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**The International Responsibility of the  
European Union and the Legal Nature of  
the Rules of International Organizations**

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# **The International Responsibility of the European Union and the Legal Nature of the Rules of International Organizations**

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## **Abstract**

This paper endorses the thesis that in the context of international responsibility, the European Union should not be treated differently from other international organizations. The argument is presented from the perspective of the debate on the legal nature of the 'rules of international organizations'. It contends that theories on European exceptionalism are founded on a purely internal nature, which does not reflect its derivation from international law.

After introducing the theme, section two of the paper goes through the historical development of the autonomy possessed by international organizations from the perspective of the nature of the rules. The third section discusses the theories on European exceptionalism looking at some key issues of the law of international responsibility, such as the attribution of a wrongful act and at the violation of an international obligation. The fourth section concludes the paper illustrating how international organizations have the same legal nature, leading to the same treatment in international law.

## List of Abbreviations

ARIO	Articles on the Responsibility of International Organizations
ASR	Articles on the Responsibility of States for Internationally Wrongful Acts
CJEC	Court of Justice of the European Communities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNSC	United Nations Security Council
WTO	World Trade Organization
TFEU	Treaty on the Functioning of the European Union

## Keywords

Rules of International Organizations; European exceptionalism; Responsibility; Member States

## Introduction

The Special Rapporteur of the International Law Commission on the responsibility of international organizations submitted in his third report the provisional Article 8 (subsequently Article 10 of the Articles on the Responsibility of International Organizations (ARIO)), entitled “*existence of a breach of an international obligation*”.<sup>1</sup> The first paragraph reflected Article 12 of the Articles on State Responsibility: “*there is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character*”.<sup>2</sup> The second paragraph adds: “*the preceding paragraph also applies in principle to the breach of an obligation set by a rule of the organization*”.

This additional paragraph is due to the unclear nature of the rules of international organizations. It implies that the rules are only “*in principle*” sources of international obligations. When a rule is characterized as internal law of the organization, its violation does not lead to international responsibility. Thus, the internal nature is considered an exception to the principle under which the ARIO applies to every rule of every international organization. As noted by Alain Pellet during the work of the Commission, the expression “*in principle*” means that there are organizations whose rules are not international law.<sup>3</sup> It is commonly assumed that this exception concerns regional economic integration organizations, and, more specifically, the European Union.<sup>4</sup>

The approach followed by Special Rapporteur Giorgio Gaja reflects a theory on the legal nature of the rules that distinguishes between categories of international organizations.<sup>5</sup> It underlines their capacity to develop a separate legal system, with the consequence that only certain organizations possess a body of internal law distinct from international law. Conversely, Pellet affirmed that it is not useful to preserve the specificity of the European Union.<sup>6</sup> The Special Rapporteur replied that the articles should reflect that European law is not international law. He referred to the scholar who regarded EU law not as *lex specialis*, which suggests that it would be of the same nature of international law, but rather as a self-contained regime.<sup>7</sup> In his rejoinder, Pellet took the view that every international organization is a self-contained legal order.

This debate had fundamental repercussions on the way in which ARIO can be applied to the European Union. After a long debate, the Commission deleted the expression “*in principle*”, considering that “*to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply*”.<sup>8</sup> The Commission preferred to rely on the *lex specialis* provision, applicable to any organization insofar as its rules are international law. The introduction of an *ad hoc* article would have

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<sup>1</sup> Giorgio, Gaja, *Third report on responsibility of international organizations* (ILC, 2005, A/CN.4/553).

<sup>2</sup> Art. 12 ASR: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”.

<sup>3</sup> International Law Commission, Summary Record of the 2840th meeting, 2005, A/CN.4/2840, 69.

<sup>4</sup> As underlined by the European Commission before the proposal (A/CN.4/545), and repeated after (A/CN.4/556; A/CN.4/568 and Add.1; A/CN.4/637).

<sup>5</sup> There are at least four theories on the legal nature of the rules. See International Law Commission, *Articles on the responsibility of international organizations*, commentary to Art. 10, 32, para. 5.

<sup>6</sup> International Law Commission, *Summary Record of the 2840th meeting* (2005, A/CN.4/2840), 70.

<sup>7</sup> International Law Commission, *Summary Record of the 2843th meeting* (2005, A/CN.4/2843), 96.

<sup>8</sup> International Law Commission, *Report of the fifty-seventh session* (2005, A/60/10), 43.

implicitly underlined the internal nature of EU law.<sup>9</sup> Conversely, the final wording of Article 10 does not take a position on the legal nature of the rules and merely recognizes that “[p]aragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization”.

The unclear nature of the rules is the main cause of the unclear relation between member states and international organizations.<sup>10</sup> On the one hand, when a rule is perceived as purely international, member states are considered as third parties; on the other hand, when a rule is perceived as purely internal, member states are considered as organs. Between these poles, there are a multiplicity of perspectives based on exceptionalism, like the one that considers the European Union as the only international institution that produces internal law.

The present paper critically analyses European exceptionalism from the perspective of the legal nature of EU law. As Kuijper and Paasivirta noted, the rules of the organization “are closely linked to the strength and the transparency of the EU institutional veil”.<sup>11</sup> However, differently from these scholars, I will contend that all international organizations possess the same constitutional structure which leads to the same treatment in international law. Abstracting from the context of the European Union, the level of integration within an international organization does not transform the legal nature of its law.

I contend that the degree of integration and autonomy, often referred to with the formula ‘Regional (Economic) Integration Organizations’, has a descriptive character that does not justify the difference between an organization whose rules are international law and an organization whose rules are internal law. Not differently from states, the internal structure of international organizations differs from one another. Indeed, international organizations’ last defence against the ILC project relied on exceptionalism as the feature that precludes the application of general rules.<sup>12</sup> This paper will criticize the European (or other) exception in international responsibility, looking at the relation *lex specialis/lex generalis*.

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<sup>9</sup> 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?”, (2010) 21 3 *EJIL*, 724.

<sup>10</sup> Gasbarri, Lorenzo, “The Dual Legality of the Rules of International Organizations”, (2016) IOLR, forthcoming.

<sup>11</sup> Kuijper, Pieter-Jan and Paasivirta, Eva, “EU International Responsibility and its Attribution: From the Inside Looking Out”, in Evans, Malcolm and Koutrakos, Panos (eds), *The International Responsibility of the European Union*, (Oxford, Hart Publishing, 2013).

