Charter Treaty[42], Article 1(3) of which reads as follows:

> "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority o take decisions binding on them in respect of those matters.

The notion of REIOs is mainly used in conventions adopted within the UN. The Council of Europe's documents, as well as the WTO Agreement, preferred to make explicit reference to the European Community.

Eventually, despite all the concerns and objections raised, the DARIO shall find application to all international organizations. The term has been defined in Article 2 (a) of DARIO to mean:

> [a]n organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Instead of providing for an exceptions clause for REIOs, the ILC adopted a fairly liberal stance on international organizations.

[41] Responsibility of international organizations, Comments and observations received from international organizations, International Law Commission,Fifty-sixth session Geneva, 3 May-4 June and 5 July-6 August 2004, UN Doc. A/CN.4/545, p. 5.

[42] Available at: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

It has underlined three common elements: the international law basis, international legal personality and membership. Without separate international legal personality and a *volonté distincte*, an organization remains the creature of its State members who are, accordingly, liable for its acts.[43] However, when compared to definitions adopted on previous occasions, a reader may notice a significant change – no longer is the traditional approach, regarding organizations as mere 'intergovernmental organization', deployed[44].

By defining organizations in a broader manner, the ILC took up the challenge to develop rules of universal application, covering a broad variety of organizations. By deciding to draft general rules, one may however risk too high a level of abstraction and a possible deprivation of any practical relevance[45]. However, such diversity was taken into account as may be inferred from the inclusion of a *lex specialis* rule or from reference to the rules of the organization.

5. Elements of responsibility

As reflected in Article 3 DARIO, every internationally wrongful act of an international organization entails the international responsibility of that organization. Analogously to the ASR, there are two elements of an internationally wrongful act of an international organization: the conduct needs to be attributable to that organization under international law; and must constitute a breach of the organization's international obligations.

[43] See R. Higgins, *The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties – Preliminary Exposé and Draft Questionnaire*, 'Annuaire de l'Institut de Droit international' 1995, Vol. 66-1, Session de Lisbonne, p. 249, at p. 254.

[44] As in, e.g., the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975) or the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986).

[45] See; E. Paasivirta, P.J. Kuijper, *Does One Size Fit All?: The European Community and the Responsibility of International Organizations*, 'Netherlands Yearbook of International Law' 2005, Vol. 36, p. 169 at p. 223.

In its early comment, the European Commission claimed that it deserved special treatment in several respects[46]. It mentioned acts connected to mixed agreements, i.e. treaties to which both the EU and member states are parties. This dimension is relevant to the breach of an obligation. The second aspect, a vertical one, pertains to attribution. Specifically, it deals with acts of member states undertaken to implement EU law. Both dimensions will be scrutinized below.

In contrast to the corollary provision of the ASR, Article 5 DARIO repeats merely the first sentence of the former. Accordingly, the characterization of an act of a State as internationally wrongful is governed by international law. Quite deliberately, the remaining part of the State responsibility provision was omitted here: such characterization as internationally wrongful is not affected by the characterization of the same act as lawful by internal law, since it was not sure how to interpret the term "internal law".

As regards the apportionment of obligations, the European Court of Justice considered the distribution of competence between the Community and Member States as an internal question[47]. Much depends on the respective agreements requiring declarations of competence, as envisaged for example by Annex IX of the United Nations Convention of the Law of the Sea.

It may also transpire that an agreement does not require any declaration of competences, but the organization, nevertheless submits one. Such was the case with the Energy Charter Treaty. The European Communities, as Contracting Parties to the Energy Charter Treaty, issued a detailed statement concerning their policies, practices and conditions with regard to disputes between an investor and a Contracting Parties and their submission to international arbitration or conciliation:

> The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for

[46] See: Responsibility of international organizations Comments and observations received from international organizations, UN Doc. A/CN.4/637, Responsibility of international organizations. Comments and observations received from international organizations, UN Doc. A/CN.4/545, at p. 5.

