

**The International Responsibility of the  
European Union: a Critique of the  
International Law Commission's  
Articles on the Responsibility of  
International Organisations.**

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## **Abbreviations.**

ACP	African, Caribbean and Pacific Group of States
ARIO	Articles on the Responsibility of International Organisations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CCP	Common Commercial Policy
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMPD	Crisis Management and Planning Directorate
CPCC	Civilian Planning and Conduct Capability
CSCE	Conference on Security and Cooperation in Europe
CSDP	Common Security and Defence Policy
Dutchbat	Dutch Battalion
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EPC	European Political Cooperation
EU	European Union

EUFOR Libya	European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya.
EUJUST THEMIS	EU Rule of Law mission to Georgia.
EUPM	EU Police Mission
EUSR	EU Special Representative
GATT	General Agreement on Trade and Tariffs
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
ITLOS	International Tribunal on the Law of the Sea
KFOR	NATO-led Kosovo Force
MARPOL	International Convention for the Prevention of Pollution from Ships.
MNBs	Multinational Brigades
NATO	North Atlantic Treaty Organisation
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
ONUC	United Nations Operation in the Congo
OSCE	Organisation for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PSC	Political and Security Committee

SAR	International Convention on Search and Rescue
SG/HR	Secretary General/High Representative
SOLAS	1974 International Convention for the Safety of Life at Sea
SRSR	Special Representative to the Secretary General
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMOs	United Nations Military Observers
UNPROFOR	United Nations Protection Force
UNSG	United Nations Secretary General
US	United States of America
WTO	World Trade Organisation

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## **Abstract.**

Responsibility plays a core role in international law; it is the very measure of its effectiveness. Responsibility began as a law of state responsibility and this has continued to limit the law. As the international arena has expanded to encompass a broader range of actors, in particular the growth of international organisations and the European Union, there has been an increased need for the expansion of the law of responsibility to address the growing actions and competencies of these actors. The International Law Commission (ILC) has sought to address this through developing the Articles on the Responsibility of International Organisations (ARIO). This study concerns itself with limitations of the approach taken by the ILC towards the ARIO and critiques the ability of the ARIO to apply to the growing actions of the European Union. The original basis of responsibility in a system of international law based around state cooperation has limited the foundations of responsibility to an idea of international action as bilateral cooperation. This has shaped the basis of responsibility into a principle that seeks to address individual, unified actors and, consequently, struggles when faced with the European Union, an actor that finds interaction and interdependence at the core of its international identity. The thesis considers the nature of the EU as an international actor to understand the challenge posed by this unique actor. It then moves on to consider the work of the ILC and provides an analysis of two main areas: the principle of attribution, which was heavily derived from the principles on state responsibility and the attempt to address the strong dependence on this prior work on responsibility through the use of references to the rules of the organisation and the attempt to develop a *lex specialis* article. The thesis then seeks to propose an alternative framework of responsibility that would scale back the law in this area and enable it to develop more organically.



# 1. An Introduction to the International Responsibility of the European Union.

The existence of duties as a corollary of rights is central to ensuring the effectiveness of any legal system.<sup>1</sup> Responsibility has long been accepted as fundamental in performing this function within the international legal system.<sup>2</sup> This crucial role is somewhat jeopardised, however, by the remit of legal responsibility as originally being limited to addressing only the actions of states. As the international system has expanded to encompass an increasing range of actors, the law of responsibility has not followed suit. This thesis considers the attempt by the International Law Commission (ILC) to expand the law of responsibility to address institutions through its Articles on the Responsibility of International Organisations (ARIO). The thesis particularly concerns itself with the growing actions of the European Union (EU<sup>3</sup>), arguing that the ARIO are not capable of addressing the dynamic international identity of the European Union.

The thesis is that the distinct nature of the EU leaves its actions incapable of being accommodated by the ARIO and, at a broader level, the law of responsibility. The identity of the EU as simultaneously striving towards autonomy while retaining significant dependence on other actors poses a significant challenge for the one-dimensional nature of the international legal system at a general level. The ILC, understandably, remained firmly within the established boundaries of the international framework, leaving the ARIO suffering from the same difficulties in addressing the Union. In analysing the ARIO and the work towards these articles the thesis is that they are a set of articles inevitably stunted by their very foundations, which are not capable of addressing the European Union's growing actions.

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<sup>1</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.4.

<sup>2</sup> H.Grotius, *The Rights of War and Peace* (R.Tuck (ed), J.Barbeyrac (trans), 1625, Indianapolis, Liberty Fund, 2005), Ch.XVII, para.1(vol.II, 884); and see the Prolegomena, para.8 (vol.1, 86), in A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.5; A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3, at p.3; *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.179.

<sup>3</sup> The thesis may refer to times or developments that occurred with the 'European Community' or 'European Communities', however, unless explicit discussion of these terms is necessary for the analysis, the thesis will refer to the European Union throughout for uniformity.

## 1.1. An Introduction to the Limitations in the Law of Responsibility.

The latter half of the twentieth century saw a significant growth in the international arena beyond a system that can be understood as based almost entirely on inter-state relations. The increasing number and growing normative authority of international organisations altered the international landscape. While initially perceived simply as fora for inter-state cooperation, the momentous development of these actors quickly moved them beyond this into a significant role at the international level. This expansion of institutions, both in number and in competence, began to give rise to questions surrounding the law of responsibility and expose increasing tensions in this fundamental aspect of international law. The law of responsibility had emerged in response to the actions of states and the expansion of international actors saw no simultaneous re-evaluation of the law of responsibility. Questions about the consequences of potential violations of international law by institutions have only continued to grow.

At the outset of the post-Second World War period, questions of responsibility in relation to institutions were largely theoretical, focusing on the idea of the existence of a gap within international law but with little real practical concern.<sup>4</sup> The alleged abuses by UN peacekeepers in the Congo as early as the 1950s began to raise more practical questions. This early concern was followed by questions on the involvement of funding from the World Bank and the International Monetary Fund (IMF) in human rights abuses.<sup>5</sup> As these questions became more frequent, the issue of legal responsibility was brought to the fore and the question of the potential responsibility of international institutions was beginning to move beyond the theoretical.<sup>6</sup> These early questions surrounding responsibility began

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<sup>4</sup> C.Eagleton, "International Organizations and the Law of Responsibility", (1950-I) vol. 76 *Recueil des cours* p. 323; K.Ginther *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Springer, 1969).

<sup>5</sup> S.A.Bleicher, 'UN v. IBRD: A Dilemma of Functionalism' 24 *International Organization* p.31; D.D.Bradlow, 'The World Bank, the IMF and Human Rights' (1996) 6 *Transnational Law and Contemporary Problems* p.47; B.Ghazi *The IMF, the World Bank Group and the Question of Human Rights* (Brill, 2005); B.Morse and T.R.Berger *Sardar Sarovar Report of the Independent Review* (Ottawa: Resources Futures International, 1992).

<sup>6</sup> *Exchange of Letters Constituting an Agreement relating to the Settlement of Claims filed against the United Nations in the Congo by Belgian nationals New York, 20 February 1965*, No.7780 (1965) *Recueil des Traités* p.198; V.L.Kent, 'Peacekeepers as Perpetrators of Abuse. Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations', (2005) 14 *African Security Review*; The Secretary-General, Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Dem. Rep. Congo, U.N. Doc. A/59/661 (Jan. 5, 2005); T.Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop



to precipitate calls to ensure that the changing nature of practice by institutions was matched by the development of legal principles to account for such actions.<sup>7</sup> The principle of accountability was the initial focus for these concerns. As a general principle, accountability applies to a variety of areas and as a general approach to ensuring a check on power, it was seen as an important part of the identity of institutions.<sup>8</sup> The law of responsibility became the legal form of accountability in international law; responsibility provides the legal framework by which to enforce consequences for breaches of international law. In providing this degree of enforceability, responsibility became the greater focus for addressing breaches of international law and, later, the growing actions of institutions.

The initial development of legal responsibility as a law of *state* responsibility emerged due to the nature of the international system and the importance of state sovereignty; responsibility regulates the relationship between sovereign states and therefore upholds their external sovereignty.<sup>9</sup> It is this initial development of responsibility in response to bilateral relations between states that serves to explain some of the limitations that exist in the foundations of the law of responsibility. The desire to develop responsibility as regulating bilateral relations created responsibility as a *singular* principle that requires an individual actor to be determined as the 'responsible actor' in order to establish responsibility. This follows the 'bilateralist' idea that only two actors will be involved: the 'victim' and the 'wrongdoer' and this has continued as the basis for the law of responsibility. This approach is outdated and simply not reflective of the way in which international action has changed. This focus on traditional state action was understandable, as it found its foundations within the ideas, and limitations, of the international legal system as a whole. With such limited ideas at the foundation of the law of responsibility, however, there would always have been difficulty in developing the law

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Contingents Serving as United Nations Peacekeepers', (2010) 51 *Harvard International Law Journal* p.113 at pp.117-119.

<sup>7</sup> A.Conze, *Die völkerrechtliche Haftung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1987); C.F.Amerasinghe, 'Liability to third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent', (1991) 85 *American Journal of International Law* p.259; M.Hartwig, *Die Haftung der Mitgliedstaaten* (Springer, 1993).

<sup>8</sup> N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at pp.189-229; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.271-293; P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.516-525; C.F.Amerasinghe, *Principles of the Institutional Law of International Organizations* 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2005) at pp.384-406.

<sup>9</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.4.

of responsibility to address the dynamic actions of the European Union. While difficult with international organisations, the standard idea of bilateral relations poses substantial difficulties when faced the complexity of the EU's international activities.

The codification and development of the law of responsibility began in the post-Second World War period. As part of the new UN framework in the immediate post-war period, the ILC was created and specifically tasked with a central role in the codification and progressive development of international law.<sup>10</sup> Responsibility was among the first topics listed for codification by the ILC, therefore showing its significance at the international level. The initial focus of the ILC's work on responsibility, however, maintained a view of the law of responsibility existing solely as a law of *state* responsibility. In spite of some initial statements recognising the potential responsibility of institutions as a future issue, there was little consideration of a broader conception of this area.<sup>11</sup> Even after some of the early instances of questionable actions by organisations, the ILC retained the responsibility project as one of state responsibility. For example, Roberto Ago, the Special Rapporteur for State Responsibility from 1969-1980, considered any discussion surrounding institutional responsibility to be premature and organisations to be too recent in their development to warrant codification in this area.<sup>12</sup> The law of state responsibility was to be considered first and foremost and any other developments in the law of responsibility might follow this.

The ILC's work on state responsibility was carried out over a number of decades and was finally concluded with the adoption by the ILC of its Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001. After the conclusion of this work, the previously dormant question of the potential responsibility of other actors arose again. The following year, in 2002, the ILC began to consider the precise question of the responsibility of international organisations.<sup>13</sup> The work of the ILC on the Articles on the Responsibility of International Organizations (ARIO) was concluded relatively quickly

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<sup>10</sup> Article 1(1) Statute of the International Law Commission 1947.

<sup>11</sup> First Report by A.El-Erian, Special Rapporteur, 'Relations Between States and inter-Governmental Organizations, Document A/CN.4/161 and Add.1, contained in ILC Yearbook (1963) Vol.II, A/CN.4/SER.A/1963/ADD.1, p.159 at p.184; Report by R.Ago Chairman of the Sub-Committee on State Responsibility, 16<sup>th</sup> January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1 at p.234.

<sup>12</sup> *Ibid.*

<sup>13</sup> United Nations General Assembly Resolution 56/82 of 12 December 2001; International Law Commission *Report of the on the work of its fifty-fourth session (2002)* A/57/10, see generally, Chapter VIII Responsibility of International Organizations.

with the adoption of these articles in 2011.<sup>14</sup> The United Nations General Assembly subsequently passed a resolution to which it annexed these articles, supporting their adoption.<sup>15</sup> It is the ARIO that provide part of the focus to this study.

The thesis initially considers the nature of the law of responsibility. It will argue that the limited approach taken to the responsibility of international organisations meant that it would be inevitable that the principles drafted would struggle to address the nature of the European Union as an international actor. The focus of the thesis is an examination of the ARIO, and their development, in order to consider the specific difficulties posed in applying the articles to the increased international activities of the EU. The thesis is that the articles are entirely grounded within a principally one-dimensional international legal system that is largely incapable of explaining or addressing the actors which these articles seek to address: international organisations. In working within the limited parameters of this system, the ILC failed to grapple with the difficulties posed by actors other than states, in particular, the complexity of the European Union. The ILC has clearly worked within these limited foundations, by strongly drawing on its previous work on state responsibility and, from this, in conceiving of the law of responsibility in a singular sense. In examining the ARIO, the thesis does consider the way in which the ILC has attempted to push beyond this original framework but it argues that this attempt to develop the law on responsibility was ineffective. It has not been successful in addressing the actions of the European Union and has, furthermore, resulted in significant tensions within the foundations of the law of responsibility. This leaves the law, as it currently stands, in a difficult position when attempting to address the dynamic actions of the EU.

The EU provides the focus for this research because of the unprecedented and unrivalled extent of its integration and international capacity, with the Union growing in importance as a global actor in an increasingly diverse number of fields.<sup>16</sup> This growth leaves the Union potentially highly impacted by the ARIO, while its institutional complexity poses one of the biggest challenges to the ARIO. The ARIO are therefore in a difficult position; the actor which could potentially be most impacted by these principles is, arguably, one of the hardest actors to account for. This simultaneous need to ensure the application of the

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<sup>14</sup> Articles on the Responsibility of International Organizations, with Commentaries, 2011, *Yearbook of the International Law Commission, 2011*, vol.II, Part Two.

<sup>15</sup> United Nations General Assembly Resolution 66/100 of 9 December 2011.

<sup>16</sup> C.Bretherton and J.Vogler *The European Union as a Global Actor*, 2<sup>nd</sup> edn (Oxford: Routledge, 2006); M.Koskenniemi (ed.), *International Law Aspects of the European Union* (Brill, 1997).

ARIO but the fundamental difficulty in gaining that assurance results in an actor that provides a very interesting focus.

## **1.2. The Changing Nature of the European Union as an International Actor.**

The beginning of the 1990s saw a renewed commitment from the EU towards progressing as an international actor. Since the early 1990s, the EU has continued to expand its external competences, moving further towards more explicitly 'political' areas of external activity, alongside its longstanding and comprehensive external activities in 'traditional' areas of EU action, such as economic policy. The EU had made a number of initial attempts at engaging in more explicitly 'political' areas of external activities, such as security and defence, as early as the 1950s but these had suffered from a number of problems.<sup>17</sup> These attempts finally found some degree of success with the establishment of the Common Foreign and Security Policy (CFSP) in the Treaty on European Union in 1992. It was clear that following the end of the Cold War and the emergence of the US as the sole remaining superpower, the EU was seeking to play a bigger role within a multipolar international community.<sup>18</sup> The later expansion by the EU into the area of security and defence and the further creation of a Common Security and Defence Policy (CSDP) furthered this development and showed the beginnings of the Union as an international actor engaged in a broad range of external actions far beyond its original economic focus.

External relations now lie at the heart of European Union integration. The central role that external relations played in the negotiations surrounding the attempts at a Constitutional Treaty and later the Treaty of Lisbon made this abundantly clear.<sup>19</sup> While this commitment has become an increasingly determined one by the Union, the resulting relationship that the EU has with the international system, however, remains complex and uncertain.