<sup>12</sup> International Law Commission, *Responsibility of international organizations Comments and observations received from international organizations* (14 February 2011, A/CN.4/637).

# **I. The nature of the rules and the concept of autonomy in the European Union and other international organizations**

This section describes the historical development of the autonomy of international organizations in parallel with the development of the concept of ‘rules of international organizations’. Through these lenses, European integration does not appear as the reason for an exception, but as one of the outcomes of common problems affecting international organizations.

The paper will proceed relying on a traditional categorization of the scholarly thought on international organizations.<sup>13</sup> The first period starts at the beginning of the 20<sup>th</sup> century and goes until the end of the Second World War, during which the autonomy of the first organizations was conceptualized in order to guarantee independence from their member states. The second period concerns the creation and the establishment of legal systems separated from national and from international law. It covers the first studies on the nature of the rules as well as the jurisprudence of the Court of Justice of the European Communities during the 60s and the 70s, shaping the internal and the external autonomy of the Community. The third period starts at the beginning of the 90s and it reflects the practical consequences of the previous foundational debate. The uncertain nature of the rules manifests itself, fostering the needs for accountability, responsibility and democracy.

## **A. The development of autonomous legal personality**

In the ‘first wave’ of the studies on international organizations there were two main reasons to discuss the autonomy of member states, and they were related to the development of legal personality<sup>14</sup> and the internal administrative functions of the organization.<sup>15</sup> Already in 1914, Anzilotti and Fusinato debated the nature of the ‘Istituto Internazionale di Agricoltura’, distinguishing between a purely international ‘common organ’ and a hybrid form of national/international personality.<sup>16</sup> In particular, they discussed the characteristics that an organization must possess in order to claim legal personality separate from their member states. On the one hand, Fusinato considered the existence of a mixture between international and internal law that creates a distinct legal personality; on the other hand, Anzilotti considered organizations as states’ common organs, rebutting the existence of a separate body of internal law belonging to the organization.

In the aftermath of the First World War, the advent of the League of Nations fostered a new debate on the legal nature of its internal administration. In particular, the issues deriving from the nature of the law governing employment relations was discussed in parallel with the autonomy from its member states.<sup>17</sup> It was commonly

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<sup>13</sup> Klabbers, Jan, “The Life and Times of the Law of International Organizations”, (2001) 70 3 *NJIL* 287.

<sup>14</sup> Scerni, Mario, “Personalità giuridica internazionale ed autonomia normativa”, (1931) *RDI* 389.

<sup>15</sup> Negulesco, Paul, “Principes de droit international administrative”, (1935) *I RCADI* 643.

<sup>16</sup> Anzilotti, Dionisio, “Gli organi comuni alle società di stati”, (1914) *RDI*; Fusinato, Guido, “La personalità giuridica dell’istituto di Agricoltura”, (1914) *RDI*.

<sup>17</sup> Borsi, Umerto, “Il rapporto di impiego nella società delle nazioni”, (1923) *RDI* 283.

considered that international civil servants could not be subjected to national jurisdiction, in order to not impair the autonomy of the League. However, this could not amount to considering them to be subjects of international law. The nature of the law governing the employment with international organizations was debated, ranging from purely internal<sup>18</sup> to ‘particular’ international law.<sup>19</sup>

Two conclusions can be deduced. First, there wasn’t a clear understanding of the definition of rules of the organization, moving from employment relations to an undetermined group of administrative norms. Second, the nature of the rules was affected by the autonomy that an organization must possess in order to claim international personality. The thesis that distinguishes between internal and external rules and the thesis that distinguishes between different organizations were the first to emerge.

## **B. The development of autonomous legal systems**

The debate moved further with the jurisprudential breakthrough on the topic, the advisory opinion of the International Court of Justice on *Reparation for Injuries*.<sup>20</sup> The ICJ settled the issue of legal personality and opened the debates on the development of separate legal systems and purely internal rules. Whilst the issue on their legal nature became an acknowledged field of research,<sup>21</sup> scholars didn’t rely on a common definition of rules of the organizations.

This second stream of scholarship dealt with the establishment of the European Communities. Their Court of Justice inaugurated its power to forge the autonomy of the European Economic Community and delivered its famous judgments in the cases *Van Gend and Loos* and *Costa*, recognizing the existence of an autonomous legal system.<sup>22</sup> In parallel, scholars debated the nature of the rules introducing the difference between original and derivative legal systems.<sup>23</sup>

The Italian debate of those years is exemplary. On the one hand, scholars like Angelo Piero Sereni developed a theory on the original and internal nature of the rules.<sup>24</sup> On the other hand, Matteo Decleva contested the original character, underlining the derivation from international law.<sup>25</sup> The concept of autonomy owned by international organizations became the main object of study. The autonomy of the European Community was studied in parallel with the characteristics of the United Nations. Decleva considered Article 100 of the UN Charter as the origin of a separate legal system, granting the Secretary-General full autonomy from member states.

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<sup>18</sup> Ibid.

<sup>19</sup> Basdevant, Suzanne, *Les fonctionnaires internationaux* (Paris, Recueil Sirey, 1931).

<sup>20</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports, 1949, 174.

<sup>21</sup> Balladore Pallieri, Giorgio, “Le droit interne des organisations internationales”, (1967)127 RCADI.

<sup>22</sup> Case 26/62 *van Gend & Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1; Case 6/64 *Costa v. E.N.E.L* ECLI:EU:C:1964:66.

<sup>23</sup> Durante, Francesco, *L’ordinamento interno delle Nazioni Unite* (Milano, Giuffrè, 1964).

<sup>24</sup> Sereni, Angelo Piero, *Le organizzazioni internazionali* (Milano, Giuffrè, 1959); *Organizzazione internazionale. Sezione 2,2, Soggetti a carattere funzionale: le organizzazioni internazionali*, (Milano, Giuffrè, 1960).

<sup>25</sup> Decleva, Matteo, *Il diritto interno nelle unioni internazionali* (Padova, Cedam, 1962).



