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EU External Action and the Attribution of Conduct under International Law

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Thesis abstract

The thesis addresses the issue of the attribution of conduct under international law in the context of EU external activity. The focus is on the distinction between conduct attributable to the Union and conduct attributable to its member states. The investigation is carried out according to strict criteria of legal analysis. Under a theoretical perspective, however, it should be noted that the doctrine of the responsibility of international organisations traditionally seeks to find a balance between the view of organisations as vehicles or agents that perform certain functions on behalf of their member states and the idea that organisations are separate legal entities capable of autonomously exercising such functions.

The analysis concerns only conduct carried out in the context of relations with third parties. Issues of responsibility of the Union or member states in their mutual relations are not covered. The starting point for the identification of the rules of attribution applicable to the EU are the two sets of articles on international responsibility prepared by the International Law Commission (ILC), namely the Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ARS) and the Articles on the Responsibility of International Organizations of 2011 (ARIO).

The first chapter analyses the extent to which customary international law corresponds to the ILC's articles. It emerges that the ARS correspond largely, at least as far as the provisions on the attribution of conduct are concerned, with customary international law. On the contrary, Article 7 of the ARIO, concerning the attribution of acts of state organs placed at the disposal of an international organisation, must be viewed as progressive development of customary international law on which international practice has not yet achieved a high level of uniformity. Uncertainties surround situations in which cooperation between organisations and member states involves organs of both and in which member states' organs operate on behalf of the organisation or in the application of its internal rules.

The second chapter describes the legal and organisational framework of EU external action with a particular focus on the common foreign and security policy (CFSP). In this policy area, relations with third parties are not fully subject to specific and comprehensive regulation and, therefore, the general rules of attribution find

wider application. Particular attention is paid to the division of external competences under EU law, which, according to a widespread view within the EU institutions and scholarship, should form the basic framework for the attribution of conduct also under international law.

The third chapter investigates the practice concerning EU external action to examine whether the general rules of attribution drawn up by the ILC must apply also in this context. An alternative model that has attracted support in the literature is that of normative control, according to which acts carried out by officials or authorities of states whose legality is entirely determined and reviewed by the Union's organs should be attributed to the Union itself. This theory responds to the perceived need for a stricter correlation between the internal division of competences and the attribution of conduct in the most common scenarios of the EU's external activity. This thesis rejects the theory of normative control, since not only do the general rules of attribution apply to the EU's external activity but they also lead to outcomes that are more coherent with the general principles of international responsibility than those to which the application of the theory of normative control would lead. The theory of normative control is rejected both as a possible general criterion for the attribution of acts of state organs placed at the disposal of an international organisation and as a special rule of attribution applicable solely to the EU or to the category of regional economic integration organisations, of which the EU is the most prominent example. In relation to areas where the application of the rules of attribution is more controversial, such as immigration management or the fight against piracy, it is shown that the criterion of effective control, when applied to the factual circumstances of each case, better meets the requirements of legal certainty and protection of third subjects involved in the EU's activities.

The final section deals with cases usually cited as evidence of the existence of special customary rules of attribution applicable to the external activity of the EU. Such cases are in fact resolved either through the application of the general rules in specific contexts or through the application of special rules established by international agreements among states parties to multilateral regimes, which exclude, in accordance with Articles 55 of the ARS and 64 of the ARIO, the application of the general rules of attribution.

List of abbreviations

ARS	Articles on the Responsibility of States for Internationally Wrongful Acts
ARIO	Articles on the Responsibility of International Organizations
CETA	Comprehensive Economic and Trade Agreement (Canada – EU Trade Agreement)
CFSP	EU Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSDP	EU Common Security and Defence Policy
ECFR	Charter of Fundamental Rights of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
FAO	Food and Agriculture Organization
FRY	Federal Republic of Yugoslavia
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISAF	International Security Assistance Force for Afghanistan
ITLOS	International Tribunal for the Law of the Sea
MISCA	African-led International Support Mission to the Central African Republic
MINUAR	French acronym for UNAMIR
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
NAFO	Northwest Atlantic Fisheries Organization
NATO	North Atlantic Treaty Organization
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SEAFO	South East Atlantic Fisheries Organisation
SOFA	Status of Forces Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNCHR	United Nations Commission on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNMIK	United Nations Interim Administration Mission in Kosovo

VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
WHO	World Health Organization
WTO	World Trade Organization

Introduction

I. Research question

The European Union (EU) is an international organisation constituted by means of a treaty between sovereign states.[1] It is endowed with international legal personality[2] and maintains a thick grid of relations with a wide range of other actors, including third states and other organisations. These relations are governed by international law. In their internal relations, the EU and its member states have organised their interactions through a structured division of competences, which also determines how external activities are performed. This inevitably has important consequences for the relations of the Union and its members with third parties. The question of this thesis is how the international rules on the attribution of conduct are applied in this context.

There are two potential obstacles to answering this question.

The first is uncertainty as to the precise content of some of the rules of attribution. There is no doubt about the guiding principle of attribution, namely that each international entity is the 'owner' of acts carried out by its own organs and is therefore potentially responsible for those acts.[3] The boundaries and the exact definition of each element of this straightforward principle, however, are debated. There is a rich practice regarding the attribution of conduct, but the multiplicity of the ways in which international relations are carried out makes it particularly difficult to distil from such practice some general rules that can serve as a reliable guide for the generality of situations.

The second potential obstacle is the application of the rules of attribution to the acts of international organisations and to the EU in particular. The activity of international organisations has characteristics that differentiate it strongly from that of

[1] See the Treaty on European Union, singed at Maastricht on 7 February 1992, Art. A: 'By this Treaty, the High Contracting Parties establish among themselves a European Union' (OJ C 191/1). The European Union was established as an evolution of the European Economic Community and the Treaty on European Union is in large part a collection of amendments to the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957.

[2] Cf. TEU, Art. 47.

[3] Cf. ARS, Art. 4, and ARIO, Art. 6.

states. First, the very nature of international organisations is different from that of states and is sometimes elusive. States have a government whose identity and sphere of sovereignty are, apart from marginal and exceptional situations, well defined. In contrast, international organisations do not have an independent power of government over a territory and a population.[4] Secondly, there are great differences among international organisations. This variety makes it hard to identify common rules. Both the international organisations and third parties with whom they enter into relations often have reasons to believe that in a given situation the organisation has certain characteristics that make the general rule of attribution inapplicable. Thirdly, precisely because of this wide variety among international organisations, bilateral arrangements and special regimes of various kinds have developed. These arrangements are of great use in regulating the day-to-day activities of international organisations, but when issues of responsibility come into play their variety can become a pretext for preventing the general rules from being applied. This is particularly true in the case of the EU, which, because of its size and the wide range of matters falling under its competence, is involved in a large number of special regimes and has the leverage to argue that special rules should apply to it because of its structure.[5]

This thesis therefore tries to clarify the division of roles between the EU and its member states in terms of attribution of conduct under international law, especially in the context of the common foreign and security policy (CFSP) and in the other areas of the EU's external action. The question in essence is which entity or entities, namely the EU, member states, or both, is or are to be considered, for the purposes of international law, to have performed acts undertaken in the context of the EU's external action.

A first easy answer is that it depends on the precise circumstances of each case. It is not possible *a priori* to provide an answer valid for all cases or even for all cases of the same species. It is possible only to provide criteria by which to address the question.

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[4] For a theoretical account of limits and opportunities of the analogy between states and international organisations in the work of the ILC and in the progressive development of international law at large, see Fernando Lusa Bordin, *The Analogy between States and International Organizations*, Cambridge University Press, 2019.

[5] See e.g. the Commission's position in the Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 63, para. 2, p. 168.

The focus of the thesis is in particular on those situations of potential international responsibility toward third parties, leaving aside all questions of the interaction of EU law and international law in the relations between the Union and its member states.

Certain issues linked to the question of attribution in international legal practice are not focused on.

First, the focus of the thesis is not on primary obligations under international law, although some consideration of the applicable primary obligations is in practice inevitable to grasp the context in which the rules on attribution have to be applied. Responsibility for internationally wrongful acts is composed of two fundamental elements, namely the attribution of the act to a state or to an international organisation and the breach of an international obligation binding on that state or international organisation.[6] The attribution of conduct should not be confused with the apportionment of the relevant primary obligations. This is not to deny that the determination of ownership, as it were, of the relevant obligations is an issue in the assessment of international responsibility, especially when an international organisation and its member states are involved in multi-layered relationships with third parties. But this does not justify seeking a solution to either question, whether the attribution or the determination of the relevant obligations, interchangeably in the rules governing one rather than the other. *A fortiori* the question is not whether any applicable primary obligation has been breached in any given situation.

Secondly, the thesis does not directly investigate whether the EU may be responsible in connection with any international unlawful act of any member state or vice versa. A clear distinction must be drawn between the attribution of conduct and the responsibility of a state or international organisation in connection with the internationally wrongful act of another state or international organisation.[7] The conditions under which a state or international organisation may be considered responsible in connection with the internationally wrongful act of another state or international organisation have attracted less attention from commentators. This is

[6] Cf. ARS, Art. 2, and ARIO, Art. 4.

[7] An interesting reconceptualisation of the relative provisions of the ARS (Part One, Chapter IV) and the ARIO (Part Two, Chapter IV, and Part Five) has been recently proposed, under the label of 'indirect responsibility', by Nikolaos Voulgaris, *Allocating International Responsibility Between Member States and International Organisations*, Hart, 2019; cf. the thorough critical review to Voulgaris' work by Christiane Ahlborn, 'The Allocation of International Responsibility between International Organizations and Their Member States: A Case of Indirect Responsibility?', *The European Journal of International Law*, 31, 2, 2020.

perhaps because, containing as they do additional conditions to those required for 'direct' responsibility, they are arguably harder to satisfy. Either way, although its potential significance should not be underestimated, so-called 'indirect' responsibility is not a focus of this thesis.

Lastly, the thesis does not deal with the procedural question of the availability or otherwise of international judicial fora for claims against responsible international organisations.

II. Relevance

Attribution is a *conditio sine qua non* of responsibility under international law. Only when an international legal person can be considered for the purposes of international law to have acted in a given instance – that is, only when the conduct in question is attributable to it – can it be asked whether it has breached a particular international obligation binding upon it, resulting in its responsibility.[8] Yet the importance of the issue of attribution is not limited to its central place in the regime of international responsibility. The rules on attribution determine more generally, for the purposes of international law, when a state or international organisation can be said to have engaged in specific conduct, which may have a range of implications.

With regard to the EU's external activity, the difficulty in identifying the entity or entities that in each situation are to be considered as having carried out particular acts constitutes an obstacle to the transparency of such activity and consequently to the development of the EU's relations with third parties. In practice, doubts as to the attribution of a particular conduct in the context of the EU's external activity may result in third parties, be they third states, other international organisations, companies or individuals, facing major challanges in asserting their rights. Even from an internal EU perspective, the identification of clear rules on the attribution of the EU's and member states' respective acts under international law can only facilitate a more orderly management of its activities. Respect for international law, one of the fundamental principles of the EU's external action,[9] can also be a guide to the orderly

[8] Cf. ARS, Art. 2, and ARIO, Art. 4.
[9] Cf. TEU, Art. 21(1).

development of forms of interaction between internal rules and relations with external partners.

The need to clarify the issue of attribution in relation to the EU's external activity arises as a result not only of the complexity of the factual circumstances in which the EU's external policies are implemented and of the multiplicity of relationships between the Union and the member states in different areas of external action but also of the debates between courts and between states and international organisations over the rules applicable to the EU in this context. During the work of the International Law Commission (ILC) on the matter, the EU supported a position which, with regard to the attribution of the acts of state organs placed at the disposal of an international organisation, did not conform to the rules finally adopted by the Commission.[10] This position has since been maintained by both the European Commission and many EU law scholars.[11] Since the position differs from the relevant rule embodied in the ILC articles, it calls for examination and assessment.

This research aims to contribute to the debate on the applicability of the general rules on the attribution of conduct to the EU and its member states in the context of the EU's external activity. Such debate, which has involved several international courts and many EU and international law scholars over the last decades, has shifted after the adoption of the relevant ILC articles to the application of those articles and, more specifically, to the applicability of the general rules of attribution contained therein to the EU. Focusing only on the issue of attribution and aiming at identifying and applying the rules of international law governing this matter, this work does not enter into the broader debate on the nature of the EU as an international organisation or on the incidents of the international legal personality of international organisations in general. However, the normative implications of the debate on the responsibility regime to be applied to international organisations and to the EU in particular cannot be ignored.

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[10] Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), General comments, European Commission, para. 3, p. 138.

[11] See, as one of the most recent works from an EU legal scholarship perspective on the matter, Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016; cf., for the point that a disciplinary divide is reflected in EU and international legal scholarship on the responsibility of international organisations, Paolo Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law', *The European Journal of International Law*, 29, 4, 2019, p. 1413.

In the history of international organisations and in the related international legal discourse, two conceptions of the nature of international organisations have always coexisted: that of international organisations as agents of their member states, which as principals always have the power to create and dismantle those organisations at will, and that of international organisations as separate legal entities endowed with autonomy albeit bound by their functional character. These two points of view from which the question of international organisations can be observed correspond to two opposing concerns, namely, on the one hand, 'the fear … that states might exploit [international organisations] to evade their international obligations' and, on the other, the 'Frankenstein problem' of the fear of having endowed international organisations with powers by which they might escape member states' control.[12] The balance between these two conceptions of international organisations and between the two corresponding concerns is also influenced by the international rules on attribution. Strict rules of attribution, namely rules that broaden the scope of cases and activities attributed to international organisations, could answer the Frankenstein problem. But, if too strict, such rules could prevent international organisations from effectively performing their functions. More cautious rules of attribution, namely rules that attribute to international organisations only that conduct genuinely under their direct and exclusive control, could render organisations freer from the mastery of their member states and thereby avert the risk that states will outsource to them their more legally questionable activities.

III. Methodology

The answers to the questions posed above are to be searched for in general international law. The attribution of conduct is an aspect of the law of international responsibility, by which is meant state responsibility and the responsibility of international organisations respectively. The rules governing international responsibility, from which states and international organisations may derogate by agreement between themselves,[13] are, in the absence of such agreement, of general

[12] Kristina Daugirdas, 'How and Why International Law Binds International Organizations', *Harvard International Law Journal*, 57, 2, 2016, p. 328.
[13] Cf. ARS, Art. 55, and ARIO, Art. 64.

application.[14] EU law is treated in this thesis either as internal rules of the organisation[15] or as *lex specialis* applicable among the member states,[16] the two ways in which it can be relevant to general international law. The internal rules of the EU may be more or less important depending on the type of relations that the EU and its member states entertain with third parties and on the degree of relevance that the internal rules of an international organisation may have for the application of the general rules of international law.

In analysing the question of the attribution of conduct in the context of the CFSP and the EU's external action, recourse is had first and foremost to the formal sources of general international law.[17] The principal source to which recourse must be had is thus customary international law. The two sets of articles adopted by the ILC on the matter of international responsibility, namely the Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ARS) and the Articles on the Responsibility of International Organizations of 2011 (ARIO), are analytically scrutinised for their potential correspondence with customary international law. The ARS, although not dealing with responsibility for the activities of international organisations,[18] are relevant in the present work for three main reasons: first, because they were the model for the drafting of the ARIO and therefore may provide guidance for the application of rules contained in the latter;[19] second, because in some situations the scope of application of certain rules contained in the ARS marks the limit of the scope of application of rules contained in the ARIO, although here the possibility that the same act may be attributed simultaneously to more than one international legal person according to different criteria of attribution is expressly accepted; finally,

[14] Cf. ARS, Arts. 1 and 3, and ARIO, Arts. 3 and 5.
[15] Cf. the definition of 'rules of the organization' in ARIO, Art. 2(b), and, for what concerns this thesis, the reference to such rules in ARIO, Arts. 2(c), 6(2), 10(2) and 64.
[16] Cf. ARS, Art. 55, and ARIO, Art. 64.
[17] This traditional analytical approach to the legal question under consideration implies a rejection of the 'general move in international law towards accountability regimes as replacing the traditional view of thinking in terms of sources of law', subtly criticised by Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability', in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, 2017, p. 989.
[18] Cf. ARS, Arts. 56 and 57.
[19] This is true notwithstanding the important clarification put forward by the ILC in the ARIO Commentary, General Commentary, para. 4, p. 46: 'When, in the study of the responsibility of international organizations, the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to international organizations, this is based on appropriate reasons and not on a general presumption that the same principles apply'.

because the possible responsibility of member states for their involvement in the external activities of the EU, which falls within the scope of this work, is directly addressed in the ARS.

As for the scholarly accounts of the ILC articles, there exists a 'disciplinary divide between international law and EU law scholars',[20] a divide that stems from different ideas about the legal nature of the EU. The EU has developed a highly articulated internal order and a much more formalised relationship between the Union and member states than is usual for intergovernmental organisations, so much so that the distinction between 'intergovernmental organisation' and 'supranational organisation', formally meaningless in terms of international law, has spread in the EU law literature. More generally, the founding treaties and the secondary legislation of the Union tend to be treated as an autonomous system,[21] with the consequence that questions concerning the relationship between international law and EU law occupy increasing space in the academic debate.[22] The official organs of the Union exhibit a strong 'activism' in international fora, and the 'ability of the EU's legal service' is such that notions peculiar only to the relationship between the Union and its members, such as the attribution of exclusive competences to the organisation, were taken for granted by the ILC when considering the general regime of responsibility of international organisations.[23]

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[20] Paolo Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law', *The European Journal of International Law*, 29, 4, 2019, p. 1411. Cf., by way of example of the divide, Bruno de Witte, 'The European Union as an International Legal Experiment', in Gráinne De Búrca and Joseph H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, 2012, and Franck Latty, 'L'Union Européenne vue du droit international', *Annuaire de droit de l'Union Européenne*, 4, 2014.

[21] Cf. *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26/62, ECR 1963 00003, p. 12: 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'; and *Flaminio Costa v. ENEL*, Case 6/64, ECR 1964 01141, p. 593: 'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves'.

[22] Cf., for a recent overview, Ramses A. Wessel, 'Studying International and European Law: Confronting Perspectives and Combining Interests', in Inge Govaere and Sacha Garben (eds.), *The Interface Between EU and International Law. Contemporary Reflections*, Hart, 2019.

[23] Paolo Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law', *The European Journal of International Law*, 29, 4, 2019, p. 1411.

A major challenge in this work has been to take account of these different positions and to propose an answer to the questions of application that arise from this fragmented picture. As above stated, the choice has been to structure the analysis on the basis of the authoritative sources of international law, thus starting from the work of the ILC. The main scholarly accounts of the matter have therefore been considered in the course of the discussion, depending on their importance for the interpretation of the rules from time to time under consideration.

The international legal personality of international organisations has sometimes been regarded as a veil behind which states can hide to avoid responsibility and which at other times they can lift to become the protagonists of their international activities.[24] One of the main objectives of the correct application of the international rules on the attribution of conduct is precisely to avoid this type of evasion of responsibility on the part of member states. To this end, the rules of attribution set out in both the ARS and the ARIO are thoroughly analysed in this thesis.

IV. Main concepts

International responsibility is the consequence of an internationally wrongful act.[25] An internationally wrongful act is composed of two elements, namely conduct attributable to a state or international organisation and the breach, by means of this conduct, of an international obligation binding on that state or international organisation.[26] Responsibility can be described as the situation in which the state or international organisation that breached the international obligation through conduct

[24] See Catherine Bröllman, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, Hart, 2007. For an overview of the most recent practice in terms of attribution through the lens of the institutional veil metaphor, see Catherine Bröllman, 'Member States and International Legal Responsibility: Developments of the Institutional Veil', *International Organizations Law Review*, 12, 2, 2015 (all the contributions to such issue of the *International Organizations Law Review* have been later published in Ana Sofia Barros, Cedric Ryngaert, and Jan Wouters (eds.), *International Organizations and Member State Responsibility. Critical Perspectives*, Brill Nijhoff, 2016).

[25] See ARS, Art.1: 'Every internationally wrongful act of a State entails the international responsibility of that State'; and ARIO, Art. 3: 'Every internationally wrongful act of an international organization entails the international responsibility of that organization'.

[26] ARS, Art. 2; ARIO, Art. 4.

attributable to it finds itself.[27] The consequence of this situation is the obligation to cease the internationally wrongful act, if it is continuing, and, where circumstances so require, to offer appropriate assurances and guarantees of non-repetition and the obligation to make full reparation for the injured caused by the internationally wrongful act.[28]

As Crawford notes,[29] the definition of responsibility set out in the ILC articles is probably more communicative in what it omits than in what it says. In particular, it does not set out any requirements in terms of psychological element on the part of the state or international organisation, of material or moral damage, or of to whom the secondary obligations arising from the wrongdoing are owed. Responsibility is 'an "objective correlative" of the commission of an internationally wrongful act'.[30]

Attribution of conduct, the element of responsibility this thesis deals with, can be defined as the 'normative operation'[31] by which international law establishes whether the conduct of a natural person 'or other such intermediary' can be considered an act of a state or international organisation and as such capable of giving rise to the responsibility of that state or international organisation.[32] The relevant conduct can be an act or a sequence of acts or an omission. The purpose of attribution is to link the action or omission of real people to some international legal person, which is an abstract collective entity.[33] The rules on the attribution of conduct are aimed at ascertaining the existence of a legally relevant link between the natural person who has materially carried out the conduct and an international legal person.

Scholarly accounts have sometimes distinguished between so-called factual links and so-called legal links, that is, between links established by reference to the factual relationship between the real persons involved and the state or international organisation and links established by reference to the official position and functions

[27] Cf. Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, p. 3: 'responsibility is the corollary of international law, the best proof of its existence and the most credible measure of its effectiveness'.
[28] ARS, Arts. 30 and 31; ARIO, Arts. 30 and 31.
[29] James Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, p. 49.
[30] Ibid.
[31] ARS Commentary, Part One, Chapter II, para. 4, p. 39.
[32] James Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, p. 113.
[33] Ibid., p. 114.

of the real persons.[34] But the distinction is prone to mislead. The link between the relevant conduct and the state or international organisation must always be legal, insofar as it must satisfy the international legal criteria for attribution,[35] and must always be established on the specific facts of the case. Attribution always involves the legal characterisation of fact.

This thesis focuses in particular on the attribution of conduct carried out in the context of the EU's external action. The EU is an international organisation with international legal personality. Under international law, not all international organisations enjoy legal personality.[36] According to the position long and consistently maintained by most states, an international organisation enjoys international legal personality only if this is conferred on it, explicitly or implicitly, by its member states.[37] As specifically regards the EU, the express conferral of this personality is found in Article 47 of the Treaty on European Union (TEU), which, although not specifying that the legal personality referred to is legal personality under international law, is universally accepted to refer to this.[38]

In this thesis, the term 'EU external action' is used in the sense of Title V of the TEU. It refers to a broad, integrated set of policy areas, encompassing both the external policy fields included under Part Five of the Treaty on the Functioning of the European Union (TFEU), such as the common commercial policy, development cooperation, and the common foreign and security policy, and the external dimension of justice and home affairs, including for instance EU policies on migration. The corresponding policy tools, which are coordinated by the European External Action Service (EEAS), range from treaties with non-member states and other international organisations to civil and military missions, participation in other international organisations, activities of international norm-promotion and international sanctions.

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[34] See e.g. Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014, p. 65.

[35] ARS Commentary, Part One, Chapter II, para. 4, pp. 38-39: 'The attribution of conduct … is based on criteria determined by international law and not on the mere recognition of a link of factual causality'.

[36] Cf. the ICJ analysis of the UN international legal personality in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174, at p. 179.

[37] For the opposite conception of an 'objective' legal personality of international organisations, see e.g. Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 5th ed., Martinus Nijhoff, 2011, p.989.

[38] TEU, Art. 47: 'The Union shall have legal personality'.

The focus is therefore on all those contexts in which the EU engages in any kind of concrete external activity. More specifically, the purpose is to identify the general rules which, where no particular agreement is in force, govern the possible responsibility of the EU vis-à-vis third states and other third entities.[39]

Finally, a clear distinction must be drawn between the notions of attribution of conduct and allocation of responsibility. The latter is sometimes referred to as 'attribution of responsibility',[40] an expression that can lead to misunderstandings. As already explained, the attribution of conduct is one of the two constitutive elements of international responsibility, the other being the non-conformity of that conduct with an international obligation owed by the relevant international legal person. The allocation of responsibility, in contrast, refers to the conclusion that a specific legal person is responsible in a specific case. The latter is the result of a structured legal operation in which the attribution of the relevant conduct is only the first step. The confusion between these two notions can come into play when more than one international legal person is or could be found responsible in relation to the same activity, be it a joint military operation, the imposition of economic sanctions, or something else. In such cases, even subtly different factual circumstances can give rise to different legal outcomes. The different scenarios of multiple attribution of the same conduct are examined later in this thesis. In contrast, the allocation of responsibility to more than one actor for different conduct in relation to the same activity, a phenomenon sometimes referred to in the literature as 'shared responsibility',[41] goes beyond the scope of this work.

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[39] In the context of the EU's external activities, as rightly noted by Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability', in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, 2017, p. 989, 'the dominant theory of functionalism, revolving as it does around relations between the organization and its Member States, is difficult to square with theorizing on the basis of obligation for international organizations under international law, precisely because the basis of obligation will come up in relations between the organization and others than its Member States'.

[40] See e.g. Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 77; cf. Stian Ø. Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State', *Oslo Law Review*, 6, 3, 2019, p. 182.

[41] 'Shared responsibility' (a concept that is sometimes intertwined or overlapping with those of 'secondary responsibility', 'indirect responsibility' and 'derived responsibility') has been the subject of the SHARES Project, a collective research led by André Nollkaemper at the Amsterdam Center for International Law and funded by the European Research Council. The major outcome of the Project are the 'Guiding Principles' published as André Nollkaemper et al., 'Guiding Principles on Shared Responsibility in International Law', *The European Journal*

V. Research outcome

Consideration of the rules of attribution adopted by the ILC together with the practice of states and international organisations leads to the rejection of the theory of normative control as a criterion for the attribution to the EU, in the context of its external action, of either measures of implementation adopted by the member states or the executive conduct of member states' organs placed at the disposal of the EU. It is argued that, despite divergent international practice and the rare judicial application of the rules owing to the scarcity of available fora, the rules of attribution codified in the ARIO offer satisfactory criteria for the attribution of conduct carried out in the course of EU's external activities. These strict criteria of attribution undoubtedly reflect a regime in which the autonomy of international organisations as regards responsibility is more limited than that of states. On the basis, however, of the mechanisms for the implementation of international responsibility currently in place, this arrangement has the advantage of ensuring greater protection for injured third parties and of leaving the door open to further developments. In the future, this equilibrium could move either towards greater autonomy for international organisations and greater integration of state organs within their activities, or towards a classic functional distinction under which international organisations engage in regulatory activities but leave to states the operational tasks constituting the traditional political core of international relations.

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of International Law, 31, 1, 2020, that in the intention of the authors should provide more clarity in situations that are 'hardly captured by the existing rules of the law of international responsibility', namely by enabling 'to share responsibility and apportion reparation between the states and/or international organizations that contribute together to the indivisible injury of a third party' (p. 15). In his thorough and well-founded critical review of the 'Guiding Principles', Lorenzo Gasbarri, 'On the Benefit of Reinventing the Wheel: The Notion of a Single Internationally Wrongful Act', *The European Journal of International Law*, 31, 4, 2021, points out that the combination of the two redefined notions of 'single wrongful act' and 'indivisible injury', as opposed to the traditional analysis of international wrongful acts as constituted of attribution of a conduct and breach of an international obligation, does not add any clarity. On the contrary, 'the test of causation for the contribution to an indivisible injury seems very strict, and many relevant cases risk falling outside the definition of shared responsibility provided by the Guiding Principles' (p. 1234).

VI. Structure of the thesis

In the first chapter of the thesis, the rules on attribution of conduct as expressed in the ARS and the ARIO are analysed in the light of the practice of states and international organisations and the relevant decisions of international courts and tribunals. The control of states over any of their organs placed at the disposal of an international organisation often remains so close as to render the application of the ARIO's rule on the attribution to an international organisation of the conduct of such organs more often than not, if applicable at all, at least concurrent with the application of the rules of attribution to states. Consideration is then given to two questions left undeveloped in the ILC's articles, namely the possibility of multiple attribution and the existence of special rules of attribution.

In the second chapter, the provisions of the EU Treaties governing EU external activities are analysed in order to grasp the external impact of these rules and the specific consequences on the degree of reliance of third parties on the autonomy of the Union. Special attention is paid to the institutional structure of the CFSP, to the speciality of the competences of the Union in this field, and to the issue of EU missions outside the borders of the Union. Finally, a brief overview of the international obligations of the EU vis-à-vis third parties is sketched in order to grasp the material contexts under which issues of attribution may concretely arise in the international practice of the Union.

In the third chapter, practice relating to EU external action is examined to ascertain whether the general rules on the attribution of conduct to international organisations or different rules are applied in this context and whether the ways in which the CFSP is implemented would ideally require different rules of attribution. The main issues in this analysis are the concept of normative control, as manifest in the power of the Union to determine in the form and content of and remedies with respect to certain measures implemented by the authorities of the member states – and the attribution of executive conduct by officials of the member states placed at the disposal of the Union. It is shown that the general rules of attribution of conduct to an international organisation are not only regularly applied to EU external activity but also lead to outcomes that are more coherent and in line with the general principles underpinning attribution than those to which the theory of normative control would lead, whether applied as a general criterion for the attribution of the acts of state

organs placed at the disposal of an international organisation or as a special rule of attribution applicable to the EU alone or to a certain type of international organisation of which the EU is an example. In particular, by focusing on contexts in which the application of the rules of attribution is more controversial, such as those of immigration management and the fight against piracy, it is shown that the criterion of effective control, applied to the circumstances of each case, better meets the requirements of legal certainty and protection of third subjects involved in EU activities. On these grounds the theory of normative control is rejected.

The last chapter is dedicated to the most debated question concerning the attribution of conduct to the Union both in its external action generally and in the specific context of the CFSP, namely whether special rules of attribution may apply to the conduct of member state organs acting under the normative control of the Union. The cases usually referred to as evidence of the existence of special rules of attribution applicable to the external activity of the EU are shown in fact to be examples of the application of the general rules of attribution of conduct to international organisations or of special rules established in international agreements among states parties to multilateral regimes that exclude, as envisaged in Articles 55 of the ARS and 64 of the ARIO, the application of the general rules of attribution.

Chapter 1
The attribution of conduct to international organisations under international law

I. Introduction

In order to determine which acts of the common foreign policy shall be legally attributed to the Union under international law and which shall be attributed to the member states, it is necessary to identify the rules of attribution applicable to such acts. Since there are no codifying treaties specifically addressing attribution, it is first necessary to verify the existence of general rules of attribution. The existence of such rules is necessary for the functioning of international law because if they did not exist, it would not be possible to link legally relevant acts to their authors and therefore it would not be possible to demand from international legal persons that their acts comply with the rules of international law. The existence of rules of attribution is indeed constantly confirmed in the decisions of international courts and they are constantly applied in international relations.

There are two codification instruments that describe the rules of attribution in the context of the international responsibility of states and international organisations, the ARS and ARIO, drawn up by the ILC and taken note of by the United Nations (UN) General Assembly. It is commonly agreed that the rules of attribution apply in general, even in circumstances outside the context of responsibility, meaning whenever international law assigns a legal value of any kind to the attribution of a specific act to an international legal person. These two sets of articles are generally considered to be texts of codification of customary international law, albeit with different levels of correspondence to the customary rules actually in force. Therefore, unless there is evidence of special rules of attribution derogating from these general rules and apart from those provisions of the ARS and the ARIO that do not mirror established rules of customary international law, the attribution of acts of common foreign policy to the Union and its member states is governed by the rules of customary international law referred to in the articles of the ILC. The question of the possible existence of special rules of attribution referring to certain acts or

international legal persons, and possibly to the EU, is addressed in general terms in Section VI of this chapter and with particular reference to EU external action in Section VI of Chapter 3.

In this chapter the focus is on the sources of the rules of customary international law governing the attribution in general terms. In Section II the Conclusions on identification of customary international law of the ILC are taken as a starting point for the analysis of the evidentiary value of the ILC articles on responsibility and of the provisions on the attribution of conduct in particular. Sections III and IV expose the rules of attribution codified in the ARS and in the ARIO respectively, accounting for their correspondence with the practice of states and international organisations and for the interpretative and application doubts concerning some of the provisions therein. Sections V and VI deal with two principles that are central to the interaction between the different criteria of attribution described in the previous sections, namely the possibilities of multiple attribution and of special rules.

II. The sources of the rules of customary international law on attribution of conduct

The main sources of the general rules on attribution are the two sets of articles of the ILC. But since these articles, as codification texts which have not been transposed into a convention, are only a material source for the identification of customary international legal rules which derive their legal value from general practice and *opinio juris*, it is necessary to examine whether and to what extent they correspond to the customary international law in force in this field. This section describes the means by which customary international law must be identified, summarises the process that led to the adoption of the ARS and the ARIO and indicates their legal value in international law.

II.1 The identification of customary international law

Customary international law can be defined as 'unwritten [international] law deriving from practice accepted as law'.[42] This is the definition proposed by the ILC in its recent work on international customary law. This work took the form of a set of Conclusions, which were adopted by the UN General Assembly and submitted to the attention of states by Resolution 73/203.[43] The Conclusions on the identification of customary international law cannot, in turn, be understood as a binding text with regard to the assessment and value of customary international law rules.[44] However, also in light of the good reception they received from state representatives at the General Assembly,[45] they can be considered a good guide to describe the nature, value and means of ascertaining the rules of customary international law according to customary law itself.[46] The ILC Commentary refers to the Conclusions as aimed to 'offer clear guidance without being overly prescriptive'.[47]

Customary international law is composed of two elements, as evident from Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), which follows to the letter the formula already used in Article 38(2) of the Statute of the Permanent Court of International Justice (PCIJ), according to which the Court shall apply 'international

[42] Commentary to the Conclusions on identification of customary international law, General Commentary, para. 3, p. 2.
[43] UN General Assembly Resolution 73/203, 20 December 2018, UN Doc. A/RES/73/203.
[44] The international legal order is based on the equality of sovereign states and there is no superordinate authority that has the power to impose by authoritative act rules that bind all states. See UN Charter, Art. 2(1): 'The Organization is based on the principle of the sovereign equality of all its Members'; and Draft Declaration on the Rights and Duties of States, Art. 5: 'Every State has the right to equality in law with every other State'.
[45] See the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session, UN Doc. A/CN.4/724, para. 128, p. 25: 'A number of delegations considered that the draft conclusions represented a balanced outcome, which had taken into account the views expressed by States over the years on many aspects of the topic. In the view of some delegations, an apt compromise had been achieved in relation to difficult issues such as the question of the practice of international organizations. According to other delegations, it was unclear whether some of the draft conclusions and the commentaries thereto purported to codify existing law or proposed its progressive development. The view was advanced that the draft conclusions should be viewed as representing the outcome of the Commission's own analysis, and not necessarily an expression of the views of Member States'.
[46] The essential elements for the identification of international customary law are set out in Conclusions on identification of customary international law, Conclusion 2: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.
[47] Commentary to the Conclusions on identification of customary international law, General Commentary, para. 4, p. 2.

custom, as evidence of a general practice accepted as law'.[48] The two elements are therefore general practice and the acceptance of such practice as law (*opinio juris*). The two elements must both be present to talk about binding custom.[49]

As affirmed in the Commentary to the Conclusions, in international law a general practice not accompanied by *opinio juris* is only a 'non-binding usage', therefore irrelevant for legal matters. Conversely, *opinio juris* without support in actual practice is only a 'mere aspiration', equally irrelevant.[50] Both the existence and the content of the rules of customary international law must be ascertained through a legal analysis articulated in two parts, addressing separately the general practice and the acceptance as law. The Conclusions offer a description of the characteristics that must be proven for each of the two elements and a non-exhaustive guide to the means that can be used to carry out the inquiry over the presence of such characteristics.

The practice that is relevant to the identification of customary international law is that of states,[51] which are the 'primary subjects of the international legal system and [possess] a general competence'.[52] The practice of international organisations can be relevant only under certain circumstances.[53] The Commentary makes it clear that this does not concern the activity of the states within the organisations of which they are members but rather the practice that can be directly attributed to international

[48] Statute of the Court, Publications of the Permanent Court of International Justice, Series D, No. 1, 1926. Available on the ICJ website at icj-cij.org/en/pcij.

[49] See e.g. *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, p. 3, para. 77, at p. 44: 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation'. The ICJ therefore recalled, in the following paragraph, the position of the PCIJ on this point in its early ruling in the *Lotus* case: 'Even if the rarity of the judicial decisions to be found … were sufficient to prove … the circumstances alleged …, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom' (*The Case of the S.S. "Lotus"*, PCIJ Series A, No. 10, 1927, at p. 28).

[50] Commentary to the Conclusions on identification of customary international law, Conclusion 2, para. 4, p. 5.

[51] Conclusions on identification of customary international law, Conclusion 4(1).

[52] Commentary to the Conclusions on identification of customary international law, Conclusion 4, para. 2, p. 9.

[53] Conclusions on identification of customary international law, Conclusion 4(2).

organisations.[54] In this case, this practice can only be considered relevant in relation to the functions that the states have entrusted to the organisation in question. In particular, the organisation's practice may contribute to the formation of those rules '(a) whose subject matter falls within the mandate of the organizations, and/or (b) that are addressed specifically to them'.[55] The Commentary cites as an example of rules whose assessment could also involve examining the practices of organisations precisely the rules on the international responsibility of organisations.[56] A particularly relevant condition in this context is that of the exercise by international organisations of 'exclusive competences' conferred upon the organisation by its member states in certain matters[57] and that of the actual exercise of competences 'functionally equivalent to powers exercised by States', for example the conclusion of treaties and the deploying of military forces.[58] The Commentary also indicates some criteria that may help to determine the relative importance of organisations' practices. These are first of all the fact that organisations act on behalf of their member states, or that those states endorsed their action, and the number of the member states; and, secondly, circumstances such as the nature of the organisation, the nature of the body that carried out the relevant acts, the fact of such acts not being carried out *ultra vires* and the facts of such acts being carried out in a way consonant with member states' practice on the matter.[59]

Practice may consist of physical and verbal acts or even, depending on the context, inaction.[60] This practice must be 'general'. This means that it must be 'widespread' and 'representative', the latter element meaning that its diffusion must be ascertained with regard to the interests involved and the various geographical regions, and it must be 'consistent' overtime. But a specific duration of this practice is not necessary.[61]

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[54] Commentary to the Conclusions on identification of customary international law, Conclusion 4, para. 4, p. 10.
[55] Ibid., Conclusion 4, para. 5, p. 10.
[56] Ibid.
[57] Here the Commentary explicitly refers to the EU.
[58] Commentary to the Conclusions on identification of customary international law, Conclusion 4, para. 6, p. 10.
[59] Ibid., Conclusion 4, para. 7, p. 11.
[60] Conclusions on identification of customary international law, Conclusion 6.
[61] Ibid., Conclusion 8.

Opinio juris consists in 'whether [states] recognize an obligation or a right to act in that way'.[62] In other words, a practice 'must be accompanied by a conviction that it is permitted, required or prohibited by customary international law'.[63] What must be ascertained is a legal conviction, and not a formal consent. For this reason the forms of evidence are not limited in number and type and can vary for example from public statements to official publications, diplomatic correspondence, decisions of national courts, and so on.[64]

The potential forms of evidence of the existence of a practice and of the existence of an *opinio juris* are largely overlapping, and in the real course of international relations the sources of evidence of the two elements available are often the same. However, they should always be considered separately to verify the existence of both elements[65] and during the two examinations the same acts must be examined in different ways. To summarise some of the acts that are most commonly taken into account as possible evidence of a general practice, one could cite national legislation, national court decisions, and verbal acts, such as claims in international disputes or official statements released on relevant occasions. As possible evidence of the *opinio juris*, it is possible to cite diplomatic correspondence; negative behaviour, such as failure to protest when accompanied by the awareness of the fact which could have given rise to the protest; the fact that a particular practice of a state goes against its own interests and therefore would probably not have been adopted except in the conviction of its obligatory nature; and finally the reactions of states to proposals of codification of rules of customary international law. In evaluating all the above forms of evidence, one must always have regard 'to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found'.[66]

The Conclusions deal specifically with the significance of certain materials for the identification of customary international law. These materials are treaties, the resolutions of international organisations and intergovernmental conferences, and, only as subsidiary means, the decisions of courts and tribunals and the teachings of

[62] Commentary to the Conclusions on identification of customary international law, Conclusion 2, para. 1, p. 4.
[63] Ibid., Conclusion 9, para. 2, p. 18.
[64] Conclusions on identification of customary international law, Conclusion 10.
[65] Ibid., Conclusion 3(2).
[66] Ibid., Conclusion 3(1).

qualified publicists.[67] In particular, Conclusion 12(2) refers to resolutions of international organisations as possible evidence of the existence and content of a customary rule or as a contribution to the development of such a rule, while Conclusion 12(3) refers to resolutions of international organisations as a reflection of an existing customary rule. The ILC, which in its Commentary stresses the importance, in this context, of the resolutions of UN General Assembly,[68] refers to the possibility of an international organisation dealing with the codification of existing customary law or the promotion of the progressive development of new rules of customary law. As explained in detail in Paragraph II.3 below, this specific function has been entrusted by the General Assembly to the ILC itself, and the ILC, in its Commentary to the Conclusions, pays particular attention to the role of its work in the establishment and development of general international law.[69]

In conclusion, the identification of customary international law is fundamental, on the one hand, to identify the rules applicable in those international dispute over matters that are not subject to agreement between the parties[70] and, on the other hand, to identify the rules applicable to ordinary relations between the international legal persons and to the interpretation of treaties.[71] What is important for the purposes of the present work is that the rules governing international responsibility of states and international organisations are rules of international customary law and that the ILC articles on this matter should be viewed as a work of both codification and progressive development of such rules with the value and effects examined in the following paragraphs.

[67] Ibid., Conclusions 11-14.
[68] Commentary to the Conclusions on identification of customary international law, Conclusion 12(2), p. 26.
[69] Ibid., Commentary to Part Five, para. 2, p. 22.
[70] This is the function recognised to customary law in Art. 38(1)(b) of the Statute of the ICJ, above cited.
[71] The rules of customary international law shall be included among the 'rules of international law' relevant for the interpretation of treaties under the VCLT, Art. 31(3)(c), and the VCLTIO, Art. 31(3)(c).

II.2 The adoption of the ILC articles

In 1949 the ILC included international responsibility among the topics it was planning, in the long term, to consider for codification.[72] In 1953, in Resolution 799 (VIII), the UN General Assembly requested the ILC 'as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility'.[73] In 2001, after more than forty years of work and thanks to the efforts of five Special Rapporteurs,[74] the ILC finally adopted on second reading its draft articles on responsibility of States for internationally wrongful acts.[75] In Resolution 56/83, the General Assembly took note of what henceforth became the Articles on Responsibility of State for Internationally Wrongful Acts, as annexed to the resolution, and 'commend[ed] them to the attention of Governments'.[76]

The international responsibility of states arises whenever they commit a wrongful act.[77] The essential elements of a state's wrongful act are the attribution of conduct, either an act or an omission, to the state and the contrast of such conduct with its international obligations.[78] State responsibility, and therefore the presence of these two elements, is most of the times a question of international relations between states; claims of international responsibility assessed by international courts and tribunals are only a very limited portion of all such claims arising in the course of international relations. The judicial outcome of cases involving the assessment of international responsibility intervene, as already noted, only as subsidiary means in the identification of the rules governing international responsibility. Conversely, such rules are addressed first of all to states as guidance for individuating the legal consequences, in terms of international responsibility, of their activities in their everyday interactions with other subjects of the international legal order; only as a parallel consequence are these rules addressed to international courts and tribunals

[72] Report of the International Law Commission on the work of its first Session, ILC Yearbook 1949, Vol. I, A/CN.4/13, para. 16, p. 281.
[73] Resolution 799 (VIII), 'Request for the codification of the principles of international law governing State responsibility', 7 December 1953, Official Records of the General Assembly, Eighth Session, Supplement No. 17, p. 52 (UN Doc. A/RES/799(VIII)).
[74] Francisco V. García-Amador, Roberto Ago, Willem Riphagen, Gaetano Arangio-Ruiz and James Crawford.
[75] ILC Report on the Work of the Fifty-Third Session, UN Doc. A/56/10, 2001, pp. 20-21.
[76] UN General Assembly Resolution 56/83, 'Responsibility of States for internationally wrongful acts', 12 December 2001, UN Doc. A/RES/56/83.
[77] ARS, Art. 1.
[78] Ibid., Art. 2.

dealing with issues of international responsibility. For what concerns this work, the rules of attribution that make part of the general regime of international responsibility represent the specific way in which general international law identifies the actors whose conduct engages the international responsibility of states.

The scope of the ARS is limited in two important ways. First, they are without prejudice to any special rules of responsibility agreed between states.[79] Secondly, they are without prejudice to all matters of international responsibility of international organisations and of states in relation to the conduct of international organisations.[80]

In the session immediately following the adoption of the ARS, the ILC decided to begin the work on the responsibility of international organisations.[81] The potential international responsibility of international organisations could have probably been already inferred from the recognition of the international legal personality of the UN in the ICJ's advisory opinion in *Reparation for Injuries*,[82] and was explicitly, although incidentally, affirmed in the *Difference Relating to Immunity* advisory opinion.[83] The new work of the ILC was led by Special Rapporteur Giorgio Gaja and was completed within ten years. In 2011 the ILC finally adopted on second reading its draft articles on the responsibility of international organisations.[84] In Resolution 66/100, the UN General Assembly took note of what henceforth became the Articles on Responsibility of International Organizations, as annexed to the resolution, and 'commend[ed] them to the attention of Governments and international organizations'.[85]

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[79] Ibid., Art. 55.
[80] Ibid., Art. 57.
[81] Report on the work of the fifty-fourth session, A/CN.4/SER.A/2002/Add.1, ILC Yearbook 2002, Vol. II (2), para. 461, p. 97.
[82] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174, at p. 179: 'the Court has come to the conclusion that the Organization is an international person … [I]t is a subject of international law and capable of possessing international rights and duties, and … it has capacity to maintain its rights by bringing international claims'.
[83] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p. 62, para. 66, at pp. 88-89: 'the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts'.
[84] ILC Report on the Work of the Sixty-Third Session, UN Doc. A/66/10, 2011, p. 39.
[85] UN General Assembly Resolution 66/100, 'Responsibility of international organizations', 9 December 2011, UN Doc. A/RES/66/100.

The ARIO largely follow both the structure and the content of the ARS. This drafting strategy had an undoubted advantage in terms of drafting time, but it aroused the opposition of those scholars and those governments which believed that the matter of the responsibility of international organisations should not be assimilated to that of state responsibility to such an extent.[86] The choice of replicating most of the rules was above all a natural consequence of the paramount work done by the ILC in the drafting of the ARS and of their good reception in international courts and tribunals and in the international community of states and international organisations. If international organisations are subjects of international law in the same way as states are, there is no reason why the rules of responsibility of international organisations should be different except to the extent that they must derive from the differences inherent in their international subjectivity compared to the subjectivity of states. Finally, also with regard to the application of the rules of international law to disputes that may arise in practice, the adoption of a text structurally similar to that of the ARS facilitates the work of the interpreters and of those to whom the rules codified in the text apply.[87]

More importantly, the differences between the two texts emerge with greater clarity when contained in structurally overlapping normative dictates. Despite the reasons that justify Rapporteur Gaja's choice to adopt a similar text structure, the ARIO would have probably been subject to a heated debate in any case, because of the scarcity of international practice regarding the responsibility of international organisations compared to that on the responsibility of states. If the international legal personality of international organisations has boundaries that are not yet entirely precise in customary international law, this is even more true for their responsibility, which moreover is only very rarely ascertained in international courts, and almost never in the absence of special norms provided for in international agreements. It follows that, while the ARS can largely reflect customary international law, and therefore be considered in large measure a text of codification, the ARIO

[86] See e.g. Alain Pellet, 'International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed.), *Responsibilitiy of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013.