The EU differs substantially to the traditional, and unified, international actor: the state. The development of its external powers has not always been straightforward and the Court of Justice of the European Union (CJEU)<sup>20</sup> has played a key role in attempting to

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<sup>17</sup> R.Wessel, *The European Union's Foreign and Security Policy: a Legal Institutional Perspective* (Martinus Nijhoff, 1999) at pp.1 and 5-10.

<sup>18</sup> See generally, M.Koskeniemi (ed.), *International Law Aspects of the European Union* (Brill, 1997).

<sup>19</sup> Although not initially a focus of the Constitutional Treaty, see European Union, Nice Council Declaration 7-10 December 2000, there was a shift to increase the focus of external relations, see Laeken Declaration on the Future of the European Union, 14-15 December 2001

<sup>20</sup> Unless making reference to a particular judgment of the previous European Court of Justice (ECJ), the thesis will refer to the Court of Justice of the European Union (CJEU) throughout for consistency.

define and expand these competences.<sup>21</sup> The extent to which it enjoys external relations powers remains contested in a number of areas and subject to a number of discussions on the extent of competences, as well as the internal division of competences.<sup>22</sup> The organic development of the EU's external competences, as well as the Union's uncertain relationship with the international legal system, thus continues to raise questions about the EU's international role; these questions inform how the EU is viewed within the thesis. The thesis considers the interrelationship between the EU and other legal orders to be fundamental to understanding the nature of the EU as an international actor. The Union is defined by a continued interaction and interdependence between the EU and its Member States, but also between the EU and the international legal system. The result of this is that the EU is not easily defined and is certainly not a unitary actor, causing a number of problems for the approach taken to the law of responsibility. The thesis argues that it is this interaction that drives the Union's international actions and capacities and this interaction is, therefore, foundational to the thesis.

The EU's increased powers – and their use - further increase the risk of a violation of international law. In spite of the growth of the Union, and its increased powers, these expanding powers have not been accompanied by a development in the law of responsibility; the EU's powers have grown without being accompanied by limits and consequences. The thesis argues that this risk leaves the EU potentially most affected by the ARIO, but also that it poses one of the greatest challenges for the ARIO. The interactive nature of the Union is in no way adequately addressed by the ARIO, resulting in a law of responsibility that does not address a substantially expanding international actor. This law of responsibility, in possessing such a flaw, has significant weaknesses within its foundations; the law of international responsibility needs to address all international legal persons and, as it stands, international law is not capable of achieving this.

### **1.3. Central argument and research questions.**

The thesis addresses these two developments, the growth of the EU's international role and the difficulties with the expansion of the law of responsibility. It questions the development of the principles of responsibility and the difficulty of applying these principles to the Union. The thesis is that the overall approach taken by the ILC and the

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<sup>21</sup> Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263; Joined Cases 3, 4, and 6/76 *Kramer* [1976] ECR 127; *Opinion 1/76 re Inland Waterways* [1977] ECR 741; Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

<sup>22</sup> Case C-91/05 *Commission v. Council* (ECOWAS Case) [2008] ECR I-3651.

articles themselves, irrespective of their legal status and the debates and questions surrounding this, are unable to address the specific complexity of the EU. The approach taken by the ILC is viewed as attempting to balance two types of articles: the general and the specific. The general are considered to be those that are strongly drawn from the Articles on State Responsibility and consequently seek to achieve a common and cohesive international law of responsibility. The 'general' area focused upon within the thesis is the principle of attribution. The specific articles, on the other hand, are those that seek to recognise the different nature of organisations by providing 'exceptions' to the general rules. These are seen as exempting references to 'the rules of the organisation' in various articles, as well as the more discrete *lex specialis* provision, both of which are considered within the thesis. While this approach of the general and the specific does have merits, the thesis argues that the way in which the two strands within this approach have been pursued through the ARIO, and the foundation from which they are working, only serves to weaken the law of responsibility. The thesis addresses both of these aspects of the approach of the ILC. It first of all considers the 'general', by exploring the issues with the principles of attribution and then addresses the 'specific', by exploring those posed by the references to the rules of the organisation and the *lex specialis* provision. An examination of these principles enables the thesis to consider the different questions that arise with each of these two approaches in isolation, while also critiquing the overall approach taken by the ILC.

The thesis argues that alternative approaches to responsibility are possible within the confines of the international system as it currently stands. Following the critique of the ARIO, one such alternative approach is proposed. The alternative approach seeks to reconsider the principle of attribution and instead of this traditional principle, to incorporate a factual nexus of action that then creates a rebuttable presumption of responsibility on the part of any, and all, involved legal persons. This would also, therefore, enable shared responsibility. This approach is not proposed as a 'solution' to the problems within the current legal framework. The thesis considers that the problems with the ARIO are so heavily engrained within the limitations of the international legal system, that a comprehensive solution to these problems cannot be developed within the current legal framework. It also considers, however, that in proposing any alternative approach, it is important to adopt a system that *may* have potential to work. Any rules of responsibility need to work within the framework, as it currently exists. As it is proposed only as a preferred alternative, it is accepted that there are a number of difficulties with this approach. It is argued, however, that the framework proposed would provide a basic system from which the law would be able to evolve and respond to the challenges within

the international system and particularly when considering the European Union. The law would be scaled back, which would better enable such development than the framework as it currently stands.

In arguing that there are a number of weaknesses in the basis of the law of responsibility, the thesis considers the ARIO as unable to work with the complex institutional nature of the Union. If the principles of responsibility fail to adequately address the EU and its significantly expanding international actions, then this will go against the basic idea of ensuring a check on the exercise of power. With this underlying idea of responsibility existing as a foundational principle within the international legal system, putting it in jeopardy could cause broader problems within the international system as a whole. The continued tension in the attempts of the international legal system to address non-state entities lies at the core of the difficulties in this thesis, both in terms of understanding the nature of the EU and in terms of the development of the law of responsibility.

With these tensions in mind, my research question asks:

**To what extent is the emerging legal regime on responsibility able to acknowledge the complex nature of the European Union and the distinct relations it has with Member States?**

This question seeks to consider and confront a number of different debates. While addressing the developing regime on responsibility and questioning its ability to respond to the actors that it faces, such as the European Union, it also necessarily addresses another aspect by questioning the identity of the EU in itself. Questioning the nature of the EU is necessary to ensure an understanding of the different issues and reasons for any issues in applying the principles of responsibility.

The growing identity of the EU as a global actor is something that is considered in the first part of the thesis and is then developed through the interaction that has been seen between the EU and the ILC in this area. The analysis of the work of the ILC, as well as consideration of the development of the EU as an external actor, is utilised to question the relationship between the EU and international law. This is a question that has been growing in importance since the very beginnings of the EU and which continues to have relevance. The thesis utilises the analysis made of this developing area of law and the inclusion of the *lex specialis* principle to question this broader relationship and develop the idea within the thesis that the EU has a degree of interaction at its centre that drives its international activities. The discussions on the *lex specialis* article, as well as the difficulties with its development and formulation, show a great deal about the, sometimes,

tense interactions involved in the Union's international actions. The idea of the EU as an international actor falling between something entirely autonomous and something subordinate to international law, having a role within a hierarchy governed by the international system is central to the thesis.

The thesis seeks to question the ability of the emerging principles of responsibility to apply to the EU as a whole. The thesis considers both the general rules of responsibility and, within this, the principles surrounding attribution, and also the work of the ILC in developing a *lex specialis* principle. These two areas, the general principles and the principles in relation to *lex specialis*, are each relevant in relation to different areas of EU action but the focus of the thesis is on the Union as a whole. The principle of *lex specialis* will be considered in relation to the traditional areas of Union action, those areas previously considered under the auspices of the Community. The general principles of attribution will also be considered, as those that would apply to an area of EU action that has been considered to remain outside the realms of *lex specialis*: foreign policy generally, and specifically, crisis management operations. The discussions by the ILC show that different areas of Union action would potentially be addressed by different parts of the ARIO and so, in order to consider the potential implications for the entire range of Union external action, this range within the ARIO will be addressed.

#### **1.4. Methodology, Approach and Thesis Structure.**

The methodology used in this thesis is largely doctrinal, focusing upon an analysis of the work of the ILC and these emerging legal principles. It seeks to outline a view of the legal framework of responsibility and the global identity of the EU before engaging in documentary analysis to address the core of the research question. The thesis uses International Law Commission documents on the ARIO project to analyse the way in which these principles evolved, as well as the potential impact of the Union on these principles. This analysis seeks to examine whether there is an accepted way of interpreting and applying these principles, both from the documents of the ILC but also from the general response to the ARIO and the limited case law that has sought to apply these principles. Overall, it is based primarily on analysing the legal principles and commentary and the way in which they have been applied. From this, the thesis will seek to examine the difficulties that the Union poses to the coherent application of the rules in the ARIO.

An important aspect to the thesis is its approach in drawing on both international law and European Union law. While the thesis is considering the development of international



legal principles, crucially the focus is in its application to the European Union. As a result of such an important role for both the areas of international law and the European Union, the thesis pursues a cohesive approach drawing on both areas of law. This cohesive approach is fundamental to the project. This is not a study seeking to define the Union as an international organisation, or to define or categorise it in any way. It necessarily has to understand the Union but does not seek to put it within a category, as this would potentially limit the approach being taken. The choice of the EU is due to the importance of its international action and its engagement in the ILC drafting process. The study will indicate inadequacies of the ARIO and the approach taken by the ILC. Consequently, the focus may remain on the Union and recognise its unique nature, but the identified inadequacies may have broader implications for the law of responsibility. The thesis argues that the different nature of the EU is one that needs to be recognised within the international system and which challenges the way in which the ILC has approached its work on responsibility. It is the very nature of the EU that challenges the work of the ILC and indicates a number of broader weaknesses: it has attempted to codify general principles with no reference to the nature of the entities being addressed. There will be a concerted effort throughout, however, to retain the individual identity of the EU and to bring together the perspectives of EU law and international law.

When looking at these two areas of law, Koskenniemi has argued that “to reduce one [area] into the other or to set them in a hierarchical relationship will distort the image of both”.<sup>23</sup> He discusses the need to recognise the way in which different legal ‘cultures’ are ‘embedded’ within each other and, consequently, an understanding of both perspectives and an attempt at a synthesis between these perspectives enables a better and more coherent understanding of the overall area. The thesis pursues a synthesis between international and European legal perspectives as argued for by Koskenniemi. While it is a project analysing international legal principles, it does so through an analysis that retains the individual identity of the EU rather than using it as an ‘example’ of an international organisation or by reducing it to be simply a part of international law. The importance of retaining this focus and ensuring the distinct identity of each of these legal orders is integral to the project.

The thesis is structured into three parts. Part one (Chapters two, three and four) identifies the principle of international responsibility and its importance to, as well as its basis in, international law. It considers the global identity of the European Union and the resulting

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<sup>23</sup> M.Koskenniemi (ed.), *International Law Aspects of the European Union* (Brill, 1997) at pp.vii-viii.

complexities with this identity that would always have caused difficulties in applying principles of responsibility to this dynamic international actor. Part two (Chapters five, six and seven) addresses the work of the International Law Commission and its Articles on the Responsibility of International Organisations in detail. This part critiques the principles and the uncertainties that exist in their application to the European Union. Part three (Chapters eight and Conclusion) develops the idea of a scaled back alternative approach to the principles on the responsibility of international organisations, before reaching some general conclusions.

Responsibility is central to the thesis. Chapter two begins by considering the development of the law of responsibility. The chapter examines the beginnings of this law in state responsibility and why responsibility remained restricted to states as legal actors. It then traces the development of the framework of responsibility beyond states and the way in which the ILC has pursued the ARIO. The chapter finally looks at some of the criticisms that have emerged in response to the work of the ILC on ARIO, as well as some of the broader issues that exist in within the law of responsibility as a whole. The chapter will argue that the foundations of the law of responsibility are flawed, when considering the expansion of the law beyond state responsibility, due to the limitations of the international system in moving beyond the state.

Chapter three picks up on these criticisms and focuses on the difficulties of the international legal system in addressing actors other than states, in particular international organisations. This difficulty has shaped the foundations of the principles of responsibility, leaving them substantially limited. The chapter considers the difficulty of institutions within the international legal system, in particular when considering the idea of moral agency and making any determination of responsibility when examining a collective actor. This idea is flawed and this difficulty, again, returns to the inability of the international legal system to understand and address international organisations.

Chapter four then moves to specifically consider the European Union. The weaknesses of the international system in addressing international organisations are only exacerbated when considering the EU. The chapter analyses the global identity of the Union and argues that it has developed a unique role with a continued interaction existing between the Union and international legal orders. There exists no true hierarchy or overarching global system encompassing all legal actors and legal systems, but rather, a continued interaction between the EU legal order and international law as distinct legal systems. This is termed the principle of institutional balance and the chapter considers that this relationship should be further explored in order to fully understand both the changing identity of the

EU, but also the changing nature of international law. It considers that the Union has a positive role at the international level but that in order to do so; its role needs to be fully considered.

The thesis then turns its attention to the work of the ILC. Overall, it critiques the work and the actual principles of ARIO. While the overall approach of the ILC is considered as understandable, it is argued that it was inevitably flawed. The thesis considers that the approach of the ILC can be conceptualised as having two parts to it. On the one hand, the articles reflect a general desire to retain the principles drafted in relation to states. The ILC sought to retain coherence across the law of responsibility, irrespective of the type of legal person involved. This approach is considered in chapters five and six. On the other hand, there has been an acknowledgment by the ILC that some differences need to be identified and accounted for within the principles. These are predominantly dealt with through the inclusion of a *lex specialis* provision and reference to the rules of the organisation. This approach is considered in chapter seven. This attempt to combine these two opposed positions in the hope of developing principles that responded to the different nature of organisations does not work. While this is addressed more specifically in chapter eight, chapters five, six and seven are structured around the approach of the ILC.

Chapter five analyses the question of attribution as the focus for the 'general' approach of the ILC. Attribution is a core aspect of responsibility and yet one that will always struggle with actors other than states. This chapter makes use of the principles, the commentaries and the comments made by states, international organisations and the Special Rapporteur, as well as various pieces of case law to show the significant uncertainty that exists here. The chapter argues that the considerable differences between states and international organisations mean that state based principles do not easily apply to organisations and any attempts to 'make them fit' are subject to a great amount of uncertainty. In particular, the chapter considers the problems with the principles of attribution reflecting the foundational idea of responsibility as a principle that is singular; attribution plays a core role within the attempts of international responsibility to determine a single actor as possessing responsibility. The chapter argues that this is one of the fundamental flaws at the core of the law of responsibility. The EU is an international actor that depends on interaction with its Member States and the continued attempt at the international level to determine responsibility in an individual manner shows a fundamental disconnect.

Following on from this, chapter six considers these principles specifically in relation to the EU and crisis management operations. The chapter seeks to analyse the application of these principles to such operations. It takes the analysis deeper than simply the theoretical

and develops the argument that the principles of attribution have fundamental flaws that would cause difficulties when faced with the structures of the EU.