The dichotomy original/derivative is the origin of a distinction that lasts until today. On the one hand, originally supported by Focsaneanu and Cahier, there is the idea of a rigid separation between legal systems;<sup>26</sup> on the other hand, sustained by Decleva and Ballardore Pallieri, there is an acknowledgement of a constant permeability.<sup>27</sup> The first stream continued throughout the years, as far as to trace a clear distinction between responsibility in international law and in the organizations' system.<sup>28</sup> The second stream found development in the International Law Commission, where the Special Rapporteur Gaja gave a fundamental role to the *lex specialis* character of the rules, implying a permeability between the international and the organization legal systems.<sup>29</sup>

Starting from the 60s, the Court of Justice of the European Communities progressively defined the autonomy possessed by the EEC legal system.<sup>30</sup> Autonomy was defined first in relation to national law, in order to develop the main features of the validity, supremacy and direct effect of Community law.<sup>31</sup> In relation with national legal systems, the Court underlined the international character of the new autonomous legal system, to which member states delegated part of their sovereignty. The main purpose of internal autonomy was to guarantee the uniform application of EU law. In this sense, autonomy means integration with national legal systems and superiority of the international autonomous European legal system.<sup>32</sup>

Conversely, the autonomy in relation with international law is less clear.<sup>33</sup> In analogy with national law, the debate conformed to the distinction between monism and dualism. In *Haegemann* and *Kupferberg*, the Court introduced its version of monism, considering that international law is part of Community law.<sup>34</sup> In *Demirel*, it refined the criteria of direct applicability stating the need for the international obligation to be clear, precise and not subjected to the adoption of implementing measures “*regard being had to its wording and the purpose and nature of the agreement itself*”.<sup>35</sup> The last remark conferred fundamental importance to the nature of the international agreement, which allowed the EU to adopt different degrees of separation in relation with different regimes of international law - in particular, the closure toward GATT/WTO.<sup>36</sup>

The unclear nature of the rules of international organizations provides for a different perspective from which study the relation between European and international law. Instead of referring to monism or dualism, it is the international or the internal nature of EU law that affect the autonomy of its legal system. The dichotomy

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<sup>26</sup> Focsaneanu, Lazar, “Le droit interne de l’organisation des Nations Unies”, (1957) 3 AFDI 315; Cahier, Philippe “L’ordre juridique interne des organisations internationales” in Dupuy, René-Jean (ed), *Manuel sur les organisations internationales* (Dordrecht, Nijhoff, 1998).

<sup>27</sup> Decleva, *supra* note 25; Ballardore Pallieri, *supra* note 21.

<sup>28</sup> Klein, Pierre, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, (Bruylant, Bruxelles, 1998).

<sup>29</sup> Forteau, Mathias, “Régime général de responsabilité ou *lex specialis*?”, (2013)1 RBDI.

<sup>30</sup> Vezzani, Simone, “L’autonomia dell’ordinamento giuridico dell’Unione Europea. Riflessioni all’indomani del parere 2/13 della Corte di Giustizia”, (2016)68 RDI.

<sup>31</sup> Wessel, Ramses A., “Reconsidering the Relationship between International and EU Law: Toward a Content-Based Approach?”, in Cannizzaro, Enzo (et al.), *International Law as Law of the European Union* (Leiden, Nijhoff, 2012).

<sup>32</sup> Case 35/76 *Simmenthal v. Minister for Finance* ECLI:EU:C:1978:49.

<sup>33</sup> Vezzani, *supra* note 30.

<sup>34</sup> Case 181/73 *Haegeman v. Belgium*, ECLI:EU:C:1974:41; Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg* ECLI:EU:C:1982:362.

<sup>35</sup> Case 12/86, *Meryem Demirel v. Stadt Schwabisch Gmund*, ECLI:EU:C:1987:400.

<sup>36</sup> Tancredi, Antonello, “On the Absence of Direct Effect of the WTO Dispute Settlement Body’s Decisions in the EU Legal Order” in Cannizzaro, Enzo (et al.), *International Law as Law of the European Union* (Leiden, Nijhoff, 2012).

monism/dualism is inadequate to reflect the relation between international law and the legal system developed by international organizations.<sup>37</sup> However, when the relation between EU law and international law was first conceptualized, the category ‘rules of international organizations’ still had to be defined.

The absence of a legal definition of the rules of international organizations was filled by the United Nations conference on the representation of states in their relations with international organizations only.<sup>38</sup> Since the Vienna Convention of 1975, the rules of international organizations have been identified as including “*the constituent instruments, relevant decisions and resolutions, and established practice of the Organization*”. This definition, reproduced with minor changes in the 1986 Vienna Convention and in the 2011 ARIIO, reflects the need for a broad notion of the rules – discussed, but not included, in the 1971 draft articles by the ILC –<sup>39</sup> and the discussion on the nature of international organizations in the context of the law of treaties.<sup>40</sup>

Before 1975, the academic debate was affected by an unclear object of study. Scholars had different views on what the rules were, and one of the mistakes of the contemporary discussion is to apply the 1975 definition to previous studies.<sup>41</sup> Contemporary scholars support the international nature of the all-encompassing definition of the rules relying on authors that had in mind only a form of internal primitive regulations.<sup>42</sup> However, it is only after this period that the International Law Commission discussed the nature of the rules, during the work of the 1986 Vienna Convention.

### **C. The development of autonomous ‘rules of the organization’**

Contemporary scholarship often describe international organizations at the mercy of their two natures, struggling between autonomy and representation of states’ interests.<sup>43</sup> This tension is reflected in every act of every organization, which can be considered either as international law or as internal law of the organization. For example, organizations can be considered to be established with the conclusion of a contract or by the means of a constitution.<sup>44</sup> The contract-related view is based on the analogy with private national enterprises and considers the rules purely international law, while the constitutional view relies on the public dimension of international institutions and considers the rules as purely internal law.<sup>45</sup> The first approach is based on a managerial-oriented concept based on functionalism. The second is based on the publicness of constitutional entities.

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<sup>37</sup> van Rossem, Jan Willem, “The EU at Crossroads: A Constitutional Inquiry into the way International Law is Received within the EU Legal Order”, in Cannizzaro, Enzo (et al.), *International Law as Law of the European Union* (Leiden, Nijhoff, 2012).

<sup>38</sup> Randal, Kenneth “Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975)”, (2007) MPEPIL.

<sup>39</sup> International Law Commission, *Yearbook of the International Law Commission, 1971*, vol. II, Part One, 288.

<sup>40</sup> See in particular the 14th, 15th, 16th and 17th ILC meetings.

<sup>41</sup> Even the ILC, see the commentary to Art. 10 ARIIO, paragraph 5.

<sup>42</sup> For example, Daillier, Patrick and Pellet, Alain, *Droit international public*, 7th ed. (LGDJ, Paris, 2009).