[47] Ruling 1/78 of 14.11.1978, ECR 1978, p. 2151, at para 35.

> the fulfilment of the obligations contained therein, in accordance with their respective competences. The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days (without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States)[48].

According to the Luxembourg Court, declarations of that kind constitute a useful tool in interpreting the complex relations between the Community/Union and its Member States[49]. Interestingly, the initial approach of the ECJ towards the declarations was reverse. In *Ruling 1/78*, the Court of Justice stated that it was "not necessary to set out and determine, as regards other parties to the Convention, the division of powers within the Community, particularly as it may change in the course of time". Consequently, it was "sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community"[50].

More problematic, however, was the attribution question. Generally, the conduct of organs or agents of an international organization in the performance of their functions shall be considered an act of that organization under international law, regardless of the position held by the organization itself[51].

Both notions were defined in Article 2 of DARIO, be referring to the functions of the organization. According to the said provision, "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization, whereas "agent of an international organization" means an official or other person or

[48] Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, O.J. 9.3.1998, L-69, p. 115.

[49] See, e.g. *Commission of the European Communities v Ireland*, Case C-459/03, Judgment of 30.5.2006, ECR 2006 Page I-04635, para 104 ff, especially para 109 where the appendix to the Declaration of Community competence, while not exhaustive, is considered as a useful reference base.

[50] Ruling 1/78, at para 35.

[51] DARIO, art. 6 (1).

entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts. Such a broad understanding of the latter term is not unexpected. It relies on the established jurisprudence of the International Court of Justice[52]. However, one may notice here that DARIO as formulated on first reading (2009) included too broad a definition of an agent, as to cover officials and other persons or entities through whom the organizations acts[53].

The DARIO did not define the functions. Its Article 6 (2) merely states that "the rules of the organization apply in the determination of the functions of its organs and agents". The importance of such reference was underlined by the European Commission in the first comment provided to the ILC[54].

As the rules of the organization were defined to extend to "established practice of the organization", one may not exclude a scenario wherein functions which are not covered by constituent instrument, but only in practice, also fall within this definition. This was indeed foreseen by the Special Rapporteur in his second report where it was held that:

> [t]he question may be raised whether, for the purpose of attribution of conduct in view of international responsibility, practice should not be given a wider significance than when the organization's capacity or competence is discussed. It may be held that, when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility in case of conduct that

[52] In the advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court noted that: "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts." (I.C.J. Reports 1949, at p. 177) Later on, in the advisory opinion on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*, the ICJ noted further that: "The essence of the matter lies not in [the agents'] administrative position but in the nature of their mission." (I.C.J. Reports 1989, at p. 194, para 47).

[53] Article 2 (c) DARIO 2009.

[54] Responsibility of international organizations Comments and observations received from international organizations, UN Doc. A/CN.4/545, at p. 13.

> stretches beyond the organization's competence. However, the possibility of attribution of conduct in this case may be taken into account when considering ultra vires acts of the organization and need not affect the general rule on attribution[55].

Suffice it here to mention the changed interpretation on the voting within the UN Security Council. A separate provision on attribution of ultra vires conduct was also included as Draft Article 8.

Several intensive debates were provoked by Draft Article 7 according to which:

> [t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

In its comments on the DARIO adopted on first reading, the European Union questioned the reliance on the proposed standard, and especially its conformity with the position of the European Court of Human Rights, as expressed in *Behrami and Saramati*[56] and in its subsequent decisions[57]. Thereafter, the criterion of effective control was replaced with the concept of "ultimate authority and control"[58].

Conversely, in mid-2011 the European Court of Human Rights adopted a balanced position which, in fact, overturned its previous stance. In the *Al-Jedda* case, it found after careful examination that the Security Council of the United Nations had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force[59]. This decision may be viewed with more sympathy than the preceding and contrasting ECHR judgments.