Chapter seven examines the various provisions developed as exceptions to the original state based principles; it analyses the complexities that arise with the *lex specialis* article and the inclusion of references to the rules of the organisation. The chapter considers whether these principles can be said to exist and discusses the way in which the evolving norms would work in practice; how can a system of international responsibility simply be referred back to the internal system of an organisation involved? The chapter argues that this is simply avoiding dealing with the true nature of the entities involved. The references to the rules of the organisation only appear to serve to confuse the status of these internal institutional norms; do they exist as 'law' internal to the institution or do they have some sort of status as international legal provisions? The attempt at the inclusion of a *lex specialis* article also seems only to confuse, as the norms of the Union cannot be *true lex specialis* provisions. The EU norms cannot be said to be a system of international law, so it is somewhat confusing to attempt to term them specialised principles *of international law*. The way in which the 'special' rules have been created organically within the Union legal order also means that the parameters remain quite undefined. The uncertainty surrounding the potential 'special rules' and the extent of their impact leaves the idea of defining them as *lex specialis* in an even more questionable position; how can a set of rules be deemed to be a special regime when their boundaries are far from defined. The chapter argues that any attempts to consider the individual nature of the Union are, consequently, weak and delayed.

Chapter eight then develops an alternative approach to that established by the ILC. It argues that, most particularly the principles of attribution cause difficulty with the Union and need to be reconsidered. Overall the ILC's work was premature. There is simply not enough understood about the relationships that exist in order to develop principles of responsibility. As a result, it argues, that the law in this area should be scaled back and allowed to develop in a manner that would better consider the actors to which it is being addressed. In place of attribution, a rebuttable presumption of responsibility is proposed. This would be determined using a factual nexus and would incorporate the potential for shared responsibility. While this would not be a flawless solution and would also have its difficulties, it is argued that it would be an improvement on the system involving attribution. In scaling back the law, this would allow these important principles to develop more organically within the international legal system.

The thesis conclusions draw on the previous analysis to argue that the ILC's project, in relation to the EU, is inherently flawed and that this is highly problematic, considering the potential pertinence of the ARIO to the growing activities of the EU. In drawing upon earlier discussions of the concept of responsibility, the thesis concludes with some ideas of how the ILC could have better pursued a question of the responsibility of international organisations. The conclusions will explore whether any wider conclusions can be drawn on the work of the ILC, such as the broad difficulties within the basis of the ARIO. It also considers the areas for future work that exist in the area of responsibility, as well as in terms of the growth of the EU as a global actor.

Attempts to have an overall system of international responsibility addressing all legal persons in exactly the same way are weak and unrealistic, while the system remains unable to actually take account of the nature of all of these different actors. The principles drafted are unable to act in the broad manner necessary. When considering the international system as it currently stands, there needs to be more acceptance that there exist a number of different responsibility regimes that interact with each other. It is important to maintain the integrity of the law of responsibility, as well as the internal constitutional integrity of the EU, and this will only be possible by ensuring that it responds to the actors that it seeks to address.

## 2. The Development of the International Law of Responsibility.

“[R]esponsibility is at the heart of international law...it constitutes an essential part of what may be considered the Constitution of the international community.”<sup>24</sup>

Responsibility is the very corollary of international law.<sup>25</sup> Power cannot be accepted as existing in absolute terms; there is a need to address the potential for excess of power leading to unlawful conduct. Limitations on the exercise of power are, therefore, necessary to ensure the consequent obligations and duties that arise as a result of power. In ensuring consequences for any breach of, or misuse of power, responsibility provides this assurance and is thus a crucial principle that is necessary at the very heart of any legal system to address all subjects of that legal order.<sup>26</sup> The general idea of responsibility has long been accepted as having a central role in international law.<sup>27</sup>

More specifically, responsibility ensures the effectiveness of international law, as well as maintaining its identity. International law may have entered its “post-ontological era”, as Franck has called it; but the debate has shifted.<sup>28</sup> Concern now exists in giving effect to the rules of international law and attempting to cope with its expansion and evolution.<sup>29</sup> It is the law of responsibility that contributes to the effectiveness and also the identity of

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<sup>24</sup> P.Reuter, ‘Trois observations sur la codification de la responsabilité internationale des États pour fait illicite’ in *Le Droit international au service de la paix, de la justice et du développement- Mélanges Michel Virally*, (Pedone, Paris, 1991), 390; reproduced in P. Reuter, *Le développement de l’ordre juridique international- Écrits de droit international* (Paris, Economica, 1995), 574, cited in A.Pellet, ‘The Definition of Responsibility in International Law’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3, at p.3.

<sup>25</sup> A.Pellet, ‘The Definition of Responsibility in International Law’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3, at p.3.

<sup>26</sup> A.Pellet, ‘The Definition of Responsibility in International Law’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.3; *Third Report on State Responsibility by R.Ago, Special Rapporteur*, UN Doc A/CN.4/246 and Add.1-3 (F), *ILC Yearbook 1971*, Vol. II(1), p.199 at p.205, para.31; D.Anzilotti, *Cour de droit international* (trans Gidel, 1929) (Paris, Panthéon-Assas/LGDJ, 1999) 467, cited in A.Pellet, ‘The Definition of Responsibility in International Law’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) p.3 at p.4; C.Tomuschat, ‘Reconceptualising the Debate on *Jus Cogens* and Obligations *Erga Omnes*- Concluding Observations’, in C.Tomuschat and J-M.Thouvenin (eds.) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden/Boston: Martinus Nijhoff, 2006) p.428.

<sup>27</sup> H.Grotius, *The Rights of War and Peace* (R.Tuck (ed.), J.Barbeyrac (trans), 1625, Indianapolis, Liberty Fund 2005), Ch.XVII, para.1 (vol.II, 884); *Factory at Chorzów, Merits, 1928, PCIJ, Series A, No.17*, p.4 at p.29.

<sup>28</sup> T.Franck, *Fairness in International Law and Institutions*, (Oxford: Oxford University Press, 1995) p.6.

<sup>29</sup> *Ibid.*

international law as a *legal* system, providing a normative framework to ensure consequences and limits upon the exercise of power.<sup>30</sup>

Whilst the law of responsibility is in this sense well established in international law, the way in which it has developed raises questions about the extent to which it fulfils its purpose in checking the power of international actors. Responsibility can both indicate and be a consequence of international legal personality, but in whichever way it is conceived, only legal persons can incur responsibility.<sup>31</sup> The initial focus on states as international legal persons meant that the development of the law of responsibility became the law of state responsibility. The International Law Commission (ILC) in developing the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) showed a continual focus on states, even in this core area of law. The growth of international actors since the Second World War, in particular the exponential growth of international organisations, has precipitated a need to reconsider the international system generally, but also more specifically areas such as responsibility. The acceptance of international organisations as being capable of possessing legal personality showed a further turning point in the international arena; personality would mean a capacity for autonomous action and for the incurrance of responsibility.<sup>32</sup> This turning point along with the expansion of capacities of these institutions means that it is now inconceivable to leave organisations to act without any conception of responsibility.

In spite of the need for the powers of institutions to be checked, the early focus on state responsibility has left a lasting impression on the law of responsibility as a whole. Responsibility has evolved on the basis of international law being focused around the state.<sup>33</sup> As a result, international law has limited its own development in establishing principles that are able to apply to international actors beyond the state. This continued limited nature of the international legal system has left significant flaws in the very foundations of the law of responsibility that now mean that any attempts to expand the law beyond the state will inevitably struggle. This has in fact been seen by the attempt by

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<sup>30</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.4

<sup>31</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) p.3 at p.6

<sup>32</sup> *Reparations for Injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174.

<sup>33</sup> See for further explanation chapter three at pp.54-56.

the ILC to expand the law of responsibility from its original application to the state, to a consideration of the actions of international organisations.

This chapter seeks to trace the development of the law of responsibility from the initial principle, through its origins as a law of state responsibility. The chapter then looks at the attempt by the ILC to progress the normative framework in its development on the Articles on the Responsibility of International Organisations (ARIO). In considering the approach taken towards the ARIO, as well as the critique surrounding the ARIO, this chapter finally argues that foundational difficulties exist in the law of responsibility. The chapter argues that these difficulties exist due to the continued focus of responsibility upon the specific, singular responsibility of a unified actor- most often, the state. While states are relatively unified actors, the international organisations that the ARIO seeks to address and, even more so the European Union, exist in a fundamentally different manner. The external action of the European Union depends upon interaction with its Member States, as well as other international actors.<sup>34</sup> This interaction fundamentally differentiates the Union from states and challenges the traditional singular way of conceiving of responsibility.

## **2.1. The idea of Responsibility and its origins in State Responsibility.**

The idea behind the principle of responsibility arises from the concept of being answerable for your actions; the term has been said to derive from the latin *respondeo*, meaning 'I answer'.<sup>35</sup> The concept behind this term, therefore, is a moral one; any wrongs should be 'answered' for. The idea is one that is central to most legal systems and has long been accepted as a core principle within international law.<sup>36</sup> It is traceable as far back as the seventeenth century and the statement from Grotius that when injury is caused "there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done."<sup>37</sup> Not only does responsibility in this sense prove the existence of international law,

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<sup>34</sup> See for further explanation chapter four at pp.106-108.

<sup>35</sup> T.Erskine, 'Making Sense of 'Responsibility in International Relations: Key Questions and Concepts', in T.Erskine, *Can Institutions have Responsibilities? Collective Moral Agency and International Relations* (Palgrave: 2003) p.1 at p.7.

<sup>36</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.3.

<sup>37</sup> H.Grotius, *The Rights of War and Peace* (R.Tuck (ed.), J.Barbeyrac (trans), 1625, Indianapolis, Liberty Fund, 2005), Ch XVII, para.1(vol II, 884); and see the Prolegomena, para. 8 (vol. 1, 86) in A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.5.



but is also taken to be a measure of its effectiveness.<sup>38</sup> With no responsibility in international law, and no concept at all of rights and duties, it has been argued, that international law would cease to exist.<sup>39</sup>

The attachment of responsibility to a wrong committed becomes complex at the international level due to the dominance of collective actors in the international legal system. It is, inevitably, more straightforward to determine the actions of individuals; a link naturally exists between the action and the perpetrator. At the international level, the vast majority of international norms consider collective actors, the main such actor being the state. In spite of this increased complication, responsibility has developed within international law and has been accepted as forming a key part of this legal system. The recognition of responsibility in international law was only ever in response to collective actors and this has inevitably shaped its limited development.

Responsibility can have a number of meanings. It has been seen by some as existing in a prospective way, with individuals 'promising' that they will act in a particular way.<sup>40</sup> Responsibility is also recognised, however, as a retrospective principle under which people are required 'to answer' for their actions.<sup>41</sup> Responsibility in international law follows the latter idea. It addresses the ex post facto questioning of actions, or, who is culpable for wrongs that have been committed. This can be seen with the perspective of the Permanent Court of International Justice on responsibility:

"[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."<sup>42</sup>

This famous pronouncement on responsibility shows the nature of responsibility as being an obligation arising after some kind of breach of law. Responsibility supports the idea that any subjects of international law that have rights and duties should consequently be

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<sup>38</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.3.

<sup>39</sup> *Third Report on State Responsibility by R.Ago, Special Rapporteur*, UN Doc A/CN.4/246 and Add.1-3 (F), *ILC Yearbook 1971*, Vol. II(1), p.199 at p.205, para.31.

<sup>40</sup> J.R.Pennock, 'The Problem of Responsibility' in C.J.Friedrich (ed.) *Responsibility* (New York: Liberal Arts, 1960) p.3.

<sup>41</sup> P.H.Nowell Smith, 'Action and Responsibility' in M.Brand and D.Walton (eds.) *Action Theory* (Dordrecht, 1976) p.311.

<sup>42</sup> *Factory at Chorzów, Merits, 1928, PCIJ, Series A, No.17, p.4, 29.*

held responsible for the failure to perform those duties.<sup>43</sup> It is through this assurance of duties accompanying rights that the very nature of international law as a legal system is maintained.

### **2.1.1. The ILC and the ARSIWA: the Restrictions on Responsibility from the Beginning.**

The significance of responsibility within international law can be seen by its inclusion on the original list of fourteen topics for examination and codification by the ILC after its creation in 1947.<sup>44</sup> The ILC was established for the purpose of codification and the progressive development of international law.<sup>45</sup> The inclusion of responsibility as a topic showed an acceptance that this was a significant area of the law that warranted some attention by this new body. Although the League of Nations had made some initial attempts at codification of international law, this had been limited and the inclusion of responsibility in the workload of the ILC showed a renewed commitment to this area.<sup>46</sup>

The ILC began its work on responsibility in detail in 1956 with a determined focus on the law of *state* responsibility.<sup>47</sup> While the nature of responsibility changed somewhat over the course of this work, what remained constant was the focus of this work in relation to states. Any suggestion of broadening the topic beyond this was continually rejected,<sup>48</sup> though, in terms of individuals, concurrently there were separate developments in international criminal law.<sup>49</sup> This state-based focus in respect of responsibility was inevitable given the focus on states within the very foundations of international law.<sup>50</sup> Responsibility existed for the purpose of protecting the sovereign nature of states; there

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<sup>43</sup> D.Anzilotti, *Cour de droit international* (trans Gidel, 1929) (Paris, Panthéon-Assas/LGDJ, 1999) p.467 in A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.4.

<sup>44</sup> Yearbook of the International Law Commission 1949, Summary Records and Documents of the First Session including the report of the Commission to the General Assembly, at pp.49-50.

<sup>45</sup> Article 1 Statute of the International Law Commission.

<sup>46</sup> United Nations Documents on the Development and Codification of International Law, Supplement to Vol.41 *American Journal of International Law*, October 1947, at pp.66-91.

<sup>47</sup> *Report on International Responsibility* by Mr. F.V.Garcia-Amador, Special Rapporteur, A/CN.4/96, Extract from the Yearbook of the International Law Commission 1956, vol.II.

<sup>48</sup> First Report by A.El-Erian, Special Rapporteur, 'Relations Between States and inter-Governmental Organizations, Document A/CN.4/161 and Add.1, contained in ILC Yearbook (1963) Vol.II, A/CN.4/SER.A/1963/ADD.1, p.159 at para 172.

<sup>49</sup> A.Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2008); *Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session (1996)*, International Law Commission 48<sup>th</sup> Session, A/CN.4/L.532 (1996); Rome Statute of the International Criminal Court, July 17 1998, 2187 UNTS 3.

<sup>50</sup> See for further explanation chapter three at pp.54-56.

was recognition of the obligations that sovereign states have towards each other and responsibility could address any infringement of rights by other states.

This foundation was reflected in the initial focus on responsibility in quite a 'subjective' sense; there was a focus on particular individual primary obligations of states, such as the obligations of states in diplomatic protection and the responsibility of states for injury to aliens.<sup>51</sup> From early on in the work of the ILC, any consensus on developing these particular 'primary' obligations proved almost impossible.<sup>52</sup> The focus on primary obligations, more importantly, would have required an understanding of which of these norms were binding on particular states.<sup>53</sup> In focusing upon primary obligations, furthermore, the law of responsibility would not cut across all areas of law as would be necessary in a comprehensive system of responsibility. Consequently, the work of the ILC shifted towards developing broader 'secondary' principles of responsibility. The focus on protecting sovereign states has remained, however. These early foundations have shaped some of the fundamental aspects of the law of responsibility that remain problematic and now cause such difficulty with the ARIO. Most particularly, the law of responsibility retains a largely singular nature: there is the idea of a single 'perpetrator' and a single 'victim'. This initially worked in the ILC's project on state responsibility and its desire to focus upon the state. It reflected the notion of a Westphalian international society based around bilateral state actions.<sup>54</sup> The result, however, is a law of responsibility with significant flaws due to these restricted foundations.