<sup>43</sup> Klabbers, Jan, “The EJIL Foreword: The Transformation of International Organizations Law”, (2015) EJIL 9.

<sup>44</sup> Klabbers, Jan, “Two Concepts of International Organization”, (2005)2 IOLR 277.

<sup>45</sup> D’Aspremont, Jean, “The Law of International Organizations and the Art of Reconciliation: From Dichotomies to Dialectics”, ACIL Research Paper 2015-05, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2593048](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593048), (online on 25 March 2017).

The tension between the two natures is reflected by the difficulties faced by the European Court of Justice in drawing EU external autonomy. Article 216(2) TFEU states that “*agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*” and it was considered as the source of the “privileged status” of international law within the European legal order.<sup>46</sup> However, the traditional permeability of the EU legal system today finds strict limitations. Aside from the traditional closure towards WTO law, the European Court of Justice limited the effects of external law in *Intertanko*, the *Kadi* saga and impeded accession to the European Convention on Human Rights.<sup>47</sup>

In 2005, the Court of First Instance relied on international standards in order to review the validity of acts implementing UNSC resolutions, considering Community law part of the same legal system of UNSC resolutions.<sup>48</sup> In 2008, the Court of Justice relied on internal standards, considering Community law part of a separate legal system in confrontation with international law. In both cases, the Courts did not realize that the UNSC resolutions may belong to a separate legal system too. In analogy with the Court of Justice, the United Nations may claim that the validity of its own rule can be reviewed only with internal UN standards. The legal nature of EU regulations and UN resolutions is the same, consisting in the product of two autonomous legal systems both derived from international law. The same applies to the WTO, UNCLOS and the Council of Europe, and it shows how the recent closeness of the European Union is not towards international law but towards different regimes derived from international law.

The unclear legal nature of the rules is a perspective rarely used by scholars, either of international or European law. Usually, the topic is framed in the dichotomy ‘European Union versus international law’, without realizing that it is often a clash between international regimes. As Klabbers conceptualized, it is not a conflict of coordination but a conflict of values.<sup>49</sup> The European Court of Justice considers the European legal system as an isolate island in the international law ocean. For example, in the *Kadi* saga it is fundamental to realize that UN Security Council resolutions are not merely international law but the rules of the UN legal system.

This brief historical venture was conducted in order to show how the unclear nature of the law produced by international organizations lies at the root of their common legal history. It is often a problem of perspectives adopted by international law or EU scholars, fighting for the primacy of their discipline. The exceptional characteristics of the European Union can be compared to the specificities of every international organization and do not modify the nature of its legal system. The presence of a developed internal system with judicial institutions demands a pioneering role in solving legal issues that are faced by every international institution. Claiming exceptionalism is to refuse this role.

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<sup>46</sup> Cannizzaro, Enzo “The Neo-Monism of the European Legal Order”, in Cannizzaro, Enzo (et al.), *International Law as Law of the European Union* (Leiden, Nijhoff, 2012).

<sup>47</sup> Case C-308/06 *Intertanko* ECLI:EU:C:2008:312; Case T-315/01 *Kadi v Council and Commission* ECLI: ECLI:EU:T:2005:332; Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundations* ECLI: ECLI:EU:C:2008:461; Case T-85/09 *Kadi v Commission* ECLI:EU:T:2010:418; Opinion 2/13 ECLI:EU:C:2014:2454.

<sup>48</sup> Palchetti, Paolo, “Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice”, in Cannizzaro, Enzo (et al.), *International Law as Law of the European Union* (Leiden, Nijhoff, 2012).

<sup>49</sup> Klabbers, Jan, *Treaty Conflict and the European Union*, (Cambridge, Cambridge University Press, 2009).

## II. Theories on European Exceptionalism: attribution of conduct and the breach of international obligations

Only original legal systems produce purely internal law.<sup>50</sup> The European Union would possess an autonomous legal system, separated from international law, only if it became a federal state not founded by an instrument of international law and its member states acted as organs of the political unity. Degrees of autonomy are possessed by every organization, but they do not modify the nature of the legal system and of the law it produces.<sup>51</sup> The level of integration within the European Union entails a level of complexity that should not be confused with its legal nature. Indeed, the inherent complexity of EU law should not be the reason to claim exceptionalism.

In analogy with states' responsibility, two requirements must be satisfied for an internationally wrongful act of an international organization to occur: the conduct in question must be attributable to the international organization and the conduct must violate an international obligation of the organization. The theories on European exceptionalism affect both elements.<sup>52</sup>

### A. Attribution of conduct and attribution of responsibility

In the context of international responsibility, the unclear nature of the rules of international organizations influences the distinction between the attribution of conduct and the attribution of responsibility. The issue concerns the role of member states implementing decisions taken at the level of the organization. If the rules are purely internal, member states act as organs of the organization and their conduct becomes the conduct of the organization. If the rules are the purely international, member states act as third parties in relation with the organization and their conduct is not directly attributable to the organization. Consequently, the attribution of responsibility to the organization must rely on different criteria. From the outset, it is intuitive that member states are neither organs or third parties and the rules are neither purely internal or purely international.

The necessity for a provision dealing with a European exception was proposed in order to exclude member states' responsibility in areas of EU exclusive competence, in which the conduct is attributable to member states acting as merely organs. In one version of the numerous proposal, an article dealing with European exceptionalism says:

*“Conduct of organs of a Member State of a regional economic integration organization. The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be*

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<sup>50</sup> Romano, Santi, *L'ordinamento giuridico* (Pisa, 1917) is traditionally considered the founder of the debate. For more recent scholarship see Raz, Joseph, *The Concept of a Legal System*, (Oxford, Clarendon Press, 1990); Van de Kerchove, Michel and Ost, François, *Legal System between Order and Disorder*, (Oxford, Oxford University Press, 2002).

<sup>51</sup> Collins, Richard and White, Nigel D., *International Organization and the Idea of Autonomy: Institutional Independence in the International Legal Order* (London, Routledge, 2011).

<sup>52</sup> Kuijper, Pieter Jan and Paasivirta, Eva, “Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations”, (2004) 1 IOLR 111.