[55] UN Doc. A/Cn.4/541, para 24, p. 13.

[56] *Behrami and Behrami v. France*, Decision (Grand Chamber) of 2.5.2007 on the admissibility of applications No. 71412/01 and No. 78166/01.

[57] *Kasumaj v. Grece, Gajic v. Germany, Beric and others v. Bosnia and Herzegovina*.

[58] *Behrami*, para 133 ff.

[59] *Al-Jedda v. the United Kingdom*, Application No. 27021, Judgment of 7.7.2011, para 83.

Lowering the attribution threshold by the Strasbourg Court, as was done in *Behrami* and other converging cases, has attracted a considerable amount of criticism[60]. The Court's assumption was that the application of the effective control test needs to result in identification of one solely responsible entity. Thereby, it excluded dual or multiple attribution. This runs contrary to the argument that the Special Rapporteur Gaja presented in his second report, which stated that:

> [c]onduct does not necessarily have to be attributed exclusively to one subject only. Thus, for instance, two States may establish a joint organ, whose conduct will generally have to be attributed to both States. Similarly, one could envisage cases in which conduct should be simultaneously attributed to an international organization and one or more of its members[61].

Here, again, the Special Rapporteur relied on the European integration experience. The argument followed to some extent the comments provided by the European Commission. The latter organ insisted that, when implementing a binding act of the European law, the conduct of the organ of a member State would be attributed to that international organization. At the same time it emphasized the readiness to assume responsibility in the given field[62]. In legal writings, some proposals of a special provision in that regard were voiced[63]. There have been several judgments confirming the above position. In the *European Communities – Protection of Trademarks*

[60] See, e.g. P. Klein, *Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt Behrami et Saramati*, 'Annuaire Français de Droit International' 2007, Vol. 53, p. 43 at p. 55.

[61] Second report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/541, para 6, at p. 3.

[62] Responsibility of international organizations Comments and observations received from international organizations, UN Doc. A/CN.4/545, at p. 20.

[63] See: S. Talmon, *Responsibility of International Organizations: does the European Community require Special Treatment?*, [in:] M. Ragazzi (ed.), 'International Responsibility Today: Essays in Memory of Oscar Schachter', Nijhoff, The Hague 2005, p. 405 at p. 420; F. Hoffmeister, *Litigating against the European Union and its member States: who responds under the ILC's draft articles on international responsibility of international organizations?*, 'European Journal of International Law' 2010, Vol. 21, p. 723 at p. 746.

and Geographical Indication for Agricultural Products and Foodstuffs, the World Trade Organization (WTO) panel confirmed that assumption and considered that the domestic authorities of the member states "act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general"[64].

It may be noted that the eagerness of the EU to take up responsibility appears at first glance to be counter-intuitive – the intuitive scenario would be to deny or to restrain one's liability and not to monopolize it. This might, at least to some extent, be explained by the EU's efforts to confirm its international role and receive acceptance therefor[65].

The WTO panels seemed to accept such a stance, which comes as no surprise given their pragmatism. In fact, it may be argued that the outcome depends on the procedural background of available respondents to the jurisdiction of the respective bodies[66].

The European Court of Human Rights, for example, has over decades developed the opposite view by which it does not possess any possibility, at least to date, to decide on the responsibility of international organizations.

It is perhaps for that reason that the Special Rapporteur did not favour the position suggested by the European Commission. Instead, it can be held that Draft Article 9 may apply. Accordingly:

> [c]onduct which is not attributable to an international organization under Articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

In rejecting the position of the European Commission, Gaja made reference to certain important ECHR case law. In the *Bosphorus* case, the

[64] Report of 15.3.2005 (WT/DS174/R), para 7.725. It was again decided in this way by the panel report of 29.9.2006 on *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R, WT/DS292/R and WT/DS293/R), para 7.101. See generally P. Eeckhout, *The EU and its Member States in the WTO: Issues of Responsibility* [in:] L. Bartels, F. Ortino (eds), 'Regional Trade Agreements and the WTO Legal System; OUP, Oxford 2006, p. 449 at pp. 453 ff.