The ILC's work on this topic did take a number of decades, but the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) were adopted and presented to the General Assembly in 2001.<sup>55</sup> They were unanimously accepted and

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<sup>51</sup> J.Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 *The American Journal of International Law* p.874 at pp.877-878; Report by R.Ago Chairman of the Sub-Committee on State Responsibility, 16<sup>th</sup> January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1, at pp.252-253; D.Bodansky and J.R.Crook, 'Symposium: The ILC's State Responsibility Articles. Introduction and Overview' in (2002) 96 *The American Journal of International Law* p.773 at p.777.

<sup>52</sup> J.Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 *The American Journal of International Law* p.874 at pp.877-878.

<sup>53</sup> *Ibid.*

<sup>54</sup> See for further explanation chapter three at pp.54-61.

<sup>55</sup> Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission 2001, 2001, vol.II, Part Two.

annexed to a Resolution without a vote.<sup>56</sup> The work done in drafting these articles begins to show some of the complexities that exist within the foundations of the law of responsibility. The ILC did initially attempt to address the weaknesses in the foundations of the law of responsibility. Within the work on the ARSIWA, the ILC began to attempt a comprehensive law of responsibility.

### **2.1.2. Early attempts by the ILC to Address the Weaknesses in the Law of Responsibility: Developments in the ARSIWA.**

During the work on state responsibility, the ILC attempted two significant changes to move responsibility beyond its limited foundations. The ways in which these changes were attempted, and the difficulties with them, serve to further explain some of the issues within the basis of the law of responsibility. These attempts at development by the ILC showed some move towards progress but there were fundamental limitations that it could not move beyond. The first change that was seen was the attempt to make responsibility a more objective system of law and to move it away from being supportive of, and engrained in, a bilateral conception of the international actions. The second change surrounds the expansion of international legal persons and the consequent potential for wrongs committed by these actors meant that responsibility needed to be considered in relation to these expanded international actors.

When considering the first of these difficulties, in spite of the origins of responsibility existing to protect state sovereignty, there was an attempt to move the principles beyond the bilateralist ideas protecting the nature of states. As responsibility evolved, the ILC recognised that there was a need for responsibility to be bigger than just bilateral relations between states. The ILC attempted to develop a more objective system of responsibility capable of emerging as a more comprehensive system of law. As the work on the ARSIWA developed, in particular the work done under the guardianship of Roberto Ago as Special Rapporteur, this move towards an increasingly objective system was seen. There was, first and foremost, a determined move towards developing 'secondary' norms of responsibility and away from the prior focus on primary rules of obligation, for example the principles on injury to aliens.<sup>57</sup>

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<sup>56</sup> United Nations General Assembly Resolution A/RES/56/83, adopted by the General Assembly on 12 December 2001.

<sup>57</sup> Report by R.Ago Chairman of the Sub-Committee on State Responsibility, 16<sup>th</sup> January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1 at p.228.

Some have questioned the distinction between primary and secondary norms. In terms of responsibility, questions continue to surround this distinction.<sup>58</sup> Hart considered it important to distinguish between different types of norms and considered there to be ‘power-conferring’ norms and ‘duty-imposing’ norms.<sup>59</sup> Rules that confer powers can also be termed primary rules; primary norms are those that govern conduct directly.<sup>60</sup> ‘Power-conferring’ norms, or secondary norms, are rules about other rules; secondary rules govern, for example, how to interpret rules or enact or develop them.<sup>61</sup> In making the distinction between these norms, it is possible to identify the ILC attempting a set of norms that would govern the conduct of states irrespective of the particular area in question. The need for this comprehensive approach was clear from Ago, who stated that the work of the ILC should consider “the whole of responsibility and nothing but responsibility.”<sup>62</sup> The work of Ago then began to develop more objective principles of responsibility, decisively shifting the direction of the ILC’s project.

This attempt to develop a more objective set of rules, furthermore, saw a shift away from damage constituting a basic element of responsibility.<sup>63</sup> The requirements of breach and attribution became both necessary and sufficient for an internationally wrongful act.<sup>64</sup> The requirement of damage existed as recognition of responsibility being a system to protect the relations between states and consequently the sovereignty of states. As a result, the move away from damage as being necessary for responsibility began to reduce the focus on bilateral relations and progress further towards a stronger overarching international system. While this was an attempt to further objectivise the law, this could only be taken so far. The initial ideas in the law of responsibility that were entrenched at this early stage continued to provide the focus for the law of responsibility; principles of responsibility had been built around state actions and consequently followed a bilateral idea in response

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<sup>58</sup> A.Nollkaemper and D.Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, Amsterdam Law School Legal Studies Research Paper No.2011-17, Amsterdam Center for International Law No.2011-07 at pp.81-88.

<sup>59</sup> H.L.A.Hart, *The Concept of Law* 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2012) at pp.79-80.

<sup>60</sup> H.L.A.Hart, *The Concept of Law* 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2012) at p.81.

<sup>61</sup> *Ibid.*

<sup>62</sup> Report by R.Ago Chairman of the Sub-Committee on State Responsibility, 16<sup>th</sup> January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1 at p.253.

<sup>63</sup> *Second report on State Responsibility, by R.Ago, Special Rapporteur, A/CN.4/233*, Yearbook of the International Law Commission, 1970, vol.II, ‘State Responsibility’ at pp.179-187.

<sup>64</sup> Articles 1 and 2 ARSIWA; A.Pellet, ‘The Definition of Responsibility in International Law’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.9.

to the original idea of state action. The restricted foundations of international law have, therefore, resulted in the law of responsibility continuing to focus on a singular idea of international action and, consequently, international responsibility. In spite of the attempt to develop a comprehensive law of responsibility, this basic foundation has remained firm and now exists as one of the limitations in the law of responsibility.

This singular focus to responsibility is particularly problematic when considering the second main difficulty facing the law of responsibility, namely the increasing number of legal persons at the international level. The manner in which responsibility has grown and changed over time shows the conflict in the international system attempting to respond to these actors. There has been an attempt to develop responsibility in response to the growth of international actors but the very basis of the law of responsibility does continue to be grounded in ideas developed in response to the state and its actions. There are, as a result, difficulties that exist within the very foundations of this area of law. The basis of responsibility as existing to ensure redress for wrongs is accepted. It is the detail of the law in implementing the ideas underpinning these principles that causes difficulty. The attempt to move the law beyond the boundaries of state responsibility has begun to further expose these problems. It is this challenge, in particular the growing capacities of the EU, that forms the core of the present thesis.

## **2.2. The Development of the Law of Responsibility: The Expansion of Principles beyond the Articles on State Responsibility?**

The acceptance of the need to expand the law of responsibility to take account of international organisations began as a theoretical concern.<sup>65</sup> There was recognition of the growing powers of institutions and from this awareness arose the need to address any potential responsibility. From the early 1990s onwards, however, this recognition began to emerge as more than a theoretical issue. The increasing numbers of examples of wrongful conduct that involved institutions in some way, for example the claims of human rights abuses by United Nations peacekeepers, began to give weight to the argument that this area needed further consideration.<sup>66</sup> As the ILC concluded its work on the

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<sup>65</sup> C.Eagleton, "International Organizations and the Law of Responsibility", (1950-I) vol. 76 *Recueil des cours* p. 323; K.Ginther *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Springer, 1969).

<sup>66</sup> V.L.Kent, 'Peacekeepers as Perpetrators of Abuse. Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations', (2005) 14 *African Security Review*; The Secretary-General, Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Dem. Rep. Congo, U.N. Doc. A/59/661 (Jan. 5, 2005).

responsibility of states, the questions surrounding the responsibility of institutions were still increasing. As a result the ILC decided that, on conclusion of the ARSIWA project, it would then consider moving on to consider the responsibility of international organisations.<sup>67</sup>

### **2.2.1. Early Recognition of the Responsibility of International Organisations.**

The possibility of responsibility of international organisations could be said to have arisen as early as the 1940s with the acceptance that they are capable of possessing legal personality. This was first recognised in relation to the United Nations by the International Court of Justice in the *Reparations* case in 1949.<sup>68</sup> In spite of this early pronouncement, however, it was not until 1980 that the Court elaborated upon this. This later pronouncement saw the idea of organisations as subjects of international law with rights and duties.<sup>69</sup> This early acceptance of personality remained limited, though.

As international organisations grew, so did the need to address this question of responsibility. An early judicial consideration of responsibility was made in the 1990s with the judgment that immunity of organisations in national law did not absolve any legal responsibility at the international level.<sup>70</sup> The Court stated that “immunity from legal process is [an issue] distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by agents acting in their official capacity.”<sup>71</sup> There was, therefore, recognition from the Court that there is a need to ensure the responsibility of *all* international actors. This development may have been a gradual one, but as the number, and the capacity, of organisations has increased, as has the recognition of the need to address their potential responsibility for their actions.

This initial judicial recognition was accompanied by early academic work. Even while the principles on state responsibility were being drafted, literature was beginning to emerge

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<sup>67</sup> International Law Commission *Report of the on the work of its fifty-second session* (2000) A/55/10, see Annex at p.135.

<sup>68</sup> *Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion ICJ Reports, 1949, p.174.*

<sup>69</sup> *Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion ICJ Reports, 1949, p.174; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, [1980] ICJ Reports p.73 at pp.89-90; N.White and S.MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’, (2008) 19 *European Journal of International Law* p.965 at pp.970-971.*

<sup>70</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion [1999] ICJ Reports p.62 at p.88.*

<sup>71</sup> *Ibid.*

on the potential responsibility of other entities, in particular international organisations.<sup>72</sup> This early work continued to focus on the importance of personality without considering the broader questions of the distinct nature of organisations and their differences when compared with states. A lot of the discussion remained highly “speculative”<sup>73</sup>, as no real question of this had properly arisen.

There existed some early examples of questionable action, but they did not provide much assistance. When considering those involving the UN and its peacekeepers, for example, there was often an acceptance of liability or a voluntary award of compensation for its actions or for those actions of peacekeepers for which the UN was responsible.<sup>74</sup> None of these cases raised the *public law* question of responsibility. They were instead simply acceptances of liability. The ILC and the Special Rapporteur have used these examples of claims brought against the UN as a basis of discussion as examples of the principles.<sup>75</sup> This remains problematic, at best, as these claims are not examples of international responsibility. They show when the UN has voluntarily conceded liability in a private capacity or in an area of private national law. Consequently, they do not provide a basis from which to develop public law principles. An acceptance of liability in a particular circumstance is not equivalent to a determination of responsibility by a source external to the organisation. They remained limited in their ability to develop legal principles.

The largely theoretical focus of responsibility continued until the *International Tin Council* case, where the practical difficulties of responsibility with institutions came to the fore.<sup>76</sup> The International Tin Crisis saw an international organisation having incurred huge financial liabilities, raising questions about its potential direct liabilities along with the potential concurrent or joint responsibilities of its Member States.<sup>77</sup> This crisis highlighted,

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<sup>72</sup> C.Eagleton, “International Organizations and the Law of Responsibility”, (1950-I) vol. 76 *Recueil des cours* p. 323; K.Ginther *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Springer, 1969).

<sup>73</sup> C.Eagleton, “International Organizations and the Law of Responsibility”, (1950-I) vol. 76 *Recueil des cours* p. 323 at p.401.

<sup>74</sup> *Exchange of Letters Constituting an Agreement relating to the Settlement of Claims filed against the United Nations in the Congo by Belgian nationals New York, 20 February 1965*, No.7780 (1965) *Recueil des Traités* 198.

<sup>75</sup> *Eight Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, 14<sup>th</sup> March 2011 A/CN.4/640 at para.33; *Responsibility of International Organizations, Comments and Observations received from International Organizations*, 17<sup>th</sup> February 2011, A/CN.4/637/Add.1, sect. II.B.2, paras. 2-10.

<sup>76</sup> *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257.

<sup>77</sup> *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257; I.Cheyne, “The International Tin Council” (1987) 36 *International and Comparative Law Quarterly* p.931; I.Cheyne, “The International Tin



in *practical* terms, many of the questions that go to the very core of the question of the potential international responsibility of an international organisation; namely the complex structure of institutions in terms of the relationship that they have with their Member States. The aftermath of this case saw an emergence of literature on the potential consequences for the actions of organisations. This increase in literature saw an initial focus on the broader idea of accountability to address these practical questions.<sup>78</sup>

### **2.2.2. Discussions on Accountability and the Work of the Institut de Droit International and the International Law Association.**

The original focus on accountability within the literature reflected an initial flexible approach to the growing actions of organisations and the continued focus on the state in terms of responsibility. While it does not focus on a legal approach and lacks the force of law, the failure to 'account' for actions, be they financial, administrative, political or other, should result in consequences and accountability enables this broad range of areas to be addressed. This principle formed the initial focus when considering the growing actions of organisations.<sup>79</sup> Accountability focuses on the general concept of being answerable for actions in any number of ways, rather than questioning the development of any specific legal principles that are enforceable within courts.<sup>80</sup> This *legal* calling to account is the role of responsibility at the international level; it is the *legal* branch of international accountability. The movement towards responsibility as a more specific and more strictly 'legal' approach to cope with the potential breaches of international law came as a result of the ever-expanding role of organisations. Following the *Tin Council* case in the 1990s, but more prominently after 2001, accountability developed and later responsibility really began to emerge in the literature.

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Council" (1989) 38 *International and Comparative Law Quarterly* p.417; C.F.Amerasinghe, 'Liability to third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent', (1991) 85 *American Journal of International Law* p.259.

<sup>78</sup> A.Conze, *Die völkerrechtliche Haftung der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1987); C.F.Amerasinghe, 'Liability to third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent', (1991) 85 *American Journal of International Law* p.259; M.Hartwig, *Die Haftung der Mitgliedstaaten* (Springer, 1993); A.Reinisch, 'Securing the Accountability of International Organizations', (2001) 7 *Global Governance* p.131; C.Harlow *Accountability in the European Union* (Oxford: Oxford University Press, 2002).

<sup>79</sup> *Final Report of the ILA Committee on the Accountability of International Organizations* (Berlin Conference, April 2004); N.White *The Law of International Organizations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at pp.189-205; C.Harlow *Accountability in the European Union* (Oxford: Oxford University Press, 2002); A.Reinisch, 'Securing the Accountability of International Organizations', (2001) 7 *Global Governance* p.131.

<sup>80</sup> N.White *The Law of International Organizations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at pp.189-190.

The early academic work developed can be viewed alongside the earlier attempts at developing principles, in terms of both accountability and responsibility. The growth of the ability of organisations initially precipitated a push for responsibility on the part of Member States, as considered in 1995 by the *Institut de Droit International* and later the accountability of organisations as considered by the International Law Association (ILA) in 2004.<sup>81</sup> The ILA comprehensively dealt with the overall question of the accountability of international organisations, however, accountability is a very general concept and the study did involve quite general principles. This led to an acceptance that more concrete principles in the area of legal accountability, or responsibility, were needed. The work of the *Institut de Droit International*, furthermore, considered quite a particular area with the responsibility of Member States for the actions of institutions. While recognising the need to address the growing actions outside of solely state action, this project did continue the focus on states. There was no real attempt to address the actions of institutions as distinct international actors. The first move to address principles of the responsibility of organisations came with the work of the ILC.