*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?*<sup>53</sup>

Similar proposals are endorsed by the European Commission, claiming that the nature of a supranational organization requires the attribution of conduct where it has exclusive competence.<sup>54</sup> The thesis is founded on the internal institutional link established between the organization and its member states, which is created by the internal law of the organization. In areas of exclusive competence, member states act as organs of the organization. Member states' conduct becomes the conduct of the organization when the rules are considered purely internal law, while it “*tries to satisfy the central operational features of EU legal system based on 'executive federalism'*”.<sup>55</sup> Member states disappear behind the institutional veil of the organization when the rules are considered internal law conferring exclusive competences.

The European exception in international responsibility is a consequence of a theory on the purely internal legal nature of the rules of international organizations.<sup>56</sup> This approach requires the adoption of a rule on attribution based on the internal nature of EU law, and not the application of an international *lex specialis*.<sup>57</sup> Christiane Ahlborn brought the internal nature of the rules to their necessary consequences, contesting their *lex specialis* relation with international law.<sup>58</sup> Since the rules belong to a different legal system, they are not *lex specialis* in relation to international law. It is through the relation between internal *lex specialis* and international *lex generalis* that the limits of the purely internal nature of the rules becomes evident, since it is unable to acknowledge their inherent derivation from international law.<sup>59</sup> The attribution of conduct to the organization based on exclusive competence cannot be considered as a form of *lex specialis* developed to meet the specificities of the European Union, since it necessarily involves that EU law is not international law.

Paradoxically, the development of a legal system that separates itself from international law, within which the law is purely internal, does not need to rely on a special provision based on competences in order to transform the conduct of member states in the conduct of the organization. Indeed, the attribution of conduct would be covered by Article 6 ARIO, which states that the the rules of the organization apply in the determination of the functions of its organs. The European exception is an outcome of the need to find a compromise between the purely internal nature of EU law and its consequences. This compromise gives a major role to exclusive competences.

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<sup>53</sup> Hoffmeister, *supra* note 9.

<sup>54</sup> Cortés Martín, José M., “European Exceptionalism in International Law? The European Union and the System of International Responsibility”, in Ragazzi, Maurizio *Responsibility of International Organizations Essays in Memory of Sir Ian Brownlie* (Leiden, Nijhoff, 2013), 189.

<sup>55</sup> Kuijper Paasivirta, *supra* note 11.

<sup>56</sup> Licková, Magdalena, “European Exceptionalism in International Law”, (2008) 19 3 EJIL 463.

<sup>57</sup> Paasivirta, Eva, “Responsibility of a Member state of an International Organization: Where Will It End?”, (2010) IOLR 49.

<sup>58</sup> Ahlborn, Christiane, “The Rules of International Organizations and the Law of International Responsibility”, (2011) 8 IOLR 397.

<sup>59</sup> Forteau, *supra* note 29.

The Special Rapporteur on the responsibility of international organizations maintained that the attribution of responsibility based on exclusive competences does not require a provision in the ARIO.<sup>60</sup> He considered that the attribution of responsibility without attribution of conduct depends on the nature of the primary obligation contracted by the organization. For example, Annex IX to the United Nation Convention on the Law of the Sea deals with attribution of responsibility and not with attribution of conduct between the organization and its member states.<sup>61</sup> In Gaja's words: "*It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States*".<sup>62</sup> Consequently, the attribution of responsibility based on exclusive competences can be considered as a form of *lex specialis*, developed to meet the specificities of the regime in the interest of all the parties.

From EU perspective, the reason to focus on exclusive competences in the attribution of conduct lies in the need to avoid interferences from external regimes, allocating responsibility despite competence and undermining the primacy of the European Court of Justice. However, this necessity has the undesirable consequence of giving too much power to the rules of the organization. Indeed, internal rules would have the effect of determining the allocation of responsibility between the organization and its member states, despite injured third parties. Whilst the European Commission has an internal perspective, the ILC relies on the content of the external obligation. The former relies on the attribution of conduct, the latter on the attribution of responsibility. Both perspectives defend relevant necessities: either external regimes interfere with internal autonomy, or the rules of the organization bind third parties without their consent. If the rules are purely internal law, the *pacta tertiis* principle does not apply. Alternatively, if the rules are purely international law, third parties shall always consent to the attribution of responsibility based on exclusive competences.

## **B. The violation of an international obligation**

The complexities of the EU are most evident when a Court has to determine who, between the organization and its member states, breached the international obligation. In a recent opinion, the International Tribunal for the Law of the Sea addressed a question concerning the responsibility of the European Union for illegal, unreported and unregulated fishing activities conducted by vessels flying the flag of its member States.<sup>63</sup> In that circumstance, the EU contracted the obligation with third states, while the wrongful conduct was directly attributable to member states only.

The Tribunal affirmed that the EU has exclusive responsibility in reason of its exclusive competence: member states do not share the obligation, and the exclusive competence transforms state conduct in the conduct of the organization.<sup>64</sup> The Tribunal goes even further, stating that in the exercise of exclusive competences "*the*

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<sup>60</sup> Gaja, Giorgio *Second report on responsibility of international organizations* (ILC, 2004, A/CN.4/541), para. 10 .

<sup>61</sup> Treves, Tullio, "The European Community and the Law of the Sea Convention: New Developments", in Cannizzaro, Enzo (et al.), *International Law as Law of the European Union* (Leiden, Nijhoff, 2012).

<sup>62</sup> Gaja, *supra* note 60 at para. 11.

<sup>63</sup> Case No. 21, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, ITLOS, 2 April 2015.

<sup>64</sup> *Ibid*, para. 172.

*obligations of the flag State become the obligations of the international organization*".<sup>65</sup> The transformation of the rules in internal law is thus completed and the European Union is treated as a federal state. The consequence of the exclusive competence as a rule on attribution of conduct is that member states take advantage of the fishing authorizations without sharing obligations that are contracted by the Union. Can the European Union confer indirect rights and avoid direct obligations for its member states?

The attribution of responsibility based on the dialectic competence-obligation is misleading. It confuses the internal and international relations between the EU and its member states. Whilst the attribution of conduct on exclusive competences is based on the internal nature of EU law, the apportionment of international obligations between the EU and its member state is founded over an international nature.