[87] See the arguments in support of this drafting choice in Giorgio Gaja, First report on responsibility of international organizations, A/CN.4/532, ILC Yearbook 2003, Vol. II(1).

are instead mostly a text of progressive development of international law in a field in which such law is poorly consolidated.[88]

Despite the many similarities, the ARIO actually contain differences even of primary importance. In particular with regard to the attribution of conduct, the focus of this thesis, the drafters adopted different solutions. Moreover, the ARIO contain initial indications on the scope of application of the articles[89] and a list of definitions,[90] which is of great importance precisely in the field of attribution of conduct.

II.3 The evidentiary value of the ILC articles

In order to examine the value of the ARS and the ARIO in the identification of customary international law on international responsibility, firstly the general value recognised in international practice to the work of codification and progressive development of international law of the ILC must be addressed, and secondly the specific value of the two sets of articles considered herein.

At the general level, the function of the ILC is 'the promotion of the progressive development of international law and its codification'.[91] The ILC was established for this purpose by Resolution 174 (II) of the General Assembly as its subsidiary body, with the aim of fulfilling the General Assembly's duty, established in the UN Charter, to 'initiate studies and make recommendations for the purpose of … encouraging the progressive development of international law and its codification'.[92]

Recently, in particular in occasion of the drafting of the Conclusions on identification of customary international law commented above in Section II.1, the ILC had occasion to shed light on the value of its work in the codification and progressive development of international law.[93] In the Commentary to Part Five of the

[88] ARIO Commentary, General Commentary, para. 5, pp. 46-47.
[89] ARIO, Art. 1.
[90] Ibid., Art. 2.
[91] ILC Statute, Adopted by the General Assembly Resolution 174 (II), 'Establishment of an International Law Commission', 21 November 1947, UN Doc. A/RES/174(II), Art. 1.
[92] UN Charter, Art. 13(1)(a).
[93] As for the ILC Statute, Art. 15, for 'codification of international law' must be intended 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'; and for 'progressive development of international law' must be intended 'the preparation of draft

Conclusions, on the significance of certain materials for the identification of customary international law, the ILC affirmed that '[t]he output of the International Law Commission itself merits special consideration'.[94] The reasons why the work of the ILC has a special value in the assessment of general international law are the specific mandate given to it by the General Assembly, 'the thoroughness of its procedures', and the close relationship of its work with the work of the General Assembly, including the reception of comments from states and international organisations.[95]

For what regards the thoroughness of the procedures of the ILC, both the nominating procedure of the members of the ILC and the drafting process, regulated in detail in the Statute of the ILC, assure a very high standard of scrutiny and a wide representation of the best international legal expertise. The 34 members of the ILC[96] are nominated by majority of voting members of the General Assembly[97] from a list prepared by the Secretary-General.[98] The names included in the list are submitted by governments[99] and must be of experts with recognised competence in international law.[100] The election must assure the representation of the principal legal systems of the world[101] and no two nationals of the same state can be elected.[102]

As regards the drafting process, two slightly different procedures are established for cases of texts of progressive development on the one side and texts of codification on the other side. In both cases the ILC shall formulate a plan of work[103] and on that basis request governments to supply information and materials relevant to the topic;[104] it shall draft a first version of the text and present it to governments via the Secretary-General[105] for them to submit their comments;[106] and finally, on the

conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'.

[94] Commentary to the Conclusions on identification of customary international law, Part Five, para. 2, p. 22.

[95] Ibid., Part Five, para. 2, p. 22.

[96] Statute of the ILC, Art. 2(1).

[97] Ibid., Art. 9(1).

[98] Ibid., Art. 7.

[99] Ibid., Art. 3.

[100] Ibid., Art. 2(1).

[101] Ibid., Art. 8.

[102] Ibid., Art. 2(2).

[103] Ibid., Arts. 16(*b*) and 19(1).

[104] Ibid., Arts. 16(*c*) and 19(2).

[105] Ibid., Arts. 16(*g*) and 21(1).

[106] Ibid., Arts. 16(*h*) and 21(2)

basis of such comments, draft a final version of the text that is submitted to the General Assembly.[107] The differences lie in the power of initiative, which in the case of texts of progressive development pertains to the General Assembly[108] or to other UN or intergovernmental organs,[109] whereas in the case of codification pertains to the ILC itself,[110] although always under the auspices of the General Assembly;[111] in some additional requirements and possibilities in the case of works of progressive development, including the appointment of a Special Rapporteur to be chosen among its members,[112] the possibility to appoint a sub-committee of members[113] and the possibility to consult with external experts;[114] and in the recommendations that the ILC submit to the General Assembly following the adoption of the final draft, which in the case of texts of codification expressly include four options: no further action, inclusion of the text in a General Assembly resolution, further consideration by states in view of the conclusion of a convention or establishment of an international conference to conclude a convention.[115]

The ILC's articles are relevant as subsidiary means for the determination of rules of customary international law under the meaning of Conclusion 14. This provision extends to the doctrine produced as 'output of international bodies engaged in the codification and development of international law',[116] of which the ILC is the most relevant example, having been entrusted by the UN General Assembly with precisely that function. The works of the ILC are relevant specifically under the meaning of Conclusion 14 'in the light of the mandate and expertise of the body concerned'[117] and particularly in as much as its composition, seen above in this section, can be seen as being 'representative of the principal legal systems and regions of the

[107] Ibid., Arts. 16(*j*) and 22.
[108] Ibid., Art. 16.
[109] Ibid., Art. 17(1).
[110] Ibid., Art. 18(2).
[111] Ibid., Art. 18(3).
[112] Ibid., Art. 16(*a*).
[113] Ibid., Art. 16(*d*).
[114] Ibid., Art. 16(*e*).
[115] Ibid., Art. 23.
[116] Commentary to the Conclusions on identification of customary international law, Conclusion 14, para. 5, p. 30.
[117] Ibid.

world'.[118] This special role of the ILC's work has been recognised on several occasions by various international courts.[119]

However, the evidentiary value of the work of the ILC is not always the same for every topic: it depends on the subject under examination and the process by which the work is carried out in the specific case, especially with regard to the participation and responses of states and their subsequent practice.[120] This is also expressed in the forms and titles of the different types of texts adopted by the ILC, which may reflect a more or less defined state of the assessment of the status of general international law concerning the matter in question. In particular, among the factors that may affect the degree of correspondence of the texts produced by the ILC with the general international law in force, the ILC has referred to 'the sources relied upon by the Commission, the stage reached in its work, and above all … States' reception of its output'.[121]

Apart from its evidentiary value as codification and progressive development of international law, the work of the ILC can acquire specific relevance under the label of 'certain materials' listed in Part Five of the Conclusions on identification of customary international law. First, when ILC texts are taken note of by the General Assembly in its resolutions, they can become relevant as 'resolutions of international organizations' under Conclusion 12. Such resolutions 'cannot, of itself, create a rule of customary international law',[122] but they 'may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development'[123] or even reflect such a rule 'if it is established that the provision

[118] Ibid., Conclusion 14, para. 4, p. 30.
[119] See e.g. the extensive passages from both the then Draft Articles, adopted by the ILC in first reading, and the attached Commentary cited in *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, paras. 50-53, at pp. 40-41; and the recognition in *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 169, at p. 56, that in the application of the UNCLOS, with respect to the applicable rules of responsibility of general international law, 'account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law'.
[120] Cf. Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law', *International and Comparative Law Quarterly*, 63, 3, 2014, p. 567.
[121] Commentary to the Conclusions on identification of customary international law, Part Five, para. 2, p. 22.
[122] Conclusions on identification of customary international law, Conclusion 12(1).
[123] Ibid., Conclusion 12(2).

corresponds to a general practice that is accepted as law'.[124] The Commentary to the Conclusions states that '[s]pecial attention should be paid in the present context to resolutions of the General Assembly, a plenary organ of the United Nations with virtually universal participation'.[125] Resolutions, however, are not relevant in as much as they are expression of the views of the organ of the international organisation in question, but in as much as 'they may reflect the collective expression of the views of [member] States'.[126] On the other side, since 'the attitude of a State towards a given resolution … is often motivated by political or other non-legal consideration', the evidentiary value of such attitude must be weighed cautiously, and having regard, apart from every textual element of the resolution, also to 'debates and negotiations leading up to the adoption of the resolution and especially explanations of vote and similar statements'.[127]

Secondly, a text drawn up by the ILC can become a multilateral convention. In this case the text becomes potentially relevant as evidence of the existence of rules of customary international law under Conclusion 11. Here again the number of states parties to the treaty is of great relevance, especially in the case of provisions 'adopted without opposition or by an overwhelming majority of States',[128] so as it is any sign of agreement about the customary nature of the rule in the treaty's preparatory work.[129] The decisive evidence of the existence of the customary rule in question, though, must always be individuated in the general practice of states and in the acceptance of such practice as reflecting binding law. Even the case of broad agreement around the inclusion of a provision in a treaty, such provision can be treated as corresponding to customary international law only in as much as 'States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law'.[130]

Thirdly, the work of the ILC can be relevant as qualified doctrine under the meaning of Conclusion 14. This provision extends to the 'output of international

[124] Ibid., Conclusion 12(3).
[125] Commentary to the Conclusions on identification of customary international law, Conclusion 12, para. 2, p. 26.
[126] Ibid., Conclusion 12, para. 3, p. 26.
[127] Ibid., Conclusion 12, para. 6, p. 27.
[128] Commentary to the Conclusions on identification of customary international law, Conclusion 11, para. 3, p. 23.
[129] Ibid., Conclusion 11, para. 5, p. 24.
[130] Ibid., Conclusion 11, para. 4, p. 23.

bodies engaged in the codification and development of international law',[131] of which the ILC is the most relevant example, having been entrusted by the UN General Assembly with that precise function. The works of the ILC are relevant specifically under the meaning of Conclusion 14 'in the light of the mandate and expertise of the body concerned',[132] particularly in as much as its composition can be fairly considered as 'representative of the principal legal systems and regions of the world'.[133]

With regard specifically to the ARS and the ARIO, it should be recalled that they were taken note of by the General Assembly in the form of two sets of articles submitted to the attention of states and international organisations. They therefore deserve first of all the consideration due to resolutions of the UN General Assembly as indicated in Conclusion 12. As regards the specific value of each of the two sets of articles, regard must be had to the mandates in accordance with which the ILC work was conducted and to the process that led to the adoption of each set of articles, as well as to the specific indications that the ILC itself has provided in this regard. The General Assembly in Resolution 799 (VIII) requested the ILC 'to undertake the codification of the principles of international law governing State responsibility'.[134] The Commentary to the final version of the ARS states that the articles 'seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts'. The latter sentence reflects the fact that different views were still mirrored in the comments of governments on the ILC final draft, leaving space for a certain degree of uncertainty, at least with respect to some of the articles.[135]

In 2001 the General Assembly took account of the recommendation of the ILC in its Report on the work of the fifty-second session, that 'after careful examination of

[131] Ibid., Conclusion 14, para. 5, p. 30.
[132] Ibid.
[133] Ibid., Conclusion 14, para. 4, p. 30.
[134] Resolution 799 (VIII), 'Request for the codification of the principles of international law governing State responsibility', 7 December 1953, Official Records of the General Assembly, Eighth Session, Supplement No. 17, p. 52 (UN Doc. A/RES/799(VIII)).
[135] This position was e.g. expressed by the Netherlands while commenting on the final form to be given to the articles: 'It must also be remembered that a declaration by the General Assembly should be seen both as a codification of existing customary international law and, to the extent that the articles are still no more than emerging rules of customary law, a form of State practice which will make a significant contribution to the development of customary law in this area' (Comments and observations received from Governments, A/CN.4/515, ILC Yearbook 2001, Vol. II (1), p. 47).

the preliminary studies', the topic of the responsibility of international organisations was 'appropriate for inclusion in the [ILC] long-term programme of work'.[136] In its Resolution 56/82, the General Assembly requested the ILC 'to begin its work on the topic "Responsibility of international organizations"'.[137] Like for the ARS, in the case of the ARIO the ILC stated in the Commentary that the articles are the result of 'its work for the codification and the progressive development of the law of international responsibility'.[138] In this case, though, the ILC further specified that '[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter'.[139] It is true that, according to the Secretariat topical summary, the delegations at the Sixth Committee of the General Assembly affirmed that 'in many respects the [ARIO] reflected current customary law'; but the delegations also welcomed the ILC 'acknowledgement that several of the draft articles tended towards progressive development' and 'that special rules could play a significant role, especially in the relations between an international organization and its members'.[140] The above mentioned specification in the ARIO Commentary, highlighting their tendency towards progressive development, is probably the ILC answer to the requests made in this sense by governments and international organisations in their comments to the draft articles adopted in first reading.[141]

Despite the cautious statements of governments and the ILC itself, always carefully referring to both the sets of articles as texts of 'codification and progressive development' of international law, the evidentiary value of the ARS seems much more established in practice. This is mirrored both in the literature, which looks at the

[136] Report on the work of the fifty-second session, A/CN.4/SER.A/2000/Add.1, ILC Yearbook 2000, Vol. II (2), para. 729, p. 131.
[137] UN General Assembly Resolution 56/82, 'Report of the International Law Commission on the work of its fifty-third session', 12 December 2001, UN Doc. A/RES/56/82.
[138] ARIO Commentary, General Commentary, para. 1, p. 46.
[139] Ibid., General Commentary, para. 5, pp. 46-47.
[140] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat, published as annex to the Report of the ILC on the work of its sixty-third session (2011), A/CN.4/650/Add.1, 20 January 2012, para. 10, p. 5.
[141] See e.g. the general comment of the UN: 'the Secretariat notes that the Commission has acknowledged in the commentary to a number of draft articles that practice to support the proposed provision is limited or non-existent. A general introduction to the commentaries could make this point and explain the consequences for the character of the draft articles' (Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), p. 141).

ARS as being 'in whole or in large part an accurate codification of the customary international law of state responsibility',[142] and in the dicta of international courts and tribunals.[143] This is not exactly established for each and every article,[144] but it is true at least with respect to the main principles and, for what concerns this thesis, for the chapter on attribution of conduct.

The same cannot be said about the ARIO. As it is examined below in Section IV, substantial disagreements persist among states and international organisations and among experts around some of their provisions. This means that, apart from very fundamental principles such as the principle of speciality of international organisations' international legal personality,[145] the basic principle that the internationally wrongful act of an organisation entails its international responsibility[146] and the saving clause of *lex specialis*,[147] the clause that has gathered the greatest consensus in the international community, most of the provisions contained in the ARIO are still to be regarded as sources of progressive development of international law until proven differently, especially in the light of the very fragmented practice on most of the matters therein regulated. However, for what specifically regards the articles on attribution, the main divergences in international practice concern, as seen below in Section IV, Article 7 on the attribution of conduct carried out by organs of a state or agents or organs of an international organisation placed at the disposal of another international organisation. On the contrary, Articles 6, on the attribution of conduct carried out by organs or agents of an international organisation, and Articles 8 and 9, on *ultra vires* acts and on the acknowledgment of conduct, are widely considered as according with customary international law.

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[142] James Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, p. 43.
[143] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 401, at p. 209; and *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, 12 October 2005, para. 69.
[144] See e.g. James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility', in Malcom D. Evans (ed.), *International Law*, 5th ed., Oxford University Press, 2018, p. 420: 'The Articles are the product of more than 40 years' work by the ILC on the topic, and in common with other ILC texts they involve both codification and progressive development'.
[145] See ARIO Commentary, General Commentary, para. 7, p. 47.
[146] ARIO, Art. 3.
[147] Ibid., Art. 64.

III. The general rules on attribution of conduct to states

The ICJ, in the *Genocide* case, referred to the rule of attribution to states of conduct of persons that are neither organs or agents of the state as 'customary international law, as reflected in the ILC Articles on State Responsibility'.[148] As noted below in Section III.4, that rule, expressed in Article 8 of the ARS, is actually the rule of attribution on which more ink has been spilled and whose status under international law has been more lately ascertained and established. The fact that the ICJ has referred to such rule as codified customary international law can be seen as a strong indication towards the recognition of the customary nature of the other rules on attribution of conduct to states included in the ARS as well.

The ARS chapter on attribution of conduct consists of eight articles. The general rule to which such articles give detailed and articulated shape and add some special cases is that 'the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State'.[149] Article 4 states the basic rule on the conduct of state organs. Article 5 assimilates to the conduct of state organs the conduct of subjects empowered by the state to exercise elements of its governmental authority. Article 6 concerns the conduct of organs of one state placed at the disposal of another state. Article 7 states the rule on the attribution of *ultra vires* acts. Article 8, probably the most discussed, deals with the conduct of private persons to whom the state issued instructions or over whom exercised direction or control.[150] Finally, Article 11 considers the exceptional case of conduct retroactively attributed to the state: every conduct not attributable to the state under any other rule of attribution, is still attributed to state in the moment the state subsequently acknowledges and adopts it as its own.

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[148] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 401, at p. 209.

[149] ARS Commentary, Chapter II, para. 2, p. 38.

[150] Arts. 9 and 10, on the conduct carried out in the absence of the official authorities and on the conduct of insurrectional movements, state two additional rules dealing with very special situations. These two articles aim to exclude gaps of protection of third parties involved in very exceptional circumstances, in which the normal functioning of the state machinery is not operating at all. They are of little relevance to the purpose of the present thesis as they do not find any parallel in the life of international organisations and therefore no corresponding provisions have been included in the ARIO.

III.1 Conduct of organs of a state

According to the main rule on attribution, the conduct of any state organ, including organs of territorial subdivisions of the state, is attributed to the state.[151] The first legal source to verify whether a real person is to be considered to represent an organ of the state is domestic law: 'An organ includes any person or entity which has that status in accordance with the internal law of the State'.[152] But the internal law of the state is not the only possible source of the status of state organ. The quality of organ can also be deduced from practice, referring to the functions and powers exercised by the person or entity in question.[153]

Article 4 of the ARS refers to 'any state organ'[154] with the intention of covering 'all the individual or collective entities which make up the organization of the State and act on its behalf'.[155] The rule applies equally 'whether the organ exercises legislative, executive, judicial or any other functions'[156] and 'extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level'.[157] No distinction is made depending on the hierarchical position of the organ: the rules applies 'whatever position it holds in the organization of the State'.[158] The Commentary further clarifies that 'lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official

[151] ARS, Art. 4(1); cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 385, at p. 202, according to which the attribution to the state of 'the conduct of any State organ' must be regarded as a 'well-established rule, one of the cornerstones of the law of State responsibility' and a rule 'of customary international law … reflected in Article 4 of the ILC Articles on State Responsibility'.
[152] ARS, Art. 4(2).
[153] ARS Commentary, Art. 4, para. 11, p. 42; cf. *Application of the Genocide Convention* at p. 205, para. 392, p. 205, cited below in the text; and *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14, para. 109, at p. 62: 'What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government'.
[154] ARS, Art. 4(1).
[155] ARS Commentary, Art. 4, para. 1, p. 40.
[156] ARS, Art. 4(1).
[157] ARS Commentary, Art. 4, para. 6, p. 40.
[158] ARS, Art. 4(1).

capacity is nonetheless attributable to the State'.[159] Finally, the rules applies irrespective of the acting person being 'an organ of the central Government or of a territorial unit of the State'.[160]

Before the ILC concluded its work on the international responsibility of states, the ICJ, in the famous case concerning US support to Nicaraguan paramilitaries, addressed the issue of the attribution of conduct of allegedly autonomous groups in great detail. Once the principle had been affirmed that acts of persons or groups directly controlled by states must be attributed to them regardless of their qualification as organs in domestic law, the question arose of what degree of control was required. In fact, it is one thing to create, organise and direct a group in all its operations as if it were an organ of the state, it is another thing to support it, and another thing, certainly outside the sphere of conduct attributable to a state, to benefit from its actions without directly influencing their execution.

The Nicaraguan *contras* had killed, wounded and kidnapped civilians as part of a strategy that included the spreading of fear among the civil population. The Court had to decide whether United States' (US) support, which had been proven to be of decisive importance in maintaining the operation of the *contras*,[161] was such as to justify the attribution of all their conduct to the US for the purposes of its responsibility towards Nicaragua. The Court ruled out the possibility of equating the *contras* with US organs, because, although economically and logistically dependent, they maintained a certain operational autonomy with respect to the US machinery. Then it examined whether the *contras*, even though they were not equated with US organs, could be considered as acting on their behalf.[162] The Court therefore considered first whether they were *de facto* state organs, a case that would have been equated, for the purpose of establishing US responsibility, with the situation of official state organs under what is now Article 4 of the ARS. Then it examined whether, even if they were not, their acts were nonetheless attributable to the US to the extent that they had been carried out under the effective control of that state under what is now Article 8 of the ARS. In giving a negative answer to the first question, it was decisive that 'the evidence available to the Court indicates that the various forms of assistance

[159] ARS Commentary, Art. 4, para. 7, p. 41.
[160] ARS, Art. 4(1).
[161] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, *ICJ Reports* 1986, p. 14, para. 111, at p. 63.
[162] Ibid., para. 109, at p. 62.

provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid'.[163] The standard for the qualification of persons as *de facto* organs of a state notwithstanding the lack of their official integration in the state's machinery under domestic law is therefore that of 'complete dependence'.

Such standard was confirmed and further justified in ICJ judgment in *Genocide*:

> [P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent.[164]

Once established that those who acted represent an organ of the state, it is necessary to verify whether the persons or entities were acting at the time in their official capacity. Indeed, even though Article 4(1) of the ARS does not specify this, state officials' conduct is always attributable to the state 'provided they are acting in their official capacity'.[165]

This principle has recently been confirmed for instance by the European Court of Human Rights (ECtHR) in the *Makuchyan and Minasyan* case, concerning the killing and attempted killing of Armenian soldiers by an Azerbaijani soldier at a training NATO training camp. In order to exclude attribution of the killer's criminal acts to Azerbaijan as acts of an organ of the state, the Court observed the following:

> [A]lthough a member of the Azerbaijani military forces at the material time, [the killer] was not acting in the exercise of his official duties … In particular, he was not engaged in any planned operation or in a spontaneous chase … On the contrary, … the crimes were committed as a result of [the killer's] private decision to kill during the

[163] Ibid., para. 110, at p. 62.
[164] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 392, at p. 205.
[165] ARS Commentary, Art. 4, para. 7, p. 41; cf. ibid., Art. 4, para 3, p. 40: 'the State is responsible for the conduct of its own organs, acting in that capacity'.

> night and outside of training hours … It has not been suggested that the crimes … were committed on orders given by his superiors and nor is there is any evidentiary basis for such a far-reaching conclusion.[166]

The same principle was applied by the Arbitral Tribunal in the *Enrica Lexie* award in order to demonstrate, conversely, the existence of a functional link and the exercise of official functions. The case concerns the killing of two Indian fishermen allegedly shot by two Italian marines being employed in a vessel protection detachment on board the Italian oil tanker "Enrica Lexie" and the following exercise of jurisdiction by India. The rule of attribution of conduct of organs to the state was applied in order to establish whether the immunity *ratione materiae*[167] of the relevant acts of the Italian soldiers should have precluded India from exercising its jurisdiction. The Arbitral Tribunal found that '[i]n the present case, the Marines were, as members of Italy's armed forces, fulfilling a State function. The Marines were deployed on board the "Enrica Lexie" as part of a [vessel protection detachment] pursuant to a mandate from the Italian State'. In these circumstances, '[t]he fact that the Marines were stationed on a merchant vessel, and not a warship, in the view of the Arbitral Tribunal, does not alter their status and the character of their mission as part of the [vessel protection detachment], undertaking acts in an official capacity attributable to the Italian State, as provided in the Italian Law'.[168] Once established the organic link between the agents and the state in the course of the whole operation, the Arbitral Tribunal goes further and evaluates the permanence of the link in the course of the relevant actions. The Tribunal observed that '[d]uring the incident, Sergeant Latorre engaged his chain of command by activating radio communication with other members of the [vessel protection detachment], donned his personal protection equipment, and positioned himself on the starboard wing of the bridge. As the craft approached the "Enrica Lexie", the Marines appeared to have followed the applicable rules of engagement'.[169] As a consequence of all this, according to the Tribunal 'the

[166] *Makuchyan and Minasyan v Azerbaijan and Hungary*, Appl. No. 17247/13, ECHR 2020, para. 111.
[167] The application of the rule of attribution to determine the scope of immunity *ratione materiae* was supported by Roman A. Kolodkin, Special Rapporteur, Second Report to the ILC on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, ILC Yearbook 2010, Vol. II (Part 1), p. 404, para. 25.
[168] PCA, *The 'Enrica Lexie' Incident (Italy v. India), Award*, 21 May 2020 (PCA), para. 859.
[169] Ibid., para. 861.

evidence demonstrates that during the incident the Marines were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a [vessel protection detachment]'.[170]

What is relevant for this examination is therefore, in the words of the ARS Commentary, whether the person acted 'in an apparently official capacity, or under the colour of authority'.[171] The only conduct excluded from the scope of attribution is therefore 'purely private conduct'.[172] On the contrary, an additional rule of attribution includes in the conduct attributable to the state that of state organs acting *ultra vires*. A specific provision was included in the ARS for this purpose:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[173]

This provision applies not only to the conduct of state organs, but also to the conduct of persons or entities exercising elements of governmental authority[174]. According to the ILC, the purpose of this rule is to ensure 'clarity and security in international relations',[175] avoiding the state to escape responsibility for conduct carried out by persons acting under the cover and with the means and powers assured by their official status. The provision establishes attribution 'even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence'.[176] The concrete standard for determining whether the conduct of an organ or agent is to be attribute to the state is therefore, according to Article 7, 'whether the conduct was performed by the body in an official capacity'.[177] More precisely, as already noted with regard to Article 4,[178] the only conduct of state officials that can be excluded from attribution to the

[170] Ibid., para. 862.
[171] ARS Commentary, Art. 4, para. 13, p. 42.
[172] Ibid.
[173] ARS, Art. 7.
[174] Cf. ibid., Art. 5.
[175] ARS Commentary, Art. 7, para. 3, p. 45.
[176] Ibid., Art. 7, para. 2, p. 45.
[177] Ibid., Art. 7, para. 7, p. 46.
[178] Cf. ibid., Art. 4, para. 13, p. 42.

state is purely private conduct. As for the official nature of a conduct, this comprise not only conduct actually entrusted by domestic law to the organ in question, but also actions carried out under their 'apparent authority'.[179]

III.2 Conduct of persons or entities exercising elements of governmental authority

The second rule of attribution of the ARS assimilates the conduct of persons or entities 'empowered by the law of [the] State to exercise elements of the governmental authority' to the conduct of state bodies.[180] This provision concerns mainly, but not only, parastatal entities and state corporations exercising some sort of public power, for example regulatory powers. The major issue for the application of this criterion is the definition of 'governmental authority'. According to the Commentary, the scope of this category of functions must be established with regard to the characteristics of the 'particular society, its history and traditions' and the 'content of the powers, … the way they are conferred … , the purposes for which they are to be exercised and the extent to which the entity is accountable to government'.[181]

In the case of the seizure of the US embassy in Tehran by the Islamic militants, the ICJ examined, among other criteria of attribution, also the possibility of attributing the seizure to Iran on the basis of the empowerment of such militants with operative governmental functions:

> No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.[182]

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[179] Ibid., Art. 7, para. 8, p. 46.
[180] ARS, Art. 5.
[181] ARS Commentary, Art. 5, para. 6, p. 43.
[182] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment*, ICJ Reports 1980, p. 3, para. 58, at p. 29.

As affirmed by the Court, attribution of the conduct of the militants on the basis of the exercise of governmental functions would have required express and clear acts of official empowerment by the state. Under Article 5 of the ARS, in fact, three requirements need to be met in the specific circumstances: the persons or entities need to be acting in the exercise of governmental functions; the state must have empowered them through official decisions of state organs; and they need to be acting in the capacity they are vested with through such official decisions.

III.3 Conduct of organs placed at the disposal of a state by another state

According to Article 6 of the ARS, for the conduct of an organ of a state placed at the disposal of another state to be attributed to the latter, three conditions need to be met. First of all, the persons or entities must be organs of the sending state.[183] Secondly, they need to be acting in the exercise of elements of governmental authority, in the sense that has already been illustrated with regard to Article 5. Third, they need to have been 'effectively put at the disposal of another State'.[184]

The requirement of effectively being placed at the disposal of the receiving state is met only if the organ is acting for the benefit of such state and under its exclusive authority.[185] More precisely, the organ must act with the consent of the receiving state, for its purposes and 'in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State'.[186] If these conditions are met, the conduct in question is attributed only to the receiving state, with exclusion of concurrent attribution to the sending state.[187]

The provision, which due to the rigidity of the requirements described above excludes all normal cases of cooperation and collaboration between states' authorities,[188] is rarely applied. The aforementioned requirement of 'exclusive direction and control' seems to recall the situation of the allocation of conduct

[183] ARS Commentary, Art. 6, para. 5, p. 44.
[184] Ibid., Art. 6, para. 1, p. 44.
[185] Ibid.
[186] Ibid., Art. 6, para. 2, p. 44.
[187] Ibid., Art. 6, para. 1, p. 44.
[188] Cf. ibid., Art. 6, para. 2, p. 44.

directed or controlled by the state regulated by Article 8 of the ARS. The present provision, however, in addition to describing very different factual situations in which persons acting on behalf of the state are organs of another state, has the quite significant effect of extending the conduct attributable to the receiving state as to include *ultra vires* acts, which are instead excluded from the scope of application of Article 8.[189] In the ARS Commentary, an issue that is to be discussed at length later makes its appearance: although the drafters initially refer to the exclusive attribution to the receiving state,[190] later on they seem to admit double attribution not only in cases of joint organs, but also, more significantly, in cases where the organ 'acts on the joint instructions of its own and another State'.[191] This notation, which is apparently contradictory with respect to the exclusivity of the attribution criterion in question, could refer to other attribution criteria that can be applied cumulatively.

III.4 Conduct directed or controlled by a state

The ARS then consider those hypotheses in which the state controls the action of persons who do not represent its organs. In these cases as well, however, 'the existence of a real link between the person or group performing the act and the State machinery' must be demonstrated on a case by case basis and with due regard to all contextual circumstances.[192] Therefore, it is necessary to identify acts of state organs that in some way established a principal-agent relationship with the relevant conduct of persons not representing organs of the state.

Article 8 establishes the attribution to the state of conduct carried out by persons 'acting on the instructions of, or under the direction or control' of state organs. The rule is to be considered established in customary international law.[193] Here the scope of the relevant conduct is no longer defined by the governmental character of the conduct. There need not be an appearance of public authority. Any sort of act is

[189] Cf. ibid., Art. 7, para. 9, pp. 46-47.
[190] Ibid., Art. 6, para. 1, p. 44.
[191] Ibid., Art. 6, para. 3, p. 44.
[192] ILC Report on the Work of the Fifty-Third Session, UN Doc. A/56/10, 2001, p. 47.
[193] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 398, at p. 207: 'On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC'.

relevant in as much as it is controlled by state organs in at least one of the three forms of instructions, direction or control. Instructions, direction or control must relate to 'the specific operation' in the course of which the relevant conduct was committed.[194] However, this is not automatically sufficient to attribute the conduct. In fact, since the conduct in question is only indirectly connected with state organs, which is a special hypothesis derogating to the general rule of attribution of conduct carried out by organs or assimilated subjects, the standard is more restrictive. The relevant conduct must be 'an integral part' of the controlled operation, and not merely a conduct 'incidentally or peripherally associated' with it.[195]

The ILC mentioned the so-called *Nicaragua* test in its comment to Article 8 of the ARS. In that case the Court, although considering the dependence of the *contras* on US aid as solidly proven, affirmed that, once excluded the qualification of *contras* as *de facto* agents of the US, attribution to the US of all their acts 'depend[ed] on the extent to which the United States made use of the potential for control inherent in that dependence'.[196] According to the Court it had not been proven, in the course of the trial, neither that the US took advantage of the full dependence of the *contras* nor that the US exercised 'effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.[197] In other words, the control of the US was only a potential control, not an ongoing control. In conclusion, the Court stated that 'the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*'.[198] Evidence of the supply of information, logistic support, sophisticated methods of communication, field broadcasting networks, radar coverage and aircraft and of the decisive participation of the US in the financing, organising, training, supplying and equipping of the *contras*, in the selection of their military targets and in the planning of their operations, were not considered sufficient to attribute all the conduct of the *contras* to the US, because it was never proven 'that all the operations

[194] ARS Commentary, Art. 8, para. 3, p. 47.
[195] Ibid.
[196] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, *ICJ Reports* 1986, p. 14, para. 110, at p. 62.
[197] Ibid., para. 115, at p. 65.
[198] Ibid., para. 116, at p. 65.

launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States'.[199]

Before the final adoption of the ARS, a voice had been raised against the *Nicaragua* test for the attribution of conduct directed or controlled by a state. In 1999 the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that the *Nicaragua* test should have been rejected because it made it too difficult to prove the responsibility of a state for the groups it controlled.[200] The Tribunal had jurisdiction over the conduct of individuals in the context of the war in the former Yugoslavia. In the *Tadić* case, it had to decide on the application of some rules of humanitarian law and therefore to assess whether the acts in question had been carried out in the context of an international conflict. To this end, it had to evaluate whether certain acts of the Bosnian-Serb paramilitary groups could be attributed to Serbia. The Tribunal proposed a functional reading of the provision of the ARS, already approved in the first reading, that attributed to a state the conduct of private individuals acting on its behalf: the objective of the provision is that the state should not make others carry out conduct that would be illegal if committed by the state itself. According to the Tribunal, to this end it makes no sense to establish a universal standard of control: 'The *degree of control* may … vary according to the factual circumstances of each case'.[201] This kind of interpretation would be supported by the anti-formalist character of the whole international responsibility regime,

> which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[202]

The weak point of this argument is the use of the term 'entrusting': if it means that states issue directives, then the conduct would be attributed because of such instructions; but the question of control arises precisely where there have been no clear and explicit instructions. The Tribunal asserted that it was necessary to distinguish between private individuals and organised groups. For the latter, the standard should be less restrictive than the one established in Nicaragua:

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[199] Ibid., para. 106, at p. 61.
[200] *Prosecutor v. Dušco Tadić*, Appeal Judgment, IT-94-1-A, *ICTY*, 1999, para. 115, at p. 47.
[201] Ibid., para. 117, at p. 48.
[202] Ibid., para. 121, at pp. 49-50.

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.[203]

In these situations, the Tribunal specified,

> [a]cts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[204]

Despite the heated criticisms raised in *Tadić*, the *Nicaragua* test was decisively reaffirmed by the ICJ in its *Genocide* decision. The factual context of *Genocide* was the same on which the ICTY had ruled in *Tadić*, but the ICJ had to pronounce, unlike the ICTY, directly on the issue of Serbia's international responsibility for the atrocities committed by Bosnian-Serb paramilitaries. Serbia was accused of the violation of the Convention on the Prevention and Punishment of the Crime of Genocide, in particular in relation to the Srebrenica massacre. The ICJ first examined whether the Bosnian-Serb groups could be considered organs of Serbia or whether they, although not qualifying as organs of the state according to domestic law, performed such functions and had such a structural link with the Serbian state that they could be equated with state organs as *de facto* organs. The standard for equating Bosnian-Serb troops with state organs should have been that of 'complete dependence'.[205] The result was negative: despite the strong financial and strategic support provided by Serbia, Bosnian-Serb troops enjoyed a certain degree of independence in the planning and execution of their operations.

The second phase of the ICJ's analysis concerned the potential control of these troops by Serbia:

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[203] Ibid., para. 131, at p. 56.
[204] Ibid., para. 137, at p. 59.
[205] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 393, at p. 205.

> Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.[206]

The exam of the existing link between the state and the agents must be, in order to ascertain attribution under this exceptional rule, more adherent to the facts and the role of the state vis-à-vis those facts:

> in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[207]

These requirements were not deemed to be met in relation to those acts for which Serbia's responsibility was invoked. Instead, Serbia was held responsible for the violation of its obligation to prevent the crime of genocide. Serbia had the power to take action to prevent the Bosnian-Serb troops from committing it and could not be unaware of the risk that it would take place if they failed to act. In this case, the relevant standard was a mere 'position of influence'.[208]

Not only did the ICJ confirm the position expressed in *Nicaragua*, but it also explicitly rejected the conflicting judgments expressed by the ICTY in *Tadić*:

> It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.[209]

[206] Ibid., para. 401, at p. 209.
[207] Ibid., para. 400, at p. 208.
[208] Ibid., para. 434, at p. 223.
[209] Ibid., para. 406, at p. 210.

Having recalled the general principle of state responsibility, the Court restated the three main categories of persons whose acts can be attributed to a state due to the existing link between the acting persons and the state's organisation, i.e. *de jure* organs of the state, *de facto* organs of the state and persons instructed, directed or controlled by the state:

> That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8.[210]

The ICJ did not limit itself to reaffirming its dicta on matters of attribution of conduct, but it openly criticised the ICTY for having reversed such dicta in matters that were touched upon by that Tribunal only as accessory elements of its decision:

> the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.[211]

This reaffirmation of the authority of the ICJ in the interpretation of the rules of general international law and this reproach of the intrusive encroachment of the ICTY in matters central to the exercise of ICJ jurisdiction achieved the intended result and the standard of effective control for the attribution to states of conduct of groups or persons not organs of the state has not been undermined any more by international courts and tribunals. Nevertheless, it can still be interesting to recall some of the vulnerabilities of that standard, which made the ICTY consider that such standard was questionable. One of the most interesting criticism of the 'effective control' test

[210] Ibid.
[211] Ibid., para. 403, at p. 209.

concerns the concrete object of such test. Both *Nicaragua* and the ARS Commentary stated that the hypotheses of instructions, direction and control are alternative. It is thereby unclear in what forms can control materially take place. In *Nicaragua*, effective control is explained as directions and direct enforcement of a conduct.[212] Direction, though, is one of the other alternatives of Article 8 of the ARS, and direct enforcement could probably be included in the hypotheses of attribution under Articles 4 or 5 of the ARS as conduct of organs or *de facto* organs of the state. This would not leave space for any autonomous hypothesis of control.[213] This criticism is not entirely without reason but, on the other hand, if the criterion of effective control has to be accepted, the ICTY manoeuvre would amount to its complete overthrowing. 'Effective control' cannot be regarded as a question of degree: control is either effective or it is not.[214] It cannot be, as the ICTY stated in *Tadić*, a question of different degrees to be applied to different categories.

Having taken in due account the relevance and the persuasiveness of the ICTY arguments, the ground on which the Tribunal's point loses its grip is that of precedent.[215] If it is true that 'the Appeals Chamber held that the legal criteria it

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[212] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, *ICJ Reports* 1986, p. 14, para. 115, at p. 64.

[213] This criticism was put forward immediately after the *Genocide* decision in an article by Antonio Cassese, one of the ICTY judges who had decided on the *Tadić* case. Cassese reiterated his disagreement with the *Nicaragua* test and tried to bring new arguments in support of the ICTY's position: Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *The European Journal of International Law*, 18, 4, 2007, p. 653.

[214] De Frouville identified the time factor as the distinguishing feature of the 'control' referred to in Art. 8 of the ARS. While 'instructions' and 'direction' would take place at a specific point in time, control would constitute a 'continuous factual link' (Olivier De Frouville, 'Attribution of Conduct to the State: Private Individuals', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, p. 271). This is an interesting interpretative hypothesis and most likely correct from an analytical point of view; however, the question remains open as to what acts does 'control' actually involve, if they are neither instructions, nor directives, nor all the forms of support that had been proven in *Nicaragua*.

[215] In the cited article, Cassese referred to various cases, both prior and subsequent to *Tadić*, all of which, for one reason or another, are not fully convincing: either because of the remoteness of the factual situations compared to the typical cases described above or because of the diverse jurisdiction of the courts. Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *The European Journal of International Law*, 18, 4, 2007, p. 658, cites, for instance, the *Yeager* case ('Kenneth P. Yaeger v. The Islamic Republic of Iran', *Iran-US Claims Tribunal Reports*, 1987): the Revolutionary Guards were not official organs of the Iranian state at that time, but the court recognised that they were in fact operating as such and observed that, in any case, Iran could not tolerate the actions of such paramilitary groups and then evade responsibility for their acts. However, the example is not fully appropriate, because those groups operated on

propounded [in *Tadić*] were valid both for international humanitarian law and state responsibility', this cannot be a basis to claim the primacy of ICTY doctrinal statements over ICJ precedent.[216] Consequently, also the argument based on the authority of the court and the chronological precedence of *Tadić* over *Genocide* is inconsistent with the fact that *Tadić* decision contradicted the previous ICJ ruling in *Nicaragua* over the standard of effective control as basis for attribution of non-organs' conduct. A delicate question on the authority of precedents of different international courts is at stake. Under this perspective, it would be inaccurate to disregard the authority of the ICJ in matters of international responsibility, precisely because it is a matter that falls within its ordinary jurisdiction. On the other hand, it would be incoherent to complain about the scarcity of case law after *Genocide* recalled the principles already established in *Nicaragua*. *Genocide* highlighted an undoubted consolidation of such principles. Furthermore, the international community of states and international organisations did not revolt at any moment against the ICJ doctrine on effective control; on the contrary, they actively participated in the works of the ILC on the ARS and the ARIO, which fully upheld the *Nicaragua* test.

As a last clarification, it must be recalled that Article 7 of the ARS, concerning *ultra vires* acts, does not apply to Article 8 of the ARS. The conduct in contravention of instructions in this case is not attributable to states since the article refers to persons or entities authorised under the law of the state to perform governmental functions, therefore not enjoying legal authority in the first place, and therefore without possibility of acting beyond the scope of authority.

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the territory of the defendant state and therefore necessarily under its territorial control, at least in the form of an obligation of prevention against their damaging acts towards third parties. Another case cited by Cassese (p. 658) is *Loizidou v. Turkey*, Appl. No. 15318/89, ECHR 1996, concerning Turkey's responsibility for the wrongful acts of the government of Northern Cyprus. The Court attributed the acts to Turkey because Cypriot authorities were acting under Turkey's 'effective overall control'. However, that was not a question of control over paramilitary groups, but of control, by an occupying force, over the governing bodies of the occupied country.

[216] Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *The European Journal of International Law*, 18, 4, 2007, p. 663.

III.5 Conduct acknowledged and adopted by a state as its own

Attribution for acknowledgement is a case of retroactive attribution of conduct carried out by non-organs. The Commentary specifies that an expression of approval of the conduct is not sufficient: the 'clear and unequivocal' adoption of the conduct by the state as its own conduct must be demonstrated.[217] Adoption, however, can also be 'inferred from the conduct of the State'.[218] It is important to distinguish this rule of attribution from cases of acknowledgement of the international responsibility, in which the acknowledgment does not entail, on the part of the state, the adoption of the relevant conduct as its own.

The most famous case of acknowledgment, brought as an example also by the ILC,[219] is that of the adoption by the Iranian state of the acts of the Islamic militants that had seized the US embassy in Tehran. The ICJ commented the acknowledgement in the following terms:

> The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.[220]

Although in the case at hand the responsibility of Iran had already been ascertained on the basis of its failure to protect the embassy or to put an end to the seizure, the cited passage clearly illustrates the distinction between the attribution of acts of agents of the state, relative to the second phase of the seizure, and the attribution for acknowledgment, relative to the prior acts of the militants retroactively adopted by the state.

The ECtHR recently decided on a case that offered many elements of interest for the clear understanding of the conditions required for attributing an act to a state on the sole basis pf acknowledgment. The case concerned the killing of an Armenian

[217] ARS Commentary, Art. 11, para. 8, p. 53.
[218] Ibid., Art. 11, para. 9, p. 54.
[219] Ibid., Art. 11, para. 4, pp. 52-53.
[220] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment*, ICJ Reports 1980, p. 3, para. 74, at p. 35.

soldier and the attempted killing of another by an Azerbaijani soldier that was attending their same NATO language-training programme and the following acts of endorsement of his actions by official organs of the Republic of Azerbaijan. The acts of endorsement on the part of Azerbaijan were summarised by the Court in the following terms:

> the State of Azerbaijan took measures in the form of pardoning R.S., releasing him immediately upon his arrival, awarding him eight years' salary arrears, providing him with a flat for his own use and promoting him within the military. Each of those measures certainly constituted, individually and cumulatively, the subsequent "approval" and "endorsement" of R.S.'s acts by various institutions and the highest officials of the State.[221]

Notwithstanding all these open acts of approval, the Court could not conclude in the sense of acknowledgment by Azerbaijan of the killing and attempted killing of the two Armenian soldiers:

> Having most thoroughly examined the nature and scope of the impugned measures within the overall context in which they were taken and in the light of international law, the Court is unable to conclusively find that such "clear and unequivocal" "acknowledgement" and "adoption" indeed took place.[222]

As explained by the Court, the described acts did not reach the 'high threshold for State responsibility for an act otherwise non-attributable to a State at the time of its commission'.[223] Indeed, due to the exceptional nature of the attribution according to this retroactive criterion, such threshold 'is not limited to the mere "approval" and "endorsement" of the act in question'; on the contrary, 'Article 11 of the Draft Articles explicitly and categorically requires the "acknowledgment" and "adoption" of that act' as cumulative and necessary conditions.[224]

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[221] *Makuchyan and Minasyan v Azerbaijan and Hungary*, Appl. No. 17247/13, ECHR 2020, para. 115.
[222] Ibid., para. 118, pp. 38-39.
[223] Ibid., para. 112, p. 36.
[224] Ibid.

IV. The general rules on attribution of conduct to international organisations

The lack of practice with respect to many of the situations of organisations' responsibility regulated in the ARIO 'moves the border between codification and progressive development in the direction of the latter'.[225] This was observed by many of the governments that sent their comments in response to the draft articles adopted in first reading. They underlined the limited practice on which the ARIO were based,[226] but generally welcomed the work of the ILC as a useful guide towards the development of new practice in the sense suggested by the articles.[227] In particular, different views were expressed with regard to the choice of taking the ARS as a starting point and following them insofar as the rules of state responsibility could have been successfully transposed to the responsibility of international organisations. The choice was finally supported by most governments on the grounds of the suitability of the general approach adopted in the ARS, the extensive research and discussion carried out by the ILC and 'the need to develop a single coherent body of rules on international responsibility'.[228]

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[225] ARIO Commentary, General commentary, para. 5, pp. 46-47.

[226] See e.g. Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), General comments, Mexico, para. 3, p. 108; ibid., General comments, Netherlands, para. 1, p. 109; ibid., General comments, Republic of Korea, para. 3, p. 110; ibid., General comments, Cuba, para. 1, p. 108, further observing that the ARIO established 'theoretical proposals for progressive development that will inevitably generate conflicts of interpretation'. Cf., on the part of international organisations, similar criticisms moved e.g. in Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), General comments, CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO, and WTO, para. 2, p. 137.

[227] See e.g. Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), General comments, Mexico, para. 2, p. 108; ibid., General comments, Netherlands, para. 2, p. 109; ibid., General comments, Cuba, para. 2, p. 108.