### **2.2.3. The Development of Principles of Responsibility of International Organisations.**

The question of legal principles addressing the responsibility of organisations was raised as early as 1963 within the ILC, but it was decided that retaining the distinction between states and other actors in the area of responsibility was necessary.<sup>82</sup> It was only once the work on state responsibility had been completed that the ILC put the question of the responsibility of international organisations on its work programme and in 2001 the General Assembly requested that the ILC begin work on this topic.<sup>83</sup> Work began on this topic in 2002 and was largely developed using the ARSIWA as a basis. A final set of draft articles commentaries were adopted by the ILC on second reading on 3 June 2011, with a

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<sup>81</sup> *Final Report of the ILA Committee on the Accountability of International Organizations* (Berlin Conference, April 2004); Institut de Droit International Session of Lisbonne 1995, 'The Legal Consequences for Member States of Non-fulfilment by International Organizations of their Obligations toward Third Parties', Fifth Commission, Rapporteur: Mrs Rosalyn Higgins.

<sup>82</sup> First Report by A.El-Erian, Special Rapporteur, 'Relations Between States and inter-Governmental Organizations, Document A/CN.4/161 and Add.1, contained in ILC Yearbook (1963) Vol.II, A/CN.4/SER.A/1963/ADD.1, p.159 at p.184; Report by R.Ago Chairman of the Sub-Committee on State Responsibility, 16<sup>th</sup> January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1, at p.234.

<sup>83</sup> International Law Commission *Report on the work of its fifty-second session* (2000) A/55/10, at Ch.IX.A.1, para.729; United Nations General Assembly Resolution 56/82 of 12 December 2001, para.8.

full set of commentaries being adopted on second reading on 5 August 2011.<sup>84</sup> The ILC then referred its work to the General Assembly, which proceeded to welcome the conclusion of the work and annexed the articles to a resolution, as it had done with the ARSIWA.<sup>85</sup>

The ILC began work on the ARIO from the perspective that a focus on the principles developed in relation to states should be maintained and this continued throughout the project.<sup>86</sup> The ILC retained a determined focus to create a comprehensive system of responsibility with principles that would apply to all international legal persons. The idea of responsibility arising as a result of an internationally wrongful act that is constituted by a breach of international law that can be attributed to the responsible legal person is the same for both states and international organisations. In recognition of the different nature of organisations, the ILC incorporated some limited references to the rules of the organisation as part of the principles. The ILC also went further in developing a *lex specialis* principle to allow more specialised rules of regimes to be applied in place of the ARIO, therefore recognising the existence of different frameworks in place.

The growth of the project of responsibility of international organisations out of the law of state responsibility meant that there was little individual consideration of the nature of organisations before the codification of principles by the ILC. The way in which the foundations of the ARIO are found in the previous work on the ARSIWA is where the main critique of these articles began to develop. The approach of mapping the ARIO onto the previous principles of state responsibility is a sensible one: all international legal persons should be subject to the same rules. The difficulty is in the basis of the rules being grounded in foundations so focused around the state. The principles developed would not have been capable of considering the actions of the European Union, nor the large number of actors addressed by the ARIO. There would inevitably have been difficulties with these principles because of this focus.

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<sup>84</sup> Articles on the Responsibility of International Organizations, with Commentaries 2011, Yearbook of the International Law Commission, 2011, vol.II, Part.Two.

<sup>85</sup> United Nations General Assembly Resolution 66/100 of 9 December 2011.

<sup>86</sup> International Law Commission *Report on the work of its fifty-second session* (2000) A/55/10, Annex p.135 at p.136; International Law Commission *Report on the work of its fifty-fourth session* (2002) A/57/10 at pp.231-232.

### **2.3. The Limitations in the Foundation of the Law of Responsibility.**

The initial development of the law of responsibility begins to expose a number of limitations within the foundations of this law. These are difficulties that go to the very core of the law of responsibility through the initially limited development of the law of state responsibility. The individual focus of the principles of responsibility and their consideration of individual action had grown out of state based action and so could respond to the actions of states. Even when state action expanded and evolved, key principles such as attribution were able to evolve and respond to these actions.<sup>87</sup> The development of responsibility from the ARSIWA and into the ARIO has exposed the weaknesses that already existed in the law of responsibility.

The continued focus by the international system on states as the dominant international actors has severely restricted the expansion of the law of responsibility beyond state responsibility. Organisations remain, to an extent, outsiders in the international system and creating legal principles that apply to them remains problematic. The solution of the international system to this first difficulty has been to attempt to map principles developed in relation to states onto organisations. While a logical approach in attempting to create a coherent and comprehensive law of responsibility, this does raise a second consideration that complicates responsibility, namely the unique identity and nature of organisations.<sup>88</sup> Organisations are so fundamentally different to states that in attempting to apply state based principles to them, the international system is not actually addressing these actors of international law and is far too restrictive.

This substantial difference should not be underestimated and has left the ARIO subject to substantial criticism. The even greater differences between the EU and the state have created further critique. The identity of a state is known and understood, while organisations can vary substantially. While states are largely unified actors, the actions of which can, mostly, be recognised and understood, organisations are far more 'transparent' in their nature and their actions are not always as easily identifiable.<sup>89</sup> While states can be considered to exist in a 'closed' way, as unified actors capable of individual and determined action, organisations do not exist like this. As organisations have progressed in their development, there have been increasing attempts to develop increasingly

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<sup>87</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, ICJ Reports 1984, p.392.

<sup>88</sup> See for further explanation chapter three at pp.61-76.

<sup>89</sup> See in further detail, below chapter three at pp.74-76.

autonomous organisations with a centralised identity and their own '*volante distinct*'.<sup>90</sup> This is limited, however. The progression towards autonomy can only go so far. While it cannot be said that they are 'closed' actors, nor can it be said that they are entirely 'open' and that all action can be traced through the 'veil' of the organisation to the Member States. They exist somewhere between these two in a 'transparent' manner.<sup>91</sup> The existence of institutions is thus a 'layered' one with their internal workings sometimes visible and, more significantly, sometimes relevant in understanding particular actions. It is this transparent nature that differentiates organisations so substantially from states.<sup>92</sup> Making any determination of what action is that of the institution is, therefore, complex and uncertain.

The European Union, furthermore, takes this difficulty even further. It exists in an interdependent manner. The Union continually strives towards an independent identity at the international level but requires the actions and assistance of its Member States to do so: as the international action of the Union increases, as does its dependence on its Member States creating a complex international actor.<sup>93</sup> It is this interaction that results in the EU's identity as a complex international actor and it can only be governed and understood by reference to the internal norms and principles of the Union. Attempts to understand these interactions by reference to objective legal principles, such as those of responsibility, will suffer from the deficiency of not fully understanding the actor to which they are addressed, as well as potentially not fully understanding to which actor they should be addressed. The complex nature of the Union's international activities can lead to confusion as to which actor has committed an action, as well as who incurs responsibility.

A practical demonstration of the problem in determining responsibility when faced with the actions of institutions is evident in the *Behrami* case. The European Court of Human Rights (ECtHR) considered the actions of the KFOR and UNMIK forces acting in Kosovo came into question following the withdrawal of the troops of the Federal Republic of

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<sup>90</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.13-33.

<sup>91</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.29-33.

<sup>92</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.13-33; See for further explanation chapter three at pp.74-76.

<sup>93</sup> See for further explanation chapter four at pp.106-108.

Yugoslavia.<sup>94</sup> This deployment of the KFOR security presence had been originally enabled by a UN Security Council resolution.<sup>95</sup> The claims sought to argue that actions by French forces in the NATO led KFOR could be attributed to France and that, therefore, the Court had jurisdiction to hear the case and could rule on whether these troops had committed a breach of human rights in their actions.<sup>96</sup> The question that the Court needed to answer was whether the national contingents acted in a national or an international capacity and consequently who had been in charge of their actions. The ECtHR ultimately traced the actions of the troops in question back to the United Nations Security Council Resolution that had originally authorised the action. The UN exercised no real control over troops and the decision has been highly criticised but it serves to show the complex relationships that exist in international action involving institutions.<sup>97</sup> The relationship between an organisation and its Member States is often complicated and ultimately depends on the organisation itself. It is this unique identity and the way in which organisations are neither distinct autonomous entities, nor simply collections of the states that constitute them that poses such a challenge. They fall between these two ideas. At the very least *Behrami* shows the complexities that exist in international relationships and the resulting difficulties in determining who incurs responsibility. The consequence of these difficulties in *Behrami* was that ultimately no one was held responsible and individuals were left without redress.

### **2.3.1. Literature and Case Law on the Responsibility of International Organisations: the Criticisms.**

The early work on responsibility began to examine the pragmatic questions arising from the assumption that the legal personality of an organisation would lead to its legal responsibility. These questions ranged from what legal obligations are held by relevant

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<sup>94</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10, at paras.2-17.

<sup>95</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10, at paras.3-4; United Nations Security Council Resolution 1244 of 10 June 1999.

<sup>96</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10.

<sup>97</sup> M.Milanovic and T.Papic, 'As Bad as it Gets: The European Court of Human Rights' *Behrami* and *Saramati* Decision and General international Law', (2009) 58 *International Comparative Law Review* p.267; K.M.Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control Test' (2008) 19 *European Journal of International Law* p.509.

organisations,<sup>98</sup> to what happens in the case of mixed agreements and a cross over between the organisation and the Member States,<sup>99</sup> to the illegal conduct of Member States as a result of membership of an organisation, as just some examples.<sup>100</sup> There was a growing body of literature on the responsibility of international organisations that began to explore the more detailed questions in this area. The more specific and difficult questions surrounding the complexities of international organisations and the practical aspect of *how* legal responsibility could be determined began to come further into focus.<sup>101</sup>

A limited body of case law was also beginning to emerge as a result of the expanding competencies of international organisations.<sup>102</sup> There were actual cases arising in a variety of courts and tribunals that showed the practical questions surrounding the responsibility of relevant actors.<sup>103</sup> As these questions were further considered in the judicial arena, there were increasing acceptances of the potential for the responsibilities of international organisations. In the *Cumaraswamy* Advisory Opinion, the International Court of Justice

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<sup>98</sup> A.Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* p.851; C.Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* p.3.

<sup>99</sup> E.Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements', in E.Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (The Hague: Kluwer Law International, 2002) p.193; M.Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?' (2001) 70 *Nordic Journal of International Law* p.373; F.Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 *European Journal of International Law* p.723; C.Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin: Duncker and Humblot, 2001).

<sup>100</sup> S.Yee 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership', in M.Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005) p.435; J.d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 *International Organizations Law Review* p.91; E.Paasivirta, 'Responsibility of a Member state of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations' (2010) 7 *International Organizations Law Review* p.49.

<sup>101</sup> M.Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?' (2001) 70 *Nordic Journal of International Law* p.373; E.Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements', in E.Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (The Hague: Kluwer Law International, 2002) p.193; F.Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 *European Journal of International Law* p.723.

<sup>102</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10; *R (on the application of Al-Jedda) v Secretary of State for Defence*, [2008] 1 AC 332.

<sup>103</sup> *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257; *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* [1994] 2 WLR 126.

(ICJ) stated that the United Nations “may be required to bear responsibility”.<sup>104</sup> In making this statement, the ICJ explicitly recognised the potential for the legal responsibility of the UN.

As the literature grew and more case law emerged, international organisations were continuing to grow but without any development of correlative duties, posing a significant problem for the international legal system. As phrased by Hirsch, a situation cannot be tolerated “in which such an active actor in the global system may violate binding international norms without bearing the consequences in the sphere of international responsibility.”<sup>105</sup> Hirsch argues that this would undermine the ideas underpinning the principles of responsibility<sup>106</sup> but others have gone further arguing responsibility to be at the core of the international system.<sup>107</sup> Following this reasoning, allowing actors to violate international law and not bear the consequences would undermine the international legal system itself. Some claimed it was actually a customary international law rule that organisations could incur legal responsibility.<sup>108</sup> In spite of this, there had not been consideration of *how* this would apply or work with international organisations. These questions and discussions remained theoretical.

Alongside the more explicit literature on the responsibility of international organisations came literature on the European Union and its potential international responsibility.<sup>109</sup>

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<sup>104</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999 p.62 at p.89.

<sup>105</sup> M.Hirsch *The Responsibility of International Organizations Toward Third Parties* (Boston and London: Dordrecht, 1995) at p.8.

<sup>106</sup> *Ibid.*

<sup>107</sup> P.Reuter, ‘Trois observations sur la codification de la responsabilité internationale des États pour fait illicite’ in *Le Droit international au service de la paix, de la justice et du développement- Mélanges Michel Virally*, (Pedone, Paris, 1991), 390; reproduced in P. Reuter, *Le développement de l’ordre juridique international- Écrits de droit international* (Paris, Economica, 1995) p.574, in A.Pellet, ‘The Definition of Responsibility in International Law’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.3.

<sup>108</sup> C.F.Amerasinghe, *Principles of the Institutional Law of International Organizations* 2<sup>nd</sup> edn (Cambridge: Cambridge University Press, 2005) at p.400.

<sup>109</sup> A.Conze, *Die völkerrechtliche Haftung der Europäischen Gemeinschaft* (Baden-Baden: Nomos 1987); C.Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin: Duncker and Humblot, 2001); M.Björklund, ‘Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?’ (2001) 70 *Nordic Journal of International Law* p.373; C.Tomuschat ‘The International Responsibility of the European Union’, in E.Cannizzaro (ed.) *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002) p.177; E.Neframi, ‘International Responsibility of the European Community and of the Member States under Mixed Agreements’, in E.Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (The Hague: Kluwer Law International, 2002) p.193; P-J.Kuijper and E.Paasivirta, ‘Further exploring international responsibility: the European Community and the ILC’s project on responsibility of international organizations’, (2004) 1 *International Organizations*



The initial focus was an international law one, analysing the European Community as an example of an international organisation.<sup>110</sup> As the area has grown, however, there has been an increased recognition of the unique nature of the EU and consideration of the responsibility of the EU as an independent international actor. One of the original considerations of this question came with how the division between the EU and its Member States would be determined and discussed the question of, for example, mixed agreements and shared competences, which often led to a focus on the internal division of powers.<sup>111</sup> The focus remained on the internal aspects of the EU, rather than on any external set of principles or ideas. It had some limitations, therefore. It only considered one aspect of the question of responsibility.

This did develop further, with consideration of the extent to which international roles can develop and apply to the EU. This led to the question of the extent to which the European Union, as an entity in international law, warranted special treatment when it came to the question of responsibility.<sup>112</sup> Talmon has argued that it does not warrant special treatment and focuses upon the need to have a comprehensive system applicable to all.<sup>113</sup> Tomuschat, furthermore, argues that there is a strong foundation to consider the rules relating to states as a starting point and then begin to consider the more specific aspects of the

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*Law Review* p.111; E.Paasivirta and P-J.Kuijper, 'Does one size fit all?: The European Community and the responsibility of international organizations', (2005) 36 *Netherlands Yearbook of International Law* p.169; S.Talmon, 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M.Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005) p.405; M.Zwanenburg 'Toward a more Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Missions', in S.Blockmans (ed.) *The European Union and Crisis Management Policy and Legal Aspects* (The Hague: TMC Asser Press, 2008) p.395; F.Naert 'Accountability for Violations of Human Rights Law by EU forces' in S.Blockmans (ed.) *The European Union and Crisis Management Policy and Legal Aspects* (The Hague: TMC Asser Press, 2008) p.375; F.Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 *European Journal of International Law* p.723.