It is difficult to establish a clear division of competences between the EU and its member states.<sup>66</sup> In the case concerning illegal fishing activities, the relevance of the exclusive competence relies on the declaration submitted under Article 5(1) Annex IX UNCLOS. Therefore, the alleged criteria of attribution of conduct is in reality a criterion on the attribution of responsibility envisaged by the obligation contracted with third parties. Third parties can negotiate international obligations but not the rules of international organizations, among which the division of competences. However, they can negotiate an obligation that entails the responsibility of the organization for conducts attributed to member states. Annex IX deals with the attribution of responsibility and not with the attribution of conduct. It does not provide for a general or special rule on the attribution of conduct based on competences, but – if accepted by third parties - it allocates responsibility on the basis of the competence declared by the organization. It implies that the apportionment of responsibility derives from the regime of the obligation breached and not from a special rule of the organization on the attribution of conduct.

In the absence of a declaration of competence, some obligations provide for joint and several responsibility of member states and organizations.<sup>67</sup> It is thus evident that it is not a special rule on the attribution of conduct, but the content of the primary rule contracted by the parties. Indeed, ITLOS considered the existence of joint and several responsibility relying on the regime even if only the EU concluded the agreement breached by the conduct of its member states.<sup>68</sup> Conversely, if the obligation does not contain any reference to the responsibility of member states, general international law should provide for forms of derived responsibility able to reflect their indirect role.

Considering the approach based on the attribution of responsibility rather than attribution of conduct, it is fundamental to distinguish between obligations of means and of result.<sup>69</sup> Concerning the latter, Gaja claimed that

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<sup>65</sup> Ibid.

<sup>66</sup> Heliskoski, Joni, *EU Declaration of Competence and International Responsibility*, in Evans, Malcom and Koutrakos, Panos (ed), *The International Responsibility of the European Union*, (Oxford, Hart Publishing, 2013).

<sup>67</sup> Koutrakos, Panos, *EU International Relations Law* (Oxford, Hart Publishing, 2015), 200.

<sup>68</sup> *Case No. 21, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, ITLOS, 2 April 2015, para. 174.

<sup>69</sup> Gaja, Giorgio "The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations", SHARES Research Paper 25/2013, available at

responsibility will derive from the breach of the obligation, whenever the conduct is attributed to the state or to the organization. Concerning the former, he considered the existence of a different form of responsibility looking mainly at prevention, which entails a conduct different from the one breaching the obligation.

Following the approach based on the nature of the obligation, the conduct of member states is not directly attributed to the organization. The rules are purely international, and member states are third parties in relation with the organization. In the advisory opinion issued by ITLOS, the obligation breached by the conduct of member states was of due diligence.<sup>70</sup> Therefore, if we apply the approach based on the nature of the obligation, the EU would be responsible for the failure in preventing member states from violating its due diligence obligation or for a form of derived responsibility.

In analogy with state responsibility, the Tribunal preferred to rely on an ancillary obligation of conduct establishing a duty to prevent vessels flying the flag of member states to incur in illicit activities. However, applying the internal nature of the rules and the attribution of conduct based on competences it is really difficult to consider the EU responsible. Indeed, exclusive competence “*with regard to the conservation and management of sea fishing resources*” does not cover the “*measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions*”.<sup>71</sup>

Even the approach based on a purely international nature of the rules is not completely satisfactory. It has the merit of separating the individual responsibility of each subject relying on the content of the obligation, bypassing the problem of the attribution of conduct. However, it entails the risk that external regimes may interfere with the internal division of competences. Again, it is a problem that might be faced by every international organization, but it is more evident in the complexity of the EU system. It is thus necessary to examine further this approach, in order to rebut the existence of exceptionalism in the responsibility of international organizations.

The next section will contend that the nature of the obligation has to be confronted with the nature of the constitutional structure of international organizations. It will confront the approach based on the nature of the obligation with general international law and with the constitutional structure of international organizations. Member states are neither organs or third parties, and their responsibility in the treaty concluded by the organization should reflect their indirect position. They cannot disappear under the international institutional veil.

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<http://www.sharesproject.nl/publication/the-relations-between-the-european-union-and-its-member-states-from-the-perspective-of-the-ijl-articles-on-responsibility-of-international-organizations/>, (online on 25 March 2017).

<sup>70</sup> Case No. 21, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, ITLOS, 2 April 2015, para. 141.

<sup>71</sup> Declaration by the EC concerning competence under Art. 5(1) of Annex IX UNCLOS.



### III. From the same constitutional structure derives the same treatment in international law

The autonomy of the legal system developed by international organizations has been described in tension between the ‘contract out from’ and the ‘fall back to’ international law.<sup>72</sup> The dialectic between autonomy and the general regime of international responsibility reflects the unclear nature of international organizations.<sup>73</sup> The topic could be framed in the debate on the fragmentation of international law. As noted by Koskenniemi during the work of the International Law Commission, excluding the relations between the organization and its member states from the project on international responsibility “*would forcefully reintroduce the notion of the self-contained regime*”.<sup>74</sup> The rules of international organizations do not constitute either a self-contained or an entirely separate regime.

The International Law Commission did not take a stance on the nature of the rules, endorsing an approach adopted since the work for the 1969 Vienna Convention. Scholars have already noticed that the Commission changes the nature of the rules throughout ARIO.<sup>75</sup> It contends that international responsibility may arise only when the rules are international law, without providing for a criteria to distinguish between internal and international rules. Actually, the Commission inserted a saving clause in the commentary to Article 10, stating that “[b]reaches of obligations under the rules of the organization are not always breaches of obligations under international law”.<sup>76</sup> This is a cunning intention to bypass the problem, guaranteeing the application of the project for every international organization.

The purpose of the present paper is to debate how the general regime applies to the international responsibility of the European Union, in conformity with other international organizations. The European Commission, together with a number of scholars, demands for a special regime in order to avoid interferences with the internal division of competences. Indeed, if the allocation of responsibility between the organization and its member states is governed by the regime in which the organization acts, there is a risk of conflicts between the European Court of Justice and external judicial organs. From the perspective of this ‘external’ regime, there is a degree of opportunism for privileging the responsibility of member states or of the organization.<sup>77</sup> If the WTO seeks to ensure compliance with its obligations it must consider the EU as the responsible entity, implying an internal nature of the rules. If the ECtHR seeks to ensure compliance with its obligations it must consider EU member states as the responsible entities, implying that the rules are of an international nature. In both cases, it is abstractly possible to consider an ancillary responsibility of all subjects, independent from the legal regime. A

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<sup>72</sup> Pauwelyn, Joost, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* (Cambridge, Cambridge University Press, 2003).