[228] Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), General comments, Netherlands, para. 4, p. 109; see also, e.g., ibid., General comments, Mexico, para. 3, p. 108; see, in a more critical sense, ibid., General comments, Portugal, para. 1, p. 110, stating that '[t]here is no doubt that the principles of State responsibility are in general applicable to the responsibility of international organizations', but also noting that '[n]evertheless, the draft articles continue to follow too closely those of State responsibility'; cf. the more reluctant positions expressed by many international organisations: Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), General comments, CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO, and WTO, para. 1, p. 137; ibid., General comments, ILO, para. 1, p. 138; ibid., General comments, IMF, para. 1, p. 139. Support for the ILC choice was instead expressed, e.g., by the Council of Europe: ibid., General comments, Council of Europe, para. 2, p. 137.

The articles on attribution, for their part, did not raise particular divergences, since the basic principles had already been quite established in the general practice[229] and even on the most debated point, that of the conduct of organs or agents seconded to an international organisation, the ILC choice of transposing the criterion of effective control encountered broad consensus.[230]

The process of application of the ARIO rules of attribution can be summarised in five logically consecutive phases. First, it is necessary to verify whether the conduct has been carried out by a person or entity qualified as organ of the organisation according to the rules of the organisation itself.[231] The definition of organ provided for in Article 2(c) of the ARIO refers exclusively to the rules of the organisation.[232] In the affirmative case, the conduct is always attributable to the organisation, even for *ultra vires* acts.[233] All situations in which the effective performance of the organisation's functions must be considered independently of the legal qualifications provided for in the organisation's internal legal system, the category of agent under Article 2(d) needs to be referred to.[234] In this case as well, the conduct is always attributable to the organisation, even for *ultra vires* acts. Second, it is necessary to verify whether one is confronted with organs of a state or organs or agents of another organisation

[229] See already Alain Pellet, 'Responsibility of international organizations', in 'Syllabuses on topics recommended for inclusion in the long-term programme of work of the Commission', Annex to the ILC Yearbook 2000, Vol. II (2), p. 136, who, sketching a 'Preliminary general scheme' of the work ahead on the responsibility of international organisations, mentioned as the main principles of attribution the three rules that later became Arts. 6, 7 and 8 of the ARIO, namely 'Attribution to an organization of the conduct of its organs; Attribution to an organization of the conduct of organs placed at its disposal by States or by international organizations; Attribution to an organization of acts committed ultra vires'. A seeming exception to the general acceptance of the basic rules on attribution is the comment of Mexico on 'the scarcity of practice regarding the attribution of conduct and responsibility of international organizations' (Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), General comments, Mexico, para. 3, p. 108). The comment, though, was just incidentally put forward by Mexico as an additional argument in favour of the role of guidance to be attributed to the ARS.

[230] Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), Art. 6, Austria, para. 1, p. 114; ibid., Art. 6, Mexico, para. 1, p. 114; see also the critical point made by Switzerland, ibid., Art. 6, Switzerland, para. 1, p. 114, according to which 'it would appear that one issue has not been addressed: the definition of "effective control"'.

[231] ARIO, Art. 6.

[232] Ibid., Art. 2(c): '"organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization'.

[233] Ibid., Art. 8.

[234] Ibid., Art. 2(d): '"agent of an international organization" means an official or other person or 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'.

that are fully seconded to the organisation according to its rules: their conduct is treated exactly as the conduct of the organs of the organisation according to Article 6.[235] Third, it must be verified whether the persons who have engaged in the relevant conduct are nevertheless acting on behalf of organs of the organisation, although no particular status of the persons emerges under the rules of the organisation. In this case, their conduct is attributed to the organisation within the scope of Article 6 as acts carried out by agents of the organisation.[236] Fourth, if organs of a state or organs or agents of another organisation are placed at the disposal of the organisation and are acting in part on behalf of the organisation, only the conduct under the effective control of the organisation is attributed to it.[237] In this case as well, the attribution is extended to *ultra vires* acts. Fifth, even if none of these situations occurs, conduct, no matter who carries it out, can still be attributed to the organisation if it subsequently adopts it as its own conduct.[238]

This analysis must be followed for every single conduct considered *prima facie* relevant to the assessment of an organisation's international responsibility.[239] If the relevant conduct is carried out by more than one natural person, the connection with the organisation must be verified for each individual person. Since, as expressly acknowledged both in the ARS and in the ARIO Commentaries,[240] one and the same conduct can be attributed to several international subjects, envisaging multiple attribution, the test must be repeated for each subject potentially involved. A wrongful conduct may result from several states acting on their own through independent relevant conduct, resulting in multiple conduct, from the conduct of a common organ, allowing for multiple attribution of the same conduct, or from conduct of organs of a state acting on behalf of another state.

[235] ARIO Commentary, Art. 7, para. 1, p. 56.
[236] Ibid., Art. 6, para. 11, p. 56.
[237] ARIO, Art. 7.
[238] Ibid., Art. 9.
[239] Cf. Stian Ø. Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State', *Oslo Law Review*, 6, 3, 2019, p. 183.
[240] ARS Commentary, Art. 6, para. 3, p. 44; ARIO Commentary, Part Two, Chapter II, para. 4, p. 54.

IV.1 Conduct of organs or agents of an international organisation

International organisations do not exercise functions that can be assimilated to the concept of governmental authority.[241] For this reason, the systematic approach of the ARS, based on the distinction between the conduct of state organs[242] and the conduct of persons that are not organs but are controlled by state organs,[243] has not been maintained in the ARIO. In accordance with the principle of specialty,[244] the international legal personality of international organisations, as well as their activities, does not cover all areas of public power, but only those matters that fall within the functions entrusted to them, exercised in the ways that states have established in the internal rules of these organisations. For these reasons, Article 6(1) of the ARIO is formulated in different terms than the corresponding provision in the ARS:

> The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.[245]

This provision, which apparently follows almost to the letter Article 4 of the ARS, in fact contains a difference rich in implications: not only the conduct of their organs but also that of their agents is attributed to international organisations. An organ is equivalent to the situation of a *de jure* state organ within the meaning of Article 4 of the ARS. An agent is equivalent to the situation of a *de facto* state organ within the meaning of Article 4 of the ARS, but it includes also situations comparable to the empowerment of non-organs with the exercise of governmental functions and to

[241] ILC Report on the Work of the Sixty-Third Session, UN Doc. A/66/10, 2011, p. 56.
[242] ARS, Arts. 4, 5 and 6.
[243] Ibid., Art. 8.
[244] See ARIO Commentary, General commentary, para. 7, p. 47: 'International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality")'. Cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, p. 66, para. 25, at p. 78: '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'.
[245] ARIO, Art. 6(1).

control over private persons or entities dealt with in Articles 5 and 8 of the ARS,[246] as well as situations of organs or agents placed at the complete disposal of the organisation without any residual control on the part of the sending state.[247]

The definition of organ provided for in Article 2(c) ARIO refers exclusively to the rules of the organisation: '"organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization'.[248] For situations in which the effective performance of the organisation's functions must be considered independently of the legal qualifications provided for in the organisation's internal legal system, the category of agent under Article 2(d) needs to be referred to.

The definition of agent is provided for in Article 2(d):

> "agent of an international organization" means an official or other person or 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.[249]

For the purposes of attributing conduct of an agent to the international organisation, 'the fact that the person in question had or did not have an official

[246] See ARIO Commentary, Art. 6, paras. 2, 10 and 11, pp. 55-56. This wide coverage of Art. 6 of the ARIO descends from a liberal interpretation of the notion of agent – defined by the ILC in ARIO, Art. 2(d), and further specified in the text – which was deemed necessary by the ILC as a corrective to the principle of speciality and the very differentiated institutional structures that follow therefrom. Such wide definition had been subject to various criticisms in the governments' comments to the draft articles adopted in first reading, which brought to a more precise definition in the final version of the articles and in the commentary. Cf. e.g. Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), Art. 1, Austria, para. 3, p. 111; ibid., Art. 1, Belgium, para. 1, p. 111.

[247] See ARIO Commentary, Art. 6, para. 6, p. 55; and cf. ibid., Art. 7, para. 1, p. 56.

[248] According to the ILC, although Art. 2(c) 'leaves it to the international organization concerned to define its own organs' (ARIO Commentary, Art. 2, para. 22, p. 52), this qualification is not conclusive as to the question of attribution, since the residual category of organisation's agent cover every other natural or legal person not qualified as organ and still acting on behalf of the organisation in carrying out its functions: 'The different scope that the term "organ" may have according to the rules of the organization concerned does not affect attribution of conduct to the organization, given the fact that also the conduct of agents is attributed to the organization according to article 6' (ibid., Art. 2, para. 21, p. 52). Examples of organs are the principal organs enumerated in Art. 7 of the UN Charter (the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat) and subsidiary organs established by the UN Security Council according to Art. 29 of the UN Charter (the latter include, among the others, commissions and investigative bodies, standing and *ad hoc* committees, peacekeeping operations, special political missions and international tribunals).

[249] ARIO, Art. 2(d).

status' is not relevant.[250] The ILC, in defining the notion of agent, refers expressly, in two different points of the ARIO Commentary, to a passage of the ICJ in *Reparation for Injuries*:

> [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.[251]

Article 6 therefore indicates not only the criterion of attribution of acts of the organs of the organisation, but also the criterion of attribution of acts committed by non-official agents 'under the instructions, or the direction or control' of the organs.[252] The notion of agent gave rise to some criticisms both from the part of governments[253] and international organisations.[254] The UN Secretariat provided the ILC with detailed information on the persons and entities through whom the UN may carry out its functions,[255] and invited the ILC to further specify the definition of agent.[256] As a

[250] ILC Report on the Work of the Sixty-Third Session, UN Doc. A/66/10, 2011, p. 55.
[251] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174, at p. 177; the passage is recalled in ARIO Commentary, Art. 2, para. 23, p. 52; and in ibid., Art. 6, para. 2, p. 55.
[252] ARIO Commentary, Art. 6, para. 11, p. 56.
[253] See e.g. Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), Art. 2, Belgium, para. 1, p. 111: 'Belgium notes that the definition of the term "agent" is imprecise and could lead to a proliferation of cases'.
[254] See e.g. Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 2, ILO, para. 2, p. 143: 'The understanding of "agent" proposed in the draft articles does not exist in the current practice of international organizations to ILO's knowledge'.
[255] Among the 'persons', the Secretariat included staff members, UN volunteers, special rapporteurs, members of human rights treaty bodies, members of commissions of inquiry, UN police, military liaison officers, military observers, individual contractors, etc.; among the 'entities', it included private companies with which the UN enters into commercial agreements to provide goods and services. Not all of these subjects' acts can be attributed, according to the Secretariat, to the organisation (Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 2, United Nations, para. 10, p. 145).
[256] See Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 2, United Nations, para. 12, p. 145: 'It is the view of the Secretariat that the broad definition adopted by the Commission could expose international organizations to unreasonable responsibility and should thus be revised. In the practice of the Organization, a necessary element in the determination of whether a person or entity is an "agent" of the Organization depends on whether such person or entity performs the functions of the Organization. However, while the performance of mandated functions is a

consequence of this discussion, the relevant articles include reference to the functions of the organisation and to the act of empowerment through which the organisation entrust a person or an entity with some of that functions.[257]

Article 6(2) states that '[t]he rules of the organization apply in the determination of the functions of its organs and agents'.[258] This means that the rules of the organisation certainly apply in the qualification of organs of the organisation and in the characterisation of acts of empowerment of agents as effectively carried out by organs of the organisation, but that 'in exceptional circumstances, function may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization'.[259] The reference, in Article 6(2), to the 'rules of the organization' is therefore not to be understood as exclusive: even outside these rules, an act is always attributable under Article 6 if the persons who acted were 'entrusted with functions of the organization, even if this was not pursuant to the rules of the organization'.[260]

Article 8 of the ARIO, which corresponds to the provision on *ultra vires* acts in Article 7 of the ARS,[261] reads as follows:

> The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.[262]

Article 8 is to be intended, like Article 7 of the ARS, as regarding every act put in place by organs and agents apparently carrying out their official functions.[263] The provision applies only in respect of the conduct of organs and agents of the organisation. It does not extend to the conduct of an organ of a state placed at the disposal of an international organisation.

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crucial element, it may not be conclusive and should be considered on a case-by-case basis'.

[257] Cf. the previous version of draft Art. 2(c), adopted in first reading: '"agent" includes officials and other persons or entities through whom the organization acts' (ILC Yearbook 2009, Vol. II(2), p. 19).

[258] ARIO, Art. 6(2).

[259] ARIO Commentary, Art. 6, para. 9, p. 56.

[260] Ibid., Art. 6, para. 11, p. 56.

[261] ARS, Art. 7.

[262] ARIO, Art. 8.

[263] ARIO Commentary, Art. 8, para. 4, p. 60.

IV.2 Conduct of organs of a state placed at the disposal of an international organisation

It may be that an international organisation borrows organs of the member states[264] in order to carry out operations within their sphere of competence. International organisations always have a staff that is incomparably smaller than that of states and often disproportionately small even for carrying out their limited functions. For their part, member states generally prefer to place part of their staff at the disposal of an organisation rather than allocating more resources to build up a larger permanent staff directly under the authority of the organisation.

Dealing with such cases, Article 7 of the ARIO reads as follows:

> The 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.[265]

Article 7 of the ARIO, which apparently follows Article 6 of the ARS on organs of a state placed at the disposal of another state, in fact assumes a different role, consistent with the different approach set forth in the general rule of Article 6 of the ARIO. Most of the cases that correspond to cases regulated in Article 6 of the ARS, in other words those of bodies 'fully seconded to the organization', fall within the scope of Article 6 of the ARIO.[266] Article 7 of the ARIO refers instead to organs that are not 'fully seconded' in the terms of the ILC Commentary.

However, the question arises with respect to the last part of Article 7 of the ARIO, of determining in each specific case whether an organ of a state which serves within an organ of an international organisation, for example in a classic peacekeeping operation, thereby becomes an organ or an agent of the organisation, with the result that whether its conduct is attributed to the organization depends on Article 6 of the

[264] Art. 7 makes also reference to the possibility of organs or agents of an international organisation being placed at the disposal of another international organisation. This possibility is not further analysed in this thesis because it is not relevant to the question of the attribution of conduct between the EU and its member states in the context of EU external action.
[265] ARIO, Art. 7.
[266] ARIO Commentary, Art. 7, para. 1, p. 56.

ARIO[267] and effective control is irrelevant, or whether it is to be considered an organ of a state placed at the disposal of an international organisation in the sense of Article 7, in which case whether its conduct is attributable to the organisation depends on the organisation's effective control over the conduct.

In order not to deprive the Article 7 of its scope of application, the provision must be read as a special criterion or at least as a criterion not overlapping with that of Article 6. Otherwise, since an organ placed at the disposal of an organisation is usually integrated into its institutional structure, more often than not such organ would end up becoming part of organs of the organisation. Therefore their conduct would always be attributable to the organisation within the meaning of Article 6 and there would be no room to apply the standard of effective control. Possible solutions to this paradoxical outcome are either to treat the criterion in Article 7 as special in relation to that in Article 6, thus removing from the scope of Article 6 any conduct of seconded organs even if they have become an integral part of organs of the organisation; or – and this can in fact be read as a specification of the previous solution – to distinguish organs placed at the disposal of the organisation according to whether they are to be considered as 'fully seconded', thus as becoming organs or agents of the receiving organisation, or just organs of the state partially and temporarily placed at the disposal of the organisation, as indicated by the ILC in its commentary to the ARIO,[268] thus applying the criterion of effective control only in the latter case and instead assimilating fully seconded organs to the organs of the organisation.

State organs seconded to international organisations can carry out a wide range of activities, some in fixed structures of the organisation and others in specific and time-limited operations. Many of the operations in question are part of the external activities of international organisations and these are often the most sensitive operations. Such activities may include, for example, measures concerning immigration, such as relocation, rejection and detention, military and peacekeeping operations and anti-piracy missions. Of all these activities, the most risky and most likely to give rise to issues of international responsibility are military operations.

A special place in the debate over the attribution of acts of organs and agents of international organisations has been dedicated to peacekeeping operations. Classic

[267] Or ARIO, Art. 8 in case of *ultra vires* acts.
[268] ARIO Commentary, Art. 7, para. 1, p. 56.

UN peacekeeping missions constitute subsidiary organs of the organisation,[269] whereas operations merely authorised by the Security Council are not understandable in any way as UN organs.[270] The position of the UN, restated in its comments to the draft articles adopted in first reading, is that in classic UN peacekeeping missions 'forces placed at the disposal of the United Nations are "transformed" into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization … regardless of whether the control exercised over all aspects of the operation was, in fact, "effective"'.[271] This position is reflected, albeit not strictly for the purposes of international responsibility, in the model Memorandum of Understanding between the UN and troop-contributing states, according to which the UN is responsible 'for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation' forming part of the operation mandate'.[272] The position of the UN in this respect is therefore different from that adopted by the ILC, inasmuch as the first considers decisive the status of the operation as a subsidiary organ of the UN,[273] whereas the latter gives precedence to the factual control of each specific conduct.

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[269] See e.g. UN Security Council Resolution 2217, 28 April 2015, UN Doc. S/RES/2217, transforming the former African Union's operation MISCA into a UN peacekeeping operation labelled MINUSCA. The 1990 model SOFA for peacekeeping operations establishes that 'United Nations peacekeeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations' (UN Model Status-of-Forces Agreement, UN Doc. A/45/594, annex, para. 15).

[270] See e.g. Security Council Resolution 678, 29 November 1990, UN Doc. S/RES/678, authorising the member states 'to use all necessary means' to put an end to the invasion of Kuwait by Iraqi military forces.

[271] Comments and observations received from international organizations, A/CN.4/637, Yearbook of the ILC, 2011, Vol. II (1), Art. 6, United Nations, para. 3, p. 150.

[272] 'Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions', A/C.5/60/26, Chapter 9, Art. 9. of the Model Agreement deviates from Art. 6 ARIO insofar as it continues 'but 'if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims'. For its part, ARIO Commentary, Art. 7, para. 3, p. 57, notes that 'this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that this party may have towards the State or organization that is responsible under the general rules'.

[273] See also the opinion of the UN Legal Counsel, according to whom '[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization' (Memorandum of 3 February 2004 by the United Nations Legal Counsel to the

Two types of military operations under the aegis of the UN can be distinguished, namely peacekeeping operations comprising subsidiary organs of the UN and authorisations to use all necessary means addressed by the UN to a coalition of states or to another international organisation.

Peacekeeping operations were initially thought only as security and interposition forces in already pacified areas and it was believed that they should never intervene in open combat except in case of self-defence. After the war in Yugoslavia the need for a more flexible model of peacekeeping was affirmed since UN troops had witnessed atrocious crimes without being authorised to intervene because of their rules of engagement.[274]

Peacekeeping operations in the classic sense are generally placed under the authority of the Security Council, which delegates the Secretary-General, who in turn appoints a special representative and a military commander. Operations are conducted by the latter, but the troop commanders and the national authorities of each country retain disciplinary and criminal jurisdiction over the troops. This is why UN Guidelines speak of 'operational control' of the UN commander but exclude direct 'command' of troops, creating a grey area that leaves room for wide and divergent interpretations.[275] The UN asserts that it recognises its liability for any damage to third parties caused by international wrongdoings committed by the troops.[276] Nevertheless, this general recognition does not automatically constitute acknowledgement of conduct under Article 9 of the ARIO, because such acknowledgement must be verified for each individual circumstance.[277]

The UN undertakes to compensate injured third parties. However, there is no jurisdiction to enforce this right. In fact, the UN model status-of-forces agreement provided for the establishment of standing commissions for claims of individuals

Director of the Codification Division, ILC Yearbook 2004, Vol. II (1), UN Doc. A/CN.4/545, p. 28).

[274] See, on the new model of peacekeeping, *United Nations Peacekeeping Operations: Principles and Guidelines*, United Nations, 2008 (the so-called Capstone Doctrine).

[275] *United Nations Peacekeeping Operations: Principles and Guidelines*, United Nations, 2008, p. 68.

[276] Model Memorandum of Understanding between the United Nations and [participating state] contributing resources to [the United Nations peacekeeping operation], Annex to UN Doc. A/51/967, 1997, Art. 9.

[277] From the point of view of the international law of responsibility, the UN's acceptance to compensate could amount more modestly to the acceptance to refund the damage produced by the wrongdoing of others; or, a step further, to the acknowledgement of responsibility for conduct committed by others (under Chapter IV of the ARIO); or simply to provide the means of internal control without prejudice to any legal liability for the facts themselves.

harmed by UN troops;[278] however, these commissions have never been established and administrative means have been used so far.[279]

The second type of military operations is that of authorisation to use force under Chapter VII of the UN Charter. The Charter authorises the use of force in collective interventions under the authority of the Security Council.[280] The Security Council shall act on this matter by decision of at least nine members and without opposition from any permanent member.[281] The practice of open mandates, began with Resolution 678 of 1990 on Kuwait, continued with Resolution 1441 of 2002 and Resolution 1483 of 2003, legitimising US invasion of Iraq, and subsequently with Resolution 1511 of 2003, which only provided for a reporting obligation 'not less than every six months' by the occupants.[282] A similar mechanism was replicated with Resolution 1973 of 2011 on Libya.[283]

These controversial decisions by the Security Council, which did not entrust collective security operations to regional organisations, as established by Article 53(1) of the Charter, but to individual states and *ad hoc* coalitions, gave rise to a debate on its power to delegate the use of force.

In the context of peacekeeping operations that are only authorised by the UN, the terms of the legal authorisation to military intervention under the relevant Security Council resolutions are not always clear and they do not always find a clear correspondence in the concrete command and control structure of the operation. In such cases, if organs of a state are placed at the disposal of an organisation and act under its effective control, according to Article 7 of the ARIO their conduct is attributable to the organisation. The 'effective control' criterion of Article 7 of the ARIO echoes the standard used by the ICJ in *Nicaragua*[284] and referenced in the ARS Commentary as the basic frame for attributing to a state the conduct of persons controlled by it.[285] In these terms, the conduct of organs placed at the disposal of the

[278] Model status-of-forces agreement for peace-keeping operations, UN Doc. A/45/594, 1990, para. 51.
[279] See Nigel D. White, *The law of international organisations*, 3rd ed., Manchester University Press, 2017, p. 236.
[280] UN Charter, Art. 42.
[281] Ibid., Art. 27(3).
[282] UN Security Council Resolution 1511, 16 October 2003, UN Doc. S/RES/1511, para. 25.
[283] UN Security Council Resolution 1973, 17 March 2011, UN Doc. S/RES/1973.
[284] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, *ICJ Reports* 1986, p. 14, para. 115, at p. 64.
[285] ARS Commentary, Art. 8, para. 4, pp. 47-48.

organisation would seem to be similar to the 'conduct directed or controlled by a State' under Article 8 of the ARS inasmuch as effective control over their action must be proven in order for their conduct to be attributed to the entity exercising control. Under Article 7 of the ARIO the basis of attribution is 'the factual control of the specific conduct'.[286]

In the literature, the distinction between authorisation, well delimited and defined, and delegation, open to the choice of discretionary means, has been debated. According to a scholarly position, in the case of military operations there must always be delegation because the choices in the field are always too complicated.[287] In this case, however, the UN should retain at least the ultimate authority and control in order to be responsible for the operations. This idea was taken up literally by the ECtHR in *Behrami and Saramati*.[288] Later on, however, the approach of the House of Lords in *Al-Jedda* and *Al-Skeini*, concerning Iraqis killed in detention centres run by the British occupation forces, did not take into account the fact that the ultimate authority and control mentioned by the ECtHR in *Behrami and Saramati* was intended not only as legal, but also as factual.[289]

A few months after *Genocide*'s decision, the ECtHR in *Behrami and Saramati* seemed to reopen the issue of the standard of control required for the attribution of conduct carried out by non-organs with regard to international organisations. The ECtHR stated that the criterion of attribution in the case of conduct carried out by military contingents under the aegis of an international organisation is 'overall authority and control'. It would be sufficient that operations were conducted within limits defined by the mandate issued by the international organisation, in this case the directives of the UN Security Council, so that all the activities of the troops were

[286] ARIO Commentary, Art. 7, para. 4, p. 57.
[287] Dan Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of Its Chapter VII Powers*, Clarendon Press, 1999, p. 15.
[288] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility*, Appl. Nos. 71412/01 and 78166/01, ECHR 2007, para. 133.
[289] The House of Lords argued that the facts were to be attributed to the UN because the British troops were acting under the auspices of the UN; but the ECtHR (*Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07, ECHR 2011, para. 149; *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08, ECHR 2011, para. 84) rightly pointed out that the UN had no factual control, unlike in *Behrami and Saramati*, where KFOR was acting within the narrow lines drawn by UN Security Council Resolution 1244, 10 June 1999, UN Doc. S/RES/1244.

attributed exclusively to it.[290] The surprising terms of such attribution model can perhaps be explained by the chronological proximity to *Genocide*'s decision and by the failure to embrace what would later prove to be the most authoritative version of attribution.[291] In fact, in its subsequent decision on *Al-Jedda*, a case concerning detention measures issued by British troops in the context of the multi-national military mission authorised by UN Security Council Resolution 1511, the ECtHR appeared to have partially changed its opinion. The Court stated that UN authorisation and the imposition of reporting obligations did not amount to the effective control of conduct where the UN did not assume any degree of factual control over the operations.[292] International case law and domestic rulings now seem to be firmly aligned on this position.

The Dutch Supreme Court in its latest decision on the Srebrenica massacre has ruled, in this respect, that the two sets of articles of the ILC, namely the ARS and the ARIO, are the first sources to be considered in terms of attribution of conduct.[293] The criteria for attribution contained in the two sets of articles must be kept separate and the application of one does not exclude the application of the other in the same case. For what concerns the conduct of Dutch troops during the siege and the taking of Srebrenica, since the defendant is the Netherlands, only the text of the ARS must be considered. The Court incidentally affirmed the important principle that the various attribution criteria are complementary and not alternative. Later on, however, the Court stated that since the Court of Appeal found that the Dutch contingent employed in Srebrenica (Dutchbat) was a UN organ, a statement that was never questioned by the parties, then it must be assumed that it cannot be a Dutch organ and therefore there can be no attribution of its acts under Article 4 of the ARS. It could be possible,

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[290] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility*, Appl. Nos. 71412/01 and 78166/01, ECHR 2007, para. 134.

[291] See e.g. the criticisms of the doctrine in Nigel D. White, *The law of international organisations*, 3rd ed., Manchester University Press, 2017, p. 241; and in Christian Tomuschat, 'Attribution of International Responsibility. Direction and Control', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013, p. 28, according to whom the overall control test was the result of an imprecise and hasty interpretation of the differentiated approach proposed by Sarooshi with regard to authorization and delegation of the use of force by the Security Council (Dan Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers*, Clarendon Press, 1999).

[292] *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08, ECHR 2011, para. 80.

[293] *Mothers of Srebrenica*, Application 17/04567, Supreme Court of the Netherlands, Civil Law Division, 19 July 2019, para. 3.2.

though, that Dutchbat, although being an organ of the UN, were still to be considered also an organ of the Netherlands as well. This hypothesis has not been taken into consideration by the Court, but it does not seem that it can be excluded *a priori*. Here, then, is one of the questions that remain unresolved with regard to the attribution of conduct between an organisation and its member states.

The Dutch Court presented an orthodox application of the criterion of 'effective control', reasoning that the conduct of military staff within UN missions is attributable to the state if the state retains control over the operation in the context of which the conduct took place and if the specific conduct is an integral part of that operation. On the other hand, there is no attribution in case of an incidental conduct out of control of the state. The Court excluded 'that effective control can also ensue from a general, all-inclusive instruction from the State that concerns all aspects of the (later) conduct of the organ' and excluded 'that effective control can also be evident from the circumstance that the State was in such a position that it had the power to prevent the specific act or acts'.[294] Indeed, having the power to prevent conduct is one thing, from which responsibility for omission may arise in the presence of an obligation of prevention. Carrying out conduct is quite another.

As has been seen, however, a number of issues remain open, first and foremost, as the case of Srebrenica has shown, the lack of protection for conduct controlled by international organisations. With respect to such case, the ECtHR has refused to rule on the conduct that the Dutch courts had dismissed as having been carried out by Dutchbat in its position as a UN organ and allegedly outside the control of the Dutch government.[295]

In recent years, also the Belgian courts had the occasion to pronounce themselves on circumstances very similar to the ones examined by the Dutch courts in *Mothers of Srebrenica*. The case concerned the behaviour of Belgian troops employed in the United Nations Assistance Mission for Rwanda (UNAMIR). The Belgian troops in question, regularly placed under the command of UNAMIR structures, had placed their encampment at the *Ecole Technique Officielle* in Kigali. With the deterioration of the situation on the field, the Belgian encampment was turned into a *de facto* refugee camp, since about 2,000 persons sought refuge in the

[294] Ibid., paras. 3.5.2 and 3.5.3.
[295] *Stitching Mothers of Srebrenica and Others v. the Netherlands, Admissibility*, Appl. No. 65542/12, ECHR 2013, paras. 154 and 168.

facility. This new situation was consistent with the general worsening of the conflict in the region, which had prompted the Security Council to expand the mission mandate as to 'contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas'.[296] On 11 April 1994, in view of the approaching of the Interahamwe militias and of their aggressive attitude towards both civilian population and the UN officials, the Belgian unit precipitously evacuated the school, with the support of French and Belgian troops sent on mission precisely for that purpose and outside of UNAMIR framework, without taking any measures for the protection of the refugees. Most of the 2,000 persons were killed by the militias immediately afterwards.[297] Some of the survivors and victims' relatives brought a case against Belgium and the involved Belgian commanders before the Belgian courts.

The judgment of the Court of First Instance of Brussels was cited in the ARIO Commentary as an example of application of the standard of effective control over conduct as determinative for the seemingly-exclusive attribution to the troop-contributing state.[298] The Court found that no orders nor any sort of exchange had taken place between the Belgian commander of the unit and the UN chain of command; whereas the chiefs of staff of the Belgian army were regularly consulted during the developing of the described events. As a consequence, any potential wrongful conduct occurred in the circumstances had to be attributed to the Belgian state, and not to the UN.[299] The Court did not make reference to the then draft ARIO, but the decision on attribution to the Belgian state can be considered an application

[296] UN Security Council Resolution 918, 17 May 1994, UN Doc. S/RES/918.

[297] *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, RG No. 04/4807/A and 07/15547/A, Court of First Instance of Brussels, 8 December 2010, para. 16, published in *Oxford Reports on International Law in Domestic Courts*, Case No. 1604 (BE 2010), available at oxfordlawreports.com.

[298] ARIO Commentary, Art. 7, para. 8, p. 58.

[299] *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, RG No. 04/4807/A and 07/15547/A, Court of First Instance of Brussels, 8 December 2010, para. 38. The relevant passage of the judgment reads as follows: 'il paraît suffisamment significatif au tribunal qu'à aucun moment, dans la décision concrète d'évacuer l'[*Ecole Technique Officielle*], qui était particulièrement lourde de conséquences, il n'a été question de la moindre concertation entre le colonel Marchal [commander of the Kigali sector for UNAMIR] et le général Dallaire [commander of the Belgian unit stationed at the *Ecole Technique Officielle*], alors qu'il ressort par contre des éléments produits que la concertation était permanente entre ce dernier et l'état-major de l'armée belge, qui n'hésitait pas par ailleurs à passer outre l'avis de la MINUAR. Il y a lieu de considérer dès lors que la décision d'évacuer l'[*Ecole Technique Officielle*] est une décision prise sous l'égide de la Belgique et non de la MINUAR'.

of the rule now stated in Article 7 of the ARIO, which in the absence of effective control on the part of the international organisation excludes the attribution of their acts to such organisation. The remaining applicable criterion for the attribution of the Belgian troops' acts was therefore that established in Article 4 of the ARS, those troops being to all intents Belgian organs.

The decision was reversed on appeal. The Brussels Court of Appeal found that the Belgian commanders who had authorised the evacuation of the camp had done so as members of UNAMIR's chain of command and that the Belgian state had not interfered in the withdrawal operations ordered by UNAMIR, neither assuming exclusive control of its troops nor joint control, and that it was only after leaving the School that the Belgian unit gathered with the Belgian and French national missions that were carrying out the repatriations.[300] On this occasion, the Court explicitly cited both the ARS and the ARIO as applicable international law in order to establish whether the conduct under consideration was attributable to the Belgian state.[301] However, throughout the decision the Court no longer referred to specific articles; therefore, it is not entirely clear what criteria it considered applicable in the present case. The explicit exclusion of exclusive or joint control by the Belgian state[302] over the unit involved in the facts seems to be functional both to the exclusion of the application of the criterion of attribution set out in Article 8 of the ARS, also mentioned in the first part of the judgment, and as evidence of the continuation of control by UNAMIR and therefore of the applicability of the criterion of attribution set out in Article 7 of the ARS. However, the Court never refers to an act of secondment; on the contrary, it explicitly refers to Belgian troops as members of UNAMIR and therefore to all intents and purposes belonging to a UN organ.[303] The criterion of attribution thus applied would be that of Article 6 of the ARIO, in accordance with the already recalled Secretariat position that troops of peacekeeping operations under the aegis of the UN should always and plainly be treated as UN organs. If this was indeed the reasoning implicitly followed by the Court, evidence of lack of control by the Belgian state would only be useful to exclude an additional and concurrent

[300] *Mukeshimana-Ngulinzira and Others v. Belgium and Others, Appellate Judgment*, 2011/AR/292, 2011/AR/294, Brussels Court of Appeal, 8 June 2018, paras. 65-66, available at https://www.justice-en-ligne.be/IMG/pdf/bruxelles–2018-06-08–eto.pdf.
[301] Ibid., paras. 42-43.
[302] Ibid., para. 65.
[303] Ibid., para. 66. The Court refers to the involved Belgian military commanders as acting 'en leur qualité de membres de la MINUAR'.

attribution to the Belgian state under Article 8 of the ARS, whose applicability would not have the effect of excluding the attribution of the relevant conduct to the UN. The Court's reasoning, however, does not seem to be heading in this direction. Rather, it seems that the Court deems to apply the criterion of attribution of seconded organs to the organisation under Article 7 of the ARS and therefore, in order to exclude control by the state and thus to confirm the continuation of UN control, it invokes the ultimate control standard referred to in the already commented decision of the ECtHR in *Behrami and Saramati*.[304] In support of this decision the Court cites extensive passages from the Court of Appeal of The Hague decision on *Mothers of Srebrenica*,[305] which had established the attribution of the relevant conduct of Dutch troops to the UN and had excluded in principle the possibility of multiple attribution, and therefore of attribution to the Dutch state, at least up to the moment of a reversed act of transfer of the troops to the Dutch state.[306] As has been seen, this decision was then overturned by the subsequent decision of the Supreme Court of the Netherlands, in particular with respect to the exclusion of the possibility of multiple attribution.[307] In the present case, however, it does not result that the relatives of the victims have again lodged further claims against the decision.

In the past, some German courts too have denied their jurisdiction on the basis of a loose criterion of organisation's ultimate authority and control. In the case of an airstrike nearby the Afghani city of Kunduz ordered by the German armed forces employed in the International Security Assistance Force for Afghanistan (ISAF) and cost the lives of tens of civilians, the Administrative Court of Cologne considered that this criterion should also apply with respect to operations only authorised by the UN.[308] The Court affirmed that it did not have the jurisdiction to review the relevant acts of the German armed forces since they had not been carried out in the exercise

[304] Ibid., para. 65. Without explicitly recalling the ECtHR decision, the Court quotes its well-known expression in the following terms: 'Il est ainsi établi que la MINUAR a gardé "le contrôle ultime" sur KIBAT [Belgian UNAMIR battalion]'.
[305] Ibid., para. 44.
[306] *Mothers of Srebrenica*, Cases No. 200.158.313/01 and 200.160.317/01, Court of Appeal of The Hague, 27 June 2017, para. 27.2.
[307] *Mothers of Srebrenica*, Case No. 17/04567, Supreme Court of the Netherlands, Civil Law Division, 19 July 2019, para. 5.1.
[308] The ISAF operated in Afghanistan on the basis of UN Security Council Resolution 1386, 20 December 2001, UN Doc. S/RES/1386, which merely authorised 'the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate'.

of the German sovereignty, but under the control of ISAF and therefore under the authority of the UN which authorised such mission.[309]

After several parallel proceedings finally dismissed by the Higher Regional Court of Düsseldorf that considered the claims inadmissible on the basis of lawfulness of the German armed forces under international law and an order of inadmissibility of the Federal Constitutional Law,[310] the *Kunduz* case was finally brought before the ECtHR. The applicant, the father of two victims of the airstrike, based his claim before the ECtHR on the premise that the relevant conduct was attributable to Germany and that his sons were therefore under German jurisdiction when they were killed. On 26 February 2020, the Court held a Grand Chamber hearing.[311] It could have reasonably be expected that the judgment would have addressed the issue of the attribution of conduct carried out by peacekeeping forces acting within the framework of a UN resolution delegating the use of force to member states. In the Grand Chamber public hearing the parties have expressed themselves in opposite terms on this point. Germany's legal representative stated, making explicit and extensive reference to the decision of the ECtHR in *Behrami and Saramati*, that the relevant acts 'are not attributable to Germany because the airstrike was carried out on behalf of the United Nations' and that the Court should, as a consequence, decline its jurisdiction *ratione personae*. On his part, the applicant's representative noted that, according to Article 7 of the ARIO, 'for the conduct of an organ of a state put at the disposal of the UN to be attributable to that organization, the organization must exercise effective control over the conduct' and observed that, in the case at hand, 'at no point was the UN involved in the exercise of effective control over the conduct'. He further specified, recalling the exact terms of Article 7 of the ARIO, that 'in determining whether acts of state forces are to be attributed to an international organization, what is decisive is the amount of control exercised over the particular conduct at issue'. Finally, he pointed out that in the light of the largely established

[309] *Anonymous v. German Federal Government, First instance judgment*, Case No. 26 K 5534/10, Administrative Court of Cologne, 9 February 2012, paras. 70-72; the full text has been published (in German) and commented in the Oxford Reports on International Law, ILDC 1858 (DE 2012).
[310] German Federal Constitutional Court, Order of 19 May 2015, 2 BvR 987/11; see Press Release No. 45/2015, 19 June 2015, published on the website of the Court at bundesverfassungsgericht.de.
[311] See the ECtHR Press Release No. 075 (2020), 26 February 2020.

possibility of multiple attribution, 'the conduct will not cease to be attributable to Germany even if it was hypothetically also concurrently attributable to the UN'.[312]

In its judgment, though, the Court adopted a self-restraining approach on the scope of its assessment of jurisdiction, noting that 'the applicant did not complain about the substantive act which gave rise to the duty to investigate'. Therefore, the Court's reasoning goes, the Court itself 'does not have to examine whether, for the purposes of Article 1 of the Convention, there is also a jurisdictional link in relation to any substantive obligation under Article 2. It emphasises, however, that it does not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act falls within the jurisdiction of the Contracting State or that the said act is attributable to that State'.[313] The Court did not address directly the issue of attribution and the relative standard of control, but it limited its appraisal to the following investigation, affirming that Germany was obliged both under customary international humanitarian law and under the ISAF status-of-forces agreement to investigate the airstrike executed by its troops, as it did.[314]

It could be argued that the ILC had not sufficiently distinguished the reach of normative criteria from that of factual criteria.[315] This would have been necessary precisely in light of the institutional structure of organisations, all of which carry out their activities primarily via their legal relationship with the official bodies of member states. Article 6 of the ARIO does exactly the opposite, bringing together official and *de facto* agents, whose actions were regulated separately in the ARS. Those scholars think that the attribution of conduct to member states can be based on the factual and narrow criterion of 'effective control', whereas the attribution to the organisation should be based on the looser criterion of 'ultimate authority and control', not intended as simple legal authority, but as the presence of a tight network of control and cooperation with its head in the organisation. Since organisations normally act through means, such as troops, provided by member states, a looser criterion is needed for some sort of responsibility of the organisation to exist at all. As

[312] A full recording of the Grand Chamber public hearing of 26 February 2020 on the case *Hanan v. Germany*, Appl. No. 4871/16, is available at the Hearings session of the Court's website: echr.coe.int.
[313] *Hanan v. Germany*, ECtHR, Appl. No. 4871/16, ECHR 2021, para. 143.
[314] Ibid., paras. 137-138.
[315] Christian Tomuschat, 'Attribution of International Responsibility. Direction and Control', in Malcom D. Evans and Panos Koutrakos (ed.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013.

a matter of fact, in virtually no situation do organisations retain full effective control of conduct.

Another proposal imagined an even looser rule for the attribution of conduct. In the case of organised paramilitary groups systematically supported by a state for example, 'the nature of the state's assistance and the characters of the group lead us to assume that any activity of the group is undertaken under the authority of the state'.[316] It would make no sense for an organised group acting on foreign territory on behalf of a state to try to defend itself against allegations by claiming the responsibility of the state that supports it, either because the group would be completely delegitimised in the country where it is acting, or because it would become useless, for the supporting state, to employ an unofficial group of fighters. Therefore, the argument goes, there is not the same risk of abuse that exists for unorganised groups, risk that justifies being subjected to the more stringent 'effective control' test. For organised terrorist groups, for example, effective control would often be impossible to prove because of the difficulty of gathering evidence on groups which typically act through autonomous and very narrow operative units. The necessity of a less stringent test would be confirmed also by national regulations allowing the incrimination of individuals for their mere membership and the sanctioning of states suspected of financial support of such groups. For peacekeeping operations, instead, the difficulty of attribution would derive from an intricate legal framework and from the consequent shifting of responsibility made possible by the double hatting of the operations: the national commanders of the single contingents on the one hand and organisation's general command on the other. According to this position, the state or the organisation should be made accountable to whoever exercises 'global control'.[317]

The internal factor within the rules of the ILC that makes it particularly difficult to ascertain the responsibility of the organisations is the vagueness of the standard of effective control referred to in Article 7 of the ARIO, which establishes the attribution of the acts of the bodies provided by the states. Article 7 of the ARIO is the result of the combination of certain elements of two separate provisions of the ARS, Article 6 on the attribution of the conduct of seconded organs and Article 8 on the attribution of

[316] Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *The European Journal of International Law*, 18, 4, 2007, p. 661.
[317] Ibid., p. 667.

the conduct effectively controlled by a state. In fact, although the criteria for the attribution of these two Articles are added together in Article 7 of the ARIO, which requires secondment and effective control, the situations falling under Article 7 are not overlapping either of these two hypotheses. In fact, both in the case of full secondment and in the case of factual control of private agents, the conduct is attributed to organisations within the meaning of Article 6 of the ARIO. This is due to the fact that in practice the link between the staff of a state seconded to an organisation and the organisation itself is a new and different phenomenon not exactly comparable to the secondment of staff from one state to another.

The rule expressed in Article 7 of the ARIO does not differ from the rule in Article 6 by the nature of the link between the persons who have carried out the conduct and the organisation, which some describe as a factual link instead of an institutional one.[318] The link referred to in Article 7 is always an institutional link, meaning a link between the person acting and the official organs of the organisation, only that this link is indirect. The link is indirect in the sense that the person does not play a stable role in the organisation's apparatus but is temporarily integrated into it, albeit in an official manner, by virtue of belonging to another organisation's apparatus. The person is therefore institutionally linked to the receiving entity through the mediation of direct organs of the entity, making themselves available to them and acting under their direction. Effective control is therefore not the passage that establishes the specific link between the person and the receiving entity: this link is established by the transfer of authority, whatever specific form it takes, therefore it is always an institutional act. Effective control is rather an additional condition to the institutional link that must be verified in order to attribute the conduct to the receiving organisation. This additional condition is required precisely because of the mediated nature of the institutional link and is intended to ensure that particular factual circumstances have not made the transfer of authority and the institutional link established by it a purely nominal issue. If effective control were not required, the conduct of agents seconded to an international organisation which is beyond its control would still be attributed to it as part of its institutional framework as a result of its temporary authority over seconded agents. The lack of effective control, on the

[318] This is e.g. the interpretation of Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 73.

other hand, breaks that link. But the analysis of factual situations, even if formulated in the positive terms of the existence of effective control, is actually aimed at verifying a negative circumstance, namely that the agents seconded to the organisation have not escaped its control. The concept of secondment, in fact, would imply the real transfer of authority and therefore the subsistence of control by the receiving entity. However, the double link of institutional dependence, towards the receiving entity but also towards the sending entity, with respect to which the agent has not become extraneous due to the fact of secondment, means that in practice the risks of the agent escaping the control of the receiving entity are much higher than in a normal agency situation.

If, for a moment, all the questions of factual verification that exist in these situations could be eliminated, the ideal solution would probably be to exclude the attribution to the receiving entity only for that conduct that the seconded agent has put in place because of his loyalty to the sending entity; in fact, all his other conduct should be attributed to the receiving entity as *ultra vires* conduct. However, since it can be supposed that double loyalty is the most common reason why a seconded agent might act outside of the tasks assigned to him by the hosting institution, in order to avoid imposing an excessive burden of responsibility on the host institution, it seems reasonable to exclude the attribution to the host institution simply on the basis of the absence of effective control. An alternative solution could have been to assume the existence of effective control of the seconded agent subject to evidence to the contrary by the complainant, for example by inserting a specific safeguard clause in Article 7 or Article 8, since, as mentioned above, conduct outside the control of the organisation could always be understood as *ultra vires* conduct. The solution given by the ILC seems largely justified given the weak links between seconded agents and the host organisation, which are often outweighed by loyalty and obedience to the home state. However, it is important to stress that the link at the origin of the attribution referred to in Article 7 is not a factual link, but an institutional link. The requirement of factual control is an additional requirement that must be verified in addition to that of the existence of the institutional link. This observation is important from a conceptual and systemic point of view because it indicates that at the origin of the difficulty of ascertaining the attribution under Article 7 is not a too stringent factual requirement, but the weakness of the institutional link established by secondment acts.

During the preparatory works of the ARIO, the criterion of effective control was severely criticised by some international organisations that responded to the ILC's invitation to provide their comments. Some of them considered that the criterion did not deserve to be included in a general provision referring to secondment because all the practice where its application could be found concerned peacekeeping operations, while other secondment models should have been treated differently.[319] The UN Secretariat, on the other hand, which was the main organisation directly concerned by this criterion, considered the draft disposition to be entirely different from what it considered to be the established practice of its peacekeeping operations. In particular, the Secretariat argued that for peacekeeping operations under direct UN command, any conduct should be attributed to the UN, without prejudice to the UN's right to request the refunding of any reparations to contributing states in the event that violations arise from gross negligence or wilful misconduct of their personnel; for operations simply authorised by the UN, conduct should always be attributed to the states conducting the operations; while for joint operations, conduct should be attributed according to effective command and control, thereby to the member states that command the troops.[320] Therefore, the criterion of effective control of Article 7 according to the UN excessively restricts the cases in which conduct can be attributed to the organisation, improperly imposing a case-by-case control on the course of events and on the effective functioning of the lack of command of the operation.[321] The EU, the other major organisation that in addition to the UN and NATO now has the operational capability to engage, or have its member states engaged, in peacekeeping operations, has also rejected the criterion of effective control as excessively restrictive. The EU has noted that this criterion seems to reflect the mistaken belief that the remedies provided by international organisations are not sufficient to ensure compliance with international law in the course of their operations or to sanction non-compliance.[322]

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[319] See Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 6, European Commission, para. 2, p. 149; and ibid., Art. 6, ILO, p. 150.

[320] Ibid., Art. 6, United Nations, paras. 2-5, pp. 150-151; cf. Blanca Montejo, 'The Notion of "Effective Control" under the Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed.), *Responsibilitiy of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013, p. 396.

[321] UN Doc. A/CN.4/545, p. 18.

[322] Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 6, European Commission, para. 3, pp. 149-150.