<sup>110</sup> C.Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin: Duncker and Humblot, 2001).

<sup>111</sup> M.Björklund, 'Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?' (2001) 70 *Nordic Journal of International Law* p.373; E.Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements', in E.Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (The Hague: Kluwer Law International, 2002) p.193.

<sup>112</sup> S.Talmon, 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M.Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005) p.405.

<sup>113</sup> *Ibid.*

responsibility of the EU.<sup>114</sup> The law of responsibility does not necessarily need to possess too many specialised rules.

In more recent discussions of the responsibility of the European Union, newer questions have arisen about the interaction of the EU not just with states and other organisations but also on the involvement of the EU with private companies and entities and what these relationships mean for potential responsibility.<sup>115</sup> These questions of control are relevant for the question of attribution and whether the EU can incur responsibility. It shows the way in which the EU has progressed to act as an increasingly active international actor. Its growth has been significant and it now shows a high degree of involvement with other actors, which only leads to further questions of responsibility.

#### **2.4. The Articles on the Responsibility of International Organisations: The Criticisms.**

The work of the ILC on the ARIO signalled a more detailed and specific attempt by the international system to address responsibility in detail and to develop comprehensive legal principles to address the evolving problem of the growing action of non-state entities. From its very beginnings this was a project being viewed as a continuation of the work on the responsibility of states.<sup>116</sup> The final set of articles further support this by describing the scope of the project as reflecting “what was left open in Article 57 on State responsibility.”<sup>117</sup> The ILC has viewed its work on responsibility as a coherent whole and this project is the latest chapter in this work.<sup>118</sup> The ILC does, however, define its various works on responsibility as distinct and any questions of responsibility of institutions remain entirely separate from those questions surrounding the responsibility of states.<sup>119</sup> The consequence in attempting this overall system, with some slightly distinct ideas has

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<sup>114</sup> C.Tomuschat ‘The International Responsibility of the European Union’, in E.Cannizzaro (ed.) *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002) p.177.

<sup>115</sup> N.White and S.MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’, (2008) 19 *European Journal of International Law* p.965.

<sup>116</sup> ‘Syllabuses on Topics Recommended for Inclusion in the Long-term Programme of Work of the Commission’ International Law Commission, *Report on the work of its fifty-second session* (2000), A/55/10, Annex at p.135.

<sup>117</sup> General Commentary to the Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.2.

<sup>118</sup> International Law Commission *Report on the work of its fifty-second session* (2000) A/55/10, Annex p.135 at p.135.

<sup>119</sup> International Law Commission *Report on the work of its fifty-third session*, (2001) A/56/10 at p.141.

been central to the difficulties with the ARIO. The difficulty with the grounded ideas of responsibility has meant that applying this to organisations, more particularly to the EU, would always have struggled and that slight distinctions would not be sufficient to address the difficulties with even the very foundations of international responsibility.

The ILC took a significant step in beginning this project. Questions surrounding the potential responsibilities of institutions have continued to arise and in making an attempt to address these difficulties, significant work has been done. This is not to say that this project has been entirely successful. The literature that has arisen since the ILC has developed a full set of draft articles has focused on a number of key criticisms of the approach taken by the ILC as well as its work in general. There are four main criticisms that can be identified; the ability of the articles to address the wide range of international organisations, the reliance on the articles on state responsibility and whether any close links can and should be drawn, the lack of existing practice upon which the articles are based and whether it is premature to develop these secondary obligations when often the primary obligations of organisations are far from certain.<sup>120</sup>

The majority of these criticisms return to the same difficulty, which is namely the limited work carried out by the ILC on the ARIO in their own right. This goes to the heart of the difficulties with these articles, as there is no real consideration of the individual nature of institutions. The critique of the ARIO as existing as a 'copy and paste' approach is perhaps unfair as some consideration was made by the ILC as to the capacity of principles drafted

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<sup>120</sup> N.Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations Seriously? A Mid-term Review', in J.Klabbers and A.Wallendahl (eds.) *Research Handbook on the Law of international Organizations* (Edward Elgar, 2011) p.313; C.Ahlborn 'The Rules of International Organizations and the Law of international Responsibility', ACIL Research Paper No 2011-03 (SHARES Series); P-J.Kuijper and E.Paasivirta, 'Further exploring International Responsibility: the European Community and the ILC's project on responsibility of International Organizations', (2004) 1 *International Organizations Law Review* p.111; E.Paasivirta and P-J.Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', (2005) 36 *Netherlands Yearbook of International Law* p.169; E.Paasivirta, 'Responsibility of a Member state of an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations', (2010) 7 *International Organizations Law Review* p.49; F.Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 *European Journal of International Law* p.723; See also P-J.Kuijper, 'Introduction to the symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 *International Organizations Law Review* p.9; N.Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' (2010) 7 *International Organizations Law Review* p.35; A.Reinisch 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 *International Organizations Law Review* p.63.

in the ARSIWA to apply to institutions.<sup>121</sup> This was not always a developed consideration but there was some discussion. An approach that had fully engaged in an attempt at analogous reasoning would have had the potential for a developed system of law. An attempt at a comprehensive approach, in that sense, would enable an overall system of responsibility that responded to different legal actors within it. This is not, however, what was attempted by the ILC. Any consideration of how the different sets of articles should differ was only dealt with briefly and simply did not fully consider the differences that needed to be accounted for with institutions. In approaching this without developing sufficient analogous reasoning, the ILC limited the capacity of these articles to apply to these different entities. The critique of the ARIO as having been an exercise of ‘copy and paste’ from the principles of state responsibility is too severe. The criticism fails to recognise that the ARIO are able to make some distinctions between different actors. While the critique may be too harsh, it is important to recognise that the basis of the ARIO as being so grounded in the principles of state responsibility does mean that there are some substantial limitations in the basis of the ARIO. This is not simply a problem with the ARIO, but with the law of responsibility as a whole.

The movement by the ILC in attempting to expand the law of responsibility beyond the state shows positive recognition of the need to develop this law to respond to the growth of actors within international law. This was concluded quickly, however. In spite of a number of substantial questions remaining, the ILC sought to conclude this project rather than to fully explore this area.<sup>122</sup> The very foundations of the law of responsibility, as identified within the ARIO, are brought into question when considering the nature of the actors being considered here. The very foundations of the way in which responsibility is conceived, struggle when faced with the transparency of institutions, and they struggle even more so when considering the European Union.

The very foundation of responsibility is focused around determining responsibility as a singular principle: the principles on responsibility are drafted to establish action and, from this, responsibility as belonging to an individual actor. When considering the transparent

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<sup>121</sup> J.Wouters and J.Odermatt ‘Are all International Organizations Created Equal? Reflections on the ILC’s Draft Articles of Responsibility of International Organizations’, Leuven Centre for Global Governance Studies, Global Governance Opinions, March 2012 at p.7; J.d’Aspremont ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’, (2012) Amsterdam Law School Legal Studies Research Paper No.2012-95 at p.1.

<sup>122</sup> J.d’Aspremont ‘The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility’, (2012) Amsterdam Law School Legal Studies Research Paper No.2012-95 at pp.1-2.

nature of institutions, and of the Union, many of the difficulties in the law of responsibility come down to the difficulty in reconciling this complex identity with this nature of responsibility. There may have been some attempt to develop an objective system of responsibility in the ILC's original work on state responsibility but this just did not go far enough. The difficulty in expanding principles with this limited foundation beyond the state is significant. The original principles respond to the traditional forms of state activity, yet the international legal system is now arguably much more complex. It is the difficulty of the international system in expanding beyond its state based focus that has stunted the development of the law of responsibility and caused significant problems in considering the actions of entities beyond the state, in particular the European Union.

## **2.5. Conclusion.**

Responsibility is a central principle to any legal system and has long been accepted in the international legal system. The initial work on the law of responsibility was created and developed within traditional foundations of the international system. In spite of attempts to develop this system beyond the idea of international law regulating relations between sovereign states, the focus of the law of responsibility has remained a singular one; the law of responsibility is designed to respond to bilateral relations. This can particularly be seen, for example with the focus and importance of a principle such as attribution. There is a requirement to establish action and, consequently, responsibility as that of a singular action in order for responsibility to arise. This is highly problematic when considering the way in which relations at the international level have changed. It has been the difficulty of the international system, as a whole, in moving beyond these foundations and being able to address actions of, for example, international organisations that has affected the development of international law as a whole but also more particularly the law of responsibility.

These limitations could be addressed within the confines of the law on state responsibility due to the unified nature of the state and the fact that the principles of responsibility were responding to a system that was built around the state. In developing beyond this, however, these limited foundations have become exposed and now, even within the previously relatively settled law on state responsibility, problems can be seen.

There was an attempt by the ILC to respond to the criticisms of the ARIO as being too heavily focused on the actions of states. In developing references to the 'rules of the organisation', as well as developing a *lex specialis* principle, the ILC sought to enable the ARIO to respond to the individuality of international organisations. With the foundations

of the law of responsibility and the development of these foundations into principles of responsibility so heavily entrenched within the traditional ideas of international law as a system focusing upon bilateral state cooperation, this was always going to be insufficient.

The nature of international organisations differs substantially from that of states, which leaves international law struggling to accommodate international organisations and this is only exacerbated with the growing numbers and actions of these entities. International organisations do not possess the unified nature of a state but instead exist in a transparent manner. This fundamentally challenges the basis of international law and, in particular, challenges the singular nature of responsibility. Considering the tension that exists in the attempts of international law to accommodate organisations is central to understanding the weaknesses within the ARIO.

### **3. The Complex Nature of International Organisations within the International Legal Order and the complications of the ARIO.**

The difficulty in attempting to develop the law of responsibility to address international organisations was inevitable. The identity of international organisations is complex and the one-dimensional nature of international law struggles to accommodate these actors even at a general level. This struggle lies at the core of the attempt of international law to develop in response to these growing actors. The principles drafted on the responsibility of international organisations, more specifically, suffer from these limitations due to their continued focus upon the principles developed in relation to states. There has not been any full attempt to address the different nature of international organisations, and yet it is this different nature that poses such a difficulty for the ARIO.

The exponential growth of international organisations, in both number and competence, since the end of the Second World War has not only meant a need to address their growing powers but has also continued to affect the way in which they are addressed and accommodated within the international legal system. They were initially hailed as the institutional fora to provide a check on the power exercised within the state-based system of international law. In turning to international organisations as some kind of distinct institutional framework within international law, scholars seemed to espouse the hope that a centralised framework would emerge that would enable the comprehensive development of an international rule of law. This was not to be the case, however. In order to develop such a rule of law, the decentralised nature of international law needs to be fully understood and within this, a system of responsibility developed to address all international actors. The retention of the one-dimensional nature of international law and the growth of organisations and their distinct identity now only poses a further challenge for international law in its attempts to develop responsibility.

The difficulty posed by international organisations for international law arises from the 'transparent' nature that organisations have developed, as they have expanded in ability. Organisations have grown to exist simultaneously as 'open' structures that exist as collectives of states and 'closed' structures that are distinct legal entities. Within an international legal system that is largely one-dimensional in its focus around the state, this 'transparency' causes particular difficulty; the international legal system is not capable of addressing these different actors. The law of responsibility particularly struggles with the different nature of these actors.

Responsibility is ultimately a moral idea; wrongs must be redressed. In order to apply any moral considerations, the actions of these actors must be understood and it must be possible to make a determination that these actors are capable of having committed certain actions and are therefore capable of incurring responsibility. This is complex at the international level due to the focus and dominance of collective actors rather than individuals. In order to consider responsibility of collective actors, there needs to exist some principle of moral agency. The international system has addressed this with states through the principle of attribution. The transparent nature of international organisations limits the ability of the international system to further develop the application of the principle of attribution. These limitations mean that the crucial element of moral agency is substantially limited.

This chapter argues that the nature of institutions cannot be accommodated within the limited foundations of the international legal system. The one-dimensional nature of the system cannot fully comprehend the transparent nature of institutions and its attempts to address these actors are, consequently, limited. The chapter begins by considering the way in which international organisations have developed in their own right and within the international legal system. It then analyses the nature of institutions as transparent actors and the way in which this is a fundamental aspect of the nature of institutions and one that keeps on developing. This difficulty with the nature of institutions goes to the core of the difficulties with the law of responsibility; it is difficult to determine action as that of an organisation *or* that of a Member State of that organisation due to the transparent nature of this action. This is foundational to the problems with the law of responsibility. In order to address this, the chapter finally considers the fundamental difficulty in the law of responsibility responding to these transparent actors: the moral agency of these actors and their capacity for incurring responsibility.

### **3.1. The Growth of International Organisations: a Challenge for the Basis of International Law?**

International law finds its foundation in the idea of the sovereign state. The gradual acceptance of the notion of the state as a form of political organisation in the eighteenth century following its beginnings in the aftermath of the Peace of Westphalia coincided with a strengthening of the idea of sovereignty and its entrenchment in the idea of the state.<sup>123</sup> The strengthening of the external aspect of sovereignty, in particular, reinforced

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<sup>123</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.37-38.



national boundaries. It provided the fundamental underpinning of the international system as a legal order focused around the state as the sole subject.<sup>124</sup> By the late nineteenth century, international law moved away from its initial natural law origins. The structures of international law then developed, what has been perceived of as, a strongly positivist underpinning; the authority of norms developed by these structures was, and remains, dependent upon the acceptance, in procedural terms, of the actors whom the law binds.<sup>125</sup> This dependence upon voluntarism and the will of states as the core actors of the system became, and remains, a foundational aspect of the international legal system. This basis has pervaded, and continues to pervade, every aspect of international law.

Even as the international system has expanded to incorporate other actors, most particularly international organisations, the influence of the state has continued and, it is argued, was even initially reinforced by these actors.<sup>126</sup> Institutions existed largely as fora for state cooperation, simply reinforcing the sovereign nature of states by being entirely governed by their will and existing only to pursue goals of the state. The world had come to be organised on the “basis of the coexistence of States, and [...] fundamental changes [would] take place only through State action, whether affirmative or negative”.<sup>127</sup> This basis may have continued but as international organisations emerged at the international level, their expansion increasingly posed a challenge to this foundation.

A number of scholars initially viewed international organisations as inherently good actors, which could provide a necessary check on the power exercised by states and develop a stronger rule of law.<sup>128</sup> As actors entirely external to the state, institutions

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<sup>124</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.37-38; D.Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, (1996) 65 *Nordic Journal of International Law* p.385 at pp.406-408; P.Taylor, *International Cooperation Today: The European and Universal Pattern* (London: Elek, 1971) at p.28; P.Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (London: George Allen and Unwin, 1958) at pp.42-43.

<sup>125</sup> C.de Visscher, *Theory and Reality in Public International Law* (Princeton: Princeton University Press, 1968) pp.3-18; R.Collins, ‘Modern-Positivism and the Problem of Institutional Autonomy in International Law’, in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.22 at p.22.

<sup>126</sup> R.Collins, ‘Modern-Positivism and the Problem of Institutional Autonomy in International Law’, in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.22 at p.22; A.Nussbaum, *A Concise History of the Law of Nations*, Revised edn, (New York: MacMillan, 1954) at p.232.

<sup>127</sup> P.Jessup, *A Modern Law of Nations* (Macmillan, 1948) at p.17.