<sup>73</sup> Palchetti, Paolo, “Unità o pluralità o inutilità dei regimi di responsabilità internazionale applicabili alle organizzazioni?”, in Vellano, Michele, *Il futuro delle organizzazioni internazionali* (Napoli, Editoriale Scientifica, 2015), 43.

<sup>74</sup> International Law Commission, *Summary record of the 2841st meeting*, A/CN.4/2841, 78, 79.

<sup>75</sup> Ahlborn, *supra* note 58.

<sup>76</sup> ILC, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, comment to Art. 10, 33.

<sup>77</sup> Kuijper, Pieter Jan, “Attribution – Responsibility – Remedy. Some comments on the EU in different international regimes”, (2013)1 RBDI.

similar thought has been recently shared by Kuijper, considering how different regimes affect the allocation of responsibility between the EU and its member states: “*it is not just the question of the scope of EU exclusive powers that determines the degree to which the EU will bear sole responsibility or there will be shared responsibility with the Member States for certain wrongful acts. The system of responsibility within which the EU operates will also be of considerable importance, more particularly its remedies*”.<sup>78</sup>

Whilst the regime in which the organization acts has a fundamental role, the autonomous nature of the organization should not be underestimated. The risk of affecting the internal division of competences is defused if the autonomous structure of the organization is not subjected to modifications in every regime. International responsibility embodies the unity of the system and it should reflect that international organizations are autonomous entities deriving from international law. The nature of the law they produce maintains this dual feature and it cannot be considered either as purely internal or as purely international law.<sup>79</sup> Even if different regimes deal with international organizations imposing on them different degrees of transparency, the legal structure of the organization does not change. Consequently, the European Union cannot be affected by external interferences that do not modify the internal distribution of competences and its legal structure.<sup>80</sup> This assumption will be verified in different context, in which international obligations are contracted only by member states, only by the organization or shared between all the subjects. The hypothesis is that the rules of every international organization are neither purely internal or purely international. The next sub-section will deal with this dual nature in different context.

## **A. Regimes in which only member states contract obligations**

The first circumstance concerns treaties such as the European Convention on Human Rights and the United Nations Charter. In both cases, the organization is not formally bound by the obligations contracted by member states only. The role of the organization in the treaty concluded by all member states reflects the opposite situation of the role of member states in the treaty concluded by the organization.<sup>81</sup> Issues derive from the thesis that the transfer of competences would determine the “substitution” of the organization in the relation with third parties.<sup>82</sup> The idea is again based on the internal nature of the rules under which the organization, as a federal state, would succeed member states. Clearly, this does not reflect the constitutional structure of international organizations.<sup>83</sup>

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<sup>78</sup> *Ibid.*, p. 115.

<sup>79</sup> Gasbarri, *supra* note 10.

<sup>80</sup> Vezzani, *supra* note 30.

<sup>81</sup> Tomuschat, Christian, “International Organizations as Third Parties under the Law of International Treaties”, in Cannizzaro, Enzo (ed) *The Law of Treaties Beyond the Vienna Convention* (Oxford, Oxford University Press, 2011).

<sup>82</sup> Hirsch, Moshe, *The Responsibility of International Organizations toward third parties* (Leiden, Springer, 1995) 49; Klein, *supra* note 28.

<sup>83</sup> Despite the early theory on the EC succession to the GATT agreements. See generally Koutrakos, *supra* note 67, at 280.

In the context of the ECHR, the Court first considered how member states disappear behind the institutional veil of the organization in the implementation of its rules.<sup>84</sup> If the rules are considered as internal law, the Court cannot pierce the institutional veil. After strong criticism, the Court changed its approach relying on the autonomy that member states have in the implementation of the rules.<sup>85</sup> If the rules are considered as international law, the Court can pierce the institutional veil.

However, the issue is affected by an either/or paradigm which does not reflect the legal nature of international organizations. Their rules cannot be considered as purely internal or international law, and, consequently, the organization is always present in the regime in which only member states act implementing the rules. Confronted with the European Union, the European Court of Human Rights inaugurated the doctrine of the equivalent protection.<sup>86</sup> The equivalent protection reflects the need of an indirect involvement of the organization in the obligation of its member states. The member state is not responsible if the organization provides for a mechanism of human rights protection equivalent to the standard adopted by the Convention.

The general system of international responsibility is indispensable in dealing with the responsibility of the organization. The *lex specialis* does not exclude *lex generalis*. The European Union would deal with the violation of a non-contractual obligation, where “*l’existence de ce régime général de responsabilité est un élément essentiel qui illustre et renforce la stature des organisations internationales comme véritable sujet de droit international*”.<sup>87</sup>

## **B. Regimes in which only the European Union contracts obligations**

The second circumstance concerns a conspicuous number of agreements that international organizations conclude to pursue their aims. An example that has already been discussed is the Convention on the determination of minimal conditions for access and exploitation of marine resources within the maritime areas under jurisdiction of the member states of the Sub-Regional Fisheries Commission.<sup>88</sup> Moreover, international organizations conclude in their name a plurality of contracts within national regimes. The *Westland Helicopters* and the *International Tin Council* cases reflect the difficulties of piercing the international institutional veil in cases in which only the organization contracted the obligation. The exclusive competence is not a necessary condition, and it is not the sole circumstance in which only the EU contracts obligations.<sup>89</sup> It does not imply that member

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<sup>84</sup> *Behrami v. France* (app. no. 71412/01) and *Saramati v. France, Germany and Norway* (app. no. 78166/01), ECtHR Grand Chamber Judgment, 2 May 2007.

<sup>85</sup> *Nada v. Switzerland* (app. no. 10593/08), ECtHR Grand Chamber Judgment, 12 September 2012; *Al-Jedda v. the United Kingdom* (app. no. 27021/08), Grand Chamber Judgment, 7 July 2011.

<sup>86</sup> *Bosphorus v. Ireland*, (app. no. 10593/08) ECtHR Grand Chamber Judgment, 30 June 2005; *Al-Dulimi and Montana Management Inc. v. Switzerland*, (appl. no. 5809/08), ECtHR Second Section, 26 November 2013, referred to the Grand Chamber.

<sup>87</sup> Marhic, Gilles “Le régime de responsabilité des opérations de paix de l’Union européenne: quelles règles applicables?”, (2013) 1 RBDI 142.

<sup>88</sup> *Case No. 21, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, ITLOS, 2 April 2015.

<sup>89</sup> Koutrakos *supra* note 67, at 164.

states do not coexist as subject of international law.<sup>90</sup> For example, within the WTO, member states and EU coexist regardless of matters falling in EU exclusive competences.