Both the UN and the EU's position, however, fails to appreciate the fundamental difference between the provision of jurisdictional remedies and the need for a general rule of attribution applicable in particular circumstances of secondment. This difference is even more relevant in situations, such as those referred to by the UN and the EU, where jurisdictional and administrative remedies are governed by, and established within, the international organisation's internal law. While these remedies may work in practice, their existence does not seem to be a reason to ignore the issue of the attribution of the conduct of agents seconded from the member states in a text of articles on the responsibility of organisations.

The UN's argument is also inconsistent as it divides the question of attribution into two levels, claiming that it is itself the owner of all conduct but that it has the right to claim the refunding for cases of negligence and wilful misconduct. It is unclear, though, how else the acts of organs seconded to the international organisation that acted outside the command framework established by the organisation could be qualified if not as cases of negligence or wilful misconduct. The effect of the arrangement described and applied by the UN is therefore, in substance, very similar to that which would be obtained through the application of the rule enshrined in Article 7, but instead of being established as a general rule it would be applied at the discretion of the internal organs of the UN. This arrangement may have good political reasons and may well be agreed upon among UN members. But to oppose the formulation of a general rule on the basis that the UN regulates this matter internally is an attitude which risks compromising the accountability of all other organisations and the possibility for third parties who are injured by their activities to question their responsibility on the basis of clear conditions. In particular, with regard to third states that may be injured, asking them to rely on the internal remedies provided by other states within the organisations of which they are members seems contrary to the general principle of reciprocity.

In contrast to the position of the UN and the EU, the positions of states throughout the process of the drafting of the ARIO was more conciliatory. Very few states had serious objections to the rule.[323] As such, the rule was maintained in the text of the ARIO of which the General Assembly eventually took note.

[323] See e.g. Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), Art. 6, Austria, para. 1, p. 114, suggesting that the ILC include 'the

It is by no means certain that the solutions to these doubts should necessarily be sought in the direction of a more extensive consideration of the cases of attribution to organisations and in particular the EU. It is always necessary to keep in mind that international organisations are created with the aim of exerting specific functions and that the characteristics of their international legal personality is not the same as that of states.[324] On the basis of these observations, one may wonder whether the extension of the scenarios falling within the scope of international organisations' responsibility would strengthen the accountability of public authorities in general before violations to the rights of individuals. The answer is not self-evident, especially if one thinks that the states are still considered to an extent the masters of international organisations and the general and original subjects on which international law is based upon and those that most international dispute resolution mechanisms address.

According to another position in the literature, the distinction between the fully seconded organs referred to in Article 6 of the ARIO and the not fully seconded organs referred to in Article 7 of the ARIO is completely artificial.[325] In particular, contingents seconded to organisations, according to this dichotomy, would always be not fully seconded, because states would always retain full command over them. Therefore, since there are no fully seconded organs in peacekeeping operations, it is necessary to lower the standard by which they consider themselves fully seconded and to allow the application, in certain cases, of Article 6. However, it should be noted that the fact that there are no fully seconded organs in peacekeeping does not deprive Article 6 of its scope of application and therefore does not deprive it of logical and legal sense. It simply means that Article 6 does not apply to peacekeeping as it exists so far but to other cases.

Along the same lines, the distinction between fully and not fully seconded organs is too fine-grained and intrusive with respect to the rules of organisations. It should be left to the free choice of those organisations to determine who the organs of the

exercise of functions of the organization' as an additional condition for attributing the acts of seconded organs to the organisation.

[324] See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, p. 66, para. 25: 'international organizations are subjects of international law which do not, unlike States, possess a general competence'.

[325] Aurel Sari and Ramses A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press, 2013, p. 132.

organisation are. The ILC, though, had to balance the interest of self-regulating organisations with the interest of third parties in not seeing international responsibility for international wrongful acts too dispersed. It should also be noted that the rules of the organisation, as well as those of states, cannot have the last word on the question of attribution, but can be contradicted by factual situations in which power is exercised in a manner that differs from the rules themselves. The less problematic character of secondment in the ARS, as opposed to the ARIO, is due to the fact that secondment is a rare practice between states, usually resorted to only when the seconding state have a direct and clear interest in entrusting the control of an organ to the other state. In any case, also for states, it is a factual situation that can be reversed, when examining the facts, with respect to formal agreements. For international organisations, on the other hand, secondment is a much more pervasive practice and therefore it seems correct to distinguish among different ways of using it, in particular to prevent states from shifting responsibility for the acts of their troops, which in secondment between states could happen much less easily. According to the positions under consideration, however, the transfer of authority of troops seconded to the UN by member states would give rise to a presumption of attribution of their acts to the UN.[326] But this seems to be more of a UN position of principle than an accepted rule of customary law. The UN, on its part, has all the interest in supporting such an arrangement, because the conduct attributed to the UN cannot be adjudicated except through internal administrative mechanisms of the UN itself.[327]

IV.3 Conduct acknowledged and adopted by an international organisation as its own

Article 9 of the ARIO reads as follows:

> Conduct 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

[326] Ibid., p. 133.
[327] Cf. the 'Local Claims Review Boards' established by the UN in its peacekeeping operations.

and to the extent that the organization acknowledges and adopts the conduct in question as its own.[328]

The provision is identical, *mutatis mutandis*, to Article 11 of the ARS. However, although there appear to be no reason not to extend to organisations the attribution criterion set out in Article 11 of the ARS with regard to states,[329] in the case of organisations the principle is substantiated by very scarce practice,[330] the only relevant example being the attitude of the European Commission in the context of the World Trade Organization (WTO) practice. The European Commission declared the European Community to be 'ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the [European Community] level or at the level of Member States'.[331] The WTO Panel in the *Local Area Network* case, although without making explicit reference to such statement, seemed implicitly to accept this approach.[332] As the ILC correctly noted, though, in similar cases 'it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility'.[333] Indeed, the terms used by the European Community in the quoted claim seem to point more in the direction of the latter. As for the standard of proof required in order to demonstrate that the conduct is actually adopted by the organisation as its own,

[328] ARIO, Art. 9.
[329] Cf. ARIO Commentary, Art. 9, para. 5, p. 62.
[330] Cf. the Secretariat comment in Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 8, United Nations, para. 2, p. 152, according to which '[t]he Secretariat is unaware of any case in which any United Nations organ has acknowledged or adopted conduct not otherwise attributable to it'.
[331] Oral pleading of the European Communities in the *European Communities – Customs Classification of Certain Computer Equipment (Local Area Network)*, WT/DS62/R, WT/DS67/R, WT/DS68/R, Panel Report of 5 February 1998, reported in ARIO Commentary, Art. 9, para. 3, p. 62. Cf. European Commission's comment in Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 8, European Commission, p. 152, which, although criticising the ILC for having made reference to such claim and pointing out that 'the EU declared that it was ready to assume the entire international responsibility for all measures in the area of tariff concessions because it was exclusively competent for the subject matter concerned', does not seem to clearly qualify its previous claim in either the sense of acknowledgement of conduct or of acknowledgment of responsibility.
[332] *European Communities – Customs Classification of Certain Computer Equipment (Local Area Network)*, WT/DS62/R, WT/DS67/R, WT/DS68/R, Panel Report of 5 February 1998, paras. 4.9-4.11 and 8.15.
[333] ARIO Commentary, Art. 9, para. 3, p. 62.

the condition of 'clear and unequivocal adoption' referred to in the ARS Commentary[334] must be considered to apply.

V. Multiple attribution

Multiple attribution, in addition to being a possibility generally referred to in practice, although never judicially enforced, mainly for reasons of jurisdiction, is explicitly acknowledged as a possibility in the ARIO Commentary.[335] A typology of multiple attribution based on the different types of links between the collective entity and the acting agents has also been proposed in the literature.[336] The classic case is that of the double formal link of common organs, which may act, in their official capacity, on behalf of more than one subject, either states,[337] organisations,[338] or a mix. Unless the organs act only on behalf of one of their principals, their unlawful conduct is attributable to all principals.[339] The second case is that of organs or officials formally connected with an organisation but whose acts are controlled by a state. In this case there will be attribution to the organisation under Articles 6 or 7 of the ARIO and attribution to the state under Article 8 of the ARS. More difficult is the reverse case, where the organs or agents of a state act on behalf of the organisation and under its control, but residual state control does not allow to exclude the attribution to the state of origin. This may occur, for example, in the course of a peacekeeping operation conducted by an international organisation in which the troops of a country participating in the mission receive concurring instructions from both the organisation and the home state.[340] The same type of situations concern the

[334] ARS Commentary, Art. 11, para. 8, p. 53.
[335] ARIO Commentary, Chapter II, para. 4, p. 54.
[336] Stian Ø. Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State', *Oslo Law Review*, 6, 3, 2019, p. 190.
[337] E.g. the UK and France for the Channel Tunnel Commission.
[338] E.g. the UN and the FAO for the World Food Programme.
[339] This is explicitly accounted for in ARIO Commentary, Chapter II, para. 4, p. 54: 'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. … One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ'.
[340] In these cases the ARIO Commentary, Art. 7, para. 4, p. 57, speaks of attribution 'either to the contributing State or organization or to the receiving organization' depending on the subject exercising the effective control of the troops. Therefore, some authors interpreted Art. 7 as incompatible with the possibility of double attribution (see, in this sense, Francesco

cases of double control by the organisation coordinating the mission and by a state other than the country of origin, to which the conduct will be attributed under Article 8 of the ARS.

V.1 Conduct of single organs or agents acting on behalf of more than one state or international organisation at the same time

Whenever the conduct of a person or group of persons can *prima facie* be linked to more than one international legal person, then the test of attribution could in principle be repeated for all the organisations involved according to the rules codified in the ARIO and, with the due differences, for all the member states involved according to the rules codified in the ARS. Different types of joint or cumulative attribution may arise.[341] Multiple attribution could be seen, at least from a practical point of view, to be the rule rather than the exception in situations where an organisation carries out activities in the international arena. This would be particularly true if state's military forces serving in a peacekeeping contingent were always to be considered as organs of the home state acting in that capacity, as an extensive application of Article 4 of the ARS would require, and the organisation were always understood as acting on their behalf for the sole fact of having authorised the peacekeeping mission, as an extensive application of Article 7 of the ARIO would

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Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014, p. 92, according to whom the ILC's choice not to automatically attribute seconded agents' conduct to the receiving organisation signals a preference for the attribution to states due to the larger financial means at their disposal in case compensation is required and due to the fact that states 'never completely transfer their organs to international organisations'). On the other hand, it does not seem appropriate to exclude the possibility of multiple attribution solely on the ground of such incidental enunciation in the Commentary. The text of Art. 7, in fact, refers to 'effective control' by the organisation, and not to 'exclusive control' (in this sense, see Paolo Palchetti, 'International Responsibility for Conduct of UN Peacekeeping Forces. The Question of Attribution', *Seqüência. Estudos Jurídicos e Políticos*, 36, 2015, p. 49). As already seen, Art. 7 of the ARIO largely differs from Art. 6 of the ARS in not relieving the agents' home state, because these agents are not 'fully seconded', otherwise being included in the notion of *de facto* agents under Art. 6 of the ARIO.

[341] See e.g. the two explanatory tabs in Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014, pp. 68-69; and Stian Ø. Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State', *Oslo Law Review*, 6, 3, 2019, p. 190.

require. In practice, both elements of the previous hypothesis are contentious, as already seen in Sections III and IV above. Indeed, in order to allow for an interpretation of Article 7 of the ARIO that would not render completely void the notion of secondment, and consistent with the intention of the drafters, at least as it emerges from the ARIO Commentary,[342] the conduct of state organs seconded to an organisation and acting under the effective command and control of that organisation should be attributed to the organisation alone. In reality, though, cases in which at least a certain level of control is retained on the part of the troop contributing state are much more common; and there emerges the issue whether effective control is to be intended as an exclusive criterion or a cumulative one. Both hypothesis find some support in the international practice[343] and in the positions expressed by states and international organisations;[344] multiple attribution, though, seems to be gaining growing consensus at all levels.[345]

The major difference between the scholarly approach to the matter of multiple attribution is in fact that the some consider the possibility of double attribution under the hat of Article 7 of the ARIO to be excluded,[346] while others admit it.[347] The second hypothesis seems more convincing despite a contrary formulation in the ILC's Commentary, which incidentally refers, perhaps just out of a lack of careful

[342] See the reference to the 'either … or' alternative in ARIO Commentary, Art. 7, para. 4, p. 57.

[343] A large debate was fostered, as already noted, by the *Behrami and Saramati* decision, which seemed to close the door to the possibility of double attribution in the context of UN peacekeeping missions. See in particular *Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility*, Appl. Nos. 71412/01 and 78166/01, ECHR 2007, para. 150.

[344] This is reflected in the ILC statement, in ARIO Commentary, Art. 2, para. 10, p. 50, that '[t]he existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members'. This was not contested by governments and organisations; on the contrary, the principle found support in some of their comments, e.g. in Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), Art. 2, Mexico, para. 1, p. 112; and ibid., Chapter II, Mexico, p. 113, where Mexico recognised that 'dual or multiple attribution of conduct is essential in order to ensure that attribution is not diluted among the various members of the organization and that the question of international responsibility is not evaded'.

[345] See e.g. *Mothers of Srebrenica*, Application 17/04567, Supreme Court of the Netherlands, Civil Law Division, 19 July 2019, para. 3.3.5.

[346] See e.g. Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014.

[347] See e.g. Stian Ø. Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State', *Oslo Law Review*, 6, 3, 2019, p. 191.

consideration, to the attribution 'either to the contributing State … or to the receiving organization'.[348] Moreover, the possible negative result of the attribution test with regard to a subject does not exclude the responsibility of the same subject on the basis of criteria of indirect responsibility. In particular, for member states, the provisions of Article 40 of the ARIO, which obliges the organisation and the member states to cooperate in making responsibility enforceable and resources available for possible reparation, and Article 61 of the ARIO, which prohibits states from using the internal division of responsibilities within the organisation to evade their obligations. These two provisions read together could greatly reduce the possibility of states deliberately evading international responsibility by entrusting the most controversial activities to international organisations that are much more difficult to bring before an international court.

Even in the case of acknowledgement, there is no reason to believe that the attribution should in principle be exclusive. In the Commentaries of the ARS and the ARIO there are no explicit indications either in the sense of exclusivity or in the sense of cumulative attribution by acknowledgement. A possible indication could come from the ARIO Commentary where it states that 'the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be affected on the basis of other criteria'.[349] One could read this provision in the sense of admitting the possibility that the same conduct is attributed also under other criteria, in addition to acknowledgement, and therefore that those criteria may lead to attribution also to other subjects. However, also the opposite reading would be possible: that is, one according to which the possible attribution through other criteria would not be relevant because the acknowledgement would necessarily lead to exclude any other hypothesis of attribution and therefore to exclude the attribution to other subjects. In the Commentary to Article 11 of the ARS it is perfectly logical that the ILC has not addressed the issue because in that case the acknowledgement can be referred to acts of private individuals or state bodies that no longer exist, so the conduct could not be attributed in any case; while it would be much more unlikely, to the extent of the impossible, the hypothesis that a state intended to recognise as its own the activities of another state. Rather, the state could somehow provide its support and collaboration for such acts or exert influence

[348] ARIO Commentary, Art. 7, para. 4, p. 57.
[349] Ibid., Art. 9, para. 2, p. 62.

over their implementation, and then it would be responsible under Chapter IV of ARIO for conduct related to acts of another state. In the case of international organisations, on the other hand, that of acknowledgement of acts of member states is the most likely assumption of acknowledgement. In fact, in the ARIO Commentary the ILC refers precisely to the acknowledgement by the EU of member states' measures in the WTO dispute settlement. In the ARIO Commentary it is added that it is not clear whether these assumptions represent acknowledgement of the conduct itself or acceptance of responsibility.[350] However, the observation in the ARS Commentary that acknowledgement should preferably be referred to conduct seems correct and extendable to organisations, since in the course of proceedings, for example in those before WTO Panels, acknowledgement is referred to a certain extent usually before the issue of its possible conflict with the organisation's international obligations is addressed. If the organisation were to assume the burden of responsibility following the establishment of a breach of an international obligation, such acceptance 'would … amount to an agreement to indemnify for the wrongful act of another'.[351] Thus, it appears that in the case of the acknowledgement of member states' conduct, the ILC's observation in the general commentary to the ARIO chapter on attribution, which in principle admits the possibility of multiple attribution, is applicable.[352] On the other hand, the possibility of multiple attribution in this context is of almost only theoretical relevance since if in the course of proceedings before an international tribunal an organisation acknowledges the conduct of a member state usually does so with the intention, once the actual breach of an international obligation has been acknowledged, to take possible reparative measures, in which case, in accordance with Article 48 of the ARIO, the injured party could not then bring an action against the member state for the same conduct.

[350] Ibid., Art. 9, para. 3, p. 62.
[351] ARS Commentary, Art. 11, para. 7, p. 53.
[352] ARIO Commentary, Chapter II, para. 4, p. 54.

V.2 Joint conduct of two or more organs or agents acting on behalf of different states or international organisations

A case perhaps rarer in practice but simpler from a conceptual point of view is that of two or more organs belonging to different entities that are associated in the realisation of a single conduct. In most cases where organs from different states, or from states and organisations, collaborate in the commission of a wrongful act, their actions are traceable to separate and different conducts. Therefore, as what matters for international responsibility is wrongful conduct and not the production of an injury, in these cases it is probably correct to talk about multiple responsibility, and not multiple attribution of the same conduct.[353]

However, situations can certainly be imagined in which organs or agents belonging to different international legal persons act in concert in the commission of a single conduct. One can think, for example, of military actions involving major equipments in which troops belonging to different states of an international coalition and acting in coordination with each other for the use of these means and through them commit acts that violate the same obligation that binds both principals of the agents involved. In such a case the wrongful act would be unique and the conduct would be unique, but it could be attributed to more than one international legal person and all international legal persons could be held jointly and severally responsible.[354] In the very rare situations in which these conditions may occur, the

[353] See e.g. *MSS v. Belgium and Greece*, Appl. No. 30696/09, ECHR 2011, in which the Court found Greece responsible for having exposed the applicant, an asylum seeker, to inhuman and degrading treatment as a result of its detention in a Greek facility (para. 233) and found Belgium responsible for having expelled him to Greece ignoring the foreseeable risk for him to suffer such inhuman and degrading treatment in Greece (para. 367). The Court therefore found the two governments responsible for two different violations resulting in the same inhuman and degrading treatment but realised in two different moments with two different and separate conducts.

[354] In favour of this possibility, see Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014, p. 79, who cites as a possible argument supporting the eventuality of multiple attribution of a conduct carried out jointly by organs of different states, the decision of inadmissibility of the ECtHR, *Saddam Hussein v Albania and Others (Admissibility)*, Appl. No. 23276/04, ECHR 2006. The application was declared inadmissible because the applicant had not demonstrated the existence of a link between the relevant conduct and any of the respondent. The fact that the Court did not exclude *a priori* the possibility of such a link existing for more than one of the defendants is recalled by Messineo as an argument supporting *a contrario* the possibility of such multiple attribution.

obstacle for the purposes of determining responsibility, and even before attribution, would be to identify the precise limits of the relevant conduct, so as to verify whether it can be divided in such a way as to identify different conducts each attributable to an organ or agent or to organs or agents belonging to a single entity, and then verify for each of these conducts any contradiction with the obligations of international law of the entity to which it belongs.

VI. *Lex specialis*

International agreements, especially multilateral agreements, often provide for particular conditions and consequences for the identification and qualification of violations of the obligations they establish. These conditions and consequences may overlap with the rules of responsibility set out in the ARS and the ARIO.[355] Both sets of articles contain a lex specialis provision.[356] This provision has been unanimously welcomed by governments[357] and makes the application of the ARS and the ARIO residual, for matters regulated by the parties to an agreement, to the rules set out in that agreement.[358] This approach, set out by the ILC in the ARS, has been fully replicated in the ARIO, albeit with some adjustments and specifications due to the particular role played in this context by the rules of the organisation, both those set out at the level of founding treaties and those set out at the level of internal organs of the organisation, which may affect the rules of responsibility governing relations between member states and between them and the organisation.

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[355] Cf. James Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, p. 103.
[356] ARS, Art. 55, and ARIO, Art. 64.
[357] Cf. the 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session Sixth Committee', A/CN.4/504, para. 15, which also reports the position of some representatives further noting that 'the draft articles would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade'.
[358] Cf. ARS Commentary, General commentary, para. 5, p. 32, stating, with regard to the rules set out in the ARS, that '[b]eing general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility'.

VI.1 Lex specialis *and the general rules on attribution of conduct to states*

Article 55 of the ARS reads as follows:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[359]

The Commentary to Article 55 of the ARS begins by recognising that '[w]hen defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach'.[360] The Commentary does not provide for other cases in which special rules of responsibility may be applied outside the consent of the parties.

The rule applies to both bilateral and multilateral treaties and can cover any part of the ARS except for the possible peremptory character of certain principles, such as the exclusion of remedies that authorise acts contrary to peremptory norms themselves.[361] The Commentary makes reference for instance, with respect to multilateral regimes, to the special rules on remedies provided for in the WTO and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) systems.[362]

When it is claimed that the rules of the ARS and the ARIO are residual with respect to the rules on the responsibility for the violation of the obligations contained in the treaties, this does not mean that the former become completely and permanently inapplicable in relation to such obligations for the mere existence of the latter. In fact, conventional regimes of responsibility that overlap with the general one do not necessarily presuppose its total and definitive exclusion: the general rules can be applied residually if their application is in conformity with an interpretation of the agreement that ensures compliance with the principle of effective interpretation, unless, of course, the parties to the treaty in question have consented to the

[359] ARS, Art. 55.
[360] ARS Commentary, Art. 55, para. 1, p. 140.
[361] Ibid., Art. 55, para. 2, p. 140.
[362] Ibid., Art. 55, para. 3, p. 140.

complete exclusion of the application of the general rules on responsibility.[363] This can prove necessary, for instance, in cases of continuous violation of a treaty obligation and failure to obtain reparation with the means provided for by the special rules provided for in the treaty itself.

VI.2 Lex specialis *and the general rules on attribution of conduct to international organisations*

When touching upon the interaction between the law of international responsibility and special multilateral regimes, Alain Pellet, the ILC member charged with the sketching of a preliminary programme for the Commission's work on the responsibility of international organisations, advocated for a plain and simple '[e]xclusion of conventional regimes of responsibility' from the scope of the articles.[364] On closer examination, the expression probably referred only to regimes dedicated to special forms of responsibility.[365] In any event, the final formulation of the *lex specialis* principle in the ARIO is at first glance very similar to that in the ARS but in substance more controversial as regards its scope.[366]

The first sentence of Article 64 of the ARIO reads as follows:

> These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the

[363] This possibility, based on the application of the principle of effective interpretation (*ut res magis valeat quam pereat*) and with the parallel rule of interpretation of treaties according to their object and purpose codified in the VCLT, Art. 31(1), was pointed out in Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', *The European Journal of International Law*, 17, 3, 2006, pp. 508-509.

[364] Alain Pellet, 'Responsibility of international organizations', in 'Syllabuses on topics recommended for inclusion in the long-term programme of work of the Commission', Annex to the ILC Yearbook 2000, Vol. II (2), p. 136.

[365] In fact, Alain Pellet cited ibid., as an example of the excluded conventional regimes of responsibility, the Convention on International Liability for Damages Caused by Space Objects.

[366] See e.g. the doubts on the final formulation of the rules expressed in Comments and observations received from Governments, A/CN.4/636, ILC Yearbook 2011, Vol. II (1), Art. 63, Belgium, p. 130; and Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 63, European Commission, para. 2, p. 168. The specific tension between the *lex specialis* principle as interpreted by the ILC and the claim of the European Commission in favour of a special rule dedicated to regional organisations is analysed below in the text.

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.[367]

Special rules of responsibility may exist and may only apply between states that have consented to them. The Commentary to Article 64 of the ARIO seems to imply a different framework where it says that 'special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations'.[368] This statement, which seems to reflect the desire of the ILC not to take sides in an open dispute and not to completely disappoint the part of those who argue in favour of a special rule for the EU, is tempered by the fact that the special rule may relate to the relations of a special organisation 'with some or all States'. The debated question is toward whom this special rule has effect. Given that the bearers of the obligation can be all or only some states and international organisations, the criterion seems to be that of agreement between the parties or, in the unlikely event that it is really all of them, the development of a customary rule in this sense. The meaning of the provision would have been clearer had the ILC made explicit the need for an agreement between the parties in order to give effect to the special rule. The ILC could have also specified the relevant criteria of speciality. But, after all, the reference to Article 55 of the ARS[369] is sufficient to this purpose, since the ILC had specified both aspects therein.[370] On the other hand, there can be no special rules which apply to a single subject or group of subjects in their relations with all other subjects of the international legal order without their explicit or implicit consensus. Therefore, the existence of special rules must be carefully verified. If a special rule is not substantiated, the general regime applies.

Article 64 of the ARIO, in which the saving clause concerning the *lex specialis* is formulated, does not provide any further clarification. On the contrary, in the Commentary the ILC implicitly admits the impossibility of reaching an agreement on the point, precisely given the 'variety of opinions' precisely on the possible 'attribution to the European Community … of conduct of States members of the Community

[367] ARIO, Art. 64.
[368] ARIO Commentary, Art. 64, para. 1, p. 102.
[369] Ibid., Art. 64, para. 7, p. 103.
[370] ARS Commentary, Art. 55, paras. 1-2, p. 140.

when they implement binding acts of the Community'.[371] The Commentary recalls the two antithetical positions developed in the two special systems of the WTO and the ECHR. The WTO Panel in the *Geographical Indications* case considered member states as acting '*de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general',[372] whereas the ECtHR in *Kokkelvisserij* stated that '[a] Contracting Party is responsible under Article 1 of the 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'.[373] Unfortunately, the ILC, in addition to leaving the question completely open,[374] does not provide any examples of special rules of responsibility that can be used as a basis for further evidence to settle the question of the responsibilities of the Union and its member states towards third parties.

The externalisation of the effects arising from the international organisation's internal rules has been fuelled by the unclear formulation of the second sentence of Article 64 of the ARIO:

> 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.[375]

In the ARIO, the ILC has remained ambivalent about the nature of the rules of the organisation in the system of international responsibility. It was noted that a series of ARIO articles treat the rules of the organisation as internal law, reflecting references to the domestic law of the states in the ARS, and another series of articles treat them as special international law. Namely, the rules of international organisations are treated as internal law of such organisations, on the one hand, where the ARIO deal

[371] ARIO Commentary, Art. 64, para. 2, p. 102.
[372] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO/DS174/R, Panel Report of 15 March 2005, para. 7.725.
[373] *Kokkelvisserij U.A. v. the Netherlands*, Appl. No. 13645/05, ECHR 2009, para. 153.
[374] Cf., on the contrary, Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 106, according to whom the ILC is in favour of the solution accepted in the WTO.
[375] ARIO, Art. 64.

with the functions of international organisation's organs and agents,[376] with the irrelevance of internal rules with regard to the non-compliance with the obligation to make reparation,[377] and with the duty to take all appropriate measures, according to the rules of the organisation, to provide the organisation with the means for make reparation.[378] On the other hand, the rules of international organisations are treated as international law where the ARIO deal with the breach of international obligation arising under the rules of the organisation,[379] with the rule according to which countermeasures cannot be contrary to the rules of the organisation,[380] and with the rules of the organisation as special rules of responsibility.[381]

The uncertainty about the nature of the rules of the organisation results from the tension between the conception of international organisations as autonomous subjects of international law and the conception of international organisations as a set of relations between other subjects of international law, namely their member states. In fact, it does not appear that the traditional dual view of international law and domestic law as two separate worlds is contradicted by treating the constitutive instruments of organisations as the international law of the member states. These instruments are for all intents and purposes special international law between the contracting parties, and as is normal for international agreements, they create obligations binding only the parties to them and not third parties. The fact that other provisions refer to the rules of the organisation by treating them as the internal law of the organisation derives precisely from the fact that such rules do not bind third parties except as a factual situation, as is the case for the internal constitutional rules of a state.

The only internal rules that can be enforced against third parties are those that are necessary to enable the international organisation to act as an international legal person, presumably and until proven otherwise coinciding with those that are necessary to act also for states. Such rules can be enforced against third parties only to the extent that they are manifest and are therefore treated as mere facts.[382]

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[376] ARIO, Art. 6(2).
[377] Ibid., Art. 32(1).
[378] Ibid., Art. 40.
[379] Ibid., Art. 10(2).
[380] Ibid., Arts. 22 and 52.
[381] Ibid., Art. 64.
[382] This is confirmed *inter alia* in ARIO Commentary, Art. 5, para. 3, p. 54: 'When the rules of the organization are part of international law, they may affect the characterization of an act

The described interplay, in the ARIO, of provisions that consider the rules of international organisations sometimes as domestic law and sometimes as international law probably contributes to potential disagreements around the correct interpretation of this provision. Supporters of the theory of normative control can interpret the provision in the sense of considering the international organisation's rules as domestic law extending their effects, in certain situations, also to third states. This confusion also stems from the fact that the attribute 'applicable to the relations between an international organisation and its members' was placed next to the 'rules of the organisation', resulting in an unnecessary specification, and not, instead, next to the 'special rules', what would have been a useful clarification.

A clearer formulation of the provision would have been as follows:

> Such special rules of international law applicable to the relations between an international organization and its members may be contained in the rules of the organization.

In this way the provision would not have provided support to the erroneous interpretation that extends the effects of the rules established by the members of an international organisation to third states not involved in their formation. Through such formulation, the provision would not only have stated that the international organisation's rules are international law applicable to member states, but that precisely 'such' special rules, the rules of responsibility derogating from the general regime regulated in the ARIO, could have been contained in an international organisation's rules. Moreover, this reading would be fully consistent with the Commentary, which, by reformulating the provision much more clearly, underlines 'the particular importance that the rules of the organization are likely to have as

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as internationally wrongful under international law. However, while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members'. Such notation was welcomed by state representatives sitting at the Sixth Committee of the General Assembly: in the 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session', A/CN.4/650/Add.1, para. 13, was in fact noted that the newly introduced Art. 5 of the ARIO 'was particularly helpful in avoiding an incorrect interpretation of draft article 64 on lex specialis, namely, that if an act was lawful under the rules of the international organization it would necessarily be lawful under international law'.

special rules concerning international responsibility in the relations between an international organization and its members'.[383]

According to a scholarly position, Article 64 of the ILC 'may convey the false impression' that the rules of the organisation may be invoked against third parties when a question of allocation of responsibility between the organisation and its member states is raised.[384] This, the reasoning goes, would descend from the lack of distinction, in the ARIO, between the character of international law, in a first moment, and of domestic law, in a second moment, of the founding instruments of the organisation. In fact, Article 64 does not expressly indicate the requirements and the rationale of the special rules to which it refers but the Commentary refers explicitly to Article 55 of the ARS, on special rules concerning the responsibility of states. The Commentary to Article55 of the ARS, in turn, lists as criteria of speciality, by way of example, the principle *lex specialis derogat legi generali*, the principle of the succession of rules over time and the peremptory nature of obligations which conflict, in specific cases, with the application of general rules.[385]

One of the motivations of the criticised scholarly reading of Article 64 of the ARIO can be identified in the effort to make international organisations more autonomous and thus enable them to act more effectively in the international arena by assuming a greater share of responsibility for conduct carried out within their sphere of competence. The risk of definitively separating the organisation's rules from international law by theorising separate and autonomous legal systems is what the cited author calls, downplaying it, 'the catchphrase of "fragmentation" of international law'.[386] It is not clear why such a risk should not be taken seriously. The unity of general international law is not a particular vision, it serves exactly the purpose of bringing order to the international community of states and other subjects of international law.

[383] ARIO Commentary, Art. 64, para. 8, p. 103.
[384] Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', *International Organizations Law Review*, 8, 2, 2011, p. 473.
[385] ARS Commentary, para. 2, p . 140.
[386] Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', *International Organizations Law Review*, 8, 2, 2011, p. 482.

VII. Conclusion

The objective of this first chapter has been to identify the rules of international law that govern the attribution of conduct to states and international organisations respectively for the purposes of international law, including international responsibility. The fundamental sources for the identification of such rules are the ARS and the ARIO. Both these sets of articles contain a specific section on the attribution of conduct, to which governments and international courts have often referred to in contexts other than those strictly related to the assessment of international responsibility.[387]

The first condition to be verified in order to properly examine the application of the ILC articles on responsibility in the context of EU external activity is the actual correspondence of the rules set out in the articles with current customary international law on responsibility and, more specifically, on the attribution of conduct. The ARS and the ARIO, in fact, have not been subjects of international conventions, so their value remains at present that of mere instruments with a specific evidentiary value with respect to the identification of the rules of customary international law in force.[388] Examining the practice of states and the subsidiary means of identification of customary international law such as the decisions of international courts, as well as the drafting process of the ARS and the ARIO and the various positions expressed by governments and international organisations in that context, it has emerged that the two sets of articles, while generally considered as instruments of both codification and progressive development of international law, coincide to a large extent with the applicable law, especially with regard to the general principles of responsibility and attribution of conduct.

The analysis therefore continued with a detailed review of the rules on the attribution of conduct contained in both the ARS and the ARIO and of the correspondence of these specific rules with customary international law. Although the object of the research is the attribution of conduct in the context of EU external

[387] See e.g. the application of the rules on the attribution of conduct by the ICTY for the purpose of distinguishing situations of civil or inter-state conflict in *Prosecutor v. Dušco Tadić*, Appeal Judgment, IT-94-1-A, *ICTY*, 1999; and the application of the rules on the attribution of conduct by the ECtHR for the purpose of delimiting its jurisdiction *ratione personae* in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility*, Appl. Nos. 71412/01 and 78166/01, ECHR 2007.

[388] Cf. Conclusions on identification of customary international law, Conclusion 12(2).

activities, it was decided to include also a detailed examination of the rules of attribution set out in the ARS both because the ARS are the model explicitly followed in drafting the ARIO[389] and because they are systematically intertwined with those of the ARIO in all contexts in which the activities of an organisation involve in some way the organs of the member states, as is substantially the case in all contexts of EU external action.

With regard to the rules codified in the ARS, it was noted first of all that the general rule of attribution of the conduct of state organs to the state itself[390] is unanimously regarded as a rule of customary international law, and that the inclusion in this criterion of attribution of the conduct of the *de facto* organs of a state, meaning those persons who do not have the status of organs under the laws of the state, but who act on its behalf under the complete dependence on the state as is the case with the organs of the state, is also established.[391] The same can be said for the rules that establish the attribution to the state of the conduct of persons to whom the state entrusts elements of its governmental authority[392] and of organs placed at the disposal of a state by another state.[393] In all these cases, *ultra vires* acts of the organs of the state are also attributable to the state.[394] The rule which has given rise to more discussion and controversy is that of attribution to the state of conduct of persons who are not organs of the state but who act on the instructions of the state or under its direction or control.[395] After divergent assertions of the relevant principle by different international courts,[396] the criterion of effective control seems to have

[389] ARIO Commentary, General commentary, para. 4, p. 46.
[390] ARS, Art. 4(1).
[391] See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14, para. 109, at p. 62; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 392, at p. 205.
[392] ARS, Art. 5.
[393] Ibid., Art. 6.
[394] Ibid., Art. 7.
[395] Ibid., Art. 8.
[396] See in particular the difference, widely accounted for above in the text, between the standards of control applied by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, *ICJ Reports* 1986, p. 14, para. 115, at p. 65, and by the ICTY in *Prosecutor v. Dušco Tadić*, Appeal Judgment, IT-94-1-A, *ICTY*, 1999, para. 131, p. 56; and see the reaffirmation of the *Nicaragua* test in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 400, at p. 208.

become the standard for establishing the attribution of conduct of persons acting on the instructions or under the direction or control of the state. The examination of the ARS ends with a mention of the attribution to the state of the conduct acknowledged by it as its own[397] and other cases of conduct attributable in exceptional circumstances.[398]

The general rule of the ARIO takes as its starting point a principle analogous to that which governs the ARS, which is the attribution to the international organisation of the conduct of its organs.[399] However, the perspective under which this principle is to be applied is significantly different. Since international organisations are functional international legal persons,[400] the notion of agent,[401] added by the ILC and coupled with that of organ mutated from the ARS,[402] includes a set of persons and entities comprising very different categories that can be assimilated in various degrees to persons who in the ARS can be included among those entrusted with elements of governmental authority, seconded organs and persons acting under the instructions or under the direction or control of the state. In respect of all such persons, the principle of attribution to the organisation of acts committed *ultra vires* shall apply, provided that such acts are carried out in the exercise of the functions of the organisation.[403]

As regards the ARIO, the attribution criterion that has given rise to the largest debate and which is not yet fully consolidated in the practice of states and international organisations, is that of attribution to the organisation of the conduct of organs or agents placed at the disposal of the organisation.[404] The particular importance of this rule derives from the fact that in the daily practice of international organisations, especially in the most sensitive areas of their external activities such

[397] ARS, Art. 11.
[398] I.e. the cases of attribution to the state of conduct carried out in the absence or default of the official authorities (Ibid., Art. 9) and of conduct of an insurrectional or other movement (Ibid., Art. 10).
[399] ARIO, Art. 6(1).
[400] Cf. the principle of speciality that characterises the international legal personality of international organisations as set forth in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, p. 66, para. 25, at p. 78, and recalled in ARIO Commentary, General Commentary, para. 7, p. 47.
[401] See ARIO, Art. 6, and the definition of “agent of an international organization” in ibid., Art. 2(d).
[402] See the definition of “organ of an international organization” in ibid., Art. 2(c); cf. the notion of “organ” in ARS, Art. 4(2).
[403] ARIO, Art. 8.
[404] Ibid., Art. 7.

as peacekeeping operations, the use of organs seconded to the organisation form its member states is the rule and not an exception, as on is the secondment of organs from one state to another. First of all, it should be noted that unlike for the secondment to states, the ARIO Commentary distinguishes between full secondment and partial secondment.[405] In the case of full secondment, organs or agents seconded from the member states to the organisation are treated, for the purpose of attribution, exactly as organs or agents of the organisation. The case of partial secondment occurs when the state of origin of the organ or agent maintains a certain level of control over it, for instance in the form of disciplinary control or jurisdiction over its possible unlawful acts of various kinds.[406] This partial secondment is the rule in the case of peacekeeping operations and other operational activities conducted under the auspices of international organisations. For these cases, the criterion of effective control, which the ICJ had formulated with regard to persons controlled by the state as a matter of fact, has been transposed into the ARIO. Consequently, even if the standard of control is the same as the one elaborated by the ICJ and consolidated in customary international law for the conduct of persons controlled by the state, it fits into a different context, where the difficulty of applying the rules of attribution is due to the forms of cooperation of international organisations with their member states. In this context, the effect of the provision seems to be the exclusion of the presumption of attribution to an organisation of the conduct of organs and agents seconded to it; and the requirement, instead, of the demonstration on a case-by-case basis of the organisation's effective control over them.[407]

In the practice of states and international organisations, however, questions remain regarding both the application of the standard of effective control and the interaction between this criterion and other attribution criteria. The main question in this context is which other criteria of attribution, if any, can be applied concurrently and which criteria, on the other hand, are mutually exclusive. In particular, the cooperation of states in the operational activities of international organisations raises questions as to the possibility of multiple attribution, meaning the attribution of the same conduct to more than one state or international organisation at the same time. The question typically arises in relation to the attribution of the conduct of troops of

[405] ARIO Commentary, Art. 7, para. 1, p. 56.
[406] Ibid.
[407] See ibid., Art. 7, para. 4, p. 57.

member states placed at the disposal of an international organisation. Although in the past some international courts excluded the attribution of conduct carried out by troops of troop contributing states to such states on account of the involvement of the international organisation under whose aegis those troops were operating,[408] the ARIO and the discussion that accompanied their adoption seem to have been decisively oriented towards the recognition of the possibility of multiple attribution and in particular the concurrent application of more than one attribution criteria pertaining to both the ARS and the ARIO.[409] In particular, the attribution of conduct of seconded organs to an international organisation seems to be compatible with the concurrent attribution of the same conduct to a member state for acts carried out by its organs acting within the organisation or by agents who are not its organs but who have nevertheless acted, in the specific case, under its instructions or under its direction or control. This solution, although supported in the literature, has not yet found an echo, however, in the decisions of international courts, mainly because of the lack of jurisdiction of the majority of these courts vis-à-vis international organisations. At the same time, this approach has been adopted by some national courts[410].

Finally, another key issue, described here in general terms and examined in more detail in the next chapters with specific reference to the EU external action, is that of special rules. Both the ARS and the ARIO are without prejudice to the application of special rules.[411] However, they leave some questions partially open, namely the conditions for identifying special rules, the potential existence of special rules that are not agreed between specific international legal persons but are instead of general application, for example in relation to specific types of international organisations, and the effects entailed by the existence of special rules. These questions are fundamental in the case of the EU external action; in fact, the EU has always claimed the application of special rules of attribution to itself, not only with regard to its relations with member states, but also vis-à-vis third states with which it enters into relations at the international level.[412]

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[408] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility*, Appl. Nos. 71412/01 and 78166/01, ECHR 2007, para. 151, p. 44.
[409] See ARIO Commentary, Chapter II, para. 4, p. 54.
[410] See e.g. *Mothers of Srebrenica*, Application 17/04567, Supreme Court of the Netherlands, Civil Law Division, 19 July 2019, para. 3.3.5.
[411] ARS, Art. 55; ARIO, Art. 64.
[412] See Comments and observations received from international organizations, A/CN.4/637, ILC Yearbook 2011, Vol. II (1), Art. 63, para. 2, p. 168.

Chapter 2
EU external action and international law

I. Introduction

In order to determine to what extent and how the customary international rules of attribution of conduct applicable to international organisations in general apply to the EU's external action, it is first necessary to understand the provisions of the internal law of the EU which govern such action, its institutional structure, and the Union's competences in relevant areas.

The EU's external action covers a heterogeneous range of policy areas from trade to cooperation and military intervention. Some of these areas involve mainly regulatory activity, while others involve direct EU action with executive means and powers. The decision-making procedures laid down in the EU Treaties also vary widely. Those matters pertaining to the traditional core of foreign policy are still governed by decision-making and intervention mechanisms closer to the classical methods of intergovernmental cooperation. Under the CFSP, the representatives of the member states may, as a rule, take decisions unanimously[413] and without more than informative involvement of the European Parliament.[414] However, with the Lisbon Treaty and the overcoming of the pillars structure, the EU's external action has partly entered into the circuit of the common institutions: in particular, the Court of Justice of the European Union (CJEU)[415] has acquired jurisdiction over certain aspects of the CFSP and there is a trend towards the extension of such jurisdiction.[416] In terms of international responsibility, however, the evolution of the CJEU's practice has a secondary role. What matters the most is the actual way in which the Union carries out its activities and contracts or violates international obligations.

[413] TEU, Art. 31(1).
[414] Ibid., Art. 36.
[415] This thesis refers to the CJEU as the judicial institution of the EU considered as a whole, whereas it refers to the European Court of Justice (ECJ), officially just 'Court of Justice' since the entry into force of the Lisbon Treaty, as the supreme court of the CJEU system.
[416] See the exceptions to the exclusion of jurisdiction in matters of CFSP set out in the Lisbon Treaty at TFEU, Art. 275, second proposition.

The same institutional structure set up to manage the EU's external relations is also charged with the more traditional and more sensitive dimension of international relations, diplomatic relations and external security. However, this dimension is regulated by specific rules of the TEU, which provide for a special area of competence. At the international level, military activities and more generally activities related to external security are the most difficult to attribute because material circumstances are rather unpredictable and agents' discretionary powers are greater. Moreover, these activities are often the most sensitive from the point of view of responsibility towards third parties.

Section II of this chapter describes the general structure of the EU's external activity and the principles governing its action. In Section III the focus is on the legal and organisational set-up of EU operations and the most problematic aspects of such operations from the point of view of international law. Section IV provides a general overview of the international obligations binding the EU in its external action in order to identify the specific activities that raise doubts and questions in terms of the attribution of conduct under international law.

II. The institutional structure of EU external action

The external action of the EU consists of a number of activities covering different policy realms. It is therefore a cross-cutting area of intervention encompassing economic and political measures and a very diversified set of instruments, from the enacting of regulations to the conclusion of international agreements to the launching of peacekeeping operations. The Lisbon Treaty established a single representative for the direction and implementation of all branches of external action[417] and placed under his or her command a single organisational structure,[418] which is meant to be the starting point for the creation of the diplomatic service of the Union. This section examines the institutional structure of external action and the internal rules for its implementation.

[417] TEU, Art. 18.
[418] Ibid., Art. 27(3).

II.1 Principles and objectives of EU external action

The principles and objectives of the EU's external action are defined in Article 21 of the TEU. These principles could be summarised under the concepts of democracy, the rule of law and the respect for human rights. These are the same principles 'which have inspired [EU's] creation, development and enlargement'.[419] They are also essentially the same principles that Article 2 of the TEU refers to the Union as a whole. Article 3(5) is more explicitly concerned with the internal interests of the EU in its relations with the world, stating that 'the Union shall uphold and promote its values and interests and contribute to the protection of its citizens'.[420] The same article makes specific reference to 'the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade' and to 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.[421] This last reference to international law and to the principles of the UN Charter, reiterated in Article 21(1), is very important, being indeed the only mention of a specific international instrument the violation of which could result in an action before EU judges and instituting a channel for the incorporation of general international law into the corpus of EU law. The EU judicial system could in theory be activated on the basis of such clear reference.[422] In fact, CJEU jurisdiction can be exercised over EU acts in any case of contradiction with any provision of the Treaties within the limits determined by the type of act.[423] Nevertheless, the UN Charter was never taken into consideration in specific cases as a basis whose violation would invalidate an EU act. On the contrary, in the *Kadi* judgment the ECJ even affirmed that 'the obligations imposed by an international agreement', in the case at hand the obligation to implement a UN Security Council resolution on individual sanctions,

[419] Ibid. Art. 21(1).
[420] Ibid., Art. 3(5)
[421] Ibid.
[422] This is coherent to the effect already recognised to international law in *Anklagemyndigheden v. Peter Poulsen and Diva Navigation Corp.*, Case C-286/90, ECR 1992 I-06019, para. 9: 'the European Community must respect international law in the exercise of its powers'; and in *Racke GmbH & Co v. Haptzollant Mainz*, Case C-162/96, ECR 1998 I-03655, para. 45: 'the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation'.
[423] It makes exception the exclusion of CJEU jurisdiction over CFSP, which according to TFEU Art. 275 comprises not only CFSP acts but also the provisions of the Treaties relating to CFSP.

'cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.[424]

As it is for all the other areas of Union's activity, the external action is regulated in the Treaties by both general provisions dictating its organisational structure and the division of powers, and specific procedures governing the single policy at hand. However, external action and treaty-making competence have historically developed as specific features of different policy areas. As a result of this fragmented development, external competences and the competence to conclude international agreements are still organised, to a certain extent, according to different models.