<sup>128</sup> H.Lauterpacht, ‘The Covenant as the Higher Law’, (1936) 17 *British Yearbook of International Law* p.54; H.Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950); H.Kelsen,

provided a forum beyond the state where the state, and significantly its sovereign function and values, could be questioned.<sup>129</sup> As organisations grew in competence and moved from the initial idea of state cooperation further towards more contemporary organisations with a distinct identity, there was a shift away from this view. From this early point, the tension that would come to exist at the core of organisations can begin to be seen. Organisations were created by states and acted in order to pursue the actions determined by those states and yet some scholars envisaged them taking on a higher role and in some senses ‘governing’ those states. The potential can be seen for organisations to exist simultaneously as distinct entities but also as entities through which the will of the state can be pursued. In order to fully comprehend the development of this tension and its existence at the very core of the identity of organisations, the emergence and development of organisations needs to be considered.

### **3.1.1. The historical development of international organisations: from conference to organisation.**

Some have traced the original idea of institutions and the need for state cooperation as far back as the Peace of Westphalia in 1648.<sup>130</sup> It was this idea of cooperation among the sovereign actors within the international system, to better achieve for their own interests, which precipitated the beginnings of contemporary organisations. It was only in the early nineteenth century that a move towards international cooperation among states was seen, and the beginnings of contemporary organisations, with, for example, the Congress of Vienna in 1815. These early ideas of institutions were, however, largely focused on cooperation among states and existed largely for this purpose.

Brölmann identifies two trends that assist in describing the beginnings of contemporary organisations; political cooperation as witnessed in the conference system of the Concert

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*Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-1941*, (Cambridge (Mass): Harvard University Press, 1942); T.Franck, ‘United Nations Based Prospects for a New Global Order’, (1990) 22 *New York University Journal of International Law and Politics* p.601; R.Collins and N.White, ‘International Organizations and the Idea of Autonomy, Introduction and Overview’, in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.1 at p.2.

<sup>129</sup> D.Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2007).

<sup>130</sup> P.Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (London: George Allen and Unwin, 1958) at pp.46-47; R.Collins and N.White, ‘International Organizations and the Idea of Autonomy, Introduction and Overview’, in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.1 at p.1; A.Nussbaum, *A Concise History of the Law of Nations*, Revised edn, (New York: MacMillan, 1954) at p.115.

of Europe; and an increasing amount of technical cooperation among states, as seen, for example in the public international unions.<sup>131</sup> Brölmann goes on to describe the contribution made by each of these trends to the modern concept of international organisations. The conference system, on the one hand, developed the purposes of organisations, as fora for cooperation for achieving more than individual states were capable. The goal behind this cooperation was to preserve and protect the sovereign interests of those states cooperating, but another more significant purpose can be seen with the acceptance that there were certain goals and desires of states that were only achievable if states worked together.<sup>132</sup> Organisations, as collections of states, were better able to achieve certain goals than individual states.<sup>133</sup> This showed the start of organisations being more than just collectives for states to pursue individual aims.

As organisations began to be created for specific technical cooperation, there was some acceptance of an international institutional framework.<sup>134</sup> These desires were often the result of increased technical progress and the global exploitation of new and vast sources of energy, as seen with organisations existing to pursue goals such as railway and postal and telegraph systems. The river commissions were established, quickly followed by the International Telegraphic Union in 1865, the Universal Postal Union in 1874 and the International Union of Railway Freight Transportation in 1890.<sup>135</sup> The developments seen in accepting an institutional framework saw a movement from cooperation to permanency, which is crucial to understanding the movement from conference to organisation. This

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<sup>131</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.39-40; P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.5-8; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at p.16.

<sup>132</sup> R.Collins and N.White, 'International Organizations and the Idea of Autonomy, Introduction and Overview', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.1 at p.2; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.27-30.

<sup>133</sup> R.Collins and N.White, 'International Organizations and the Idea of Autonomy, Introduction and Overview', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.1 at p.2; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.27-30; J.Klabbers, 'Autonomy, constitutionalism and virtue in international institutional law', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.120 at p.121.

<sup>134</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.39.

<sup>135</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at p.16; C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.42.

development of organisations for technical cooperation, furthermore, saw a system of cooperation existing within a *permanent* institutional framework. This combination of cooperation within a degree of permanency forms the very foundation of modern international organisations. It, furthermore, begins to further develop the balance at the core of the identity of institutions; organisations exist both as groups of actors and as distinct actors in their own right.

It was with the creation of the League of Nations that this advent of a new stage in international law was signalled; there was an attempt to move beyond temporary cooperative conferences towards something more permanent. It signalled the beginnings of moves away from a purely state based system of international law and towards some idea of an international community.<sup>136</sup> The idea of a permanent body with its own institutions and a broader remit than the functional purposes of the conferences may have begun with the League, but its failings left it incapable of fulfilling this role, and its primary purpose of preventing war.<sup>137</sup> It showed a real attempt at an autonomous institution with international legal personality. Its limitations, however, affected its development within the international legal system. Some of the errors seen in the basis of the League of Nations were addressed in the creation of the United Nations. The movement seen after the Second World War with the UN showed a renewed attempt at the progress towards international institutions. While the UN retained an existence fundamentally as a collection of states, it also developed permanent legal and political organs. The UN showed a move away from institutions existing as collections of states and towards a greater independent identity.<sup>138</sup> The international arena began to attempt to progress beyond the bilateral relations between states and further towards an integrated objective system addressing all international actors: towards a new era of international law.<sup>139</sup>

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<sup>136</sup> A.Nussbaum, *A Concise History of the Law of Nations*, Revised edn, (New York: MacMillan, 1954) at p.252.

<sup>137</sup> P.Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (London: George Allen and Unwin, 1958) at pp.210-212; P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.9-10; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> Edn, (Cambridge: Cambridge University Press, 2009) at pp.17-18.

<sup>138</sup> *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.179; D.J.Bedermann, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', (1996) 36 *Virginia Journal of International Law* p.275 at pp.367-372.

<sup>139</sup> D.J.Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', (1996) 36 *Virginia Journal of International Law* p.275 at p.279.

Organisations were emerging in a wide variety of subject areas from economics and trade,<sup>140</sup> to aviation,<sup>141</sup> the law of the sea,<sup>142</sup> amongst others, as well as the beginnings of regional organisations.<sup>143</sup> Following the establishing of the UN came a proliferation of organisations. The Bretton Woods Organisations beginning in 1944 to address future economic cooperation and the General Agreement on Trade and Tariffs (GATT) showed one move towards growth.<sup>144</sup> Economics was not the only focus, with the main concern being the desire to prevent war and conflict in the future. The North Atlantic Treaty Organisation (NATO) was created to ease relations among states, as well as the Conference on Security and Cooperation in Europe (CSCE), which later developed into the Organisation for Security and Cooperation in Europe (OSCE).

Europe became a particular hub of activity for these developments. The creation of the Council of Europe in 1950<sup>145</sup>, the European Coal and Steel Community (ECSC) in 1951 and the numerous developments that followed with the European Economic Community and the European Community for Atomic Energy and the eventual subsuming of these into the unique organisation that became the European Union saw significant progress.<sup>146</sup> The EU therefore has a long-standing history and has developed extensively from its origins. The beginnings of the EU showed one of the initial attempts to activate a shift within the international arena. It only continues to evolve and so provides an interesting organisation to consider. It was originally grounded within international law, being created by treaty and being considered by the European Court of Justice as a “new legal order of *international law*”.<sup>147</sup> It was only later that the greater developments and integration precipitated arguments of a sui generis entity. As the EU progressed away from its foundations as a system of state cooperation, it increasingly integrated and the moves towards its own legal order differentiated it internationally from any other actor. While

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<sup>140</sup> P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.116-118; Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22 1944, 2 UNTS 39; General Agreement on Tariffs and Trade, Geneva, 30 October 1947, 55 UNTS 187.

<sup>141</sup> International Civil Aviation Organisation, Convention on International Civil Aviation, signed at Chicago on 7 December 1944, Ninth Edition, Doc. 7300/9.

<sup>142</sup> Article 156, United Nations Convention on the Law of the Sea of 10 December 1982 1833 UNTS 397.

<sup>143</sup> Treaty establishing the Coal and Steel Community 1951, Paris, 18 April 1951.

<sup>144</sup> Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22 1944, 2 UNTS 39; General Agreement on Tariffs and Trade, Geneva, 30 October 1947, 55 UNTS 187.

<sup>145</sup> Statute of the Council of Europe, signed in London 5 May 1949 CETS No. 001.

<sup>146</sup> Maastricht Treaty on European Union (1992) *Official Journal C 191*, 29 July 1992.

<sup>147</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

institutions were evolving, the Union progressed far beyond the developments seen with other, more typical, international organisations and now poses an even greater challenge to the international system.<sup>148</sup> Rather than forming part of an institutional framework to provide a check on the exercise of power by states, organisations and, more so, the EU, in fact have increased the need for a more comprehensive system to address the exercise of power.

The original conception of international organisations as simple methods of intergovernmental cooperation among sovereign states has become less common.<sup>149</sup> The growing emphasis on international organisations possessing a 'separate will'<sup>150</sup>, as well as the question by some as to the requirement of legal personality<sup>151</sup> has shown a shift in the nature of international organisations as increasingly permanent and established entities. This shift saw a move away from the view of organisations precipitated in the post war period of organisations as the inherently 'good' entities that could provide the needed institutional framework at the international level.<sup>152</sup> There was an increasing view of institutions as, in fact, also needing to be addressed by such an institutional framework developing an international rule of law. As institutions have emerged as autonomous actors and developed further autonomous relationships, concerns over accountability and responsibility have significantly increased. The move towards increased control would thus better develop the efficacy of international law, however the attempts at this development have remained limited and, to an extent, unsuccessful.

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<sup>148</sup> See for further explanation chapter four at pp.106-108.

<sup>149</sup> D.Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* p.840 at pp.841-842; C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.66; Also see for further explanation discussion on the definition of international organisations at pp.62-65.

<sup>150</sup> N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at pp.1-2; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.11-12; P.Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (London: George Allen and Unwin, 1958) at p.195.

<sup>151</sup> I.Brownlie, *Principles of Public International Law* 7<sup>th</sup> edn, (Oxford: Oxford University Press, 2008) at pp.676-679; I.Seidl-Hohenveldern 'The Legal Personality of International and Supranational Organizations', (1965) 21 *Revue égyptienne de Droit International* p.36 at p.66.

<sup>152</sup> H.Lauterpacht, 'The Covenant as the Higher Law', (1936) 17 *British Yearbook of International Law* p.54; H.Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950); H.Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-1941*, (Cambridge (Mass): Harvard University Press, 1942); T.Franck, 'United Nations Based Prospects for a New Global Order', (1990) 22 *New York University Journal of International Law and Politics* p.601; R.Collins and N.White, 'International Organizations and the Idea of Autonomy, Introduction and Overview', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.1 at p.2.

The attempts to answer these concerns over accountability and responsibility remain fundamentally flawed due to the foundation of the international system in the will of the state, but more fundamentally because of the nature of international organisations. This has begun to become evident when considering the evolution of organisations. The nature of international law leaves it struggling to accommodate international organisations due to their highly distinct nature and the way in which they differ so substantially when compared with states. It is this 'transparent' nature of organisations that must be understood in order to understand the general difficulties of international law when addressing organisations and the more specific issues in developing principles of responsibility of international organisations.

### **3.2. The complex, 'transparent' identity of International Organisations**

As international organisations have developed their powers, they are increasingly able to display their autonomy.<sup>153</sup> The autonomy of institutions is continuing to grow, which is raising an increasing number of questions over their legal responsibility; for an international actor to incur responsibility, they must display autonomy.<sup>154</sup> The growth of institutions as autonomous, independent actors will never be entirely complete, however. The Member States of institutions continue to play a key role in the powers, abilities and actions of organisations. The continued functionalist nature of organisations, for example, means that any action of the organisation is limited to the powers granted by the Member States of the institution in order to enable the pursuit of the specific function.<sup>155</sup> This role of Member States as governing the capacity of organisations shows a significant amount of power, therefore showing the continued dependence of the organisation upon its Members. Irrespective of the extent to which organisations progress towards an autonomous identity, their very basis and powers still depend upon their Member States.

This shows two, arguably conflicting natures within the development of organisations, leaving them unable to fit into the existing conceptions of an international actor. States can

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<sup>153</sup> V.Engström, 'Powers of Organisation and the Many Faces of Autonomy' in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.213.

<sup>154</sup> J.Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law' in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.120, at p.122; A.Sari, 'Autonomy, Attribution and Accountability. Reflections on the *Behrami* case', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.257 at p.257.

<sup>155</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.25.

be said to exist as 'closed' structures; they are unified international actors, the actions of which are only seen as those of the state. The original ideas of organisations, however, existed in a more 'open' sense; it was possible to look 'through' the organisations to the actions of Member States and to see these actions as those of Member States.

Organisations now exist, however, somewhere between these two ideas. There is a constant tension between an existence as a closed actor and one as an actor that is open. The consequence is an existence as a transparent actor, the nature of which is complex within an international system only used to dealing with a certain type of international actor.

The transparent nature of organisations and the problems of international law in coping with the unique character of organisations form the basis of the following discussion. The nature of organisations will be considered through an initial examination of the question surrounding the definition of organisations. This section then seeks to examine the unique nature of organisations as, what some academics have termed, 'transparent' actors.<sup>156</sup> The development of organisations as international legal persons and then as increasingly autonomous actors is central to the development of this unique 'transparent' nature of organisations. These two elements of personality and autonomy are necessary for responsibility to be incurred but they exist in a distinct way when considering organisations. The precise nature and development of these ideas within organisations, therefore, needs to be considered. Before that, however, the initial question of the definition of an international organisation needs to be addressed.

### **3.2.1. The Definition of an International Organisation.**

There is no generally accepted definition of an international organisation.<sup>157</sup> The variety of actors existing within the umbrella term of 'international organisation' is so wide ranging that any definitions that have been mooted have had to be incredibly broad, for example, a simple distinction from non-governmental organisations.<sup>158</sup> Within international academic scholarship three core ideas seem to continually be the focus. These requirements can be identified as an entity having (a) a State basis, (b) some element of permanency, and (c)

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<sup>156</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007).

<sup>157</sup> N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at p.1; C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.13.

<sup>158</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007), at p.14; Resolution 288(X) of 27 February 1950; amplified by Resolution 1296 (XLIV) of 25 June 1968.



some degree of autonomy from its Member States.<sup>159</sup> Klabbers considers, for example, the need for (a) states to have created the organisation; (b) creation by treaty; and (c) the possession of an independent will.<sup>160</sup> Schermers and Blokker, furthermore, state their three defining elements to be (a) creation by international agreement; (b) having at least one organ with a 'separate will'; and (c) being established under international law.<sup>161</sup> Bowett's identifies a set of five criteria, again, in a similar vein to the rest, being (a) membership composed of states and /or other organisations; (b) established by treaty; (c) the existence of an autonomous will distinct from its members; (d) the possession of legal personality; and (e) the capacity to adopt norms addressed to its members. From all of these considerations, the definition of an institution remains far from certain, but in drawing upon all of these ideas, a number of characteristics of international organisations can be identified to understand the challenge that they pose.