[65] P. Eeckhout, *op. cit*., at p. 456.

[66] See F. Hofmeister, *op. cit*., at p. 738.

Strasbourg Court held that 'a Contracting Party is responsible under article 1 of the [European Convention] for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations'[67]. Such a line of reasoning may be traced back to the earlier decision of the European Commission of Human Rights which, in the *M. & Co. v. Germany* case, came to the conclusion that:

> the transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection [...] [and] the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance[68].

The existence of the reverse effect of the vertical relationship was also acknowledged by the European Commission[69]. This saga may find its end with the planned accession of the European Union to the European Convention on Human Rights, since the new Treaty on the European Union in Article 6 (2) and Protocol 14 to the European Convention now provide for such a possibility. Following accession, the latter Convention could serve as an additional human rights accountability mechanism for the European Union.

6. Allocation of responsibility between the organization and its members

However, as explained by the Special Rapporteur there might also be some instances of responsibility without attribution of conduct. The very idea is not entirely new, since similar considerations were presented during the work on State responsibility. In the context of the responsibility of international organizations, the issue of attributing responsibility is

[67] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment (Grand Chamber) of 30.6.2005, , para 153.

[68] Decision of 9.2.1990, Decisions and Reports, Vol. 64, p. 138 at p. 144.

[69] Responsibility of international organizations Comments and observations received from international organizations, UN Doc. A/CN.4/545, at p. 20.

of crucial importance, since it deals with reciprocal relations between an international organization and their members. The Draft Articles provide separately for "Responsibility of an international organization in connection with the act of a State or another international organization" (Part Two, Chapter IV) and conversely for "Responsibility of a State in connection with the conduct of an international organization" (Part V). In either case, questions of aid and control[70], direction and control[71] and coercion[72] have been addressed.

In particular, the provisions dealing with the circumvention of obligations has attracted the attention of commentators. The initial formulation, as adopted on first reading in 2009, extended the responsibility to be incurred by an organization to the commission of an act by a State because of a recommendation.[73] The European Commission stated that the assumption that an international organization incurs responsibility on the basis of mere "recommendations" made to a State or an international organization appeared "to go too far"[74]. Following this, and other critical comments, the reference to recommendations was deleted and now Draft Article 17, as adopted on second reading, refers only to circumvention of international obligations through decisions and authorizations addressed to members.

The respective Draft Article 61 on circumvention by a State member of an international organization has also undergone some restricting amendments in the course of preparatory works and finally reads as follows:

> A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation[75].

[70] See See Draft Articles 14 and 58, respectively.

[71] See Draft Articles 15 and 59, respectively.

[72] See Draft Articles 16 and 60, respectively.

[73] Art. 16 DARIO 2009.

[74] UN Doc. A/CN.4/637.

[75] Draft Article 61 (1) DARIO. The respective provision as adopted on first reading spoke of circumvention "by *prompting* the organization to commit an act" [emphasis mine – BK], which was then converted to "causing".

The rule would apply whether or not the act in question is internationally wrongful for the international organization[76].

All in all, the reader might get the impression that the ILC is obsessed by the idea of the organization instrumentalizing its members in order to avoid its own obligations and the members abusing the organization in order to circumvent obligations incumbent on them[77]. Together with a separate rule providing for the Member State responsibility for an internationally wrongful act of its parent organization if the former has either accepted responsibility for that act towards the injured party or it has induced the injured party to rely on its responsibility[78], those parts of DARIO provide a splendid opportunity to once again examine the complex relationship between an organization and its Member States, from the point of view of international responsibility.