Different types of external competence reflect the different types of competence that characterise each material sector of Union's intervention according to the TFEU. The Union has exclusive external competence, for example, in matters of common commercial policy,[425] supporting competences in matters of cooperation,[426] and shared competence in all residual matters.[427] Article 2 of the TFEU regulates the functioning of each category of competence. Exclusive competence gives the Union the power to legislate and adopt legally binding acts, while the member states are able to adopt legal acts themselves 'only if so empowered by the Union or for the implementation of Union acts'.[428] In the area of shared competence, the member states can exercise their competence 'to the extent that the Union has not exercised its competence', and they can exercise their competence again 'to the extent that the Union has decided to cease exercising its competence'.[429] In the area of supporting competence, the Union can 'carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence' and only as far as its acts do 'not entail harmonisation of Member States' laws or regulations'.[430]

Article 15 of the TEU assigns the general task of political direction of the Union to the European Council, which 'shall provide the Union with the necessary impetus for

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[424] *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, ECR 2008 I-0635, para. 285.
[425] TFEU, Art. 3(1)(e).
[426] Ibid., Art. 4(4).
[427] Ibid., Art. 4(1).
[428] Ibid., Art. 2(1).
[429] Ibid., Art. 2(2).
[430] Ibid.; Art. 2(5).

its development and shall define the general political directions and priorities'.[431] In the area of external action, the European Council decides such priorities 'unanimously on a recommendation from the Council'.[432] The European Council 'shall identify the strategic interests and objectives of the Union', and shall do so on the basis of the general principles and objectives set out in Article 21.[433] The Council exercises its power of recommendation by qualified majority.[434] Such power, apparently divergent from the normal exercise of its role as a legislative body, actually complies with the provision stating that the Council 'shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission'.[435] The Council adopts its recommendations on the basis of High Representative's and Commission's proposals.[436] Once the European Council has set the priorities and the 'strategic guidelines' of the external action, the Foreign Affairs Council 'shall elaborate' the details of such action and 'ensure that the Union's action is consistent'.[437] Article 21 of the TEU makes direct reference to the principle of external action consistency.[438] The consistency of Union external policy must be referred both to its different external initiatives and to the action of its different institutions. The issue has great relevance, as international partners of the EU often complain about the lack of an interlocutor with a single voice.

Coordination between the action of the Commission and that of the High Representative is secured in particular by the double role of the High Representative, which, in addition to exercising its prerogatives in the external sphere, serves also as Vice-President of the Commission and as such is entitled to the external relations portfolio.[439] The High Representative is also automatically chairperson of the Foreign Affairs Council[440] and as such is entitled to the European External Action Service.[441]

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[431] TEU, Art. 15(1).
[432] Ibid., Art. 22(1).
[433] Ibid.
[434] Ibid., Art. 16(3).
[435] Ibid., Art. 16(6).
[436] Ibid., Art. 22(2).
[437] Ibid., Art. 16(6).
[438] See ibid., Art. 21(3), whose second proposition reads as follows: 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies'.
[439] Ibid., Art. 18(4).
[440] Ibid., Art. 18(3).
[441] Ibid., Art. 27(3).

Despite the institution of the High Representative, Union's external representation is still divided among different subjects, as the High Representative operates on each occasion according to one of his two functions, that is as responsible of the CFSP[442] or as Vice-President of the Commission.[443] The High Representative represents the Union in foreign and security policy matters,[444] while the Commission ensures the external representation of the Union in all other cases,[445] in particular through its President or through the appointment of another commissioner of his or her choice.[446] In foreign and security policy matters, finally, without prejudice to the powers of the High Representative in international organisations and international conferences, the external representation of the Union is conferred to the President of the European Council.[447] Clearly, this arrangement does not solve the fragmentation that characterises the representation of the Union. Moreover, in practice the representation model varies also according to the protocol level of each event.

The pursuit of a single voice for EU external action could be thought to have ended with the creation of the High Representative. The High Representative, however, is not a foreign minister. He or she could be said, rather, to resemble a super-secretary-general, insofar as he or she possesses agenda-setting, proposal and implementation powers, while decision-making power remains with the Council and, therefore, with the governments. As an obvious consequence of not being able to take autonomous political decisions, the High Representative cannot even fully represent the EU externally. In fact, he or she shares external representation with the President of the European Council[448] and the President of the Commission.[449] The true institutional set-up of the CFSP is all contained in three articles according to which the High Representative makes proposals and chairs the Foreign Affairs

[442] Ibid., Art. 18(2).
[443] Ibid., Art. 18(4).
[444] Ibid., Art. 18(1).
[445] Ibid., Art. 17(1).
[446] Rules of Procedure of the Commission, Art. 3(5) (C(2000)3614, published in its last consolidated version in OJ L 308).
[447] TEU, Art. 15(6).
[448] Ibid., Art. 15(6).
[449] Ibid., Art. 17(1). The result of this institutional setting is what Daniel Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', *European Constitutional Law Review*, 7, 3, 2011, p. 455, defines a 'compound executive order', of which the coordination of the various institutional actors is both the strength and the weakness.

Council,[450] the Council decides,[451] and the High Representative carries out the common foreign and security policy 'as mandated by the Council'.[452] As the Council has to act unanimously on this matter, the High Representative's voice is often silent, even during major international crises, pending agreement in the Council. Moreover, the title of High 'Representative' itself makes clear, despite the adjective, that he or she is not the head of foreign policy but just the person in charge of its representation. The result is a foreign policy that is more often forced to react to external shocks than to take the initiative in international relations. Paradoxically, the High Representative has stronger powers in areas of external action that are not covered by the CFSP but in his or her portfolio at Commission level.

II.2 The European External Action Service

The EEAS, the unified structure in charge of the EU's external action, is composed of a central administration and Union's delegations in third countries and international organisations, together constituting the newly founded diplomatic corps of the Union.[453] The EEAS is a 'functionally autonomous body' and is provided with the legal capacity necessary to perform its tasks and attain its objectives.[454] Staff composition is tripartite. About one third of the EEAS's members are officials of the General Secretariat of the Council, another third are officials of the relevant departments of the Commission, and the last third are officials of the national diplomatic services. The two thirds of the staff transferred from the Council and the Commission constitute the EEAS permanent staff, while staff coming from the national diplomatic services are temporarily seconded from these services.

The appointment of officials, even if merit-based, must ensure e certain geographical balance. However, all the members of the EEAS staff 'shall carry out their duties … solely with the interests of the Union in mind'. All EEAS staff shall be

[450] TEU, Art. 27.
[451] Ibid., Art. 31.
[452] Ibid., Art. 18(2).
[453] The EEAS was provided for in purposely generic terms in Art. 27(3) of the TEU and its structure was defined, after difficult negotiations, by Decision 2010/427, which can be amended by a subsequent decision by unanimity but without the need for treaty amendments and national ratifications. This element of flexibility was deemed necessary to temper member states' worries and resistance.
[454] Decision 2010/427, Art. 1.

provided with ‘adequate common training, building in particular on existing practices and structures at national and Union level’.[455] EEAS officials are usually entitled as chiefs of working groups and committees nominated by the Council. In this case, they must consult the Commission ‘on all matters relating to the external action of the Union’ and vice versa.[456] The EEAS shall also ‘extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the European Parliament’,[457] although such duty remains quite peripheral in comparison with the obligation to consult the Commission.

The EEAS Decision deals with another important aspect of consistency, namely the consistency between Union external action and the external action of the member states. EEAS officials shall ‘support, and work in cooperation with, the diplomatic services of the Member States’.[458] This duty of cooperation is even more important in the light of the principle of sincere cooperation between the Union and its member states, established in Article 4(3) of the TEU. Deciding on a case regarding the conflict between negotiations with third parties conducted by the Commission on the one side and by member states on the other, the ECJ applied the principle in the following terms:

> The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.[459]

Most of the structures of the Commission and the Council that dealt with foreign policy have been transferred to the EEAS. However, this transfer has not been complete. Both the Council and the Commission retained control of the foreign policy issues that they considered most sensitive.[460] Some bodies of the EEAS, on the

[455] Decision 2010/427, Art. 6.
[456] Decision 2010/427, Art. 3(2).
[457] Ibid., Art. 3(4).
[458] Ibid., Art. 3(1).
[459] *Commission of the European Communities v. Grand Duchy of Luxembourg*, Case C-266/03, ECR 2005 I-04805, para. 60.
[460] For the Commission, see the Directorate-General on the European Neighbourhood and Enlargement Negotiations and the Service Department on Foreign Policy Instruments. For

other hand, undertake functions which, in the executive perspective of foreign policy, go far beyond the preparatory tasks entrusted to them in the Treaties. The Political and Security Committee, composed of national ambassadors, essentially carries out the day-to-day management of the common foreign policy. It often takes decisions without ever hitting the Council table (especially for less important or urgent matters). Such a body, combined with the work of all national officials seconded to the EEAS, contributes, if not to forming a true European loyalty replacing national loyalties, at least to instilling a certain concern and experience of European foreign policy matters within the national chancelleries and to fostering uniformity of practice and a sense of collegiality.

The functional autonomy of the EEAS,[461] in the end, lies not in the possibility of acting against the will of the Council but in the fact that it takes no direct orders from either the Council or the Commission. Any decision of the Council must be addressed to the High Representative, who alone can forward it to the EEAS bodies. This is very useful to temper the disagreements between the Commission and the Council in the everyday management of the CFSP, although it does not diminish the fact that all the actions of the EEAS are guided and limited by the decisions and positions expressed by the Council. The rule for foreign policy decisions in the Council is consensus.[462] This means that all the 27 member states virtually hold a veto power.[463]

Considering the functioning of the EEAS and the obligations of coherence and consistency that the Treaties and the ECJ rulings have imposed on the member states, the EU external action would appear to be based on a high degree of unification and centralisation under the High Representative. In fact, even in the more widely integrated areas within the Commission, such as trade negotiations, member states' delegations in the consultative committees have a very strong influence (such

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the Council, see the Director-General on Foreign Affairs, Enlargement and Civil Protection, under the General Secretariat of the Council, and member states' control on EEAS bodies that still function on an intergovernmental basis.

[461] Cf. Decision 2010/427, Art. 1.

[462] TEU, Art. 31(1); cf. ibid., Art. 15(4), which establishes consensus as the rule for European Council decisions.

[463] There is a bridging clause (*passerelle* clause) for the extension of matters on which the Council may vote by qualified majority (Art. 31(3) of the TEU). However, the use of this clause is very unlikely, also due to the strong resistance of the German Constitutional Court (*Judgment of the Second Senate (Lisbon), 30 June 2009*, German Federal Constitutional Court, 2 BvE 2/08), which qualified such a clause as an amendment to the Treaties, thereby subjecting its activation to ratification by the national parliament.

is the influence exercised by some countries regarding trade negotiations that threaten the competitiveness of domestic agricultural production).[464] But if one looks at the CFSP, such influence becomes a constant and multiple threat of deadlock on its functioning.

III. The CFSP and EU missions

The CFSP is the branch of EU external action that is analogous in its conception to the foreign policy of states. Of all the branches of EU external action, the CFSP has maintained the institutional structure most anchored in pre-Lisbon intergovernmental decision-making processes. In particular, this area of action is still dominated, in its strategic dimension, by the rule of unanimity among national governments. Nevertheless, the creation of the EEAS and of specialised agencies dealing with defence-related issues has meant that the EU is increasingly directly involved in the most critical contexts of international relations, especially in its surrounding regions. This progressive widening of the EU's level of participation in international politics has led it to intervene also in situations of international conflict and crisis, situations in which executive activities more frequently come into play for which the question of attribution is central to regulating relations with third parties. The latter is so both in relation to issues of international responsibility and more generally in order to clearly delineate the ownership of acts carried out by the various actors involved in these composite scenarios.

This section examines the EU's special competence in CFSP as regulated, following the old pillars division, in the TEU. It also examines the organisational structure of EU missions, which represent the context in which relations with third parties are more intense and of a more strictly executive nature, as well as less regulated. The focus falls in particular on one of the crisis scenarios that in recent years have given rise to discussions and conflicts on the division of powers and ownership of acts between the Union and member states, namely the control of migration flows in the Mediterranean.

[464] See e.g. the resistance of the major agricultural exporters among member states to the liberalisation of trade in agricultural products with the Mercosur countries, which led to negotiations on a trade agreement with those countries lasting no less than 20 years.

III.1 The special competence of the EU in the CFSP

A special competence is provided for in Article 24 of the TEU for matters of foreign and security policy. In this area, the Union's action must be 'defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise'.[465] This arrangement leaves the pillars division, which was in force before the Treaty of Lisbon, essentially unvaried. Such a resilience of the pillar structure is patent also for the CFSP provisions in the Treaties. This policy area is not even mentioned among the titles of the TFEU dedicated to the common external action. Its functioning is treated in detail in the TEU, which in its general design should be dedicated only to cross-cutting and general provisions. The existence of this special competence represents an issue in the operating of Union's external relations to the extent that the boundaries of this sector are uncertain. Article 24 defines its scope as covering 'all areas of foreign policy and all questions relating to the Union's security'.[466] In many cases it is not clear if a given policy or a specific international intervention is to be conducted in accordance with the intergovernmental model or with the normal procedures provided for in the TFEU.

Foreign and security policy is composed mainly of political, administrative and operational activities, such as diplomatic relations, agreements with third countries, strategic analysis, missions abroad, and participation in international organisations. In this context, the intervention of the institutions cannot be reduced to purely legislative activity, as it is for areas where more technical regulation is appropriate and integration is more advanced. Therefore, '[the] success of CFSP does not so much depend on the binding force of internal decisions, but its persuasiveness and support of the member states'.[467] In such field, composed mainly of executive activities, mutual trust is fundamental. As a consequence, it is very difficult to reach agreement and to take effective action, because any member state can veto a decision. When everyone agrees, however, the EEAS has the great strength of acting on behalf of 27 states.[468] If unanimity were not required, any initiative would

[465] TEU, Art. 24(1).
[466] Ibid.
[467] Daniel Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', *European Constitutional Law Review*, 7, 3, 2011, p. 463.
[468] It is actually 26, considering Denmark's opt-out from the common security and defence policy.

risk crumbling in the process because there would always be doubts as to which governments were to effectively support a decision and this would negatively affect EU reliability vis-à-vis other international players. The CFSP is, in essence, a highly strengthened cooperation of foreign policies. Coordination and joint action are supported by a shared administrative machinery; but decisions remain a matter of agreement between national governments.

From the point of view of judicial remedies, the peculiar nature of the common foreign and security policy has resulted in the exclusion, in this field, of the two principles governing the general architecture of EU law, namely the primacy and the direct effect of EU law in national orders. There is no pre-emption of EU measures over national measures. It is true that states must refrain, according to Article 24(3) of the TEU, from any activity that impedes the common foreign policy; but in practice the activities of such a policy are not constructed in such a way as to replace national measures. They constitute a further international activity in addition to national foreign policies. The latter must of course be coordinated but are not subject to formal limits as a result of the existence of a common foreign policy. Likewise, there is no such thing as direct effect. States must ensure the alignment of their foreign policies with the common foreign policy,[469] but, unlike in the case of regulatory activities in other areas of EU competence, there would be no way to directly disregard conflicting national measures in this field.[470] One cannot, for example, ask the diplomatic staff of states to ignore national orders that do not comply with common foreign policy positions, just as one asks national judges to disregard

[469] TEU, Art. 29.

[470] Daniel Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', *European Constitutional Law Review*, 7, 3, 2011, p. 476, stresses that the need to explicitly distinguish the areas where direct effect and supremacy of EU law apply from those where they do not, is strongly felt only in national systems of dualist tradition, such as Germany and Italy. For these states, national law must be a coherent and comprehensive whole. Therefore, the direct effect of EU law is brought into these systems by means of a constitutional renvoi, which, however, must be different from the classic renvoi to compliance with international law. For example, Art. 10 of the Italian Constitution obliges the government to respect international law, but all new contractual commitments must be ratified and transposed by means of internal implementing laws. On the other hand, EU law has direct effect by virtue of Art. 11 of the Italian Constitution, which places the law deriving from limitations to sovereignty, which must be adopted in conditions of reciprocity with other states, in a superordinate position with respect to the Constitution itself (albeit without prejudice to its supreme principles, according to the theory of counter-limits). For states such as Italy and Germany, therefore, the effects of EU law are clearly distinguished according to whether there has been a transfer of sovereignty or not. For the common foreign and security policy, the latter holds true.

national statutes that do not comply with EU law. Pre-emption and direct effect would in fact be impossible precisely because foreign policy is formed mainly of executive activities, which have no direct legal effect on individual citizens of the member states. The CFSP is not included either among the matters of exclusive competence of the Union nor among those of shared competence. There has never been a transfer of sovereignty in this field. In fact, Declaration 14 annexed to the Treaty of Lisbon states that the Treaties 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy'.[471]

ECJ jurisdiction on certain matters concerning the CFSP does not alter this intergovernmental framework. Whereas for the member states the ECJ constitutes the exclusive international judicial forum for disputes relating to the special regime of international responsibility of which they are parties,[472] which excludes the application of the general rules of international responsibility at least for matters falling within the jurisdiction of the Court, for third parties ECJ rulings count as internal acts of the EU, just like any other conduct of that organisation. At the same time, in historical perspective, ECJ rulings may influence the development of the way in which the common foreign policy is implemented. However, it is only these implementing activities and their compliance with the international legal obligations of the EU and its member states that are important for the purposes of responsibility vis-à-vis third parties. These activities could potentially conflict both with customary international law and with obligations arising from international agreements with third parties. Indeed, in EU practice, given the high number of treaties concluded by the organisation in virtually all policy areas, third parties' claims would almost always involve the breach of obligations enshrined in international agreements.

[471] Declaration 14 can be seen somehow as a negative answer to the question whether there is any correspondence between the internal division of competence and external, meaning international, responsibility. Affirming that the internal division of competence does not prejudice any question of member states' responsibility is perhaps stating the obvious, but it was probably deemed useful nonetheless to affirm this so as to reassure third parties of the non-relevance of the Treaty of Lisbon to the obligations of EU members towards them.
[472] TFEU, Arts. 258 and 259.

III.2 The structure of EU missions

Factual scenarios that may involve wrongful conduct include acts of detention, the transfer of detainees to states where they risk inhuman treatment, the searching of private houses, the handling of personal data and the use of force. In the context of EU external action, this kind of situation may occur especially in the course of EU military or police missions and operations[473] with an international projection, which are part of the common security and defence policy.

The operative capacity of the common security and defence policy (CSDP) is established in Article 42 of the TEU, which affirms the active role of the EU in the management of international security, demands full respect for the principles of the UN Charter[474] and establishes a specific obligation of 'aid and assistance by all the means in [member states'] power, in accordance with Article 51 of the United Nations Charter', in case of armed aggression against one of the member states.[475] Article 42 is explicitly without prejudice to the obligations of cooperation and collective defence established by the NATO Charter for those member states that are party to it and for the EU in general.[476] Article 43 of the TEU sets out the specific objectives of EU missions, which include military objectives in combat, disarmament, counter-terrorism and crisis management.

A series of Council and EEAS acts set out the procedures for the activation and management of EU missions.[477] They envisage the drafting of a series of detailed planning documents if a mission is to be activated. All such documents are classified. Being initially drafted by the EU Military Staff, at the political level they pass first through the Political and Security Committee and are then approved by the Council. The decision to activate a mission is taken by the Council and must be unanimous,

[473] On the distinction between military missions, not directly operative in military operations, and military operations, see Council Doc. 14392/16, para. 16 and para. 32, fn. 5.
[474] TEU, Art. 42(1).
[475] Ibid., Art. 42(7).
[476] Ibid., Art. 42(7), second indent.
[477] Namely, the EU Concept for the Use of Force in EU-led Military Operations, EU Council Doc. 17168/2/09; Suggestions for crisis management procedures for CSDP crisis management operations, EU Council Doc. 7660/2/13; EU Concept for EU-led Military Operations, EU Council Doc. 17107/14; EU Concept for Military Command and Control, EU Council Doc. 5008/15; EU Concept for Military Planning at the Political and Strategic Level, EU Council Doc. 6432/15; EU Concept for Force Generation, EU Council Doc. 14000/15.

although abstention is possible.[478] Such a decision establishes objectives, chain of command, commanders, specific mandate, duration, financial terms, status of the mission and possible relations with third parties (participating third countries, etc.).[479] The organisational framework is set out in the Operation Plan. If the possibility of the use of force is contemplated, specific rules of engagement for the staff are adopted. These documents are approved by the Council in a subsequent decision launching the starting of the operation.[480] After launching the operation, the EU and the member states conclude agreements on the participation of third states in the mission, status of forces agreements with the countries hosting troops, potential transit agreements, and so on.[481] Such agreements regulate the use of uniforms, weapons, criminal jurisdiction, privileges and immunities, staff security and the settlement of any disputes regarding the conduct of operations or staff behaviour.[482]

In contrast with this procedure, often heads of state or ministers of member states, sometimes even of all member states, agree to carry out joint actions without adopting any official EU act. In this case, they adopt documents or release statements under labels such as 'Decision of the Representatives of the member states meeting within the Council'.[483] It remains to be seen what effect these member states' decisions may have on international law and vis-à-vis third parties. It is unclear whether actually no obligation binding upon the EU descends from such decisions and, indeed, whether EU law permits member states to take such decisions in the course of Council meetings. Some observers raised the issue of the formal legality of this practice with regard to the member states' decision to launch the EU-Turkey deal in 2016.[484]

The Political and Security Committee exercises political and strategic control over EU operations and has decision-making power over various matters, including the

[478] TEU, Arts. 42(4) and 43(2).
[479] See e.g. Council Decision (CFSP) 2020/472, establishing a European Union military operation in the Mediterranean (EUNAVFOR MED Irini).
[480] EU Council Doc. 7660/2/13, para. 64.
[481] These agreements are concluded on the basis of Art. 37 of the TEU and Art. 218 of the TFEU.
[482] See e.g. the Agreement between the European Union and the Republic of Mali on the status in the Republic of Mali of the European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali), OJ L 106/2.
[483] See e.g. Press Release 807/16 of the Council of the EU on the so-called EU-Turkey deal: 'Statement of the EU Heads of State or Government'.
[484] See e.g. Roman Lehner, 'The EU-Turkey "deal": Legal Challenges and Pitfalls', *International Migration*, 57, 2, 2019.

appointment of commanders of EU military operations and the amendment of plans of action. The objectives and duration of operations remain directly in the hands of the Council.[485] Operational control is entrusted to the Military Planning and Conduct Capability. As these permanent headquarters have very limited facilities, a new chain of command is usually established for each new mission. The Director General of the Military Planning and Conduct Capability exercises command and control over non-executive missions. In the case of executive operations and larger contingents, operational command and control is entrusted to operational headquarters provided by a member state or by NATO under the Berlin Plus Arrangement.[486] In all cases, operational command and control is entrusted to an operation commander through a transfer of authority over the troops forming the mission. Operational control includes the tactical deployment of assigned units but does not include the authority to assign tasks other than those foreseen in the plans nor responsibility for administrative and logistical operations. Under the operation commander's authority, the force commander exercises command in the field. The overall command over troops is maintained by the member states of origin, which consequently retain criminal and disciplinary jurisdiction. In order to regain complete control, including operational control, over their troops, the member states must request a reverse transfer of authority.[487]

An area of particular interest that has become progressively more central to the CFSP is the control of migration flows. In recent years, immigration and neighbourhood policies have become increasingly intertwined with foreign policy and foreign policy instruments, including civil and military operations and the conclusion of political agreements establishing operational commitments for both the EU and its partners.[488]

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[485] TEU, Arts. 38 and 43(2); see also Council Doc. 6432/15, paras. 17-28.

[486] Council Doc. 14392/16. The Berlin Plus Arrangement was never published, but a presentation can be found at the EEAS website: https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/5388/shaping-of-a-common-security-and-defence-policy.

[487] Council Doc. 5088/15, para. 11(e).

[488] Annegret Bendiek and Raphael Bossong, 'Shifting Boundaries of the EU's Foreign and Security Policy. A Challenge to the Rule of Law', *SWP Research Paper*, 12, 2019, p. 8, have recorded, in addition to the increasing overlapping of foreign policy and internal security measures, an 'informalisation' of these policies. It seems that there has been a considerable progressive expansion of security policies in the face of migration crises and other political shocks and that this expansion has followed the traditionally executive and sometimes semi-informal lines of foreign policy. Recent developments in this policy area are extensively dealt with in Chapter 3, Section III.1, below.

IV. The primary obligations of the EU under international law

This section summarises the types of obligations to which the Union is subject under international law in the performance of these activities. The section outlines the categories of the Union's primary obligations under international law according to their sources. It is important at least to mention these obligations because, in the context of international responsibility, the attribution of conduct is closely linked to the other essential element of an internationally wrongful act, namely the breach of an international obligation binding on the relevant international legal person. Although in relation to any conduct it is possible to assess its attribution to one or more international legal persons in the abstract, the need to attribute a certain act to a certain legal person usually arises in practice in relation to allegedly internationally wrongful acts. Before examining the application of the rules of attribution to the acts of the Union in the context of its international relations, it is therefore necessary to have a picture of the types of acts that are relevant in practice to such attribution, and these types of acts can be identified only by looking at the sources under international law of the Union's obligations towards third parties.

IV.1 The general capacity of the EU to bear international obligations

By article 47 of the TEU, the member states confer international legal personality on the European Union. This establishes the capacity of the EU to incur obligations and enjoy rights under international law. As the ICJ affirmed in *WHO and Egypt*, international organisations as international legal persons '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'.[489] For its part, the ILC has underlined that the violation of an obligation binding on an international organisation under international law gives rise to the organisation's responsibility 'regardless of the origin or character of the obligation concerned'.[490] As the ILC Commentary specifies, 'this is intended to convey that the international

[489] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Reports 1980, p. 73, para. 37.
[490] ARIO, Art. 10(1).

obligation "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order"'.[491]

While the EU is capable, however, of bearing obligations under international law, the question is what obligations under international law it actually bears. As indicated by the ICJ, the answer calls for an examination of any 'general rules of international law', meaning rules of customary international law; of the Union's 'constitution', meaning the EU treaties; and of any 'international agreements', meaning treaties, between the EU and third states. As indicated by the ILC, we must also look to any relevant 'general principle applicable within the international legal order', which includes the principle of good faith which underpins the binding character of certain unilateral statements.

IV.2 Customary international law

The international legal personality of an international organisation does not as such entail the application to it of rules of customary international law applicable to states. As was stated by the ICJ in *Reparation for Injuries*, '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'.[492] What the ICJ stated about the UN is equally true for the EU, namely that to say that it enjoys international legal personality 'is not the same thing as saying … that its legal personality and rights and duties are the same as those of a State'.[493] By which rules of customary international law those international organisations that enjoy international legal personality are bound is itself a question of customary international law. This depends on the existence of a general practice accepted as law primarily and perhaps exclusively among states. Although '[i]n certain cases, the practice of international organizations also contributes to the formation, or

[491] Comment to Art. 10(1) in the ARIO Commentary (ILC Report on the Work of the Sixty-Third Session, UN Doc. A/66/10, 2011, p. 63), citing the parallel rule expressed in the comment to Art. 12 in the ARS Commentary (ILC Report on the Work of the Fifty-Third Session, UN Doc. A/56/10, 2001, p. 55).
[492] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174, at p. 178.
[493] Ibid., at p. 179.

expression, of rules of customary international law',[494] it is not clear what these cases may be.

To date, it seems that no primary obligations under customary international law have conclusively been recognised by states as binding on those international organisations that enjoy international legal personality, including the EU. It is true that many international organisations, including notably the EU, affirm their willingness to bind their actions to the respect of human rights. But these kinds of commitments and the instruments in which they are expressed are meant to be an application of the rules of the organisations in question or, at most, of unilateral declarations by these organisations.[495] It is on the other hand unclear whether the EU is at present bound, as a matter of customary international law itself, by any primary obligation of customary international law. Scholarly positions on this point vary widely[496] and the virtual absence of judicial fora having jurisdiction on this issue makes it difficult to firmly confirm or refute this possibility. In favour of the current existence of substantive obligations of customary international law binding also on international organisations, it is argued that such general obligations are binding on all international legal persons.[497] Three main arguments are generally raised against this thesis. The first argument points to the functional character of the personality of organisations, which militates against their being bound beyond the powers and functions attributed to them by member states. The second argument is based on the non-participation of international organisations in the formation of substantive

[494] Conclusions on identification of customary international law, Conclusion 4(2).

[495] See, on the 'internal' character of human rights obligations in the EU legal order, Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials*, 7th ed., Oxford University Press, 2020, p. 392, and Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, *International Law. A European Perspective*, Hart, 2019, p. 185; cf., for a contrary view about the binding effects of human rights on the EU under customary international law, Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective', *The European Journal of International Law*, 17, 4, 2006, p. 779.

[496] A thorough mapping of the several and intricate scholarly positions on this matter has been proposed by Kristina Daugirdas, 'How and Why International Law Binds International Organizations', *Harvard International Law Journal*, 57, 2, 2016, p. 334.

[497] See, in this sense, August Reinisch, 'Sources of International Organizations' Law: Why Custom and General Principles are Crucial', in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, 2017, p. 1021; see also Kristina Daugirdas, 'How and Why International Law Binds International Organizations', *Harvard International Law Journal*, 57, 2, 2016, p. 347, pointing out that 'unless [international organisations] are bound by customary international law vis-à-vis nonmember states, the [international organisations'] member states could evade settled limits on their capacity to contract around customary international law'.

obligations of customary international law, which are formed through the practice and *opinion juris* of states. The third argument observes that primary obligations of international customary law are created specifically for states.[498] According to this second perspective, the only customary obligations that currently bind also international organisations are those arising under the secondary rules on the international responsibility of international organisations.

IV.3 Treaty

As the ICJ explained in *WHO and Egypt*, international organisations are bound both by their own constituent treaties and by any treaties they conclude with other international legal persons.[499] In the case of the EU, this means to be bound by the consolidated versions of the TEU and the TFEU,[500] the Protocols and Annexes to those treaties[501] and the Charter of Fundamental Rights of the European Union

[498] See, to this effect, Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability', in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, 2017, p. 998, who interprets the famous passage of the *WHO and Egypt* ICJ decision, according to which international organisations as international legal persons 'are bound by any obligations incumbent upon them under general rules of international law' (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Reports 1980, p. 73, para. 37), not as a reference to customary international law nor to 'general international law' (had the Court intended this, it would have stated it clearly), but as a reference to the secondary rules indistinctively addressed to all international legal persons.

[499] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Reports 1980, p. 73, para. 37.

[500] The TEU was signed at Maastricht on 7 February 1992 and established the European Union as an international organisation at that time covering only parts of the policy areas later unified under its institutional framework. The TFEU was signed at Rome on 25 March 1957 as the Treaty establishing the European Economic Community. Their last major amendment (which included the last change of title of the TFEU) was signed at Lisbon on 13 December 2007 and entered into force on 1 December 2009. The constantly updated versions of the two treaties, already amended in various occasions after the entry into force of the Lisbon Treaty, are published on the EUR-Lex website: eur-lex.europa.eu.

[501] Cf. TEU, Art. 51: 'The Protocols and Annexes to the Treaties shall form an integral part thereof'.

(ECFR);[502] and by any international agreement, bilateral or multilateral, concluded by the EU either by itself or in a mixed form in conjunction with its member states.[503]

IV.3.1 EU Treaties

Under Article 3(5) of the TEU, the Union 'shall contribute … to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. In its *ATAA* judgment, the ECJ 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 international law, which is binding upon the institutions of the European Union.[504]

That is, the institutions of the Union are obliged by Article 3(5) of the TEU to respect international law, including customary international law, when they adopt an act. But this obligation applies only as a matter of the law of the EU. Treaty rules agreed among the member states do not bind the EU vis-à-vis third states.[505] Article 3(5) of the TEU does not apply as a source of primary obligations towards third states under international law.

Similarly, Article 6(3) of the TEU provides that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms', shall constitute general principles of EU law. Article 53 of the ECFR (which according to Article 6(1) of the TEU 'shall have the same legal value as the Treaties') links the interpretation of the Charter itself to respect for the rights and freedoms protected in the ECHR. Like Article 3(5) of the TEU, however,

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[502] Cf. ibid., Art. 6(1): 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.
[503] The Treaties Office of the Directorate-General for the External Relations of the European Commission maintains a regularly updated electronic database of international agreements concluded by the EU, the Treaty Office Database: ec.europa.eu/world/agreements.
[504] *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, C-366/10, ECR 2011 I-13755, para. 101.
[505] VCLTIO, Art. 27(2).

Article 6 of the TEU does not bind the EU vis-à-vis third states.[506] As such, its breach cannot give rise to the EU's international responsibility towards third states.

IV.3.2 Agreements with third parties

The capacity of international organisations as international legal persons to conclude treaties is well recognised.[507] In relation to any specific international organisation, however, it is necessary also to assess whether and to what extent it enjoys the power under its constituent instrument to conclude treaties.

In the implementation of the CFSP, the EU has become party to both bilateral and multilateral treaties. The EU is bound by international law to observe its obligations under all such treaties.[508] In addition. Article 216(2) of the TFEU provides that treaties to which the EU is party 'are binding upon the institutions of the Union'. This obliges the EU institutions as a matter of EU law to comply with such treaties.

IV.3.2.1 EU treaty-making competence

A specific treaty-making competence is provided for in Article 216 of the TFEU. The Union 'may conclude an agreement' in four cases: (1) 'where the Treaties so provide'; (2) where its conclusion is 'necessary in order to achieve … one of the objectives referred to in the Treaties'; (3) where its conclusion is 'provided for in a legally binding Union act'; (4) where its conclusion is 'likely to affect common rules or alter their scope'.[509] These four cases make no reference to substantive policy areas. They refer, instead, to four different principles. The first one concerns possible explicit provisions in the Treaties. The second concerns the principle of implicit powers, historically resorted to in order to expand Union's competence according to its goals. The third touches upon the binding force of acts of the Union also in the

[506] Ibid.
[507] See in particular VCLTIO, Art. 6, on the capacity of international organisations to enter into treaties.
[508] See VCLTIO, Art. 26. See also VCLTIO, Art. 27(2): 'An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty'.
[509] TFEU, Art. 216(1).

external policy, thus referring to the competences of single substantive sectors. The fourth, the most disputed, refers to an even broader understanding of the doctrine of implied external power as developed by the ECJ.[510]

The exclusive, shared or supporting competences in the conclusion of treaties matches with the type of competence that governs the corresponding policy area. Nevertheless, a wide exception is provided for in Article 3(2) of the TFEU. According to such provision, the competence of the Union on the conclusion of an international agreement is in any case exclusive in the three following hypothesis: (i) where its conclusion is 'provided for in a legislative act of the Union'; (ii) where its conclusion is 'necessary to enable the Union to exercise its internal competence'; (iii) where its conclusion 'may affect common rules or alter their scope'.[511] The first and third hypotheses correspond almost literally to cases (3) and (4) above. This means that when Union's institutions decide that the conclusion of an agreement is necessary to implement one of its policies, the conclusion of that agreement automatically becomes exclusive competence of the Union. As regards the slightly divergent wording of Articles 216(1) and 3(2), the difference between 'legally binding'[512] and 'legislative'[513] acts may refer to the necessity for the Parliament to participate in establishing a new exclusive treaty-making competence, since the Parliament always participates in the adoption of legislative acts,[514] but does not always participate in the adoption of other binding acts, such as those adopted in the framework of the CFSP.[515] The difference between agreements that are 'likely to affect common rules' and agreements that 'may affect common rules' is slight. The first expression, narrower in its meaning, refers to general treaty-making competence and thus must necessarily include the second expression, which refers to exclusive competence. The second hypothesis mentioned in Article 3(2) makes explicit reference to the jurisprudence of the ECJ on implied powers, particularly to the parallelism between

[510] See *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Opinion 1/03, ECR 2006 I-01145, para. 131; cf. Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials*, 7th ed., Oxford University Press, 2020, pp. 110-111. The scope and modalities of exercise of such implied power are further discussed in the text.
[511] TFEU, Art. 3(2).
[512] Ibid., Art. 216(1).
[513] Ibid., Art. 3(2).
[514] Cf. ibid., Art. 289.
[515] TEU, Art. 24(1).

internal and external competences, falling thus into case (2) of the above seen treaty-making competence.

The treaty-making competence of the European Economic Community was originally limited to the conclusion of agreements on tariffs and trade. The ECJ soon adjudicated in the sense of an implicit parallelism between internal and external competences, according to which the Community had external competence in all those cases in which an external action was necessary in order to implement Community policies. The principle of parallelism was affirmed for the first time in the *AETR* ruling, in 1971. In that case, the ECJ decided that in order to determine 'Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions'.[516] The Court then drew a connection between the exercise of an internal power and the establishment of a correspondent external exclusive competence:

> As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[517]

The principle here established is thus that the implementation of common policies must be undertaken by any existing legal means and that 'the system of internal Community measures may not therefore be separated from that of external relations'.[518] The Court took this understanding of Community's external powers to its logical conclusion in *Opinion 1/76*. After having recalled the theory of implied treaty-making competence, the Court stated that such competence is not limited to those cases in which internal power has already been exercised but includes also those cases in which the use of internal power, even if not previously exercised, is envisaged by the Treaty and external measures become necessary in order to undertake the objectives inferable from its provisions.[519]

After Lisbon, Union's treaty-making competence can also be extended through Article 352 of the TFEU. The so-called flexibility clause has essentially the same goal

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[516] *Commission of the European Communities v. Council of the European Communities*, Case 22/70, ECR 1971 00263, para. 15.
[517] Ibid., para. 18.
[518] Ibid., para. 19.
[519] *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion 1/76, ECR 1977 00741, para. 4.

of the theory of implied powers, namely to provide the Union with powers not established in the treaties but necessary to pursue its goals. In most cases, the institutions of the Union favoured, when possible, the criterion of parallelism between internal and external powers, because the flexibility clause envisages stricter substantial and procedural conditions. In particular, the procedure cannot be resorted to in matters of CFSP.[520] The clause has been invoked only when some existing internal acts had already originated in the implementation of that clause or in the absence of any internal act regarding the same sector. Instances of this second case may be found in some cooperation agreements.[521]

IV.3.2.2 Bilateral treaties

The EU is party to a large number of bilateral treaties. Some of these treaties cover issues concerning the operational action of the EU in its CFSP. For example, the EU may have concluded specific agreements with NATO[522] or with third states participating in a mission,[523] a status of forces agreement may be in force between the EU and a third state hosting the mission, and agreements on the transit of forces[524] and on the transfer of prisoners may be in force with third states.[525]

In such situations, international agreements concluded by the Union produce two types of effect. Under international law, they create contractual relations between two international legal persons. As already seen, Union's international personality is universally recognised and the same can be said of its capacity to enter into treaties.

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[520] TFEU, Art. 352(4).
[521] See, for instance, the 1976 Cooperation Agreement with Canada, OJ 1976 L 260, and the 1980 Cooperation Agreement with the ASEAN countries, OJ 1980 L 144.
[522] In this field, the 'Berlin Plus' arrangements, concluded on 17 March 2003, lay down the foundations for future NATO-EU cooperation in contexts of crisis.
[523] See e.g., in the context of Operation Atalanta, the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 202/83, 2009.
[524] See e.g., in the context of EUFOR Tchad/RCA, the Agreement between the European Union and the Republic of Cameroon on the status of the European Union-led forces in transit within the territory of the Republic of Cameroon, OJ L 57/31, 2008.
[525] See e.g. the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania, OJ L 108/3, 2014.

The Union is thus responsible for the observance of its contractual obligations. Under EU law, the effects of international agreements concluded by the Union are defined by Article 216 of the TFEU, which provides that such agreements 'are binding upon the institutions of the Union and on its Member States'.[526] This provision obliges the institutions and the member states to comply with such treaties under the EU legal order. This means also that by accepting the binding force of the EU Treaties in their internal legal systems, member states governments are automatically obliged, under their internal law, to the observance of international obligations undertaken by the Union. This explains why the member states and the Council monitor very carefully the implementation of the Union's treaty-making competence. Often the institutions opt for a so-called mixed agreement involving all the member states and the Union.[527] Such agreements are used first and foremost when an agreement includes some issues that fall within the competence of the Union and others that fall within the competence of member states. Member states can participate to the negotiation through their own delegates or by entrusting the Union's delegation as unitary negotiator.[528] However, they must ratify the agreement according to their internal constitutional procedures. In principle, unless all the member states ratify a mixed

[526] TFEU, Art. 216(2).

[527] Panos Koutrakos, *EU International Relations Law*, Hart, 2015, p. 162, defines *mixity* as 'the legal formula enabling the Union and the Member States to negotiate, conclude and implement an international agreement whose subject-matter falls within the competence of both'.

[528] Allan Rosas, 'Mixed Union – Mixed Agreements', in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, 1998, distinguishes between facultative and obligatory mixity depending on the typology of competence. First of all, he draws a distinction between 'parallel' and 'shared' competences. In the first case, the Union may conclude the treaty without this having any direct effect on the rights and obligations of the member states, which on their part can freely be parties to the same treaty. In the second case, the division of competences implies a division of the rights and obligations included in the agreement between the Union and the member states. According to Rosas, in the realm of shared competences one can further distinguish between 'coexistent' and 'concurrent' competences. In the first hypothesis, the agreement deals with matters falling within the exclusive competence of either the Union or the member states and it would therefore be possible to divide the agreement into two separate parts, one of which pertaining to Union's rights and obligations and the other pertaining to those of states. Treaty-making competence is instead concurrent when, even though both Union's and member states' competences are involved, the agreement forms a whole that cannot be divided into autonomous parts. According to Rosas, mixity is mandatory in the case of coexistent competences, whilst it is only facultative in the cases of parallel and concurrent competences. All these variables show how intricate the treaty-making competence and the relative internal and external negotiations can be.

agreement, it does not enter into force for any of the other parties.[529] It is not sufficient for the conclusion of an agreement to theoretically fall under one of the hypotheses listed in Article 3 of the TFEU on the exclusive competences of the Union in order for mixity to be excluded. In fact, Union's exclusive competence to conclude an international agreement can be exercised only if, on a case-by-case basis, the conclusion of the agreement by the Union alone can be considered the best option according to the provisions regulating the exercise of competences. The institutions may decide to conclude an agreement without the participation of the member states even if the agreement falls under a shared competence.[530] In adopting this decision, the institutions have to take into consideration the principles of subsidiarity and proportionality.[531] On the other side, even if the Union has exclusive competence to conclude the agreement, the EU institutions may enable the member states to be parties to it.[532]

In some cases, the use of mixed agreements is particularly questionable. For instance, all the association agreements of the EU have been concluded in that form.[533] This has been usually justified through the presence, in those agreements, of so-called conditionality clauses. Such clauses submit the efficacy of contractual obligations to the compliance with sensitive standards such as human rights, democracy and non-proliferation of weapons. They were thus political clauses of a kind excluded from the Union competence, at least until the conclusion of the Treaty of Lisbon. Even in the commercial domain, though, a great legal battle broke out when, during the closing of the Uruguay Round, the conclusion of the WTO Final Act

[529] Three different solutions have been adopted in order to limit the negative consequences of the frequent delays. The first and most common solution is to provide for the provisional application of the whole agreement for the time necessary to collect all the ratifications. The second possibility is to set a deadline, by Council decision, by which the member states have to ratify. This option is quite problematic, since notwithstanding the efforts produced by the governments in order to meet the deadline, the ratification process is always a matter of national constitutional rules. The third possibility is the conclusion of an interim agreement reproducing only the provisions of the envisaged agreement that fall under EU exclusive competence, and that can thus enter into force at the moment of Union's ratification. In this case, all the provisions falling under shared competence are frozen until all the member states ratify. Without mentioning the potential conflicts over which provisions do fall under Union's exclusive competence, the solution is only partial, since all the other provisions remain in any case suspended.

[530] TFEU, Art. 2(2).

[531] TEU, Art. 5(3) and (4).

[532] TFEU, Art. 2(1).

[533] See e.g. the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, signed on 21 March 2014.

came under discussion. The Commission requested the ECJ an opinion on Union's competence on the conclusion of the agreements included in the WTO system. The Court acknowledged Union's exclusive competence on the General Agreement on Tariffs and Trade (GATT), but not on the connected General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In *Opinion 1/94* the Court declined to rule on the necessity of mixity in those hypotheses of shared competence, leaving the question of Union prerogatives over matters over which share competences had already been exercised unanswered, [534] taking a step back from the stricter conclusion it had come to twenty years before in *Opinion 1/76*.[535]

The ECJ further clarified the interaction of general competences and treaty-making competence in *Opinion 2/15*. For what regards the termination of pre-existing bilateral investment agreements between some member states and Singapore, with which the Union was on the point of concluding a free trade agreement, the Court, contradicting Advocate General's conclusions on this point, agreed with the Commission that, since those bilateral agreements concern direct investment, a matter now included in the common commercial policy, the Union is therefore entitled to negotiate and conclude agreements in this field in the place of its member states. The Court considered an established principle that 'the European Union can succeed the Member States in their international commitments when the Member States have transferred to it … their competence relating to those commitments'.[536]

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[534] See *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty*, Opinion 1/94, ECR 1994 I-05267, para. 107, in which the Court asserts that 'resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements'. As a consequence of this statement, the Court investigated only the issue of the allocation of competence, leaving the administrative issue of mixity unsolved or, rather, leaving it to the decision of EU institutions in the legitimate exercise of their reciprocal competence.

[535] *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion 1/76, ECR 1977 00741, was the first case in which the Court adopted an overall approach to the question of mixity. The European Community held shared competence in matters of transport and, in its pronouncement, the Court confirmed and deepened the theory of implied powers in relation to a European fund for inland waterway vessels. Nevertheless, the Court acknowledged that the participation of six member states in the agreement was justified, since those states were parties to earlier conventions on the same matters. The Court, though, specified that such participation had to be considered 'as being solely for this purpose and not as necessary for the attainment of other features of the system' (para. 7).

[536] *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, electronic report only, ECLI:EU:C:2016:880, para. 248.

Notwithstanding the Union's and member states' efforts to reach a permanent agreement on the use and on the internal effects of this type of international agreements,[537] it was not always possible to apply the mixed formula. Sometimes the limitations to the applicability of mixity came from outside the EU. This was the case with the negotiation for the UNCLOS. After pressures of third states, concerned with the potential complications arising from mixity, at the end Community signature and participation were permitted but they were explicitly limited to the matters included within its competence, and it was specified that such participation 'shall in no case confer any rights under this Convention on member States of the organization which are not States Parties to this Convention'.[538] The same solution was reproduced in other international conventions and it became frequent to attach to multilateral agreements in which both the EU and the member states are parties such declarations of competences.