The responsibility of the EU (or other international organizations) mainly rests on the conduct of its own organs (Article 6 ARIO) or on the conduct of its member states. As we have seen, the responsibility arising from the conduct of member states may rest on the internal nature of the rules, where member states act as organs, or on the international nature, where the obligation expressly states that the EU is responsible for the conduct of its member states.

A third approach would be based on the institutional structure of international organizations, relying on the fact that the rules are neither purely international or purely internal. In this sense, the international institutional veil does not present different degrees of transparency depending on the regime, which cannot infringe its internal division of competences. The approach should be based on forms of derived responsibility under which member states are always present in the violation of the obligation contracted by the organization. Their position is reflected in Article 40(1) ARIO “*Ensuring the fulfilment of the obligation to make reparation*”, which states that “[t]he responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter”.

Even if member states do not have direct rights or obligations, they assume consequences from the treaty to which they are not party, as the *ITLOS advisory opinion* well demonstrates. They might be autonomously responsible for the violation of a non contractual obligation, and they have an indirect responsibility reflected in Article 40(2) ARIO, stating that “[t]he members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter”.

### **C. Regimes in which both the European Union and its member states contract obligations**

In cases in which both the European Union and its member states are part of the same treaty “*the institutional veil is lifted from within*”.<sup>91</sup> There are at least three circumstances in which member states and organization are bound by the same obligation.

The first one concerns the legal system of the organization itself. Contrary to ideas of European exceptionalism, the law of international responsibility fully applies even in internal relations. The *lex generalis* character of the ILC articles consents the ‘fall-back’ every time in which the internal law is incomplete. For example, Article 56 of the

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<sup>90</sup> Gaja, Giorgio “How does the European Community’s International Responsibility Relate to its Exclusive Competence?”, in Arrangio-Ruiz, Gaetano, *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (Napoli, Editoriale Scientifica, 2004), 747.

<sup>91</sup> Brölmann, Catherine, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford, Hart Publishing, 2007), 268.

International Health Regulations includes few indications on the settlement of disputes arising from their interpretation.<sup>92</sup> The *lex specialis* nature of the regulations allows the ‘fall-back’ to the regime of international responsibility to complement and to fill gaps. The same applies in the context of the European Union, where the Court of Justice repeatedly considered the role of the general principles of international law within the EU system.<sup>93</sup>

The second one concerns the circumstances in which member states and organizations are bound by customary obligations, and responsibility arises for the violation of non contractual obligations. International law applies directly, as in the context of military operations.<sup>94</sup>

The third one concerns the European practice of mixed agreements. The phenomena of mixed agreements are founded on the coexistence of organizations and member states as autonomous international subjects. Since both subjects are neither party nor third party to the treaty concluded by the other subjects, the international relations of the European Union developed an instrument to reflect the nature of its constitutional structure. On the one hand, mixed agreements are internally useful, insofar they consent to bypassing problems of legal basis and competence to conclude the treaty; on the other hand, they are internationally useful, showing to third parties the relation between member states and organization.<sup>95</sup> Even in cases of mixed agreements the responsibility of an organization can be triggered by the conduct directly attributable only to member states.<sup>96</sup>

In the mixed regime established by the World Trade Organization, the attribution of conduct is usually based on exclusive competence. WTO panels consider EU member states as organs of the organization.<sup>97</sup> While the same result might be achieved relying on the obligation to ensure a certain conduct or a certain result, the approach taken by the WTO panel ignores the role of member states. Indeed, when a different panel had to deal directly with member states, it disregarded the competence model, piercing the EU institutional veil in order to affirm their separate personality.<sup>98</sup> As already affirmed, it is the regime that defines a special rule of attribution, but the transparent institutional structure of international organizations remains the same.

General international law does not disappear,<sup>99</sup> and again, it might be useful to rely on forms of derived responsibility able to comprehend the vertical dimension of every international organization. Article 48 ARIO distinguishes between direct and subsidiary responsibility, which, in case of mixed agreements, might arise from the existence of joint and several obligations.

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<sup>92</sup> Burci, Gian Luca and Feinäugle, Clemens, “The ILC’s Articles Seen from a WHO Perspective” in Ragazzi, Maurizio, *Responsibility of International Organizations Essays in Memory of Sir Ian Brownlie* (Leiden, Nijhoff, 2013), 189.

<sup>93</sup> de Witte, Bruno, “Using International Law for the European Union’s Domestic Affairs”, in E. Cannizzaro, *The European Union as an Actor in International Relations* (The Hague, Kluwer, 2002), 133.

<sup>94</sup> Marhic, *supra* note 87.

<sup>95</sup> Koutrakos *supra* note 67, at 200.

<sup>96</sup> *Parliament v. Council*, C-316/91 (1994) I-625, concerning the fourth Convention of Lomé.

<sup>97</sup> WTO Panel Report, EC – Selected Customs Matters, WT/DS315/R (12 June 2006). In particular para. 7553.

<sup>98</sup> WTO, European Communities and certain Member States: Measures Affecting Trade in Large Civil Aircraft. Report of the Panel (30 June 2010), WT/DS316/R.

<sup>99</sup> Gradoni, Lorenzo, *Regime Failure nel diritto internazionale* (Padova, Cedam, 2009).

## Conclusion

This paper discussed European integration from the perspective of the legal nature of the law it produced. It contended that the complexities of the EU legal system do not entail its separation from international law. The European Union is an international organization and is fully submitted to the regime of international responsibility envisaged by the International Law Commission. It rebutted the thesis based on exceptionalism assuming that is based on the purely internal nature of its rules.

On the one hand, the paper analysed how the internal nature is inherent in the attribution of conduct based on exclusive competence; on the other hand, it acknowledged how under the approach based on the international nature, external regimes interfere with the internal division of competences. In conclusion, it proposed to rely on the fact that the rules are neither purely internal or purely international law.

A special criterion on attribution does not derive from the exceptional features of the organization but from the regime in which the organization acts. However, the external regime should not take advantage of the different degrees of transparency own by the institutional veil in order to consider responsible either the organization or its member states. The legal structure of international organization does not change either in comparison with internal or external exigencies. The project of the International Law Commission represents the common background over which specific regimes fall-back in order to maintain the unity of the system. Within every regime, in many circumstances it is abstractly possible to consider an ancillary responsibility of all subjects.