7. *Lex specialis*

Last, but not least, the possible saving clause from DARIO needs to be examined, given its particular relevance to the topic under consideration. This is, in fact, the core issue. Again, reference to the advisory opinion on Reparations for injuries may be made. The ICJ recognized that: "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the Community"[79].

The idea to include a rule on *lex specialis* was mentioned in the Special Rapporteur's fifth report, probably as a result of the objections raised by the European Commission. Reacting to accusations that the diversity and variety of organizations had been ignored, Gaja argued that:

> [m]ost, if not all, articles that the Commission has so far adopted on international responsibility, whether of States or of international

[76] Draft Article 61 (2) DARIO.

[77] P.J. Kuijper, *International Responsibility for EU Mixed Agreements,* [in:] Ch. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Hart, Oxford, Portland, Oregon 2010, p. 217.

[78] Draft Article 62 DARIO establishing the presumption that any such international responsibility of a State be subsidiary.

[79] *Loc. cit*. at fn. 9, I.C.J. Rep. 1949, p. 174 at p. 178.

> organizations, have a level of generality that does not make them appropriate only for a certain category of entities.

However, the Special Rapporteur also recognized that there could be some instances where a provision similar to that of Art. 55 on State responsibility could be necessary[80].

Draft Article 64 reads:

> [e]xistence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

There was only one amendment in comparison to the text adopted on first reading. The initial formulation referred to the responsibility of "a State for an internationally wrongful act of an international organization" which in turn has been replaced by that "of a State in connection with the conduct of an international organization". Despite the broad formulation of the provision, the commentary to Article 64 concentrates solely on the EU example.

Ironically, the provision in question was subjected to divergent opinions amongst the Union's members. When commenting on the then draft Article 63, Belgium was surprised at the very extensive scope of this provision, which [...] could render the draft articles entirely pointless. Thus, it favoured the deletion or explicit limitation of its scope of its text[81]. This position might be contrasted with that of Germany, which was:

> pleased to note that the omission has left room for an interpretation on a case-by-case basis by allowing the rules of an international organization (rightly listed in article 63 as a possible source of *lex specialis*) to fully replace the draft's general rules[82].

[80] Fifth report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/583, para 7, p. 4.

[81] UN Doc. A/CN.4/636, at p. 41.

[82] *Ibidem*.

As may be seen, the discrepancy in opinions on that issue, insisted upon so strongly by the EU itself, was clearly evident amongst the members of that particular organization. One may notice at this occasion a rather limited number of states providing comments on the draft articles: of fourteen states in total, eight are members of the EU. In that regard, the international organizations themselves were much more pro-active in providing remarks and commenting upon the elaborated draft articles.

8. Concluding remarks

Doubtless, international organizations have become increasingly active and have assumed functions traditionally reserved for States. This holds true especially for supranational organizations, such as the European Union. If power still breeds responsibility, as has been classically claimed[83], then even more so this assumption should apply to the EU, given its extensive range of powers and control exercised in the aggregate of the territory of its Member States[84].

The underlying assumption of the ILC's activity scrutinized in the present contribution is that international organizations are subject to a common responsibility regime. Otherwise, it would make no sense to codify this issue at all. Rather than imposing a compulsory unitary set of rules binding on all IGOs, the Commission's aim is indeed to provide a general scheme from which exceptions are possible. That is, in fact, the case and reality of the European Union.

As may be seen from this brief survey, the European Union has influenced the perception of the responsibility of international organizations. On its own, it has adopted a particular approach towards the very idea. Thus, unsurprisingly, the EU has played a significant role in elaboration of the Articles on the responsibility of international organizations. Relying on its exceptional position, the remarks provided by the Union were positioned from a REIO's perspective. It remains to be seen how, and to what extent, the criticism levelled on many occasions by the EU affects the overall reception of the ILC's codification efforts on the given topic.

[83] C. Eagleton, *The responsibility of states in international law*, The NYU Press, New York 1928, at p. 206.

[84] Ch. Tomuschat, *op. cit.*, at p. 180.