The objective of the declarations of competence is to clarify the division of competences over the matters covered by a treaty, so that third states can know from which party to expect compliance with the specific obligations laid down in the treaty and, in the event of a breach, against whom they should seek redress.[539] Typically, the convention itself requires, as a condition for membership of an international organisation, that it is declared who, between the organisation and its members, is responsible for the performance of each obligation. The declaration is generally made in the same instrument of accession. There are different types of declaration of competence. The one contained in Annex IX to the UNCLOS, for example, offers a very detailed procedural mechanism in the event of controversy. Most importantly, it offers a residual clause in favour of third states. In the event that the Union and the member states fail to clarify who is responsible for the breach of a certain provision,

[537] See, as a recent example, the ECJ opinion on the *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, electronic report only, ECLI:EU:C:2016:880.
[538] UNCLOS, Annex IX, Art. 4(5).
[539] See Joni Heliskoski, 'EU Declarations of Competence and International Responsibility', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013, according to whom this objective is hardly met for a number of reasons. The discrepancy between the notion of wrongdoing and that of competence, which includes an infinite number of potential acts; the dynamic nature of the Union's competences; the vague terms in which such declarations are usually formulated. In fact, such declarations are more useful to EU member states for the purpose of postponing the question of the division of competences, often difficult to resolve even internally, than to third states.

they are considered jointly and severally responsibile. Other declarations of competence, such as that included in the CETA, provide for detailed procedures designed to ensure the identification of the correct respondent in a dispute with third states, but not for the joint and several responsibility as a result of failure to clarify the internal division of competence.[540] Finally, multilateral agreements may include more general statements, such as the one contained in the instrument of accession to the Kyoto Protocol, which merely states that the Community is responsible for the fulfilment of all obligations that fall within its exclusive or implicit competence (in this case the instrument manages, if possible, to make the division of responsibility between the EU and member states even more opaque).[541] The fact that in these declarations the Union refers to the internal division of competences represents 'an attempt to apportion responsibilities within a multilateral agreement based on who has competence (the EU and/or its Member States)', that is, an attempt to 'externalize an internal matter'.[542] One can rightly speak of an 'attempt', and not of an effective transposition of national law, because the declaration, whether it is merely a reference to the EU Treaties or it contains procedural indications, cannot establish *a priori* who will be held responsible for a possible violation. Responsibility will in fact be the result of an assessment of the parties' obligations, on which the declaration may have an interpretative effect, and the attribution of the conduct in question, which is not affected by the declaration of competence. The solution that most protects third parties is the contractual provision of joint and several responsibility.[543] However, even if the EU's reasons for assigning external relevance to its internal

[540] CETA, Art. 8.21(4). In this case, the jurisdiction clause is contained in the treaty because it is a bilateral agreement between Canada on the one hand and the EU and its member states on the other and not a convention open to participation of an indefinite number of subjects.
[541] The instrument is published on the World Customs Organization website: wcoomd.org.
[542] Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 111.
[543] Joni Heliskoski, *Mixed Agreements As a Technique for Organizing the International Relations of the European Community and Its Member States*, Martinus Nijhoff, 2001, p. 153, notes that such a solution, from the point of view of the EU and the member states, would frustrate the advantages arising from the conclusion of mixed agreements as a form of external projection of the division of competences. This is certainly true with regard to the division of competences in the phase of implementation of the treaty; however, one of the reasons for the choice of the Union and the member states to conclude mixed agreements is to participate in the negotiations and in this case the utility of shared responsibility and declarations of competence remains.

division of competences are set aside,[544] such an outcome could not automatically follow even in the case of the absence of a declaration of competence. In fact, joint and several responsibility can only be verified once a violation has occurred, since it depends also on the way in which an obligation has been violated and on the persons to whom the conduct can be attributed. Even in the case of contractual responsibility, in fact, one cannot completely rule out the question of the attribution of conduct and apportion entirely *a priori* the responsibility for all the possible cases of violation.[545]

IV.3.2.3 Multilateral treaties

Multilateral treaties are usually concluded among states. However, the EU is party to some multilateral treaties, for example on the law of the sea,[546] fisheries[547] and environment.[548] The obligations under these treaties bind the EU as a matter of international law.

As a matter of internal law of the EU, even pending its accession to the ECHR, the EU is obliged to respect the substantive obligations of the ECHR as 'general principles of the Union's law'.[549] As a result, both the Union and the member states

[544] Such arguments were expressed for example by the ECJ in Opinion 2/2000 on the Cartagena Protocol: 'it goes without saying that the extent of the respective powers of the Community and the Member States with regard to the matters governed by the Protocol determines the extent of their respective responsibilities in relation to the performance of the obligations under the Protocol' (para. 16). It is certainly an exaggeration to say that 'it goes without saying'. The question is more nuanced. At the internal level of EU law, the ECJ's statement is correct. On the external level of international law, however, it cannot be established *a priori* which parts of the Protocol could give rise to violations committed by the EU or states. On the other hand, it is possible that the internal division of competences may be reflected in the ownership of possible due diligence obligations, which can be carried out, and therefore violated, by the EU or by member states.

[545] According to a leading position in literature, mixity is essentially useless for what regards the subsequent legal effects of a treaty (Piet Eeckhout, *EU External Relations Law*, 2nd ed., Oxford University Press, 2011, pp. 264-265). Indeed, Art. 216(2) of the TFEU establishes that the international agreements concluded by the Union are binding also upon the member states and therefore they should prevent the states from contracting conflicting obligations. It is doubtful, however, whether the obligation incumbent upon member states as for Art. 216(2) could actually prevail over agreements of the states with third parties.

[546] See e.g. UNCLOS.

[547] See e.g. the Northwest Atlantic Fisheries Organization (NAFO) and the South East Atlantic Fisheries Organisation (SEAFO).

[548] See e.g. the United Nations Framework Convention on Climate Change (UNFCCC).

[549] TEU, Art. 6(3); ECFR, Arts. 51(5) and 53.

are obliged among them to the same standards of respect for human rights. However, EU's access to the ECHR would allow private individuals to call the EU to respond for its possible violations. To date, *Opinion 2/13* of the ECJ not only prevents EU access to the ECHR at present, but also questions the prevalence of human rights enshrined in the Convention in case of conflict with EU law.[550]

Although the EU did not become a party to the ECHR and it is not likely to become in the near future, the process of accession is still relevant to this thesis because the Draft Accession Agreement was deemed to include special rules of responsibility. Such rules may constitute a potential model for conventional solutions to the issue of attribution in case of accession of the EU to multilateral agreements. Among the elements of tension between the Draft Accession Agreement and the EU Treaties, an important place is occupied by the risk of overcoming the ECJ's prominence over disputes between member states, as the ECtHR would be entitled to judge on foreign policy measures over which the CJEU jurisdiction is currently excluded.[551]

The Draft Accession Agreement contained innovations that could be relevant in terms of application of the rules of attribution between the Union and its member states. Article 1(3) and (4) set out the criterion for the identification of the respondent in proceedings before the ECtHR. The EU would be responsible for violations committed by its institutions and bodies and by 'persons acting on their behalf'; member states would be held responsible for the conduct of their institutions and bodies and 'persons acting on their behalf', even when they were applying EU law. In the event that the above two cases occurred jointly, the EU and the member states

[550] See *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/13, electronic report only, ECLI:EU:C:2014:2454, paras. 183-184.

[551] In ibid., the Court recalls, with respect to the need to maintain its monopoly on the settlement of disputes between member states, Art. 3 of Protocol 8 annex to the Lisbon Treaty (paras. 106-107). Christian Tomuschat, 'The Relationship between EU Law and International Law in the Field of Human Rights', *Yearbook of European Law*, 35, 1, 2016, p. 617, criticises this point, recalling that '[n]o State can invoke its domestic law to justify a derogation from the mutually agreed regime. It seems to amount to a basic misunderstanding to require that in such instances the Court must invariably have the last word'. It must be remembered, however, that *Opinion 2/13* decided precisely on the compatibility between the EU Treaties and the draft treaty of accession to the ECHR, and not on the application of one of the two treaties in a concrete case. The consequence of its comments could well be the amendment of the EU Treaties. Even if, at the present time, it seems difficult to go down this road more for reasons of scarce political cohesion of the member states than for legal reasons.

might have been held jointly responsible.[552] This hypothesis also occurred when a member state had violated the ECHR because compelled to do so by obligations under EU law. Point 23 of the Explanatory Report to the Draft Agreement, however, stated that the activities of member states' staff in the course of an EU operation were to be attributed to the member state. It could be argued that the letter of the Agreement should prevail, and the letter of Article 1(3), referring to 'persons acting on their behalf', seems to include the staff of states seconded to EU operations. The 'command and control' of the EU should thereby prevail, as a basis for jurisdiction, over the 'effective control' of the state of origin. This would mean that the EU would have to respond to the ECtHR for human rights violations committed by member states' troops. This would not remove the requirement of effective control as an attribution criterion in international law; rather, it would establish a rule of jurisdiction based on a special criterion of attribution of conduct within the ECtHR.[553]

For situations where member states apply secondary EU law without any margin of discretion, Article 36 of the Draft Agreement provided for a mechanism whereby the Union and the member state might have been called as co-respondents before the ECtHR. This would overcome the current compromise set by the ECtHR in *Bosphorus*, according to which it is presumed that the measures implementing the rules of an international organisation that provides human rights with an 'equivalent protection' to that offered by the ECHR are legitimate, subject to proof of the contrary in the specific case.[554] However, the co-respondent mechanism was one of the reasons for ECJ's negative opinion. This mechanism, while leaving ample room for the EU to decide autonomously whether or not to intervene, ultimately left to the ECtHR the assessment of the 'plausibility' of EU's choice on the intervention. This, according to the ECJ, would amount to ruling on the internal division of competences

[552] See Art. 3 of the Draft Accession Agreement.

[553] According to Frederik Naert, 'European Union Common Security and Defence Policy Operations', in André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge University Press, 2017, p. 697, fn. 120, the clarification in the Explanatory Report, which seemed to go in the opposite direction to the attribution of conduct to the state of origin of the troops, would be due to the fact that the only 'internal' remedies provided for that type of conduct are before the national courts, since the CJEU has no jurisdiction in the common foreign and security policy.

[554] *Bosphorus Airways v. Ireland*, 30 June 2005, Application n. 45036/98, para. 155.

between the Union and its member states, a matter over which, under EU law, only the ECJ can exercise judicial review.[555]

IV.4 Binding unilateral statements

Those international organisations with international legal personality would seem to have the capacity to assume obligations through binding unilateral statements, although whether any specific international organisation enjoys the power under the rules of the organisation to do so is a separate and further question.[556] It can be reasonably assumed that the binding character for an international organisation of any international obligation undertaken by it by means of a unilateral declaration rests on a general principle of good faith.[557] The question of states' ability to assume obligations through unilateral declarations has been addressed by the ILC, which adopted a list of Guiding Principles on this matter in 2006.[558] The ILC has considered that different types of unilateral acts of an international organisation may have binding international legal effect on the organisation, including 'not only acts of an

[555] *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/13, electronic report only, ECLI:EU:C:2014:2454, para. 224. See the positive comment on this specific point in Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward', *German Law Journal*, 16, 1, 2015, p. 116.

[556] As to the latter, see First Report of the Special Rapporteur Víctor Rodríguez Cedeño, A/CN.4/486, p. 325, para. 38.

[557] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Principle 1; cf. VCLT, Art. 26, and VCLTIO, Art. 26.

[558] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, recorded by the UN General Assembly in Resolution 61/34, 4 December 2006, UN Doc. A/RES/61/34. These Guiding Principles do not apply to unilateral acts of international organisations. The acts of the latter were initially included together with those of states in the work plan of the ILC (Survey of international law: working paper prepared by the Secretary-General, A/CN.4/245, ILC Yearbook 1971, Vol. II(2), p. 61, para. 282), but in the end the ILC, having heard the views of the states on the matter, decided to remove the acts of organisations and possibly refer them to a separate and subsequent analysis (First Report of the Special Rapporteur on unilateral acts of States, Mr. Víctor Rodríguez Cedeño, A/CN.4/486, p. 325, para. 36). The reasons for this removal are due first of all to the important differences between the nature of the legal personality of states and that of organisations (First Report of the Special Rapporteur, Mr. Víctor Rodríguez Cedeño, A/CN.4/486, p. 324, para. 30. In this passage the Special Rapporteur explicitly quotes the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174, at p. 178), and furthermore to the different means of elaboration and formulation of the unilateral acts of organisations as compared with those of states (First Report of the Special Rapporteur on unilateral acts of States, Mr. Víctor Rodríguez Cedeño, A/CN.4/486, p. 325, para. 33).

internal nature, but also acts relating to one or more States or to the international community as a whole'.[559] As reported by the Special Rapporteur Rodríguez Cedeño, the necessity of a separate examination of unilateral acts of the organisations derives from the fact that they 'are performed as a result of the competence which States themselves have conferred' on the organisation and, as such, 'are regulated by the law peculiar to each international organization or body. The rules applicable to the treaties which authorize such bodies to perform such acts are regulated, of course, by the law of international agreements, in particular, the law of treaties'.[560]

As a matter of international law, the EU must probably be seen as capable of unilaterally assuming obligations vis-à-vis third parties.[561]

The natural consequence of the binding nature of relevant unilateral declarations is that they cannot be arbitrarily revoked.[562] These declarations, in fact, being presumed to have been issued in good faith, imply the reliance of the subjects to whom they are addressed with respect to the fulfilment of the content of the obligations that the declaring party intended to contract. Declarations are valid regardless of the form in which they are formulated, whether oral or written[563] and may be addressed to one or more entities or to international community as a

[559] Report of the ILC on the work of its fiftieth session, A/53/10, ILC Yearbook 1998, Vol. II(2), p. 51, para. 123.

[560] First Report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur, A/CN.4/486, ILC Yearbook 1998, Vol. II(1), p. 325, para. 38.

[561] See e.g. the 'Declaration addressed to the Bolivarian Republic of Venezuela on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana', attached to Council Decision 2012/19 of 16 December 2011, OJ L 6/8 of 10 January 2012. ECJ's point that the declaration, together with Venezuelan approval, had to be regarded as an international agreement (*European Parliament and European Commission v. Council of the European Union*, Joined cases C-103/12 and C-165/12, electronic report only, ECLI:EU:C:2014:2400, para. 73), is coherently questioned in Eva Kassoti and Mihail Vatsov, 'A Missed Opportunity? Unilateral Declarations by the European Union and the European Court of Justice's *Venezuelan Fisheries* Judgment', *The International Journal of Marine and Coastal Law*, 35, 1, 2019. Cf., for a parallel, UNMIK voluntary application of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, whose binding nature was recognised in the 'UNMIK – FRY Common Document' of 5 November 2001 (the document is available on the Serbian government website, at https://www.srbija.gov.rs/kosovo-metohija/en/8890).

[562] See the Guiding Principles, Principle 10. In addition to the cases of revocation already provided for in the expression of the content of the contracted obligations, there is also the exception of cases of fundamental changes of circumstances analogous to those referred to in VCLT, Art. 62, and VCLTIO, Art. 62.

[563] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Principle 5.

whole.[564] The only substantive limitation to the content of the declarations is the prohibition of conflict with *jus cogens*.[565] The main condition for the validity of unilateral statements is, on the procedural ground, the power to represent the declaring entity.[566] The same can be assumed for international organisations. There are no defined limits to the rank or functional position of the representatives that can bind a state or an organisation. The important thing is that the person in question has the competence to represent the state or organisation in the matter covered by the declaration. Hence, for the EU the classical functions of external representation normally performed by the Head of State, the Head of Government and the Foreign Minister can be similarly performed by the President of the European Council, the President of the Commission and the High Representative. The commentary to the Guiding Principles quotes the ICJ, which states that the will of the state, and presumably by parity of reasoning the organisation, can also be expressed '[by] holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even [by] certain officials'.[567]

The main substantial limitation to the binding nature of unilateral declarations is that set out in Guiding Principle 7, namely that a unilateral declaration entails obligations for the formulating state 'only if it is stated in clear and specific terms'. This excludes the binding character of the majority of the declarations of principles relied on by the EU in its common foreign policy practice. The terms of the declaration must be 'clear and specific' both with regard to the willingness to enter into obligations under international law and with regard to the specific content of these obligations, the cases to which they refer and the beneficiaries. This requirement also imposes precise consequences with regard to the interpretation of the declarations. The text of Guiding Principle 7 further provides that '[i]n the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner'. According to the Commentary, a restrictive interpretation is required 'in particular when the unilateral

[564] See ibid., Principle 6.
[565] See ibid., Principle 8; cf. VCLT, Art. 53, VCLTIO, Art. 53.
[566] See ibid., Principle 4: 'A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so'.
[567] Commentary to the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Principle 4, ILC Yearbook 2006, Vol. II(2), p. 163, citing the *Case Concerning Armed Activities on the Territory of the Congo (New application 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, ICJ Reports 2006, p. 6, para. 47.

declaration has no specific addressee'.[568] The addressee, as already seen, does not necessarily have to be a single subject, it can be even the whole international community. But the entity that intends to oblige itself must unequivocally express its willingness to enter into an obligation towards determined subjects.

The latter condition to the binding effect of unilateral declarations probably imposes very tight limits on the configuration of EU obligations expressed in unilateral acts. Internal acts which bind the EU in its domestic law and in its relations with member states could hardly be appealed by third parties. This is particularly true of the many detailed commitments to respect for human rights that the EU has also called for in relation to the conduct of its external action. Human rights have a central place in the structure of the Treaties. They are among the founding principles of the Union[569] and are mentioned among the guiding principles of its external action.[570] The Union has sought to make its commitments to the active protection of human rights more precise and concrete through a series of internal acts which should also govern the EU's external activities and in particular its international operations,[571] as well as through acts negotiated with other parties.[572] However, beyond the binding effects at the domestic level and on the specific parties with which the agreements have been concluded, these commitments, although precise and detailed, clearly lack the requirement of clarity and specificity of the addressees and the willingness to enter into international law obligations towards them. It is clear that they do not have obligatory force at international level but are at most the parameters of internal validity of the acts of the institutions and member states.

V. Conclusion

The EU has established itself as an international actor capable both of conducting a foreign policy covering a wide range of substantive areas, including operational and

[568] Commentary to Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Principle 4, ILC Yearbook 2006, Vol. II(2), p. 165.
[569] See TEU, Art. 2.
[570] See ibid., Arts. 3(5) and 21.
[571] See e.g. the Updated European Union Guidelines on promoting compliance with international humanitarian law, OJ C 303/12, 2009; and the EU guidelines on human rights dialogues with third countries, Council Doc. 16526/08, 2008.
[572] See e.g. the Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 115/50, 2006.

military activities, and of assuming international obligations through bilateral and multilateral treaties and through unilateral acts.

Section II described the institutional structure of the EU's external action, in particular highlighting the growing role of the EEAS and the division of competences in relation to conclusion of international treaties. In Section III, EU missions were examined. In Section IV, the sources of EU's international law obligations have been described in broad terms. The purpose of the section was to provide guidance to identify situations where the Union's activity might be contrary to its obligations under international law and thus be relevant to the Union's responsibility. The main source of the Union's obligations towards third states are treaties. There do not seem at present to be any rules of substantive customary international law imposing primary obligations on international organisations. In contrast, international organisations are seemingly capable of undertaking international obligations by means of unilateral declarations.

Chapter 3
The application of the general rules of attribution in the context of EU external action

I. Introduction

The EU is an international organisation vested with international legal personality. The starting point for ascertaining the attribution to it of any conduct must be the general rules of customary international law on the attribution of conduct to an international organisation. This chapter applies these rules to the external activities of the Union and its member states.

The greatest difficulties in applying the international rules on the attribution of conduct to an international organisation in the context of the EU's external activities arise when these activities take place in a framework of close cooperation between the Union and the member states. In this regard, issues of attribution are most often debated when member states' authorities apply external policy measures decided by the Union and when the Union performs executive activities in third countries using personnel and resources seconded from the member states. In both cases, some observers believe that a special customary rule of attribution of conduct to the EU has developed and that this special rule is opposable to third parties. This chapter argues that there is no such special rule of attribution and that the situations in question can be effectively dealt with by applying the general rules codified and developed by the ILC. It further argues that the application of the general rules ensure an appropriate attribution of conduct.

The Union's action in highly regulated multilateral contexts such as international commerce consists in the issuing of common rules, which are then implemented by the authorities of the member states.

International courts and tribunals have to date developed two divergent strands of case law relating to the attribution of conduct to the EU which correspond to the distinction between regulatory and non-regulatory conduct. Some WTO Panels and other tribunals that have decided cases relating to the regulatory activities of the Union have embraced the argument, advanced by the European Commission and

part of the literature, that the conduct of national authorities in implementing EU law should be attributed to the Union whenever the Union exercises a high level of normative control over such implementation, leaving virtually no space for national governments to choose between different measures of implementation. This approach diverges from that of the customary international rules on the attribution of conduct applicable generally to international organisations. However, this chapter argues that this divergence should not be ascribed to the existence of special rules of attribution applicable to the EU vis-à-vis third parties with whom it has relations but to the existence of multilateral regimes with special dispute resolution mechanisms altering the functioning and the scope of application of the international rules of attribution.

Under the general rules of customary international law on the attribution of conduct to an international organisation, conduct can be legally attributed to the organisation one of the following three ways. The conduct might be performed by an organ or agent of the organisation acting in that capacity, the situation covered by Articles 6 and 8, cross-referenced with the definitions of ‘organ’ and ‘agent’ in Article 2(c) and (d) respectively, of the ARIO. Alternatively, the conduct might be performed by an organ of a state placed at the disposal of the organisation and acting under its effective control, the situation envisaged in Article 7 of the ARIO. Finally, the conduct might be acknowledged and adopted by the organisation as its own, as foreshadowed in Article 9 of the ARIO. This chapter examines each of these scenarios in turn in the context of EU external action.

II. Conduct of organs or agents of the EU

The individual or the entity that materially performs a given conduct may be officially an organ or agent of an international organisation. In the alternative, that individual or entity may be an organ of a state fully seconded to the international organisation. In the further alternative, the individual or entity, despite not being formally qualified as an organ or agent of the organisation, may be vested with official functions by the international organisation. All three possibilities are encompassed by the rule on the attribution of conduct to an international organisation embodied in Article 6(1) of the ARIO.

II.1 EU organs and agents: general framework

In order to assess the attribution of conduct to the EU, it is necessary to verify whether the material authors of the conduct are organs or agents of the EU according to the rules of the organisation. An organ is 'any person or entity which has that status in accordance with the rules of the organization'.[573] An agent is 'an official or other person or 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'.[574] Finally, '"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.[575]

Any regulatory activity is attributed to the Union if it is adopted by the Council, the High Representative, the structures of the EEAS or any other body that is organically embedded in organisational and operational structure of such organs.

If the status of organ is disputed, it is relevant to consider whether the relevant actor is integrated into the institutional structure and it does not possess separate personality in international law. The specific and detailed qualification of each body in EU law are not relevant. An agency of the EU established by agreement of the member states must be considered an organ of the Union regardless of its internal qualification, unless it is considered an independent organisation with its own international legal personality.[576] The reason lies in the fact that the organisation has total control over the agency's hiring policy, operational guidance, regulation and funding through its unitary structures. As for conducts performed by EU organs and agents during missions abroad, it shall be attributed directly to the Union in accordance with Article 6 ARIO if such staff are permanently and officially integrated in the Union organisational structure, for example if they are directly employed by the

[573] ARIO, Art. 2(c).
[574] Ibid., Art. 2(d).
[575] Ibid., Art. 2(b).
[576] Here there is no need to enter into the debated question of the subjectivity of individual EU agencies. The observation has a general value in principle: in the qualification of certain persons or entities as bodies, the rules of the organisation must be considered in their aspects that can be known by third parties with the normal diligence, just as it is, for example, for persons authorised to ratify treaties according to the internal laws of the states (cf. VCLT, Art. 46). Thus, the fact that an entity is known as an 'EU agency' is in itself a useful indication for this purpose.

Union or otherwise permanently employed in Union organs, including formally advisory bodies such as the Political and Security Committee.

Organs of states fully seconded to the EU must be treated as EU agents for the purposes of the attribution of their conduct under Article 6 of the ARIO.[577] This is for example the case of members of the diplomatic staff of a state who are employed in an EU delegation as EU's diplomatic representatives, despite being paid and ranked according to the remuneration systems of their home state.

The same applies to so-called *de facto* agents, who are not part of the organisational structure of the EU but to whom tasks ancillary to EU activities have been assigned.[578] These are usually non-regulatory activities, since regulatory activity is generally described in the Treaties and entrusted to EU organs. This is the case, for example, of individuals or security or logistics agencies employed by EU missions abroad. However, the possibility should not be excluded *a priori* that the EU relies on organs for certain regulatory activities, as states do in certain fields, which according to its law may be autonomous agencies, but whose activities are so embedded in the structure of the EU that they can be considered *de facto* its activities.

In the three previous cases, *ultra vires* conduct is also attributed to the EU. This is the case, for example, of a regulation issued by the Council outside the competences of the Union or in violation of the rules of adoption, which could give rise to attribution of an act of an EU organ. Similarly, it is the case of a document issued by a diplomat of a member state serving in an EU delegation without having an official mandate, which could give rise to attribution of an act of an organ of the EU. Finally, it is the case of a crime committed by a private security contractor employed by an EU mission in the course of its security management tasks, which could give rise to attribution of an act of a *de facto* EU agent.

[577] ARIO Commentary, Art. 7, para. 1, p. 56.
[578] Ibid., Art. 6, para. 11, p. 56.

II.2 Are CSDP operations EU organs?

Pursuant to Article 6 of the ARIO, the conducts of personnel in CSDP operations could be attributed to the EU on the basis of their status as *de jure* or as *de facto* organs.

Military operations established in the name and on behalf of an international organisation are generally considered as *de jure* organs of the organisation. Complications in the application of the rules of international law on the attribution of conduct arise, however, with regard to the specific conduct of troops. On the one hand, as part of the operation the troops could be considered as organs of the organisation, on the other hand, as national contingents they remain linked to the States of origin and can therefore be considered to be placed at the disposal of the organisation by the State.[579]

In order for CSDP personnel's conducts to be attributed to the EU as conduct of *de facto* organs, two requirements must be met: (1) a transfer of operational control of troops from states to EU structures (specifically to the EEAS); and (2) a legitimate expression of the EU's will in which it officially incorporates the mission into its organisational structure.[580] Concerning the former, the orders of transfer are not publicly available, but they are mentioned by the EU Command and Control Concept.[581]

The second requirement is fulfilled if the EU has the competence to incorporate such missions and the acts establishing the mission provide for its incorporation into the EU organisational structure. CSDP operations have been established on the basis of Article 28 TEU, which does not cover the creation of new organs.[582] Precisely because of this operational nature, the General Court in *H v. Council and Commission* denied its jurisdiction. The EU police mission at hand being only an

[579] See an extensive analysis on the attribution of conduct of troops employed in EU military operations in Andrea Spagnolo, *L'attribuzione delle condotte illecite nelle operazioni militari dell'Unione europea*, Editoriale Scientifica, 2016.
[580] Aurel Sari and Ramses A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press, 2013, p. 134.
[581] Council doc. 11096/03 EXT.
[582] Art. 240 of the TFEU, already used by the Council to establish military bodies such as the Military Committee, could also be used as a basis to establish foreign missions.

'activity', it could not be considered as an organ.[583] As for the second condition, in theory nothing would preclude the qualification of CSDP operations as subsidiary organs of the Council. However, in the internal structure of an organisation, the qualification as organ cannot be presumed, and must be formally expressed. In the case of CSDP missions, neither the decisions of the Council nor other related documents qualify them as subsidiary organs. In sum, the two conditions necessary for the incorporation of CSDP operations into the organisational structure of the Union are not fulfilled.

Different issues arise in the context of EU organs created by secondary law and endowed with 'legal personality' such as Frontex.[584] These are Union's organs and the legal personality is recognised in order to enable them to carry out their external tasks. These tasks includes the conclusion of technical agreements with third countries, negotiated in accordance with the intergovernmental framework of the common foreign policy. It allows autonomy and bypasses complicated internal issues of competence. The classification of these Union's organs as autonomous persons in the international arena 'may also serve the purpose of leaving some room for flexibility in often rapidly evolving practice',[585] not only at the internal institutional level but also vis-à-vis third parties with whom they come into contact.

II.3 Member states or member states' authorities as EU organs?

The conduct of member states in connection with EU's activities needs to be distinguished from the conduct of the organs of the organisation. The participation of a member state in the decisions adopted by an international organisation takes different forms, such as voting in the European Council, the UN Security Council or the General Assembly. In most cases, votes do not have legal relevance for the responsibility of the organisation. According to Article 6(1) of the ARIO, the acts of

[583] *H v. Council of the European Union and Others*, C-455/14 P, electronic report only, ECLI:EU:C:2016:569, paras. 24-25.
[584] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Art. 15.
[585] Niels Blokker, 'International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law', *Yearbook of European Law*, 35, 1, 2016, p. 481.

the organs of organisations, including those organs gathering the representatives of the member states voting on their behalf, must be attributed to the organisations themselves.[586] The only cases in which the member state that expressed a vote can be called to account seem those of circumvention and coercion referred to in Articles 60 and 61 of the ARIO. Therefore, with regard to this first type of situations, lifting the institutional veil is normally not allowed, at least not for the UN.[587]

However, difficulties may arise when a state binds itself to incompatible obligations under international treaty law, like when its vote in an organ of an international organisation constitutes a different behaviour from that which the state itself was obliged to hold according to an agreement with a third state. In such cases, the state's responsibility for failure to comply with obligations under treaties (including those stipulating the participation in an international organisation) cannot be avoided by invoking other conflicting obligations. Article 27 of the VCLT is clear in providing that a state may not invoke rules of national law, including that of respecting treaties, participating in decisions of an international organisation or applying those decisions, to justify non-compliance with an international treaty. A conflict between two treaties equally binding upon a member state is a question of application of the law of treaties, up to the point of irresolvable treaty conflicts, in which cases the party to both treaties must simply choose which one to breach.[588]

In case of application by member states of measures decided by an organisation, the state applies the measure by virtue of its obligations towards the organisation itself and the other members of the organisation. But such obligations, in order to be translated into activities of a member state's administration, must be transposed into domestic law.

Activities of state organs which constitute application of measures decided at the level of the organisation are therefore first and foremost the application of domestic law; more specifically, such activities are usually an application of the national

[586] It is worth noting that this does not necessarily rule out attribution to the state as well.

[587] In *Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility*, Appl. Nos. 71412/01 and 78166/01, ECHR 2007, the ECtHR stated that the ECHR cannot be interpreted in the sense of limiting or conditioning in any way the participation of a state in the UN. Even the votes expressed in the UN Security Council cannot be considered contrary to ECHR obligations (para. 149).

[588] See, in this sense, Magdalena Ličková, 'European Exceptionalism in International Law', *The European Journal of International Law*, 19, 3, 2008, p. 469, correctly observing that 'normative conflicts arising between the EC and other international conventions are a law-of-treaties problem'.

provision establishing the duty to comply with international agreements. Under international law, therefore, acts of a state which constitute the application of decisions of an international organisation are treated in the same way as any other act of the state. Indeed, in order to protect the expectations of third parties, international law generally disregards the internal organisation of states. In other words, it is not important which internal rules oblige the internal organs of a state to comply with the decisions of an international organisation. What matters is that such organs act in their quality as state organs and carry out activities typical of their functions.[589]

It can therefore be affirmed that in general terms the conduct of a state in application of the decisions of an international organisation is attributable only to the state in question. This is true despite the opposite view taken by the European Commission in its comments to the preparatory works of the ILC. The EU Commission, on the basis of a series of WTO Panel Reports in which member states' customs authorities were treated as EU organs, argued that in general member states' organs can act as *de facto* EU organs. This hypothesis was rejected by Special Rapporteur Giorgio Gaja.[590]

In fact, the WTO *Biotech* Panel made it clear that the EU responsibility for the activities of member states' customs authorities is recognised case by case on the procedural basis of the EU's failure to contest this responsibility.[591] Perhaps one could even argue in favour of a general acknowledgment of conduct by the EU under Article 9 of the ARIO. Indeed, the position that the customs authorities of the member states must be considered at the same time *de jure* organs of the EU when carrying out functions entrusted to them by EU law seems to be a minority view.[592] A different example concerns the implementation of the economic sanctions imposed by international organisations against states or individuals.[593] In these cases the

[589] See VCLT, Art. 27, and ARIO, Art. 6.
[590] Seventh Report of the Special Rapporteur on the Responsibility of International Organizations, UN Doc. A/CN.4/610, 2009, para. 33.
[591] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO/DS291/R, WTO/DS293/R, Panel Report of 29 September 2006, para. 7.101.
[592] Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (ed.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014, p. 76.
[593] See the recent case of the allegedly Iranian vessel detained by Gibraltar authorities in application of Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011:

conduct is only attributable to the state. The only exception being in case of direction and control, coercion and circumvention by the international organisation.[594] In such cases, one can speak of responsibility also or only of the organisation, although the conduct is attributed to the state.

The exclusive attribution to the member state is not affected by the transfer of competences to the EU, because member states are not subject to any external coercive authority even when acting under the so-called EU exclusive competences.[595] In some areas, state authorities are obliged under EU law to implement EU measures without discretion, but compliance with this obligation has consequences that are limited to mutual relations between member states and within the regime established by the Treaties. These consequences are not such as to constitute a transfer of sovereignty of executive activities in the terms in which sovereignty is understood in international law, that is as an effective government over a territory and a population.[596] From a legal point of view, third parties have no interest in waiting until the EU expands or makes more effective its power in matters within its competence, in order to see their rights resulting from the responsibility of

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Matthias Hartwig, 'Tanker Games. The Law behind the Action', *EJIL:Talk!*, 2019 (at ejiltalk.org/tanker-games-the-law-behind-the-action).

[594] ARIO, Arts. 16 and 17.

[595] Cf. Ramses A. Wessel and Ige F. Dekker, 'Identities of States in International Organizations', in *International Organizations Law Review*, 12, 2, 2015, p. 317, on the ambiguous role of member states as 'law enforcers' of the EU. For an accurate account of the long debated theory of *dédoublement fonctionnel*, see Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dedoublement fonctionnel*) in International Law', *The European Journal of International Law*, 1, 1990.

[596] Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 227, fails to grasp this fundamental difference from sovereign states when he observes that 'the mechanisms of control aimed at ensuring the effective and uniform implementation [of EU law] more closely resemble the "checks and balances" of federal states than the mechanisms of other [international organisations]'. Failing to recognise the fundamental importance of the structural link between the direct responsibility of sovereign states and the availability of a coercive apparatus, Delgado Cateleiro is faced with a paradox: when the authorities of member states violate international obligations in matters that would fall within the competence of the Union (e.g. providing subsidies to certain industries), 'EU Member States are breaching an international agreement when, in principle, they should not be able to do so, since they do not have the competence to conclude the agreement in the first place' (p. 232). This question appears paradoxical only if one does not realise that from the point of view of international law, based on the principle of effective government, the fact that member states should not be able to breach a certain obligation is completely irrelevant; what matters is whether states do breach a certain obligation or do not. Persevering in this error of assessment with respect to the external relevance of the division of competences, Delgado Casteleiro resolves the paradox by establishing that '[t]he EU should increase its efforts and expand its role in controlling its Member States' state subsidy policies' (p. 232).

EU member states fully protected. The erroneous perception that there is a general interest of the international community in this sense perhaps stems from the functionalist conception of international organisations as bodies that are good in themselves as entrusted with tasks that promote the greater good of international cooperation.[597] The theory that international organisations are instruments functional to the common good of its member states,[598] cannot have a normative value with respect to the general rules of attribution. There are internal consequences under EU law in the event of non-compliance by a member state, starting with the infringement procedure provided for in Articles 258 and 259 of the TFEU, but they do not provide for the use of coercive instruments. Even in the most serious cases of systematic violation of the rule of law, the mechanism of Article 7 of the TEU does not provide for the use of coercive means comparable to those exercised by states in their internal law enforcement. Article 7 provides a mechanism of sanctions as a special regime of international law,[599] and it is limited to the suspension of the member state's rights. This is the natural consequence of the suspension of the reciprocity of the member states' obligations, which has in fact already taken place on the part of the defaulting party. The internal agreements between states and organisations on the coordinated use of their organs are, if anything, relevant to the qualification of seconded organs.

In conclusion, EU members states cannot be considered as EU organs in any circumstance. However, they can place at the disposal of the organisation their organs or agents. In order to attribute the conduct to the organisation, the ILC has adopted the criterion of effective control. Therefore, the conduct is not attributed to

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[597] Cf. Jan Klabbers, '*Sui Generis*? The European Union as an International Organization', in Dennis Patterson and Anna Södersten (eds.), *A Companion to European Union Law and International Law*, Wiley, 2016, p. 11, according to whom some of the ambiguities that arise in the practice of international organisations and between their respective internal systems are due to the confusion, unresolved in the doctrine of international law, between a functionalist theoretical framework, based on the idea that international organisations serve the common good of the international community (an idea historically developed with reference to global entities such as the UN and its agencies) and the subsequent development of organisations such as the EU, set up as interest groups to promote the interests of their members in the international arena or to coordinate their internal activities.

[598] See TEU, Art. 21(2)(a).

[599] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', *The European Journal of International Law*, 17, 3, 2006, correctly note that these sanctions are part of the special responsibility regime established by the European Treaties but do not exclude, residually, the application of the general rules of responsibility, still applicable in case of ineffectiveness of the solutions on which the member states have agreed in the Treaties.

the EU if it does not exercise effective control over the seconded organ. Otherwise, it must be proven that the rules established by the ILC does not correspond to the state of international law, or the existence of a special rule on attribution for organs of member states seconded to the EU.

Another possible distinction between conducts that are attributed to the Union and conducts to be attributed to its member states can be derived from Articles 291(1) and 291(2) of the TFEU. This article concerns the implementation of EU acts respectively by the member states, as the normal rule, and by the Union, the exception. The distinction would therefore hinge on the concept of discretionary power. The state would be responsible only for the part of conduct that corresponds to the margin of its discretion, that is the part of conduct that it could have avoided by implementing the EU measures in a different way, compatible both with EU law and international law. On the contrary, for all those conducts adopted by states to implement EU measures that leave no margin of discretion, the EU only would be responsible. In this case, the distinction between the conduct attributed to the states and the conduct attributed to the Union is based on the difference between measures contained in EU regulations and measures contained in EU directives, instead of relying on exclusive and non-exclusive competences.[600] However, the fact remains that there are no situations in which member states are treated as EU organs under international law. The situations in which member states' organs are treated as EU organs are those included in the category of seconded organs as formulated in the ARIO, unless otherwise agreed between the EU and the third parties.

[600] In support of this particular version of the normative control theory, Ottavio Quirico, 'The International Responsibility of the European Union: A Basic Interpretive Pattern', *Hungarian Yearbook of International Law and European Law*, 2013, p. 73, calls into question Art. 27(2) of the VCLTIO: 'An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty'. According to Quirico, this provision would lead to the conclusion that '[w]hen the Union's rules (ought to) govern the legality of Member states' conduct, the latter should be attributable to the Union'. The matter with this interpretation is that it erroneously assumes that there is a perfect correspondence, internationally relevant, between matters falling within the Union's competence and the attribution of conduct to the Union. On the contrary, Art. 27(2) of the VCLTIO contradicts precisely this correspondence, because the rules of competence are internal rules of the Union and therefore cannot be used to decide to whom conduct should be attributed at the international law level.

III. Conduct of organs or agents placed at the disposal of the EU (Article 7 ARIO)

The second article on attribution in the ARIO is Article 7, concerning the conduct of organs of a State placed at the disposal of an international organisation.

Article 7 embodies two fundamental requirements, namely that the state organ must be placed at the disposal of the international organisation and the organisation must exercise effective control over the conduct. The majority of the practice to which this standard refers concerns non-regulatory conduct of the EU, in particular peacekeeping operations or other foreign missions with operational objectives and instruments.

Placement at the disposal of an international organisation requires an act of transfer of authority from a member state to EU organs, like a secondment. However, if the organ of the State is fully seconded to the organisation Article 6 ARIO applies, because the seconded agents or organs become, under international law, organs of the receiving entity.[601]

Article 7 applies when the organ placed at the disposal still acts to a certain extent as organ of the seconding State. The secondment is not complete when the staff is still employed, for example for salary and disciplinary purposes, by the state of origin and within its hierarchical structures. In this case, seconded staff are often part of operating units composed of personnel coming from only one single member state. This staff in some way continue to respond to their country of origin. In case of secondment to EU missions, the personnel is operationally assigned to EU organs, for example under the command of the Political and Security Committee.

It is more difficult to fulfil the second requirement necessary for attribution under Article 7 ARIO, namely effective control. This is a very remote circumstance that must be proven by the complainant. Concerning the EU, this is very difficult to prove, because the connections with the state are in practice usually very strong.

For example, it is possible that in the future mixed Frontex operational units will take place. These would consist of both EU personnel and personnel placed at the disposal of the EU by the member states. In any case, all commanders would belong to Frontex, at least from the operational headquarters to the highest commander in the field of operations. In these hypothetical cases, the conduct of the operational

[601] ARIO Commentary, Art. 7, para. 1, p. 56.

unit should be considered under the effective control of the EU. The only exception would be if the state intervened specifically by circumventing the command structure to give divergent directives to its staff seconded to the mission, despite the fact that the command structure is entirely in the hands of the EU. This is very unlikely.

The current situation, however, is different. The state holds the disciplinarily control over its own personnel and has its own commanders in charge of the individual units in the field. Also, it is involved in the command and management of operations at headquarters level. Therefore, it is very difficult to prove that the EU has effective control over Frontex operational units. Specifically, factual control cannot exist in the terms of the criterion of 'complete dependence' established by the ICJ in *Nicaragua* and *Genocide*, because EU member states give fundamental operational support to their troops in the CSDP context.[602] In sum, effective control is very difficult to prove because the transfer of authority, which is always presumed to be partial, is particularly weak and leaves a wide power of control to the troop-contributing states.

Article 7 does not cover the normative control exercised by the EU over the implementation of measures by member state. However, it should not be ruled out the possibility that in the future not only individual agents will be placed at the disposal of the EU, but also composite bodies, like an entire information or logistics service. In this case, dual attribution would be more likely, because the acts of the agency would not only be attributed to the EU under Article 7 of the ARIO, but could

[602] Aurel Sari and Ramses A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press, 2013, p. 140, argue that normative control may exist with respect to CSDP operations. This normative control is not supported here in the same terms as some authors invoke it with respect to measures by which member states' authorities apply EU law; in fact, CSDP missions would not fall into this category of measures, either because of the EU's limited defence competence or because they are not entirely subject to EU legal mechanisms. The authors combine the solutions offered by the ICTY in *Tadić*, which proposes a more relaxed standard of dependency for attribution, and the WTO Panel in *Geographical Indications*, which provides the solution of regulatory control. The authors affirm that CSDP missions could not function if it were not for all the formal acts of the Council and its bodies that make them operate. But this solution, based on a weak dependence requirement, seems incompatible with the standards that have prevailed so far in international law. In the articles of the ILC there is no presumption of attribution for subsidiary organs understood as seconded troops (there is instead the notion of seconded organs); the concrete situation must prevail over the internal rules of the organisation; there is no codification of normative control; and above all factual control must be effective control and not simply dependence.

also be attributed to the home state under Article 4 of the ARS. This is because secondment would not be complete and the state would not be relieved.

It is relevant to note that the Courts with jurisdiction over the conducts of EU member states apply the criteria of effective control in the context of states' conducts that involve direct operational intervention of the Union's institutions, such as CSDP operations, counter-piracy missions or immigration control. This is different from how the EU is treated concerning its regulatory conduct of the EU, like in the context of the WTO. This is caused by the peculiarities of the various special regimes of responsibility and by the lack of remedies for violations arising from non-regulatory activity of the Union. The possibility of an indirect responsibility of the Union, although not openly stated for reasons of jurisdiction, has often been implied in cases in which the member states alone have been called to respond. The possibility of double attribution of conduct is now accepted by an increasing number of tribunals.

III.1 The attribution of conduct in the context of immigration management

Frontex is the European Border and Coast Guard Agency, established in 2004 as the European Agency for the Management of Operational Cooperation at the External Borders and known by the French acronym for 'external borders' (*frontières extérieures*).[603] This agency is the main operative tool for the already mentioned intensification of the surveillance at EU external borders. It was initially concerned solely with the coordination of the border guards and coast guards of member states at the external borders of the Schengen area. It began to carry out operational activities in 2007, when Rapid Border Intervention Teams were established, consisting of national contingents and deployed at the request of a member state on its territory and under the instructions of that state in cooperation with Frontex.[604] In 2011 a new regulation expanded the possibilities for Frontex to set up joint operations and cooperation projects on information and security with Member States

[603] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.
[604] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, Art. 10.

and other EU agencies.[605] This led, for example, to the founding of the European Border Surveillance System, created in cooperation with the member states and establishing a framework for collaboration with third states and other agencies, such as Europol.[606] The mandate of Frontex changed again in 2016 and in 2019.[607] The plan is for Frontex to reach 10,000 personnel.[608] Of these, however, only 3000 will be EU staff, with the majority of personnel still being seconded from member states. Operational tasks already include, for instance, direct rejections and people checks. In addition, Frontex has concluded administrative agreements with both member states and third states for cooperation in migration control, and it regularly sends liaison officers to these states. Liaison officers are also seconded to Operation Sophia and other CSDP operations, usually together with Europol officers.[609]

Frontex has rapidly expanded in terms of personnel and resources in response to the migration crises triggered by the war in Libya in 2011 and the war in Syria in 2015. Since then, the member states have not been able to agree on the revision of

[605] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[606] Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

[607] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, that repealed Regulations 1052/2013 and 2016/1624.

[608] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, Annex I.

[609] Frontex, *Consolidated Annual Activity Report 2019*, pp. 66-71. Of particular importance is the project of a Crime Information Cell, shared with the CSDP Operation Sophia (EUNAVFOR MED). Sophia, launched in 2015 to replace the Italian operation Mare Nostrum, overlapped with Frontex Joint Operation Triton, which did not patrol the high seas but only the Italian coast. The original objective of Sophia was not the rescue of migrants but the capture of traffickers (Council Decision (CFSP) 2015/778, Art. 1). However, since rescue is imposed by the international law of the sea (UNCLOS, Art. 98), in 2016 and 2017 Sophia focused mainly on this, bringing to Italy many refugees whom later on other member states refused to receive according to subsequently proposed automatic redistribution schemes, triggering heated controversy which threw into crisis the whole management of the CFSP. As a result, the PSC instructed the commander of Sophia to stop using ships and therefore in practice to suspend rescues (Council of the EU, Press release of 29 March 2019, 'EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019'). In addition, instructions have been given for two new tasks, namely training the Libyan Coast Guard and preventing illegal arms trafficking (Council Decision (CFSP) 2017/1385). These tasks were adopted in implementation of UN Security Council Resolution 2292, 14 June 2016, UN Doc. S/RES/2292.

the strict criteria for asylum application set out in the Dublin Regulation[610] or on the establishment of a new common European framework for the management of migration flows.[611] The responses to these migration crises have focused on rejection and return to the states of departure and detention just inside external borders for those migrants who manage to cross the border and to apply for asylum. This has led to growing concerns over the treatment of migrants by the various national border guards and Frontex and in particular about the compatibility of such treatment with respect for human rights.[612] The above-described structure, however, makes it very difficult to appeal to the ECJ complaining about possible human rights violations by Frontex and national border guards. The activities of Frontex are largely executive activities, therefore they cannot be directly challenged before the ECJ for annulment. They could be challenged only if directed towards specific persons.[613] An additional matter is that to date all Frontex operational activities have been carried out by troops provided by member states and commanded at least in part by the state of origin. Frontex manages only the framework for cooperation and coordination of operations. Therefore, these measures are excluded from the jurisdiction of the CJEU according to Article 276 of the TFEU.

At an intermediate stage of the operational expansion of Frontex, the European Parliament brought a proceeding before the ECJ challenging the scope of the powers granted to Frontex. More precisely, the Parliament obtained the annulment of Council Decision 2010/252, implementing the Schengen Borders Code adopted by Regulation 562/2006,[614] for lack of competence. The implementing power of the

[610] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
[611] On 23 September 2020, the European Commission launched a broad proposal for a new pact on migration. Together with specific legislative proposals, the Commission issued an overarching communication: COM(2020) 609 final, 'Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum'.
[612] See e.g. the Report of Amnesty International, 'The Human Cost of Fortress Europe. Human Rights Violations Against Migrants and Refugees at Europe's Borders', 2014; and the Report of the United Nations Support Mission in Libya and the Office of the High Commissioner for Human Rights, 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya', 2018.
[613] TFEU, Art. 263.
[614] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Council, in fact, could not be exercised in such a way as to modify the essential elements of the regulation.[615] The court agreed with the Parliament's argument that the possibility of adopting operational measures with a wide discretion substantially comparable to those of a CFSP mission went beyond what could have been considered an element not essential in the regulation. In particular, the decision provided for the possibility of establishing operation plans that included, as instruments to be used on the high seas against vessels suspected of illegally entering the Schengen Area 'stopping, boarding and searching the ship', 'seizing the ship and apprehending persons on board' and 'escorting the vessel' towards the third country from where it departed. These measures, according to the court, provided for such pervasive use of discretionary public powers 'that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required'.[616] After that decision, essentially the same operational instruments were included in the new Frontex regulations but following the TFEU legislative process and explicitly providing for the respect of the principle of non-refoulment.[617]

In the foreseeable future, Frontex is likely to remain at the centre of the debate on the attribution of conducts to the EU, especially in terms of respect for human rights.[618] Its equipment, which includes the use of weapons, and its rules of engagement make it a European law enforcement agency with police and military characteristics. Today, Frontex is authorised to conclude technical agreements with third states and to carry out operations at their request, also in states that do not share borders with the Schengen area, for example in the Sahel region.[619] The latest regulation of Frontex provides for a significant extension of its budget and the training of 'standing corps' with the transition from the current staff of less than 1000 to

[615] Such limit had been made explicit in Council Decision 2006/512/EC, amending Council Decision 1999/468/EC, at Recital 7(a).
[616] *European Parliament v. Council of the European Union*, Case C-355/10, electronic report only, ECLI:EU:C:2012:516, para. 77.
[617] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Recital 9.
[618] See e.g. Frontex Press Release of 27 October 2020: 'Frontex launches internal inquiry into incidents recently reported by media', at https://frontex.europa.eu/media-centre/news-release/frontex-launches-internal-inquiry-into-incidents-recently-reported-by-media-ZtuEBP.
[619] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

10,000 officers by 2027. These standing corps will use agents from member states in short-term secondment and long-term secondment and one third of EU staff.[620] So far, all Frontex border operations have been carried out by officers placed at the disposal by member states, either the border state in which the mission is deployed, or other member states.

In practical terms, the question of the attribution of conduct of personnel involved in Frontex operations is relevant for the territorial or extraterritorial application of the ECHR. In particular, the extraterritorial jurisdiction of the ECtHR relevant in this context was defined in the *Hirsi* case, which recognised the applicability of the Convention also to operations conducted in international waters by vessels flying the flag of a state party or under their control.[621]

The officers involved in Frontex operations are seconded by the member states and are subjected to a transfer of authority, which generally assigns the command of the operation to the border state.[622] The question is whether there is a secondment to the border state under Article 6 of the ARS or to Frontex under Article 7 of the ARIO; or whether the personnel's state remains responsible for any wrongful conduct. EU Regulation 2016/1624 establishes a very elaborate command and control structure, which distinguishes between an 'operational level', governed by the Joint Coordination Board installed in the International Cooperation Centre at the border state and directed by one of its officers, and an 'implementation level', directed by the commanders of the personnel in the field.[623] Decisions regarding operations are taken by the Joint Cooperation Board, which is directed monocratically by the director belonging to the host state when governing standard operation teams. Conversely, in the frequent situations in which other states have provided large assets such as vessels or aircrafts, the Joint Cooperation Board decides with the consent of all the subjects involved in the operations, that are the

[620] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.
[621] In *Hirsi and Jamaa and Others v. Italy*, Appl. No. 27765/09, ECHR 2012, the court acknowledged that the Italian military authorities, after seizing in international waters a vessel heading toward the Italian coast, had taken the migrants under their control and then handed them over to the Libyan authorities, at a time when it was universally known that they were at serious risk of inhuman and degrading treatment in that country.
[622] This is the case of Greece for operations in the Aegean and Italy for operations in the Central Mediterranean.
[623] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, Art. 22.

host state, Frontex and the states that have provided troops specifically for the operation in question.

Attribution to the EU through article 6 ARIO has to be excluded in the case of the use of large assets. In fact, given that the crew belong to the state of origin of the asset, and so does the commander in the field, any misconduct will be attributed to the state of origin under Article 4 of the ARS. Other actors involved in the operation may at most be involved for assistance in the misconduct of another state under Article 16 of the ARS or Article 14 of the ARIO in the case of an involvement of Frontex and the EU.

In the alternative, if no large assets are involved, a further distinction should be made. The conduct is always to be attributed to the host state when the personnel belong to the host state and the contribution of Frontex or other states is limited to coordination. Otherwise, if personnel from other states or Frontex are involved, it must be verified whether there is a secondment in favour of the host state. Article 6 of the ARS applies here, but in its final version it speaks only of secondment from a state.[624] However, two elements seem to prevent the secondment within the meaning of Article 6 ARS, which would free the seconding state from the attribution of their acts. First, the host state does not use Frontex and other states' staff on its behalf and for its own purpose. Indeed, the aim of Frontex operations is the joint management of the Schengen area borders in favour of the whole EU and not only of the border state,[625] and often involve actions that go beyond the borders of the host state in international waters. Secondly, since there are always seconding state officers commanding their troops in the field, it does not seem that the level of control and the exclusiveness of the instructions given by the host state are such that they can meet the criteria of secondment.[626]

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[624] The proposal of Special Rapporteur Ago to also introduce the reference to secondment by an international organisation (it is accepted and not granted in this case that there has been a previous secondment in favour of Frontex by the agents' home states) has been deleted in the final version (Report of the Twenty-Sixth Session ILC, 286, para. 1) and left among the unregulated matters and included in the saving clause of Art. 57 of the ARS. Since the subject matter has not been regulated in the ILC, it may be assumed that Art. 6 of the ARS is also to be applied by analogy in the case of personnel seconded by an organisation.

[625] See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, Art. 5(2): 'Member States shall ensure the management of their external borders, in their own interests and in the common interest of all Member States'.

[626] On the contrary, Melanie Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law*, Oxford University Press, 2018, p.

It should then be evaluated whether Article 7 of the ARIO could apply to attribute the conduct to the EU. The institutional arrangement seems to consent that the organ is placed at the disposal of Frontex maintaining a level of control by the sending state. However, it has to be verified in the concrete case whether the coordinating officers of Frontex, in charge of the implementation of the operational plan, exercise effective control over the seconded staff. It should be stressed that the secondment referred to in Article 7 ARIO, which is different from the secondment referred to in Article 6 ARS, is not incompatible with the continuing institutional connection of personnel with their state. The conduct could be attributed also to the sending state, if it continued to exercise partial control over its own personnel, generally in the form of instructions. Therefore, the possibility of exclusive attribution to the EU remains quite remote. In the context of the ECHR, the Court would have jurisdiction over the conduct attributed to a state party.[627]

It must be noted that the abstract hypotheses examined do not exhaust the number of subjects and institutional frameworks that may appear during operations of monitoring and management of the migration flows in the Mediterranean. These operations have also involved NATO and its members in various forms. Moreover, also in the Frontex framework, the regulations in force constantly refer to 'joint operations', a terminology that, as for the agreement on migrants with Turkey, has been used by the Union to confute its responsibility claiming that member states have acted together as independent actors.

Intricate situations are far from rare, especially since the pronouncement of the *Hirsi* case, which among the undesirable effects has perhaps pushed states to more inaction and restraint in rescue operations on the high seas, especially after the outbreak of civil war in Libya. The war made even more evident that migrants could

150, considers first of all that the purpose of host state border control, even if it is exercised for the benefit of the whole EU, can still be an activity that falls under the governmental authority of the host state as activity that the host state in that context is carrying out with the contribution of seconded agents. Furthermore, while referring to the case of the ECtHR *Jaloud v. the Netherlands*, Appl. No. 47708/08, ECHR 2014, which establishes a strict control over the secondment and recognises the control by the home state also in the context of operations carried out under the operational command of another state, Fink believes that the implementation level should not be taken into account for the qualification of the secondment in this case.

[627] On this point, see Melanie Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law*, Oxford University Press, 2018, p. 164, according to whom the level of control exercised by Frontex and therefore by the EU can be at most what is known as 'ultimate authority control' in the ECtHR case law.

not be sent back to Libya because they would have suffered inhuman treatment in that country, what the ECtHR had already certified in *Hirsi*. In addition, the open conflict situation in Libya was both a spur to the flight of more asylum seekers and a protective shield for the activities of illegal traffickers.[628]

In this situation, the EU member states have increasingly retreated into a mist of irresponsibility and were not able to agree on a shared solution for the management of migration flows.[629] One of the most resounding episodes, followed by many other equally tragic ones, often discovered only when the bodies of the victims emerged on the Italian or Libyan coasts, was the so-called 'left-to-die boat'. On 27 March 2011, during a NATO operation in the Mediterranean against Libya, authorised by UN Resolution 1973(2011), Italian authorities received a request for help. 72 persons were on board of a damaged rubber dinghy in the middle of the NATO operations area, between the Libyan coast and Lampedusa. According to the report of the Parliamentary Assembly of the Council of Europe,[630] the Italian Coast Guard directly informed NATO and issued a satellite alarm signal to all boats in the area. In the following hours, an unidentified helicopter dropped water and biscuits into the boat and flew away, an unidentified warship navigated alongside the dinghy, several fishing boats cruised on sight, and other Italian and Spanish military vessels were within easy reach. Yet the dinghy was left adrift and washed up two weeks later on the Libyan coast with nine survivors on board.

Following that episode, a series of operations took place in the area[631] and between many vicissitudes they generally had, as complained by the Parliamentary Assembly of the Council of Europe, a generally poor success in limiting the occurrence of similar episodes.[632] In such situations, various obligations under international law come into play. In addition to possible obligations of customary law,

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[628] Cf. Francesca De Vittor, 'Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di "accordi" per il controllo extraterritoriale della migrazione', *Diritti umani e diritto internazionale*, 12, 1, 2018.

[629] See the Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation on an Asylum and Migration Fund, COM/2020/610 final.

[630] Parliamentary Assembly of the Council of Europe, Resolution 1872 (2012), 24 April 2012, Council of Europe Doc. 12895.

[631] The operations that were established thereafter were the Italian operation Mare Nostrum, the Frontex operations Triton and Poseidon and the military CSDP operation Sophia, interconnected with various inter-institutional agreements.

[632] Parliamentary Assembly of the Council of Europe, Resolution 1999 (2014), 24 June 2014, Council of Europe Doc. 13532.

which however, at least for the EU, do not seem to apply, the International Convention on Maritime Search and Rescue (SAR Convention) and Article 98 of UNCLOS, obliging states to require all ships flying their flag to comply with the duty to render assistance at sea, are at stake. This last obligation is addressed to flag states and is therefore inapplicable to any international organisations operating in these scenarios. The result is an arrangement by which the conduct of operations by international organisations like Frontex or NATO can act as a shield against responsibility assessments.[633]

In terms of multilateral instruments, a review of the compatibility of CSDP operations with human rights can be carried out by the ECtHR. This court, unlike the ECJ, does not have a jurisdiction whose scope is limited for areas of activity. It has general jurisdiction over all activities committed by ECHR states parties in violation of human rights. The only limit to the scope of its jurisdiction is territorial. The requirements to act before the ECtHR are therefore that there has been a violation of human rights, that it has been committed by an ECHR state party, and that internal remedies have been exhausted. The territorial requirement, in the past interpreted restrictively, is now understood to extend to all conduct committed under the effective control of a member state.[634] Therefore, the standard of effective control from an international law attribution criterion has also become an ECtHR jurisdiction criterion. It has been applied also to the control of ships on the high seas.[635]

After the decision of *Hirsi*, the strategy of Italy and the EU has increasingly been to outsource rejections to the authorities of other countries, such as Egypt, Libya,

[633] See the report presented by Omer Shatz and Juan Branco on 3 June 2019 to the Prosecutor's Office of the ICC, which accurately reconstructs the harmful effects of the repressive policies implemented by the EU and member states (e.g. the criminalisation of the fishing boats that rescued migrants in distress by the Italian government, in open conflict with the above mentioned international obligations), but which offers no explanation of the difficult issues of attribution of the reported conduct (the authors explicitly entrust the solution of these issues to the Prosecutor's Office). This appeal is against individual persons and therefore does not directly address the responsibility of the states, but since the involved individuals are national political leaders and the involved violations concern rules that largely overlap with obligations binding upon states and the EU, a guilty outcome would imply the recognition (at least in theory) of the responsibility also of states and the EU.

[634] Cf. *Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07, ECHR 2011, on the treatment of prisoners in Iraqi prisons run by UK military personnel.

[635] *Medvedyev and Others v. France*, Appl. No. 3394/03, ECHR 2010. See also the 'jurisdiction to decide' in *Kebe and Others v. Ukraine*, Appl. No. 12552/12, ECHR 2017, para. 75.

Niger, Sudan, Tunisia and Turkey.[636] Now, the question could be raised whether the extraterritoriality of ECtHR jurisdiction can also reach the measures adopted by third states but under the control of ECHR member states. The matter is that Italy's control over Libyan Coast Guard activities does certainly not reach the standard of effective control established in *Nicaragua*. Therefore, it will have to be assessed whether a less direct control is sufficient, for instance because there is complete dependence of the Libyan Coast Guard on the funding established by the Italy-Libya Memorandum of Understanding or because Italy and the EU, by entrusting control of the seas to Libya, are internationally responsible for aid, control or circumvention.[637]

However, the fact that Italy and the EU are internationally responsible under those articles, possibly even for violation of *erga omnes* international obligations, does not automatically extend the ECtHR's authority to assess such unlawful conduct, since at present the Court's jurisdiction seems to be limited to acts directly attributed to states parties.[638] Even if the Court would not consider its jurisdiction under Article 1 of the

[636] Cf., for an account of the Italian practice of outsourcing and its consistency with internal constitutional provisions, Andrea Spagnolo, 'The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice', *Italian Yearbook of International Law*, 28, 1, 2019.

[637] ARS, Arts. 16 and 17; ARIO, Arts. 14 and 58. Cf. Giuseppe Pascale, 'Is Italy internationally responsible for the gross human rights violations against migrants in Libya?', *QIL, Zoom-in*, 56, 2019.

[638] The ECtHR will have the opportunity to address these issues in its examination of the case recently communicated to the Italian Government in *S.S. and Others v. Italy*, Appl. No. 21660/18, communicated on 26 June 2019. The case refers to yet another episode resulting from the outsourcing of external border control by the Union and its member states.In this case a rubber dinghy with about 150 migrants on board floating in international waters in rough sea conditions, after having launched a request for help to the Rome Maritime Rescue Coordination Centre, was approached by a Libyan Coast Guard military boat (a ship provided by Italy and with a crew trained by the Italian authorities), a rescue ship of a German NGO and an Italian military helicopter. During what appears to have been a violent battle, about 50 people drowned, 58 people were rescued by the NGO and about 50 people were captured by the Libyan Coast Guard and taken back to Libya, where some of the complainants before the ECtHR testify to have suffered detention and torture, and were later sold to militias belligerent in the Libyan civil war. The complainants, based inter alia on the positions of the Report of the UN High Commissioner for Human Rights on the situation of human rights in Libya, presented at the Thirty-first session of the Human Rights Council of the UN General Assembly, 15 February 2016, UN Doc. A/HRC/31/47; the Amnesty International Report 2017/18 on the state of human rights in the world; and the Statement by the President of the UN Security Council, 7 December 2017, UN Doc. S/PRST/2017/24, claim that the Italian authorities (the Rescue Centre in Rome and the military authorities that commanded the helicopter) could not have been unaware that entrusting the rescue operations to the Libyan Coast Guard would have put migrants at risk of death during the operations and inhuman treatment if they were brought back to Libya.

ECHR as covering the last similar cases brought to its attention,[639] this would not exclude the existence of violations of international law attributable to EU countries that play a more direct role in the outsourcing of migration control, as well as, indirectly, to the EU. Of course, given the ECJ's self-restraint, if the ECtHR were not to recognise its jurisdiction, there would be very little chance of seeing the matter brought before a court, given that states of origin and transit have concluded agreements with the EU and its member states in exchange for funding and are therefore very unlikely to act through diplomatic protection against the violations suffered by their citizens. Not to mention that the states of origin are often failed or semi-failed states, as in the case of Libya, or states that are accused of being directly responsible for some of the violations in question.

The outsourcing of migration management, on the other hand, is by no means a guarantee that situations will not reoccur in the near future in which member states' authorities or Frontex will have to face new arrivals in emergency conditions and therefore a high risk of violation of migrants' human rights.[640] This contingency has in fact already occurred when on 27 February 2020 the Turkish President, denouncing the violation by the European partners of obligations that were part of the 'deal', announced the unilateral opening of the borders with Greece and thousands of refugees poured from different parts of Turkey towards the Greek borders. Forced rejections by the hand of Greek police and military forces followed in Thrace and the Aegean Sea.

Thus, in the field of CFSP operational activity, situations take place that are less regulated and if possible even more intricate than those arising from EU's regulatory activity in other areas of foreign policy. The strict attribution rules codified by the ILC, however, are not a limit to judicial accountability in this case. On the contrary, such rules allow, in the current context, to find judicial answers for the most dangerous activities of the organisation, those in which gross failures or inconsistent policy choices may result in the violation of human rights. The EU tends not to carry out these activities autonomously, but in close cooperation with the governmental

[639] See, in this sense, Giulia Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law', *Italian Law Journal*, 4, 2, 2018.
[640] Cf., on the externalisation of controls on migration, Federico Casolari, 'The EU Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?', *Italian Yearbook of International Law*, 25, 2015.

structures of the member states.[641] In short, it seems that the purpose of attribution, namely reaching the international entity that is most directly linked to the commission of an offence, is effectively achieved by using the rules proposed by the ILC. Different, as we have seen, is the question of indirect responsibility, perhaps pertinent in the case of human rights violations by Libya. This question cannot be dealt with here, but it seems that international courts and the international community in general should take it more seriously and rely more on it to identify the responsibilities of those international legal persons that, while not being the material perpetrators of repeated and serious breaches of international law, have nevertheless consciously and decisively contributed to their realisation.[642]

III.2 The attribution of conduct in the context of the fight against piracy

In parallel with the informalisation of immigration-related security policies, EU policies in other security sectors also tend to favour actions under the CFSP. This is the case of the fight against piracy. The ECJ recognized that the operations to combat piracy are carried out within the institutional framework of the CFSP, and are excluded from its jurisdiction.[643] These EU operations were launched in response to a request for intervention by Somalia, endorsed by UN Resolution 1814 of 2008 and subsequent. In this context, a national court ruled on important questions of principle. The High Administrative Court of North-Rhein Westfalen affirmed that the conduct of German troops employed in Operation Atalanta in the Horn of Africa was attributable to the German state. The case concerned the transfer of suspected pirates to an African country in which their human rights could not be guaranteed. The German troops, who had captured and detained the suspected pirates on a ship flying the German flag and then transferred them, acted with operational autonomy and under the direct instructions of their national commanders. The German government defended itself by arguing that the transfer of the pirates was attributable to the EU

[641] See Kirsten Leube, 'Can the EU Be Held Accountable for Financing Development Projects That Violate Human Rights', *Georgetown Journal of International Law*, 48, 4, 2017.
[642] See, in this sense, Giuseppe Pascale, 'Is Italy internationally responsible for the gross human rights violations against migrants in Libya?', *QIL, Zoom-in*, 56, 2019.
[643] See *European Parliament v. Council of the European Union*, Case C-658/11, electronic report only, ECLI:EU:C:2014:2025; and *Skatteverket v David Hedqvist*, Case C-264/14, electronic report only, ECLI:EU:C:2015:718.

because it was adopted in the context of an operation headed by an EU operational commander and in compliance with Joint Action 2008/851/CFSP. Conversely, the national court considered that the conduct, although adopted in the context of an EU operation, was attributable to Germany in view of Article 7 of the ARS on *ultra vires* conduct.[644] The court found a violation of international law by Germany and in particular of Article 3 of the ECHR.

Indeed, all decisions and activities leading to the material transfer of detainees were taken by German officers in liaison with their ministries. Nevertheless, the position of the German government was not entirely devoid of supporting elements, because after the arrest of the pirates there had been an exchange of notes between the EU and Kenya concerning the handing over of the detainees, although according to the court's analysis the decision to handing over the detainees had already been taken by the German authorities and communicated to the officers on the ground.[645] The court obviously did not address the responsibility of the EU, but it neither excluded it as a matter of principle. On the contrary, it stated that even if there was an EU responsibility, the member state's responsibility would not be excluded. It also stressed that under the CFSP national courts are the only legal remedy for unlawful measures.[646]

IV. Conduct acknowledged and adopted by the EU as its own

The attribution of conduct to an international organisation concerns: the conducts of agents and organs of the EU and the conduct of agents and organs of member states or organisation placed at the disposal of the EU. The last element of attribution is fairly less challanging and it concerns article 9 ARIO 'Conduct acknowledged and adopted by an international organization as its own'. The organs of the EU able to express the acknowledgment of the organisation are several, for instance the

[644] Oberverwaltungsgericht Nordrhein-Westfalen, 18 September 2014: openjur.de/u/731026. See a comment in Frederik Naert, 'European Union Common Security and Defence Policy Operations', in André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge University Press, 2017.
[645] Exchange of Letters between the European Union and the Government of Kenya, OJ L 79/49, 25 March 2009. See a comment in Emanuele Sommario, 'Attribution of Conduct in the Framework of CSDP Missions: Reflections on a Recent Judgement by the Higher Administrative Court of Nordrhein-Westfalen', *CLEER Papers*, 5, 2016.
[646] Oberverwaltungsgericht Nordrhein-Westfalen, 18 September 2014: openjur.de/u/731026.

Council, the High Representative or, for matters concerning EU missions, the Head of Mission. It is more likely that the EU would acknowledge as its own the conduct the implement EU law. For example, the recognition as its own of the detailed measures adopted by the authority of a member state regarding customs as an application of EU regulations or directives.

V. The possibility of multiple attribution

The existence of situations in which multiple attribution to two or more entities is virtually possible is generally accepted in international law. As seen in Chapter 4, there are two different models of multiple attribution. The first model occurs when an organ or an agent carries out a conduct which is attributed to more than one legal person. This may occur in the presence of a joint organ serving one or more states or organisations, or an organ placed at the disposal of an organisation but maintaining links with the sending state. The second model is less relevant as far as cooperation between the Union and its member states is concerned. It concerns cases in which the same conduct is carried out jointly by a multiplicity of agents or bodies belonging to different international legal persons. For instance when the EU and the UN act independently in the same scenario. I will focus only to the most relevant cases concerning the cumulative attribution of the same conduct to the Union and its member states.

The contingents seconded by member states to organisations may, under certain conditions, be considered as organs of both entities under Article 4 of the ARS and Article 6 of the ARIO.[647] This qualification of seconded contingents as dual organs was conceived for the first time for the UN force that operated in Egypt between 1957 and 1967 (UNEF), described in the status-of-forces agreement between the UN and

[647] See Aurel Sari and Ramses A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press, 2013.

Egypt as ‘an organ of the General Assembly of the United Nations established in accordance with Article 22 of the [UN] Charter’.[648]

The first model of multiple attribution also cover situations of factual control, under which seconded organs can be controlled at the same time by the organisation and by the state of origin. This is a circumstance that rarely occurs but it cannot be excluded in principle. However, this hypothesis is important because it has the important effect of discouraging the judicial practice of invoking the formal secondment as a reason to exclude attribution and thus to discharge responsibility. Indeed, the existence of secondment should be treated as a matter of fact and not as a legal presumption, unlike the status of organ, which is relatively easier to establish.

The important distinction is between the attribution determined on the basis of the institutional relationship between an entity and its organs and the attribution on the basis of a factual control over the actions of actors that do not belong to the entity. In both cases, several links are possible, although a double effective control is very difficult to imagine, given the high standard of proof required. Finally, there may be situations of factual control by a state over activities carried out by organs of an organisation or the opposite.[649]

Multiple attribution is not relevant when there is not a single conduct, but coordinated actions of the organisation and of its member states, in the framework of common policies. They remain separate conducts, each attributable separately to the two entities. Neither from the theoretical point of view, that encompass the need to identify the responsible entity according to criteria of substantive justice, nor from the point of view of jurisprudential practice, do the rules of attribution codified and developed by the ILC raise insurmountable questions of ‘responsibility gap’, not even in the much debated cases in which member states implement EU law.[650]

Translated into a language applicable to all organisations, the implementation of EU law is a hypothesis of executive activity of member states resulting from decisions and regulatory activity of the organisation. Two relevant elements can be

[648] The legality of such an arrangement would have been sanctioned by the ICJ in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, ICJ Reports 1962, p. 151.
[649] See Stian Ø. Johansen, ‘Dual Attribution of Conduct to both an International Organisation and a Member State’, *Oslo Law Review*, 6, 3, 2019, pp. 190-191.
[650] The existence of such a ‘responsibility gap’ is maintained, e.g., by Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 78.

identified, namely the adoption of the decision by the organisation and the implementation by the authorities of the member state. If only the organisation is bound by an international obligation towards third parties, like in the case of a treaty establishing obligations towards third parties only on the part of the EU, and not on the part of the member states, it must first be verified whether the organisation can be held responsible for breach of the obligation by the mere fact of the decision. For example, if the EU committed to third countries not to allow a certain type of subsidy to be granted to companies operating in its territory and then issued a regulation allowing member states to grant that type of subsidy, there would be good reasons to believe that the issuing of the regulation itself constitutes a violation of the obligation directly attributable to the organisation. Likewise, if the EU were to commit, for example, to comply with certain human rights standards in relation to individual sanctions and then issue a regulation requiring member state authorities to follow procedures that do not comply with those standards in relation to those sanctions, the EU could be held directly responsible just for having required this.

Conversely, if the primary obligation is not breached by the organisation's decision, it should be verified whether member states are bound by the same obligation. According to the ARIO, there are several hypotheses in which states may be held responsible for the conduct attributed only to the organisation.[651] It is not the case to recall them here, but it should be remembered that the most relevant and perhaps most easily verifiable hypothesis is that of Article 40(2) of the ARIO. In the middle of these two extremes, namely direct attribution to the organisation and responsibility of the states in connection with the organisation's activities, there are Articles 16 and 17 ARIO, which cover those cases in which the organisation deliberately uses its member states to carry out a conduct that would amount to an international wrongful act had such organisation directly engaged in it.

VI. The absence of special rules of attribution in the context of EU external action

One of the main criticism moved to the ARIO has been their inadequacy to cope with the large variety of forms and functions of existing international organisations.

[651] ARIO, Arts. 58-62.

Since international organisations are very different, a general regulatory framework should be applied only in the absence of special rules applicable to each international organisation.[652] Moreover, a second criticism is that the ILC relied too much on the articles on state responsibility. Some special norms proposed by EU law scholars are inspired by the analogy between some organisations and federal states. According to these proposals, some organisations, the so-called regional economic integration organisations, are more similar to states than others.[653]

The analogy between the regional economic integration organisations and federal states should lead to treating the member states, in the spheres where functions are transferred, as mere territorial articulations of the single entity and therefore organs for the purposes of attribution of conduct. However, the analogy with federal states is inappropriate because the allocation of powers between the federal government and the federal states is usually determined by the latter, and it includes foreign policy. On the contrary, in the treaties establishing international organisations, it is states that allocate powers to the organisation, retaining the possibility to take them back through treaty revision or withdrawal. Making the organisation responsible for states' activities would mean encouraging states to design the institutional structure of the organisation in such a way as to keep carrying out their most questionable international activities while offloading the responsibility for those activities onto the organisation.

VI.1 The theory of normative control: overview

Specific proposals emerged regarding the attribution of conduct, in order to take into account special characteristics. The most discussed is that of normative control,

[652] The question of the variety of organisations and its effects on the regime of responsibility was already raised in Clyde Eagleton, 'International Organization and the Law of Responsibility', *Académie de droit international de La Haye. Recueil des cours*, 76, 1950, p. 329: 'I do not think the conclusion can be reached that all the organizations designated as International Public Unions are endowed with legal personality, if for no other reason than because they are of so many different kinds that they cannot be put together as a type'.

[653] See Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 740. For a broader overview on regional economic integration and institutions, see Walter Mattli, *The Logic of Regional Integration. Europe and Beyond*, Cambridge University Press, 1999.

especially with regard to the legal relations between the EU and its member states. According to this theory, the attribution of conduct should take into account the exercises of normative control over member states' conduct in matters within EU exclusive competence. More precisely, when 'Union law governs both the substantive legality of and the available remedies for a measure, then the Union exercises normative control'.[654] In its extreme form, the normative control theory states that every conduct that a state carries out in application of binding obligations under the legal system of an international organisation is directly attributable to the organisation as legally controlled by it. This theory can be put in relation with the general rules of attribution in three ways, namely as an extensive interpretation of the effective control standard under Article 7 of the ARIO, as a new rule of customary law in the course of formation but not transposed by the ILC, and as a *lex specialis* under Article 64 of the ARIO. The first hypothesis has already been analysed. The other two hypotheses, closely intertwined and partly overlapping, are analysed below. The claim made in this section is that normative control as a special rule of attribution should be rejected either as a general or special rule. Indeed, the decisions of international courts that are described in terms of normative control are in fact due to special regimes of responsibility established through agreements between the EU and third parties. The general criteria of attribution established by the ILC are sufficient and effective for the cases that are not covered by special regimes.

The analogy with federal states is based on the fact that, in certain matters, states' organs act as EU organs and apply EU law. This would give rise to what a WTO Panel referred to as a form of 'executive federalism'.[655] Some supporters of the theory of normative control proposed that a special rule of attribution be applied to regional economic integration organisations as a specific case of *lex specialis* under Article 64 of the ARIO. The rule, which although tailored on EU commercial policy would be applicable to other similar situations, would be formulated as follows:

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[654] Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 742.

[655] *European Communities – Selected Customs Matters*, WT/DS315/R, Panel Report of 16 June 2006, para. 2.13. The Panel uses the concept of 'executive federalism' as the arrangement according to which member states authorities execute the customs policies of the Union by virtue of the principle of subsidiarity (the Panel refers, on its part, to Koenraad Lenaerts, Piet Van Nuffel and Robert Bray (eds.), *Constitutional Law of the European Union*, 2nd ed., Sweet & Maxwell, 2005).

> The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred.[656]

The proposal is grounded mainly in WTO case law, but it also finds some support in the practice of other international bodies, such as the ITLOS.[657] Courts should look at three elements for the attribution of conduct to either the EU or its member states:

> (a) Who is the factual actor of the alleged breach?
> (b) Who has the legal power to bring an end to the alleged breach?
> (c) Who bears the international obligation invoked concerning the alleged breach?[658]

Element (c) is nothing other than the objective element of the international wrongful act, and it does not concern the attribution of conduct. Element (b) raises important questions concerning the specific nature of the relationship between domestic legal systems and the EU. However, it is not correct to affirm that the EU has the power to put an end to the wrongful conduct. While EU's judicial and executive organs can issue decisions that bind member states' authorities in certain matters, especially in customs and competition matters, in general it is the administrative and judicial authorities of the states that must order the agents who are engaging in wrongful conduct to stop it. Moreover, the matter can only be indirectly referred to the ECJ through the preliminary ruling mechanism.

The main flaw of the theory of normative control stems from the concept of *lex specialis*. The theory assumes that the legal framework freely chosen by a group of states to cooperate between themselves, in this case the establishment of an international union, can impact on the regime of an element of general international

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[656] Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 746.
[657] Cf. *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union)*, ITLOS Case No. 7, Order of 16 December 2009, *ITLOS Reports 2008-2010*, taking note of the settlement of the dispute.
[658] Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 745.

law such as the attribution of conduct. Indeed, the theory includes among the criteria for the attribution of conduct the supposedly supra-national nature of EU competences. This is contrary to the notion of special rule under Article 64 ARIO, which applies to special cases and groups of subjects agreeing between themselves rules different form the ones constituting the general regime.[659] A special rule cannot redefine the subjects of international law by introducing a new category to which special rules of attribution apply by way of derogation from the general framework. This is a category in which the EU alone would probably fall.[660] A theory of normative control more consistent with the general regime of international responsibility envisages the attribution of conduct to the organisation based on a conduct separate from that of the member state involved. For instance, it could be based on the exercise of regulatory control in breach of its international obligations, by imposing on its member states activities contrary to its obligations or by failing to act against them when it should do so on the basis of its obligations toward third parties. The ARIO already provides for hypotheses of responsibility for coercion or circumvention that could consist in adopting binding decisions obliging member states to act in violation of the international obligations owned by the organisation.[661]

A better interpretation of the attribution rules of ARIO maintains the factual character of the attribution according to Article 7 ARIO for effective control of member states' agents by the organisation, while distinguishing the case of regulatory control of member state's organs by the organisation when these organs act within the

[659] In this direction goes, e.g., Moritz P. Moelle, *The International Responsibility of International Organisations. Cooperation in Peacekeeping Operations*, Cambridge University Press, 2017, p. 323, who proposes the creation, in a multilateral framework and under the auspices of the UN, of a special rule of attribution adopting 'normative control' as the attribution criterion for activities of peacekeeping operations.

[660] Cf. Paolo Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law', *The European Journal of International Law*, 29, 4, 2019, p. 1422.

[661] Ottavio Quirico, 'The International Responsibility of the European Union: a Basic Interpretative Pattern', *Hungarian Yearbook of International Law and European Law*, 1, 2013, p. 73, rightly analyses this possibility of indirect responsibility, but improperly connects it with the notion of normative control proposed by Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010. Furthermore, Quirico includes the normative control within the scope of Art. 7 of the ARIO, which instead is referred to the control of a specific conduct and not to the control of an entire category of activities.

organisation's sphere of competence.[662] This interpretation is based on a greater consideration of the organisation's rules and, unlike the normative control theory, could be generalised to all organisations. However, according to the latter proposal, the greater consideration of an organisation's rules would be authorised by the supposedly constitutive role of a new legal order implicitly recognised to them by Article 2(a) of the ARIO. Indeed, the ILC has not included such a notion of regulatory control in the text of the ARIO.

The only theoretical hypothesis that could justify the existence of special rules of responsibility applicable to the EU alone is that the EU would be a special entity that does not fall within the common notion of international organisation contemplated by the ILC in its codification work.[663] According to a recent proposal, the use of such special rules would be due to the EU's way of operating, which would not be subjected to the common rules of responsibility codified by the ILC. In particular, the inadequacy of the ILC approach emerges with respect to two fundamental practices: the implementation of EU law by member state authorities and mixed agreements.[664] The speciality of the EU would lie in the fact that it has a 'regulatory competence

[662] See, in this sense, Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', *International Organizations Law Review*, 8, 2, 2011, p. 450.

[663] The key argument common to all lex specialis claims from the EU and EU law scholars is that 'the constitutional relationship between the Union and its Member States differs on the basis of a policy area' and that 'this special relationship between the EU and its Member States is not reflected in the Draft Articles' (Ramses A. Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?', in Malcom D. Evans and Panos Koutrakos (eds.), *International Responsibility: EU and International Perspectives*, Hart, 2013). In other words, the ARIO would not reflect the 'constitutional' structure of EU law (which, however, does not exist in the CFSP – cf. Daniel Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', *European Constitutional Law Review*, 7, 3, 2011 – and perhaps does not exist in general – cf. Peter L. Lindseth, 'Reflections on the "Administrative, Not Constitutional" Character of EU Law in Times of Crisis', *Perspectives on Federalism*, 9, 2, 2017).

[664] Esa Paasivirta, 'The Responsibility of Member States of International Organizations? A special Case for the European Union', *International Organizations Law Review*, 12, 2, 2015, According to the author, moreover, there are some mixed treaties in which the participation of states is not necessary, because the whole subject of the treaty falls within the competence of the Union. Paasivirta speaks in this regard of 'false mixity' (cf. Allan Rosas, 'Mixed Union – Mixed Agreements', in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, 1998, p. 127; and Henry G. Schermers, 'A typology of mixed agreements', in David O'Keeffe and Henry G. Schermers (eds.), *Mixed Agreements*, Kluwer Law and Taxation, 1983). In such cases, there should never be any attribution of conduct to the member states, but only to the Union.

instead of competence over implementation'.[665] As a matter of fact, it seems that the EU, like other international organisations, can act both through regulatory conduct and non-regulatory conduct, executive conduct or direct implementation. The same rules of responsibility and attribution can be applied to both types of conduct with different but satisfactory outcomes in both cases. In addition, such proposals are based on a conception of EU speciality linked to the way in which EU competences are exercised. They link the scope of the proposed special rules of responsibility to EU internal division of competences, which would directly delimit the legal personality of the organisation. The Union adopt its obligations by means of international agreements or 'the passing of legislation',[666] which are two mechanisms included in the powers recognised to the Union by the Treaties in order to exercise its competences. The matter is that the notion of responsibility implicit in such a proposal differs by far from the notion of responsibility accepted in international law. Indeed, obligations whose violation gives rise to international responsibility can only arise through the conclusion of international agreements or customary international law. Certain obligations may also arise from unilateral acts of international actors, but this is certainly not the case with EU legislation, which only affects member states and possibly EU citizens and undertakings. In fact, EU legislation can only be relevant in international law as an obligation between member states arising from the conclusion of EU Treaties, from which such legislation derives as 'secondary law'. Furthermore, in practice, situations which give rise to international responsibility towards third parties generally follow from the implementation of EU law by member states not as a violation of obligations arising from such legislation, but as a violation of previous obligations as a factual result of the application of EU law.

The perspective described, which is entirely internal to EU law, is based on an erroneous juxtaposition of the general capacity of states and organisations and is therefore unsuitable to support a thesis concerning a discipline that pertains to international law. The federal state-organisation analogy is used to demonstrate that the EU needs special rules. But the capacity to act of organisations does not extend to all areas to which that of the states does. Their personality is not of the same

[665] Esa Paasivirta, 'The Responsibility of Member States of International Organizations? A special Case for the European Union', *International Organizations Law Review*, 12, 2, 2015, p. 451.
[666] Ibid.

nature, because states must have a territory, a people and a government in order to be a state.

For organisations it is sufficient an agreement between several states. Placing states and organisations on an equal footing leads to taking their division of competences as a basic datum for the attribution of responsibility, while in reality these subjects do not start on an equal footing and the allocation of responsibility is regulated by different and specific rules for the two types of subjects.[667] But the EU not being a state, it must resort to the authorities of the member states for some of its purposes. In other words, it can be affirmed that member states use the EU for some of their common regulatory activities, but they retain the power to enforce these regulations through their national authorities. This is the case for all international organisations. It seems that the argument implicit in the claims in favour of special rules applicable only to the EU is that the EU is a special federal state that needs special rules of responsibility and not that the EU is an organisation that needs special rules of responsibility.

Rich and frequent references to the EU, however, can be found in the ARIO themselves and the EU has actively participated in the works of the ILC. The structural features of the EU and particularly its level of integration with member states, fits in the *genus* of international organisations.[668] The international personality of the Union has developed along similar lines to those of the UN, by gradually exercising activities in the international arena in accordance with what was necessary and implicit in its objectives and in the powers conferred by the member states.[669]

It is interesting that when the EU Commission proposed special rules of attribution for regional organisations, it was only referring to the EC. The proposal followed the

[667] According to Esa Paasivirta, 'The Responsibility of Member States of International Organizations? A special Case for the European Union', *International Organizations Law Review*, 12, 2, 2015, p. 456, the normal rules do not fit the EU because 'the traditional perception of an international organization is that it acts via its own organs or agents', whereas '[t]he EU does not have its own local administration in the member States (like in US-style federalism)'. What Paasivirta complains about, though, is not a 'perception', but a true rule of customary international law, which is not only limited to organisations, but also common to states.

[668] It can be useful to recall the definition of international organisation in Art. 2(a) of the ARIO: '"international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'.

[669] See Niels Blokker, 'International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law', *Yearbook of European Law*, 35, 1, 2016.

first reading of the ARIO and date back to 2004, before the Lisbon Treaty. The Commission refused to give its opinion on peacekeeping operations because they did not concern the EC at the time. The Union, which now includes the CFSP, was not considered to share the supranational character of the EC.[670] If the ILC had accepted the proposals for special rules of attribution, they might have ended up being applied later, after the conclusion of the Lisbon Treaty, as extending to the whole of the Union's activity, thus also to the CFSP. But this was not the case. It is not possible to extend the EU Commission's positions on regulatory control to peacekeeping operations without justification, which is still in fact controlled by the Council or directly by national governments. Moreover, it is absurd that those special rules of attribution would be applied to the CFSP, and this is a point in favour of the fact that the ILC was right not to adopt them. In particular, they would have led to attribute to the organisation the conducts over which its control is often only formal and definitely without effective power over the carrying out of operations.

A representative of the European Commission outlined possible solutions that would recognise the principle of normative control during a speech at UN General Assembly, commenting on an early draft of the ILC articles. The 'special situation' of the relationship between EU internal law and member states' implementing measures could be dealt with in three ways.[671] The first hypothesis was to codify 'special rules of attribution of conduct'. This would have meant the acceptance of the theory of normative control as a criterion for attributing to the organisation the acts of member states' organs carried out in application of binding EU rules in areas of its exclusive competences. As already discussed, this proposal was at odds both with the current practice, largely oriented towards the non-existence of such special rules, and with the fundamental principle of responsibility of states for their conduct already established in ARS. The hypothesis was in fact rejected.

The second proposal of the European Commission was to recognise 'special rules of responsibility'. This proposal was accepted by the ILC, although not in the sense of recognising rules specifically dedicated to the EU. These rules concern the so-called derived responsibility of the organisation for the conduct of its member

[670] See Comments and observations received from international organizations, ILC Yearbook 2004, Vol. II (1), UN Doc. A/CN.4/545, p. 16.
[671] UN General Assembly, Sixth Committee, Summary record of the 21st meeting, UN Doc. A/C.6/59/SR.21, p. 5.

states, probably better understood as direct responsibility for the violation of different primary obligations.[672]

In particular, the hypothesis that comes closest to the concept of normative control is circumvention,[673] which requires an act of decision or authorisation of certain acts of member states by the organisation. It is not management and control[674] or coercion,[675] which provide for the organisation's specific intention to violate its own international obligation in the concrete case. The main difference with the normative control theory is that in the case of circumvention the responsibility of the organisation does not relieve the state from its possible responsibility for the same conduct.

Moreover, Article 64 of the ARIO allows the formation of customary or conventional special rules of responsibility in derogation of the general rules codified in the ARIO. The ILC, while recognising the existence of special rules, has nevertheless refused to codify a specific rule concerning the EU and its member states. If it had, it would have given the EU Treaties a different status from all agreements between international players which also contain responsibility provisions. For instance, it would have recognised that a rule formed within the EU would have external effects against all third parties, for example against trade partners who are members of the WTO.

The third proposal of the European Commission was to include in the ARIO ‘a special exception or saving clause for organizations such as the European Community’. This hypothesis, as well as the first, was discarded by the ILC. It would have been contrary to the codification of general rules of responsibility of international organisations to establish special categories of organisations on the basis of special characteristics that would have been impossible to establish analytically or to negotiate once and for all with all organisations. The reference in Article 64 of the ARIO to the organisation’s rules applicable in the relations between the organisation and its members should not be confused with a ‘saving clause’ hypothesis in favour of the organisation’s rule. This is only a specific case of a special rule agreed between a number of international subjects and mandatory only between them, not opposable to third parties.

[672] ARIO, Arts. 14-17.
[673] Ibid., Art. 17.
[674] Ibid., Art. 15.
[675] Ibid., Art. 16.

Special rules of responsibility or attribution referring specifically to the EU have not been categorically excluded by the ILC. On the contrary, they may arise at any time by agreement between the EU, its member states and third parties, or as a result of the development of special rules in the international practice of the whole international community with reference to specific characteristics of the EU. An example of special rules of responsibility concerning specifically the EU is the mechanism of co-responsibility developed in the Draft Accession Agreement to the ECHR,[676] which found the opposition of the ECJ.

The development of a *lex specialis* under Article 64 of the ARIO cannot consist in the unilateral creation of a new category of subjects, such as regional economic integration organisations. The creation of a special rule could indeed be one of the objectives of the ILC. This is what the Commission legitimately requested. The rule drafted by the ILC would be submitted to all states in the General Assembly as a progressive development rule. The ILC's decision not to submit this rule to the Assembly, however, seems to be supported by three considerations, namely the lack of consistency with the current practices of states and international courts, the difficulty of combining this rule in a coherent way with a system that is governed by the principle of the effective exercise of the powers of government and the principle of consent between parties with respect to the rules governing their mutual relations, and, finally, the fact that this special rule was not necessary. In fact, the combination of the general rules of attribution of conduct and those of indirect responsibility seem to address adequately the need to identify the subjects responsible for violations of international law committed by the EU and its member states in the performance of their external activities.

The criticism to the ILC are generally based on an assessment of practice that gives too much weight to decisions of courts in specialised regimes. Such systems provide for special responsibility rules that apply only within the system itself.

[676] See, in this sense, José Manuel Cortés Martín, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility', in Maurizio Ragazzi (ed.), *Responsibilitiy of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013, p. 198.

VI.2 Attribution of conduct to the EU and WTO law

Different regimes developed different solutions for the attribution of conduct to the EU.[677] Issues of jurisdiction and the applicable law affect the way in which the rules of attribution are applied by different courts. In short, there are different regimes that poorly communicate with each other. However, this is not the sign of a pathological situation due to the fragmentation of international law, but the normal functioning of highly sophisticated multilateral regimes with special rules of responsibility.

The WTO is the most relevant example. Concerning the EU, its regulatory activity is particularly developed in the management of the custom union. The EU sets the rules that all customs authorities of member states apply without a significant margin of discretion. Trade is the oldest and most extensive of the Union's external competences.

The EC was a full member of the WTO from the outset, at the entry into force of the WTO agreement on 1 January 1995. The EC fully participated to the Uruguay Round of negotiations, which resulted in the passage from the GATT regime to the WTO. Before that, the EC represented the member states within the GATT as a consequence of its exclusive competence on the common commercial policy.[678]

During its existence, the WTO enlarged its competences as much as the EU enlarged its exclusive competences on common commercial policy. Consequently, the EU Commission increased its control of the member states.[679] In the practice of the WTO on dispute settlement, the Commission showed the preference for being the first actor directly involved. This interest reflects the established practice of member states' participation in the WTO under the unified representation of the

[677] Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013, identified an 'organic model' (applied by the ECtHR mainly for peacekeeping operations), a 'competence model' (applied by the WTO, partly by UNCLOS and in the resolution of internal EU disputes) and a 'consensus model' (applied partly by UNCLOS, as a matter of fact implemented in contexts where the joint responsibility of the organisation and member states is recognised and imagined in the co-respondent mechanism of the EU Draft Accession Agreement to the ECHR).

[678] See *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, Joint cases 21 to 24/72, ECR 1972 01219, para. 18.

[679] See Piet Eeckhout, *EU External Relations Law*, 2nd ed., Oxford University Press, 2011. For a classic overview of the constitutional implications of EU participation to the WTO within the EU legal order, see Gráinne de Búrca and Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*, Hart, 2001.

Commission. The divergences between member states occur upstream in the EU consultative bodies, such as the Trade Policy Committee. The Commission sought to prevent negotiations, agreements or disputes between an individual member state and third countries in order to preserve its role as the EU's unitary trade policy representative. The EU maintained an open trade position and sought to keep a balance between the internal division of competences and the acceptance of international responsibility.[680] However, this is limited to the WTO, the same convergence of interests may not necessarily take place in other areas of international relations. The WTO system is a special regime based on multilateral consensus. The analogies between regimes should therefore be very cautious.

The issue of the relationship between internal competences and international responsibility emerged as an issue immediately after the conclusion of the WTO agreements. Neither the EU nor its member states issued any declaration of competence. Advocate General Tesauro stated, in its Opinion on the *Hermes* case, that 'the expression "joint competence" must … mean that Member States and Community have the last word in their respective areas of competence'.[681] Consequently, he connected responsibility with competences:

> Member States and Community constitute, vis-à-vis contracting non-member States, a single contracting party or at least contracting parties bearing equal responsibility in the event of failure to implement the agreement. This clearly means that, in that event, the division of competence is a purely internal matter.[682]

The assumption that the Community and its member states constitute a single entity for their counterparts is true only, and not always, in the very particular WTO regime. The division of competences does not create any mandatory constraint in international law.

A third party can disregard the division of competences between the Community and its member states as long as the WTO Panels considers the EU as a unitary body and. However, this balance derives from the primary obligations contracted in

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[680] See Marise Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Papers LAW*, 22, 2006, p. 24.
[681] *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV*, Case C-53/96, ECR 1998 I-03603, para. 13.
[682] Ibid., para. 14.

WTO agreements. The balance concerns the ownership of the obligations between the EU and its member states. Within the EU, WTO obligations are implemented through EU regulations having direct effect on all member states. However, it is not a balance based on the attribution of conduct. WTO obligations do not raise issues of attribution of conduct, because all parties generally agree on the EU's exclusive responsibility on the basis of its unitary representation. No third party will raise the issue as long as the EU is ready to take responsibility.[683]

The Panels' and Appellate Body does not employ a coherent reasoning on the attribution of conduct to the EU. In the *Local Area Network* case, the Appellate Body held that the EC is the only respondent for the implementation of new tariff schemes, because it was a customs union under Article XXIV of the GATT.[684] The EU had stated its intention to assume the responsibility for the controversial measures,[685] but it is not clear whether the Panel ultimately held it responsible on the basis of the post-factum acknowledgement or on the exclusive attribution.[686]

The WTO Panel in *Geographical Indications* went much further in its argumentation in favour of the responsibility of the EU alone, arguing that in the common commercial policy, 'the authorities of its member States … "act *de facto* as

[683] This practical reason is correctly argued by Frank Hoffmeister, 'The European Union and the Peaceful Settlement of International Disputes', *Chinese Journal of International Law*, 11, 1, 2012, p. 90; although the same author, in another work, argues, moving from the same case law, in favour of the existence of a special rule of attribution (Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 741-742). On the contrary, it seems that the procedural nature of the tendency of third states to preferentially turn to the EU evidences that substantive legal conclusions of a general nature with regard to attribution should not be drawn from this practice.

[684] *European Communities – Customs Classification of Certain Computer Equipment (Local Area Network)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Appellate Body Report of 5 June 1998, paras. 96-97.

[685] The argument of Andrés Delgado Casteleiro and Joris Larik, 'The "odd couple": the responsibility of the EU at the WTO', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013, pp. 243-244, that the EU intended to argue in general that the conduct 'involving organs of its Member States functionally acting as EU organs' should be attributed to it is not convincing. In fact, it seems that the EU's intention to take responsibility was not further motivated with reference to the criteria of attribution, as the ILC seems to have correctly reconstructed when it commented that in this case 'it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility' (ARIO Commentary, Art. 9, para. 3, p. 62).

[686] *European Communities – Customs Classification of Certain Computer Equipment (Local Area Network)*, WT/DS62/R, WT/DS67/R, WT/DS68/R, Panel Report of 5 February 1998; see paras. 4.9-4.11 for EU acceptance responsibility.

organs of the Community, for which the Community would be responsible under WTO law and international law in general"'.[687] The Panel quoted the words of the European Commission's oral statement, but it is unclear why it took this erroneous conclusion. It is unclear why it shared with the Commission the need to extend its conclusions, justified in terms of WTO law, to general international law. In any case, the Panel's statement has no particular relevance for the current state of general international law, because it lacks competence to issue decisions on matters of general international law, which were not even incidentally relevant.

The same argument was reiterated in *Biotech*. In this decision the Panel explicitly referred to attribution under international law and seemed to imply the relevance of post-factum acknowledgement. It claimed that the EU had not contested to be the respondent even if the complaint was about measures adopted by member states.[688]

The argument shifted to the recognition of 'executive federalism' in *Selected Customs Matters* case, in which the Panel argued that 'the authorities in the Member States … act as organs of the European Communities when they review and correct administrative actions taken pursuant to EC customs law'.[689]

However, the fact that the Panels do not have a clear approach to attribution depends on the fact that claims can be raised against another WTO member on the basis of the territorial link to the measure. Indeed, article 4(2) of the DSU states that claims must relate to 'measures affecting the operation of any covered agreement taken within the territory' of a party to the agreement.[690] The fact that the attribution of member states' customs measures to the EU depends on this rule. In the *Textiles* case, Turkey claimed that the measures under scrutiny were implemented in application of the EU-Turkey customs union. The Panel argued that since the Turkey-

[687] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO/DS174/R, Panel Report of 15 March 2005, para. 7.725.
[688] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO/DS291/R, WTO/DS293/R, Panel Report of 29 September 2006, para. 7.101.
[689] *European Communities – Selected Customs Matters*, WT/DS315/R, Panel Report of 16 June 2006, para. 7.553; overruled by *European Communities – Selected Customs Matters*, WT/DS315/AB/R, Appellate Body Report of 13 November 2006, paras. 218-227.
[690] Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 175, states that Art. 4(2) of the DSU 'establishes the general rule of attribution within the WTO', thus arguing that the WTO applies a special rule of attribution. While it may not be correct to speak, in this case, of attribution as much as the territorial scope of the relevant obligations, there is no doubt that this rule has the effect of altering the scope of applicability of the general rule of attribution.

EU customs union was not a WTO member, it did not have 'any autonomous legal standing for the purpose of WTO law'.[691] However, this does not prove that the conduct of states involved in a custom union should always be attributed to the states and not to the union; on the contrary, it can imply that in certain circumstances conduct can be attributed to the union. Consequently, either the EU has assumed responsibility for the conducts of its members under Article 9 of the ARIO or that there is a double attribution. The WTO Panels have never dealt with double attribution. Alternatively, the Panels spoke improperly of attribution and rather referred to a joint responsibility according to the rule of territorial extension of obligations mentioned above.[692]

The fact that the Union regularly accepts to appear as a respondent for member states' implementing measures also emerges from the *Airbus* case, where the Panel recognized the right of member states to be parties in the proceedings concerning their measures because they are also parties to the WTO and the internal division of competence is only an internal EU question.[693] This case is used to prove the existence of a special rule of attribution in areas where states implement EU law without margin of discretion. Indeed, in this case the controversial measures were adopted by the states autonomously and the EU was only the holder of the remedies against them. Therefore, it is, at most, a case of insufficient regulation by the EU and not of active conduct in violation of WTO rules. It is important that the Panel recognized that internal relations between the EU and member states are a matter of internal EU law and that it rejected a special rule of attribution on the basis of remedies within the EU. The internal remedy against states' measures is laid down in EU law,[694] but the states were held responsible.

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[691] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO/DS34/R, Panel Report of 31 June 1999, para. 9.41.

[692] The latter interpretation would seem to be consistent e.g. with the *Asbestos* case, where the Panel, on the basis of the territorial scope of EU obligations as a custom Union, accepted the assumption of EU responsibility even in a case where the measures taken by the member state were clearly not implementing measures under EU law (WT/DS135/R, paras. 8.1-8.8). See, in this sense, Frank Hoffmeister, 'The European Union and the Peaceful Settlement of International Disputes', *Chinese Journal of International Law*, 11, 1, 2012, p. 90.

[693] *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, Panel Report of 30 June 2010, paras. 7.174-7.175.

[694] TFEU, Arts. 107 and 108.

VI.3 Attribution of conduct to the EU and UNCLOS

The International Tribunal for the Law of the Sea (ITLOS) deals with the attribution of conduct to the EU in a very similar way. However, this case involves due diligence obligations, which require further analysis.

In the *Swordfish* case, Chile appealed against the EC and not Spain, the flag state of the ships involved in the case.[695] The case was settled by an agreement between the parties, which leave us without a proper guidance on what the Tribunal would have sustained. The fact that the Tribunal took note of the settlement without objecting could be interpreted in the sense of indicating that the case was correctly brought against the EC and not the state.[696] The same criticism I raised for the WTO regime apply. There is no reason to exclude that the EU acknowledged its responsibility (in this case by acquiescence).

UNCLOS involves due diligence obligations and the relevant conduct of is attributed to private vessels, while the EU or its member states is responsible for failing to regulate, control or sanction. The relevant conduct for the EC concerns the failure to take measures to ensure adequate protection for third parties with respect to the behaviour of ships flying the flags of member states.

Annex IX UNCLOS states that international organisations can access the treaty and deposit a declaration of competence.[697] In case of uncertainty about the competence with respect to a certain matter or with respect to questions of responsibility in specific situations, other parties may request the organisation and its member states to declare who is to be held responsible.[698] This declaration is binding between the parties to the dispute or, in the case of a general declaration, on all parties to the Convention.

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[695] *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union)*, ITLOS Case No. 7, Order of 16 December 2009, ITLOS Reports 2008-2010; see Press Release No. 43 on Case No. 7 at itlos.org.

[696] Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 738.

[697] UNCLOS, Annex IX, Art. 2.

[698] UNCLOS, Annex IX, Arts. 5(5) and 6(2).

The solution adopted by UNCLOS is procedural and does not address the attribution of conduct. It 'avoids solving the question a priori',[699] offering a mechanism to bypass from the issue. This mechanism aims at solving the allocation of responsibility, because if the EU and member states cannot agree on who should be the respondent in a certain dispute, they are to be considered jointly and severally responsible.[700] This bypasses the question of attribution of conduct and division of responsibility at least for all due diligence obligations.

Recently, ITLOS issued an advisory opinion on responsibility for illegal, unregulated and unreported fishing activities carried out by vessels flying the flag of EU member state. The claimant was the Sub-Regional Fisheries Commission (SRFC), which concluded the fishing agreement with the EU.[701] In this case, the EU refused to pay the payment of the fine imposed by a SRFC state in lieu of the flag state on the grounds that it had no competence to do so. The Tribunal rightly considered that the EU and its member state would be jointly and severally responsible unless they clarified who is the respondent. In this case, only the EU, and not its member states, had entered into obligations towards the states member of the SRFC. At the EU internal plane, the effects of a treaty concluded only by the organisation is partly answered by Article 216(2) TFEU. At the international plane, it has been left unsettled, in particular after the dismissal of Draft Article 36-bis from the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (VCLTIO). This proposal intended to limit the autonomy of the organisation, providing the conditions for the effectiveness vis-à-vis member states of the obligations contracted by an organisation of which they were parties in an agreement with third parties.[702] The VCLTIO only includes a safeguard clause in Article 74(3), according to which the Convention 'shall not prejudge any question that may arise in regard to the

[699] Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016, p. 137.
[700] UNCLOS, Annex IX, Art. 6(2).
[701] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No 21, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.
[702] See the text of the draft article in the Draft articles on the law of treaties between States and international organizations or between international organizations, ILC Yearbook 1982, Vol. II(2).

establishment of obligations and rights for States member of an international organization under a treaty to which the organization is a party'.[703]

The Tribunal stated that an organisation is responsible for the conduct of a member state when a violation concerns 'a matter of its competence', 'compliance depends on the conduct of its member States', 'a member State fails to comply', and 'the organization did not meet its obligation of "due diligence"'.[704]

The last part of the statement raises no issues. The international organisation has a duty of due diligence. The link between competence and responsibility, on the other hand, needs some clarification. The fact that ITLOS spoke of the member state's conduct first, seems to indicate that it must be ascertained before the international organisation can be addressed. On the contrary, the first step should involve the identification of the competences of the international organisation, then, the breach of the due diligence obligation must be proved with reference to the specific behaviour of the ships and to the measures adopted by the member state. These measures would only be relevant in terms of factual examination, with the aim of examining whether the international organisation had taken sufficient care to ensure that they were adequate. There is no need to attribute the conduct to the state.[705] The procedural provisions mentioned above should avoid the difficulty for the court to ascertain jurisdiction as a subjective delimitation of due diligence obligations. If such delimitation was not specified by the EU and the member state, they would both be held responsible.

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[703] Cf. Catherine Brölmann, 'The 1986 Vienna Convention in the Law of Treaties: the History of Draft Article 36bis', in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag*, Martinus Nijhoff, 1998.

[704] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No 21, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4., para. 168.

[705] For what concerns the possible breach of due diligence obligations in the UNCLOS system, it should be noted that the declaration of competence is to be understood as a primary obligation that serves to delimit the subjective scope of due diligence obligations; on the contrary, it is not an instrument to be used for the attribution of conduct. See Lorenzo Gasbarri, 'The European Union is not a State: International Responsibility for Illegal, Unreported and Unregulated Fishing Activities', *Maritime Safety and Security Law Journal*, 7, 2020, who, commenting on the theoretical foundations of the ITLOS decision to consider the rules of the organisation as a tool to determine the attribution of conduct, underlines the shortcomings and the contrast with the principle of protection of the injured third party and rightly notes that due diligence obligations would also derive, at a general level, from a rule of progressive development, reflected in part in Art. 40 of the ARIO, which asks the member states to provide the means to ensure that the organisation is able to comply with its international obligations.

VI.4 Attribution of conduct to the EU and sanctions

The imposition of international sanctions by the EU is part of its regulatory activities. These measures have the peculiarity of being subject to CJEU jurisdiction. EU law ensures the right of concerned individuals to take direct action before the General Court for the annulment of the relevant decisions. The conduct at issue is the adoption of regulations, based on article 263 TFEU, indicating the persons targeted by the sanctions and the kind of measure imposed. A special situation arises when the EU adopts sanctions in application of UN Security Council resolutions, because in this case the EU regulation transposes the Security Council decision. The advocates of a special rule of attribution based on normative control contend that EU sanctions cannot be treated as UN sanctions in terms of attribution of conduct. Indeed, an analogy would mean that member states' acts of implementation should be attributed to member states, and not to the EU. According to this position, the difference between EU and UN sanctions is that EU sanctions transpose international law, namely UN resolutions, into domestic EU law, subjected to the control of the domestic legal order. Conversely, in the case of acts of implementation by states, EU regulations would enter directly into the law of the member states with direct effect.[706] National constitutional courts have differing views on how EU law becomes binding in the member states' legal systems. In those states where there is a dualist conception, EU law is generally transposed into national law as the result of a direct references in the constitution. However, the distinction between the UN-EU relation and the EU-member states relation does not lie in the ways in which EU law is transposed into national law.

The ECJ should decide on EU sanctions as a result of the EU regulations containing the sanctions and of their value under the EU Treaties in the sense of legitimating the individuals affected by the regulation to act before the Court. In other words, the targeted individual is legitimated by the jurisdictional mechanism provided for in the EU system. The case of potential actions before international courts is different. The issue of attribution arises, concerning who is in charge of the conducts carried out in several planes, for example through an EU regulation and an

[706] Frank Hoffmeister, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010, p. 737.

administrative order of a member state. According to the supporters of the normative control, in the *Kadi* case the ECJ did not decline its jurisdiction due to the lack of UN mechanisms of guarantee. This is a judicial policy consideration that has nothing to do with the legal question of attribution.[707]

ITLOS case law shows the confusion between primary obligations and attribution of conduct. The *Kadi* case shows the relevance of judicial policy and available judicial remedies.[708]

The ECtHR reached a successful solution between reasons of judicial convenience and the attribution of conduct in the *Bosphorus* case.[709] An aircraft leased by Yugoslav authorities was seized by Irish authorities in application of EEC Regulation 990/93,[710] applying UN sanctions regime against the Federal Republic of Yugoslavia. The Court attributed the measure to Ireland, considering irrelevant that the Irish authorities were applying EC law. The Court held that notwithstanding the transfer of part of state's sovereignty to an international organisation, 'absolving Contracting States completely from their Convention responsibility in the areas

[707] It should be mentioned that the ECJ had the jurisdiction to rule on the legitimacy of the regulation in question with reference to the Treaties, but perhaps it intended to state a little too broadly the autonomy of EU law with respect to international law in the following passage: 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty' (*Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, ECR 2008 I-0635, para. 285). Indeed, the Court seems to have forgotten both the provisions of EU law itself that refer to the respect of the UN Charter (TEU, Arts. 3(5) and 21) and the binding force for all member states of Art. 103 of the UN Charter, according to which the provisions of the Charter take precedence over any other agreement contained in treaties (to which member states do not seem to have wanted to derogate with the conclusion of the Lisbon Treaty). Tomuschat is therefore right when he states that '[t]he UN Charter is not just any international agreement. It constitutes the general regulatory framework for the world of today' (Christian Tomuschat, 'The Relationship between EU Law and International Law in the Field of Human Rights', *Yearbook of European Law*, 35, 1, 2016, p. 614). Moreover, although the case has shown that the Security Council's sanctions mechanism could be improved, the functioning of the Security Council is precisely at that intersection where it has historically been considered appropriate to ensure the effectiveness of international law through a political agreement (as shown by the unequal composition of the Security Council), so it seems reasonable that sanctions may fall within one of those cases where the defence of the individual, not assured by technical legal remedies, may be entrusted to diplomatic protection by his country.

[708] See *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, ECR 2008 I-0635, para. 287.

[709] *Bosphorus Airways v. Ireland*, 30 June 2005, Application n. 45036/98, para. 108.

[710] Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro).

covered by such a transfer would be incompatible with the purpose and object of the Convention'.[711] The judges applied the procedural remedy of the presumption of similar protection of fundamental rights as formulated by the *Solange* doctrine:

> State action taken in compliance with [EC] legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights … in a manner which can be considered at least equivalent to that for which the Convention provides.[712]

Equivalent is to be understood as 'comparable' and not 'identical', but the presumption of respecting fundamental rights can be overturned through a specific reference to the facts of the case. The Court used the presumption of equivalent protection to solve the intricate conflict between its lack of jurisdiction on EU measures and the need to reduce the risks of conflict with the EU system. The ECtHR rightly examined the responsibility of the EU member states' conduct falling under its jurisdiction. The presumption is an appropriate means of harmonization, necessary to mitigate the frictions between overlapping multilateral systems.

VII. Conclusion

In this chapter, an attempt has been made, albeit in the presence of a fragmented practice characterised by a multiplicity of special regimes with little communication with each other, to analyse the application of the general rules of attribution examined in Chapter 1 to the EU's external activity.

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[711] Ibid., para. 154. In addition to the reference to the purpose and object of the Convention, indicated as criteria of interpretation in Art. 31(1) of the VCLT, reference could also be made to Art. 30(4)(b) of the VCLT, from which it must be probably borne that the obligations of the Convention cannot be derogated from by obligations entered into between only certain parties to the Convention.

[712] *Bosphorus Airways v. Ireland*, 30 June 2005, Application n. 45036/98, para. 155. The *Solange* doctrine referred to was affirmed in Solange II, 73 BVerfGE 339, 22 October 1986. On the relationship between these decisions and the further implications of this line of argument in the relationship between legal systems for the protection of fundamental rights, cf. Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the *Solange* Argument', in Ole Kristian Fauchald and André Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, Hart, 2012.

The scheme set out in the chapter has followed the main criteria of attribution according to the ARIO. For each of those criteria, the most controversial issues arising in the practice of the EU's international relations were examined.

Section II argued that it is impossible to refer to member states as EU organs and examined the difficulties that arise in attempting to apply the rule of attribution to the organisation of the conduct of its organs in the case of CSDP operations, since the troops operating in such operations are to date still partly under the control of member states.

Section III examined the cumbersome application of the rules of attribution of the conduct of member states' organs placed at the disposal of the EU in two contexts such as migration management and the fight against piracy, in which the EU's external action is still essentially led by the states with their own troops and their own means within a light framework of cooperation.

In Sections IV and V, the questions of the possibility of acknowledgement and multiple attribution have been answered positively, at least in theory, since judicial practice on the matter is practically absent.

Finally, in Section VI, through an examination of the special rules established in certain special regimes of international law of which the EU is a party, it was argued against the existence of special rules of attribution applicable to the EU alone in its relations with third parties when such parties have not agreed to the application of any special rules. The Union and its members cannot externalise in terms of attribution of conduct the internal division of competences and the arrangements for implementing internal obligations without the consent of third parties involved. The most extreme form of enforcement of the special regime of responsibility within the EU is the suspension of the effects of the treaties towards a member state in breach. Since there is not a transfer of sovereignty between the member and the EU, it cannot be argued that the control over the activities of national authorities is generally sufficient to qualify them as organs of the Union.[713] The reference to the internal rules of the state or organisation in Articles 4(2) ARS and 6(2) ARIO is a reference to the conferral of the status of organ. They are not relevant for third parties apart than for the ascertaining of such status. In particular, the relevance of

[713] See, in the same sense, Paolo Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law', *The European Journal of International Law*, 29, 4, 2019, p. 1422.

internal rules is not supported by significant and consistent practice. The normative control doctrine is only applied in the context of special regimes and not in all multilateral contexts in which EU member states are involved. The questions that the normative control doctrine aims to address can be solved through a careful and comprehensive use of the rules set out in the ARIO. In the context of foreign policy activities, where the risks of violation of international obligations is higher there is no doubt about the absence of a special rule, because CFSP is characterized by intergovernmental coordination and the jurisdiction of the ECJ is mostly excluded in this area of activity.

Multilateral regimes that include dispute settlement mechanisms are based on articulated systems of cooperation. It is very difficult to draw general conclusions from existing practice. The general rules of attribution should not be the result of a sum of practices relating to special arrangements. On the contrary, they should provide those residual criteria that serve to settle disputes that are not otherwise settled and to consistently apply the principles general international law regime.[714] Practice is an element of customary international law, but care must be taken before claiming the existence of norms belonging to the general regime on the basis of the observation of practices belonging to special regimes.

[714] Cf. Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', *The European Journal of International Law*, 17, 3, 2006.

Conclusion

The aim of this thesis has been to identify the rules of attribution of conduct applicable under international law to EU external action and to examine their application in the practice of the Union's international relations. The intention was to respond to two issues that are often raised as problematic when it comes to the application of general international law to the EU. The first question, generally raised as an external criticism of EU international activity, is the difficulty of identifying the actions of the Union and in particular of distinguishing them from the international initiatives of the member states. The second question, raised instead as a claim from within the Union against the prevailing position in international law, is that many rules of general international law, including those on international responsibility and the attribution of conduct, are too focused on the international system as a system of sovereign states, as such do not reflect the political and legal reality of the Union and should therefore be reformed or be without prejudice to special rules more in line with the supranational characteristics of the Union.

The answer that can be proposed here to these questions is only partial, as it only addresses the issue of attribution of conduct. This aspect, however, is of central importance, since the assessment of the 'ownership' of acts in international law underpins a number of areas of international law, from international responsibility to limitations on the exercise of jurisdiction, and determines the boundaries of the effective involvement of international legal persons in situations governed by international law.

In the first chapter, the rules on attribution of conduct under customary international law have been identified. Since the most authoritative sources for the identification of such rules are the articles of codification and progressive development of the ILC, the ARS and the ARIO, the present work started from these articles and tried to verify the correspondence of their provisions with customary international law. A high level of correspondence between these articles and customary international law has generally been observed through the examination of the practice on attribution. They are undoubtedly the most authoritative material sources on point and the ones usually referred to in the practice of both states and

organisations whenever issues relating to attribution are addressed. In particular, the rules of attribution of conduct to states embodied in the ARS are widely regarded as essentially a codification of current customary international law. As regards the ARIO, the fundamental principles of attribution, largely derived by analogy with those of states, subject to such modifications as are necessitated by the functional character of international organisations, are generally accepted. Some specific provisions, however, on which the attention and criticisms of various international organisations have focused must be considered as progressive development, with both their application and their correspondence with customary international law still subject to debate. The most important of these provisions for the purposes of this thesis, and in particular for distinguishing conduct attributable to an organisation from conduct attributable to its member states, is Article 7 of the ARIO, on the conduct of organs of a state placed at the disposal of an international organisation. In this respect, if the criterion of effective control is now well established, its interaction with other criteria of attribution remains contested.

The interaction of the criterion of attribution applicable to state organs placed at the disposal of an international organisation with other criteria of attribution set out both in the ARS and in the ARIO is connected with another issue, namely the possibility of multiple attribution. Today this possibility seems to be generally recognised. As such, a composite picture emerges in which various criteria of attribution can interact in various ways. The examination of the practice is complicated by the respective jurisdictions of international courts, which lead in practice to the exploration of only some of the possible links between the natural persons who act and the international legal persons potentially implicated and leaves unresolved alternative bases of attribution.

Chapters 2 and 3 concerned the application of the rules on attribution to EU external activities. At a general level, it appears that the rules set out in the ARS and in the ARIO offer a widely accepted and regularly applied framework with regard to the attribution of conduct to the Union and its member states. However, in terms of both the discussions during the drafting of the ARIO and the subsequent application of the articles, certain features of the institutional and legal structure of the EU have given rise to debate and to a divide between the majority position in international law and the position supported by the Union and many EU law experts. The debate and

divide centre on the connection between the internal division of competences within the EU and the attribution of conduct under international law.

The position initially supported by the EU was that the rules adopted by the ILC did not take adequate account of the special characteristics of the EU and of the importance in EU law of both the division of competences and the different roles played by the EU and its member states respectively depending on the type of competence within which certain acts fall. The proposals that emerged from this criticism are essentially twofold. It is argued that the general rules of attribution identified by the ILC are not applicable to the EU and that special rules applicable only to the EU, or to a category of regional economic integration organisations of which today only the EU is part, should be identified. In the alternative, it is argued that, even if the general rules of attribution of conduct are applicable to the EU, Article 7 of the ARIO, regulating the attribution of conduct of states' organs placed at the disposal of the EU, should be applied having a special regard to the institutional characteristics of the EU. Both these proposals are premised on the theory of normative control.

According to the theory of normative control, when EU law governs both the substantive legality of a conduct and the available remedies against the wrongful exercise of such conduct, then the conduct should be attributed to the Union irrespective of the factual control exercised by Union's or state's organs in the specific case. The first explicit institutional proponent of normative control was the European Commission, which embraced this theory with a view to pursuing two fundamental objectives of its external policy. First of all, the Union would increase its leading role vis-à-vis third parties to the detriment of the member states and consequently would also increase, especially in multilateral contexts, its negotiating strength. Secondly, it would reduce its internal concerns, because in a number of cases member states would no longer be able to invoke compliance with their international obligations as a reason to resist the implementation of decisions adopted by the EU, insofar as any discrepancy between a measure in implementation of a Union decision and international law would be laid at the feet of the EU. Member states, in turn, would be less likely to have to bear the costs of their responsibility, without suffering, at least in the short term, a parallel decrease in their competences in favour of the Union. For some third countries, for example within the WTO, the standard of normative control could simplify and reduce the costs of finding

who is responsible for possible violations, because in a number of areas this would automatically be the Union. This could be a serious challange for states with fewer resources, which would have to deal with a single, very powerful entity in the context of international trade. On the other hand, this disadvantage would be relative, given that the Union already systematically intervenes in support of its member states in disputes before WTO Panels. Those who would lose out under the normative control theory would be all those third parties, often weak ones, such as states in internal political distress or individuals, who try to invoke the responsibility of the EU or the member states in relation to non-regulatory activities, especially in the context of military or police operations. In such cases, third parties would be twice disadvantaged by the application of the normative control standard of application: first, because the often intricate and multi-level structure of EU operations could be used by member states as a smokescreen behind which to act without suffering the consequences of responsibility; and, secondly, because it would be difficult for those affected to find independent judicial remedies, external to the EU's institutional machinery, for the EU's internationally wrongful acts.

The picture that emerged from the analysis of international practice concerning EU external action, though, is still dominated by the attribution of relevant conduct to the member states. Cases of attribution of conduct of state organs placed at the disposal of the Union to the Union itself only rarely occur in practice, and they usually concern specific operational activities such as border controls, EU missions abroad or the fight against piracy. In these cases, the contested issue is the level of control that the organisation must be proven to have exercised in order for those acts to be attributed to it. The criterion of effective control has sometimes been seen as imprecise and a lowest-common-denominator compromise between autonomy and dependence that deliberately leaves unresolved the question of the attribution of the most controversial activities of international organisations. It is perhaps true that this criterion cannot be regarded as an established rule of customary law. It is true too that the adjective 'effective' is necessarily indeterminate as a semantic matter, like all open-textured standards dependent on the legal characterisation of fact, so that its content must inevitably ascertained on a case-by-case basis and gradually refined with the progressive consolidation of practice. But the concept of factual control of the conduct of the organs of the member states acting in the context of the activities of an international organisation seems for the moment to be a necessary point of

reference to solve otherwise insoluble questions of attribution. This seems the case also with respect to EU external activities. Through the criterion of effective control, the ILC has struck a delicate balance between the principle of the responsibility of international organisations for their own conduct and the idea of the dependence of international organisations on their member states for the exercise of their functions.[715]

If the rules of attribution of conduct to international organisations were loosened without extending the remedies available in international judicial fora, there would be the risk of member states outsourcing their more hazardous and questionable international activities. International organisations would 'do the dirty work' on behalf of states without either being held to account in an international court or tribunal. In turn, other international actors or private parties may avoid dealing with international organisations precisely because conduct attributable to the latter could not be litigated before an international court or at least an independent one. Rather than risk the alternative, it seems preferable to rely on rules that are perhaps less ambitious but more consistent with the current development of customary international law and with the role presently played on the international scene by international organisations. On such rules, moreover, a consensus among states and international organisations can more easily be achieved.

[715] The most extreme formulation of this position was the idea of the organisation as a mere 'joint agency of States' legally irrelevant to third states, exposed e.g. in Ian Brownlie, 'The Responsibility of States for the Acts of International Organizations', in Maurizio Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff, 2005, p. 360.

List of cases

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 25 September 1997, ICJ Reports 2007, p. 43.

Armed Activities on the Territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006, p. 6.

Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151.

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999 , ICJ Reports 1999, p. 62.

Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, p. 7.

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, ICJ Reports 1980, p. 73.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 66.

Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14.

North Sea Continental Shelf, Judgment of 20 February 1969, ICJ Reports 1969, p. 3.

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174.

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980, ICJ Reports 1980, p. 3.

European Court of Human Rights

Al-Jedda v. the United Kingdom, Appl. No. 27021/08, ECHR 2011.

Al-Skeini and Others v. the United Kingdom, Appl. No. 55721/07, ECHR 2011.

Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on Admissibility, Appl. Nos. 71412/01 and 78166/01, ECHR 2007.

Hanan v. Germany, ECtHR, Appl. No. 4871/16, ECHR 2021.

Hirsi and Jamaa and Others v. Italy, Appl. No. 27765/09, ECHR 2012.

Jaloud v. the Netherlands, Appl. No. 47708/08, ECHR 2014.

Kebe and Others v. Ukraine, Appl. No. 12552/12, ECHR 2017.

Kokkelvisserij U.A. v. the Netherlands, Appl. No. 13645/05, ECHR 2009.

Loizidou v. Turkey, Appl. No. 15318/89, ECHR 1996.

Makuchyan and Minasyan v Azerbaijan and Hungary, Appl. No. 17247/13, ECHR 2020.

Medvedyev and Others v. France, Appl. No. 3394/03, ECHR 2010.

MSS v. Belgium and Greece, Appl. No. 30696/09, ECHR 2011.

Saddam Hussein v Albania and Others (Admissibility), Appl. No. 23276/04, ECHR 2006.

S.S. and Others v. Italy, Appl. No. 21660/18, communicated on 26 June 2019.

Stitching Mothers of Srebrenica and Others v. the Netherlands, Admissibility, Appl. No. 65542/12, ECHR 2013.

Court of Justice of the European Union

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

Anklagemyndigheden v. Peter Poulsen and Diva Navigation Corp., Case C-286/90, ECR 1992 I-06019.

Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty, Opinion 1/94, ECR 1994 I-05267.

Commission of the European Communities v. Council of the European Communities, Case 22/70, ECR 1971 00263.

Commission of the European Communities v. Grand Duchy of Luxembourg, Case C-266/03, ECR 2005 I-04805.

Draft Agreement establishing a European laying-up fund for inland waterway vessels, Opinion 1/76, ECR 1977 00741.

Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/13, electronic report only, ECLI:EU:C:2014:2454.

European Parliament and European Commission v. Council of the European Union, Joined cases C-103/12 and C-165/12, electronic report only, ECLI:EU:C:2014:2400.

European Parliament v. Council of the European Union (Lomè Convention), Case C-316/91, ECR 1994 I-00625.

European Parliament v. Council of the European Union, Case C-355/10, electronic report only, ECLI:EU:C:2012:516.

European Parliament v. Council of the European Union, Case C-658/11, electronic report only, ECLI:EU:C:2014:2025.

Flaminio Costa v. ENEL, Case 6/64, ECR 1964 01141.

Free Trade Agreement between the European Union and the Republic of Singapore, Opinion 2/15, electronic report only, ECLI:EU:C:2016:880.

H v. Council of the European Union and Others, C-455/14 P, electronic report only, ECLI:EU:C:2016:569.

Hermès International (a partnership limited by shares) v FHT Marketing Choice BV, Case C-53/96, ECR 1998 I-03603.

International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit, Joint cases 21 to 24/72, ECR 1972 01219.

Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Opinion 1/03, ECR 2006 I-01145.

NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26/62, ECR 1963 00003.

Racke GmbH & Co v. Haptzollant Mainz, Case C-162/96, ECR 1998 I-03655.

Skatteverket v David Hedqvist, Case C-264/14, electronic report only, ECLI:EU:C:2015:718.

Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P, ECR 2008 I-0635.

Other international courts and tribunals

International Centre for the Settlement of Investment Disputes

Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, 12 October 2005.

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Dušco Tadić, Appeal Judgment, IT-94-1-A, *ICTY*, 1999.

International Tribunal for the Law of the Sea

Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union), ITLOS Case No. 7, Order of 16 December 2009, *ITLOS Reports 2008-2010*, taking note of the settlement of the dispute.

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Case No 21, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.

Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10.

Permanent Court of Arbitration

The 'Enrica Lexie' Incident (Italy v. India), Award, 21 May 2020.

Permanent Court of International Justice

The Case of the S.S. "Lotus", PCIJ Series A, No. 10, 1927.

World Trade Organization

European Communities – Customs Classification of Certain Computer Equipment (Local Area Network), WT/DS62/R, WT/DS67/R, WT/DS68/R, Panel Report of 5 February 1998.

European Communities – Customs Classification of Certain Computer Equipment (Local Area Network), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Appellate Body Report of 5 June 1998.

European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WTO/DS291/R, WTO/DS293/R, Panel Report of 29 September 2006.

European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WTO/DS174/R, Panel Report of 15 March 2005.

European Communities – Selected Customs Matters, WT/DS315/R, Panel Report of 16 June 2006.

European Communities – Selected Customs Matters, WT/DS315/AB/R, Appellate Body Report of 13 November 2006.

European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, Panel Report of 30 June 2010.

Turkey – Restrictions on Imports of Textile and Clothing Products, WTO/DS34/R, Panel Report of 31 June 1999.

Domestic courts

Belgium

Mukeshimana-Ngulinzira and Others v. Belgium and Others, RG No. 04/4807/A and 07/15547/A, Court of First Instance of Brussels, 8 December 2010.

Mukeshimana-Ngulinzira and Others v. Belgium and Others, Appellate Judgment, 2011/AR/292, 2011/AR/294, Brussels Court of Appeal, 8 June 2018.

Germany

Anonymous v. German Federal Government, First instance judgment, Case No. 26 K 5534/10, Administrative Court of Cologne, 9 February 2012.

Judgment of the Second Senate (Lisbon), 30 June 2009, German Federal Constitutional Court, 2 BvE 2/08.

Judgment of 18 September 2014, Administrative Court of Nordrhein-Westfalen: openjur.de/u/731026.

Order of 19 May 2015, German Federal Constitutional Court, 2 BvR 987/11; see Press Release No. 45/2015, 19 June 2015.

Netherlands

Mothers of Srebrenica, Cases No. 200.158.313/01 and 200.160.317/01, Court of Appeal of The Hague, 27 June 2017.

Mothers of Srebrenica, Case No. 17/04567, Supreme Court of the Netherlands, Civil Law Division, 19 July 2019.

Bibliography

AHLBORN, Christiane, 'The Rules of International Organizations and the Law of International Responsibility', *International Organizations Law Review*, 8, 2, 2011.

AHLBORN, Christiane, 'The Allocation of International Responsibility between International Organizations and Their Member States: A Case of Indirect Responsibility?', *The European Journal of International Law*, 31, 2, 2020.

AHMED, Tawhida, and Israel de Jesús BUTLER, 'The European Union and Human Rights: An International Law Perspective', *The European Journal of International Law*, 17, 4, 2006.

BARROS, Ana Sofia, Cedric RYNGAERT, and Jan WOUTERS (eds.), *International Organizations and Member State Responsibility. Critical Perspectives*, Brill Nijhoff, 2016.

BENDIEK, Annegret, and Raphael BOSSONG, 'Shifting Boundaries of the EU's Foreign and Security Policy. A Challenge to the Rule of Law', *SWP Research Paper*, 12, 2019.

BLOKKER, Niels, 'International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law', *Yearbook of European Law*, 35, 1, 2016.

BORDIN, Fernando Lusa, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law', *International and Comparative Law Quarterly*, 63, 3, 2014.

BORDIN, Fernando Lusa, *The Analogy between States and International Organizations*, Cambridge University Press, 2019.

BRÖLMANN, Catherine, 'The 1986 Vienna Convention in the Law of Treaties: the History of Draft Article 36bis', in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag*, Martinus Nijhoff, 1998.

BRÖLLMAN, Catherine, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, Hart, 2007.

BRÖLLMAN, Catherine, 'Member States and International Legal Responsibility: Developments of the Institutional Veil', *International Organizations Law Review*, 12, 2, 2015.

BROWNLIE, Ian, 'The Responsibility of States for the Acts of International Organizations', in Maurizio Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff, 2005.

BÚRCA, Gráinne DE, and Joanne SCOTT (eds.), *The EU and the WTO: Legal and Constitutional Issues*, Hart, 2001.

CASOLARI, Federico, 'The EU Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?', *Italian Yearbook of International Law*, 25, 2015.

CASSESE, Antonio, 'Remarks on Scelle's Theory of "Role Splitting" (*dedoublement fonctionnel*) in International Law', *The European Journal of International Law*, 1, 1990.

CASSESE, Antonio, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *The European Journal of International Law*, 18, 4, 2007.

CILIBERTO, Giulia, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law', *Italian Law Journal*, 4, 2, 2018.

CORTÉS MARTÍN, José Manuel, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility', in Maurizio Ragazzi (ed.), *Responsibilitiy of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013.

CRAIG, Paul, and Gráinne DE BÚRCA, *EU Law. Text, Cases and Materials*, 7th ed., Oxford University Press, 2020.

CRAWFORD, James, *State Responsibility. The General Part*, Cambridge University Press, 2013.

CRAWFORD, James, and Simon OLLESON, 'The Character and Forms of International Responsibility', in Malcom D. Evans (ed.), *International Law*, 5th ed., Oxford University Press, 2018.

CREMONA, Marise, ‘External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law’, *EUI Working Papers LAW*, 22, 2006.

DAUGIRDAS, Kristina, ‘How and Why International Law Binds International Organizations’, *Harvard International Law Journal*, 57, 2, 2016.

DELGADO CASTELEIRO, Andrés, and Joris LARIK, ‘The “odd couple”: the responsibility of the EU at the WTO’, in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013.

DELGADO CASTELEIRO, Andrés, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press, 2016.

EAGLETON, Clyde, ‘International Organization and the Law of Responsibility’, *Académie de droit international de La Haye. Recueil des cours*, 76, 1950.

EECKHOUT, Piet, *EU External Relations Law*, 2nd ed., Oxford University Press, 2011.

FINK, Melanie, *Frontex and Human Rights: Responsibility in “Multi-Actor Situations” under the ECHR and EU Public Liability Law*, Oxford University Press, 2018.

FROUVILLE, Olivier DE, ‘Attribution of Conduct to the State: Private Individuals’, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010.

GASBARRI, Lorenzo, ‘The Dual Legality of the Rules of International Organizations’, *International Organizations Law Review*, 14, 1, 2017.

GASBARRI, Lorenzo, ‘The European Union is not a State: International Responsibility for Illegal, Unreported and Unregulated Fishing Activities’, *Maritime Safety and Security Law Journal*, 7, 2020.

GASBARRI, Lorenzo, ‘On the Benefit of Reinventing the Wheel: The Notion of a Single Internationally Wrongful Act’, *The European Journal of International Law*, 31, 4, 2021.

HALBERSTAM, Daniel, '"It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward', *German Law Journal*, 16, 1, 2015.

HARTWIG, Matthias, 'Tanker Games. The Law behind the Action', *EJIL:Talk!*, 2019 (at ejiltalk.org/tanker-games-the-law-behind-the-action).

HELISKOSKI, Joni, *Mixed Agreements As a Technique for Organizing the International Relations of the European Community and Its Member States*, Martinus Nijhoff, 2001.

HELISKOSKI, Joni, 'EU Declarations of Competence and International Responsibility', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013.

HOFFMEISTER, Frank, 'Litigating against the European Union and Its Member States. Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', *The European Journal of International Law*, 21, 3, 2010.

HOFFMEISTER, Frank, 'The European Union and the Peaceful Settlement of International Disputes', *Chinese Journal of International Law*, 11, 1, 2012.

JOHANSEN, Stian Ø., 'Dual Attribution of Conduct to both an International Organisation and a Member State', *Oslo Law Review*, 6, 3, 2019.

KASSOTI, Eva, and Mihail VATSOV, 'A Missed Opportunity? Unilateral Declarations by the European Union and the European Court of Justice's Venezuelan Fisheries Judgment', *The International Journal of Marine and Coastal Law*, 35, 1, 2019.

KLABBERS, Jan, *An Introduction to International Organizations Law*, 3rd ed., Cambridge University Press, 2014.

KLABBERS, Jan, '*Sui Generis*? The European Union as an International Organization', in Dennis Patterson and Anna Södersten (eds.), *A Companion to European Union Law and International Law*, Wiley, 2016.

KLABBERS, Jan, 'Sources of International Organizations' Law: Reflections on Accountability', in Jean d'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, 2017.

KOUTRAKOS, Panos, *EU International Relations Law*, Hart, 2015.

KUIJPER, Pieter Jan, and Esa PAASIVIRTA, 'EU International Responsibility and its Attribution: From the Inside Looking Out', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013.

LATTY, Franck, 'L'Union Européenne vue du droit international', *Annuaire de droit de l'Union Européenne*, 4, 2014.

LEHNER, Roman, 'The EU-Turkey "deal": Legal Challenges and Pitfalls', *International Migration*, 57, 2, 2019.

LENAERTS, Koenraad, Piet VAN NUFFEL and Robert BRAY (eds.), *Constitutional Law of the European Union*, 2nd ed., Sweet & Maxwell, 2005.

LEUBE, Kirsten, 'Can the EU Be Held Accountable for Financing Development Projects That Violate Human Rights', *Georgetown Journal of International Law*, 48, 4, 2017

LIČKOVÁ, Magdalena, 'European Exceptionalism in International Law', *The European Journal of International Law*, 19, 3, 2008.

LINDSETH, Peter L., 'Reflections on the "Administrative, Not Constitutional" Character of EU Law in Times of Crisis', *Perspectives on Federalism*, 9, 2, 2017.

MATTLI, Walter, *The Logic of Regional Integration. Europe and Beyond*, Cambridge University Press, 1999.

MESSINEO, Francesco, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, 2014.

MOELLE, Moritz P., *The International Responsibility of International Organisations. Cooperation in Peacekeeping Operations*, Cambridge University Press, 2017.

MONTEJO, Blanca, 'The Notion of "Effective Control" under the Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed.), *Responsibilitiy of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013.

NAERT, Frederik, ‘European Union Common Security and Defence Policy Operations’, in André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge University Press, 2017.

NOLLKAEMPER, André, et al., ‘Guiding Principles on Shared Responsibility in International Law’, *The European Journal of International Law*, 31, 1, 2020.

PAASIVIRTA, Esa, ‘The Responsibility of Member States of International Organizations? A special Case for the European Union’, *International Organizations Law Review*, 12, 2, 2015.

PALCHETTI, Paolo, ‘Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law’, *The European Journal of International Law*, 29, 4, 2019.

PASCALE, Giuseppe, ‘Is Italy internationally responsible for the gross human rights violations against migrants in Libya?’, *QIL, Zoom-in*, 56, 2019.

PELLET, Alain, ‘The Definition of Responsibility in International Law’, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010.

PELLET, Alain, ‘International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations’, in Maurizio Ragazzi (ed.), *Responsibilitiy of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013.

QUIRICO, Ottavio, ‘The International Responsibility of the European Union: A Basic Interpretive Pattern’, *Hungarian Yearbook of International Law and European Law*, 2013.

REINISCH, August, ‘Sources of International Organizations’ Law: Why Custom and General Principles are Crucial’, in Jean d’Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, 2017.

ROSAS, Allan, ‘Mixed Union – Mixed Agreements’, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, 1998.

SARI, Aurel, and Ramses A. WESSEL, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, in Bart

Van Vooren, Steven Blockmans, and Jan Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press, 2013.

SAROOSHI, Dan, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of Its Chapter VII Powers*, Clarendon Press, 1999.

SCHERMERS, Henry G., 'A typology of mixed agreements', in David O'Keeffe and Henry G. Schermers (eds.), *Mixed Agreements*, Kluwer Law and Taxation, 1983.

SCHERMERS, Henry G., and Niels M. BLOKKER, *International Institutional Law: Unity within Diversity*, 5th ed., Martinus Nijhoff, 2011.

SIMMA, Bruno, and Dirk PULKOWSKI, 'Of Planets and the Universe: Self-contained Regimes in International Law', *The European Journal of International Law*, 17, 3, 2006.

SOMMARIO, Emanuele, 'Attribution of Conduct in the Framework of CSDP Missions: Reflections on a Recent Judgement by the Higher Administrative Court of Nordrhein-Westfalen', *CLEER Papers*, 5, 2016.

SPAGNOLO, Andrea, *L'attribuzione delle condotte illecite nelle operazioni militari dell'Unione europea*, Editoriale Scientifica, 2016.

SPAGNOLO, Andrea, 'The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice', *Italian Yearbook of International Law*, 28, 1, 2019.

THYM, Daniel, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', *European Constitutional Law Review*, 7, 3, 2011.

TOMUSCHAT, Christian, 'Attribution of International Responsibility. Direction and Control', in Malcom D. Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union. European and International Perspectives*, Hart, 2013.

TOMUSCHAT, Christian, 'The Relationship between EU Law and International Law in the Field of Human Rights', *Yearbook of European Law*, 35, 1, 2016.

TZANAKOPOULOS, Antonios, 'Judicial Dialogue in Multi-Level Governance: The Impact of the *Solange* Argument', in Ole Kristian Fauchald and André Nollkaemper (eds.), *The*

Practice of International and National Courts and the (De-)Fragmentation of International Law, Hart, 2012.

VITTOR, Francesca DE, 'Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di "accordi" per il controllo extraterritoriale della migrazione', *Diritti umani e diritto internazionale*, 12, 1, 2018.

VOULGARIS, Nikolaos, *Allocating International Responsibility Between Member States and International Organisations*, Hart, 2019.

WESSEL, Ramses A., and Leonhard DEN HERTOG, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?', in Malcom D. Evans and Panos Koutrakos (eds.), *International Responsibility: EU and International Perspectives*, Hart, 2013.

WESSEL, Ramses A., and Ige F. DEKKER, 'Identities of States in International Organizations', in *International Organizations Law Review*, 12, 2, 2015.

WESSEL, Ramses A., 'Studying International and European Law: Confronting Perspectives and Combining Interests', in Inge Govaere and Sacha Garben (eds.), *The Interface Between EU and International Law. Contemporary Reflections*, Hart, 2019.

WHITE, Nigel D., *The law of international organisations*, 3rd ed., Manchester University Press, 2017.

WITTE, Bruno DE, 'The European Union as an International Legal Experiment', in Gráinne De Búrca and Joseph H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, 2012.

WOUTERS, Jan, Cedric RYNGAERT, Tom RUYS and Geert DE BAERE, *International Law. A European Perspective*, Hart, 2019.