Of definitions put forward, that put forth by Virally has proven popular with a broad range of international academic scholarship.<sup>162</sup> He states that an organisation is "an association of States, established by agreement among its members and possessing a permanent system or set of organs, whose task it is to pursue objectives of common interests, by means of cooperation among its members."<sup>163</sup> Several core ideas can be identified within this definition (a) an inter-State system, (b) voluntary nature, (c) permanent system, (d) with its basis in cooperation and the common interest of its members, showing a core set of similar elements in many academic considerations.

When beginning its work on the responsibility of international organisations, the ILC needed to develop a definition of international organisations to enable a firm basis upon which to develop its work. When considering the previous academic work, the ILC came up with a workable definition, if remaining somewhat general:

"For the purposes of the present draft articles:

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<sup>159</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.17.

<sup>160</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.6-12.

<sup>161</sup> H.Schermers and N.Blokker, *International Institutional Law: Unity within Diversity*, 4<sup>th</sup> edn, (Martinus Nijhoff, 2003) at §§32-46.

<sup>162</sup> N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at p.2.

<sup>163</sup> M.Virally, 'Classification of International Organizations: A Legal Approach', in G.Abi-Saab, *The Concept of International Organizations* (Paris: UNESCO, 1981) at p.51.

international organisation” means an organisation established by treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities.”<sup>164</sup>

The two main elements of state involvement and some sort of separate nature, be it through a separate ‘system or organs’ or through international legal personality, appear to be central to most definitions. Interestingly, however, when compared with other academic discussions, there is no specified requirement of a separate will or element of an autonomous nature. While considered core to some other definitions, the degree of independence of an organisation has not always been considered in definitional terms.

The definition itself may be clearer than previous attempts but it remains very wide-ranging. It requires three initial criteria of (a) an international law basis, (b) international legal personality and (c) membership to include, but not be limited to, states. While this is the definition that will be considered in this framework, an understanding should be had of the three parts to this definition and how they fit within the general ideas of international organisations. The requirement for relevant organisations to be established by international law instruments to be addressed by the ARIO is clear; principles of international law should only apply to those actors engaged with the international law framework. The consideration of members not being limited to states simply recognises the broad category of actors to which these articles will apply. The requirement that organisations have legal personality is a definite one; in order to incur responsibility, an actor must possess legal personality. In a project on responsibility, only those actors in possession of legal personality can be considered. The status of international organisations and the way that they vary so significantly is a major challenge for the international legal system and the way in which it can govern activities. The definition developed by the ILC works for the purposes of the ARIO, in being broad enough to encompass any potential actors. The extent to which it can further develop an understanding of institutions is perhaps limited due to the significantly broad nature it possesses. The extent to which it is possible to have any sort of definition clearer than that established by the ILC is questionable.

The explicit requirement of personality is an element that does require further consideration, however. In order to incur responsibility, an actor must possess legal personality. At its most basic, personality is the ability to act at the international level; it is

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<sup>164</sup> Article 2(a), Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two.

the ability to possess rights and to incur duties and it is, consequently, a prerequisite for responsibility. The determination of personality of organisations, as well as its meaning, has not always been straightforward and requires some examination in order to understand its relevance for the international identity of organisations.

### **3.2.2. International Organisations as International Legal Persons: Moving Towards a Transparent Identity?**

In the immediate post-war period it was not considered possible for organisations to possess personality because of the strong association that personality had with the idea of state sovereignty. In 1949, however, the ICJ first determined the capacity of an organisation to have legal personality:

“In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.”<sup>165</sup>

Once existing as subjects of international law, organisations were capable of possessing rights and most importantly *duties*.<sup>166</sup> This judgment, along with the varying perspectives that followed on how precisely to determine the existence of legal personality is demonstrative of the lack of a coherent perspective on organisations, particularly with the continuing debate on the origins of personality and how it should be determined. The reasoning of the Court is significant in understanding the development of institutions within the international system. Bedermann argued that this case signalled “the final days of the law of nations” bringing in the era of “international law”.<sup>167</sup>

The Court only concerned itself with the position of the UN vis-à-vis its members and did not venture into the questions surrounding the position of non-members.<sup>168</sup> It seems to use personality to identify rights of the UN and thus the position appears to be that when rights exist in favour of an organisation against its members, then personality exists. There also seems to be recognition by the Court that personality should flow from the Charter,

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<sup>165</sup> *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.179.

<sup>166</sup> *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.179; P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.517-518.

<sup>167</sup> D.J.Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’, (1996) 36 *Virginia Journal of International Law* p.275, at p.279.

<sup>168</sup> J.Klabbers, ‘The Concept of Legal Personality’, (2005) 11 *Ius Gentium* p.35 at p.51.

and consequently there is an acceptance of the initial idea of personality only being conferred by members of an institution. The interesting aspect to this is the recognition of personality as a requirement, followed by a failure by the Court to identify any conferral within the Charter. There is also, recognition of personality as being a *condition sine qua non* and thus being necessary for the capacity to act within a given legal situation.

There is a suggestion that personality must exist before action can take place, but the way in which the Court reasons this seems to suggest that personality exists as nothing more than a declaration of various rights, duties and competences possessed by an institution.<sup>169</sup> If this were the case, then it would significantly raise the question as to the point in identifying, or even discussing personality. It can be seen, however, that together with a declaratory role, personality also possesses a constitutive role.<sup>170</sup> Klabbers argues that these two roles of personality can be seen and that the consequence is that personality acts to give recognition and identity to collective entities. This recognition can then potentially shield and protect actions as that of the group. In some ways, therefore, personality can be seen as more political than it is legal.<sup>171</sup> The reasoning given by the Court on personality, while in some ways able to be criticised as limited and circular, in other ways shows a significant amount about the views on personality held within international law. It is an important principle within international law, and what can be seen here is that it was, and remains now, uncertain in definition and in meaning.

This complexity only continues when the question arises as to how to identify the desire of the founders of these organisations. The founding treaty may be the first place to look when determining whether an organisation has personality, however, finding an explicit conferral of such personality within a founding treaty is quite rare. Some academics have focussed entirely on the founding treaty in determining personality, considering any other approach as going beyond the intentions of the founders.<sup>172</sup> This approach is criticised by Hartwig, among others, because it makes organisations dependent upon their members, despite personality meaning that they have independence and their own rights and powers.<sup>173</sup> However, others consider that there is a constant link and dependence on Member States that cannot be severed even through the existence of personality; even

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<sup>169</sup> J.Klabbers, 'The Concept of Legal Personality', (2005) 11 *Ius Gentium* p.35 at p.55.

<sup>170</sup> J.Klabbers, 'The Concept of Legal Personality', (2005) 11 *Ius Gentium* p.35 at p.56

<sup>171</sup> J.Klabbers, 'The Concept of Legal Personality', (2005) 11 *Ius Gentium* p.35 at pp.65-66.

<sup>172</sup> C.Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, (Berlin: Duncker & Humblot, 2001) at p.29.

<sup>173</sup> M.Hartwig, *Die Haftung der Mitgliedstaaten* (Springer, 1993) at p.37.

when organisations progress towards independence, they will always remain somewhat dependent upon Member States. The reasoning here seems rather limited and stuck with the idea of standing conferences and cooperation between states, rather than, as the reality is, the emergence of new and powerful autonomous international actors. This seems a limited approach and wider theoretical perspectives on identifying legal personality have emerged as the dominant approaches in this area.

The two different traditional theoretical approaches to legal personality are the objective and subjective approaches. The objective approach considers that personality exists objectively as a matter of law and can be based on an 'organisation-hood' that is parallel to 'statehood'.<sup>174</sup> Seyersted identified the main criterion as the existence of a separate will of an organisation, but this does raise the problem of how to measure this separate will and the extent to which an organisation must have a will before it has personality.<sup>175</sup> The subjective approach, on the other hand, considers the intent of Member States as the determining factor; if Member States intended to grant legal personality then this will stand but otherwise there is no reason to grant this status. These are two substantially opposed positions, however, and following some debate a third approach was developed, namely the presumptive approach.<sup>176</sup> This is a pragmatic approach and goes some way to alleviating the complex theoretical debate that existed between the objective and subjective perspectives. The idea of 'presumptive' personality is that personality can be identified as soon as an organisation performs acts that can only be explained by the possession of personality.<sup>177</sup> This can perhaps be seen to be more in line with the reasoning of the Court in the *Reparations* case, with the idea of the intention of the founders in combination with the actions of the UN.<sup>178</sup> This can lead into quite circular reasoning, however; personality is determined by the conferral of powers and the powers can be inferred by the existence of personality.

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<sup>174</sup> F.Seyersted, 'International Personality of International Organizations: Do their capacities really depend upon their constitutions?' (1964) 4 *Indian Journal of international Law* p.1.

<sup>175</sup> *Ibid.*

<sup>176</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.46-52.

<sup>177</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.49-51; J.Klabbers 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.) *International Law Aspects of the European Union* (Kluwer Law International, 1998) p.231.

<sup>178</sup> *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion ICJ Reports, 1949, p.174 at p.179.

While the various perspectives do identify a variety of ways in which to determine personality, there is nothing certain about this area of law beyond the continuing need to return to the elusive 'desire' of the founding states. When this has not been expressly stated by Member States then there will always be some discussion as to whether it exists or not, as was seen with the long debate on the existence of legal personality of the European Union.<sup>179</sup> The only way in which this debate was finally concluded was with the inclusion of a provision granting legal personality on the EU in the Treaty of Lisbon.<sup>180</sup> The difficulty in being able to clarify the existence, or not, of legal personality, begins to show the significant paradox that exists when considering international legal personality. Legal personality generally suggests an importance of the international legal system as it would be the system that ought to grant this status; it is a status within the international system and thus should be conferred objectively within this system. The continued importance of the will of the states, however, undermines this idea. Irrespective of the perspective taken on personality, be it subjective, objective, presumptive or otherwise, the continued focus on the conferral of legal personality *from the Member States* furthers the view of organisations as having moved beyond an existence as a collection of states but as not completely independent from their creators. The consequence is a continued tension that shapes the identity of organisations as 'transparent' international actors, which will always prove a struggle for international law to accommodate.

The Court in the *Reparations* case showed this tension in their very first consideration on personality. The Court's reasoning is highly revealing in considering the unique nature of institutions. The reasoning of the Court shows the existence of the UN, and potentially other institutions, as 'communities' through which states participate in the international legal system and also independent legal persons on an equal level to those states.<sup>181</sup> The UN exists as both of these. While recognising the UN as an independent and unique international organisation, the Court necessarily had to ground it within the international

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<sup>179</sup> P.Craig and G.de Burca, *EU Law Text Cases and Materials* 4<sup>th</sup> edn (Oxford: Oxford University Press, 2008), J.Klabbers, 'Presumptive Personality: The European Union in International Law', in M.Koskenniemi (ed.) *International Law Aspects of the European Union* (Kluwer Law International, 1998) p.231; J.W.de Zwaan, 'Legal Personality of the European Communities and the European Union', (1999) 30 *Netherlands Yearbook of International Law* p.75.

<sup>180</sup> Article 47 Treaty of the European Union, OJ 2010 C83/01.

<sup>181</sup> R.Collins, 'Non-State, Inter-state or Supra-State? The Peculiar Identity of the Intergovernmental Organization' in J.d'Aspremont (ed.) *Participants in the International Legal System* (Abingdon: Routledge, 2011) p.311 at p.315; D.J.Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', (1996) 36 *Virginia Journal of International Law* p.275 at pp.371-374.

system and consequently ground the UN within this framework.<sup>182</sup> The Court seemingly created a paradox in its reasoning, which in fact reflects the nature of international organisations and shows some of the difficulties in understanding this nature.

The recognition of personality of the UN necessarily showed an understanding of the UN as an independent actor. Legal personality is generally considered to be the most important constitutive element of international organisations. The conferral, explicitly or implicitly, of personality indicates a certain distinction between the organisation and its Member States. It is important to recognise that organisations are not simply collections of states reliant on those states for any possible action, but rather they are actors in their own right. It distinguishes them from their own Member States, but also, and significantly, from other more traditional nineteenth century notions of state cooperation.<sup>183</sup> They are able to act as autonomous agents at the international level, and also have the capacity to breach international law.<sup>184</sup>

In its reasoning on personality, the Court retained a view of the UN as a collective of states. The Court viewed personality as dependent upon a conferral by the Member States; the UN “could not carry out the intentions of its founders if it was devoid of legal personality.”<sup>185</sup> This focus on the intention of Member States in order to determine the UN as an independent entity creates a degree of tension. The definition originally given by the ICJ on personality was effectively a very circular one; it possessed personality because possessing personality was the only way of explaining the legal powers that it was enjoying.<sup>186</sup> The judgment was seemingly a compromise between the different approaches to personality.<sup>187</sup> The Court arguably took quite a significant step in identifying personality at all, particularly at a time when concern surrounding the UN and the

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<sup>182</sup> R.Collins, ‘Non-State, Inter-state or Supra-State? The Peculiar Identity of the Intergovernmental Organization’ in J.d’Aspremont (ed.) *Participants in the International Legal System* (Abingdon: Routledge, 2011) p.311 at p.320.

<sup>183</sup> P.Sands QC and P.Klein, *Bowett’s Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at p.469.

<sup>184</sup> E.Butkiewicz, ‘The Premises of International Responsibility of Inter-Governmental Organizations’, (1981) 11 *Polish Yearbook of International Law* p.117 at p.122.

<sup>185</sup> *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.179.

<sup>186</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.78.

<sup>187</sup> C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at p.78; N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at p.44.

potential existence as a super-state was far more present than it is today.<sup>188</sup> The existence of a compromise between approaches was, however, perhaps a sign of the confusion that would continue to exist surrounding this term. As time has progressed, no more clarity seems to have developed around this term. The one aspect that the Court remained certain on, however, is that personality is a status that can be identified but, with international organisations, this cannot be said to define or confer any powers or capabilities.

Most particularly, these two views can be seen through the circular reasoning undertaken by the Court in establishing personality of the UN. Personality should be established as a result of Member State intention, which did not explicitly exist here but could be inferred as a result of the different powers and activities of the UN; personality existed because it was the way to explain the powers of the UN. This shows a simultaneous recognition of the UN as an independent actor, but that this independence was only established because of the will of the Member States that constitute it:

“It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.”<sup>189</sup>

This recognition showed the beginning of a new understanding of the strange multi-layered nature of institutions. The UN did not exist as a super state, nor an inter-state alliance, but a new different actor. The discussion by the Court on personality began to remove the sensitive nature of sovereignty from this discussion.<sup>190</sup> It is this different nature that defines the nature of institutions; they cannot be considered to be entirely independent but are yet more than simply a collection of states. Within an international system that is able to address either the ‘closed’ actions of states, or the ‘open’ action of a traditional conference of states, the ICJ here recognised the difficulty that would continue to exist within the foundation of the attempts of international law to address the actions of these transparent actors. It was not until the 1960s that the debate surrounding the increased role for organisations began to reduce and it began to be understood that there was an increasing role for organisations and this could develop without them developing

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<sup>188</sup> N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at p.44.

<sup>189</sup> *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.179.

<sup>190</sup> P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.469-470.



any form of sovereignty.<sup>191</sup> When considering the reasoning of the Court, personality becomes fundamental in understanding this new role for institutions. Personality is, furthermore, fundamental for determining responsibility. This link, in terms of organisations, would only really be fully explored later, however.

The conferral of personality is complex, but the consequences of such a conferral raise further questions. The original determination of personality of the UN by the Court does not consider any consequences of personality. The conferral of personality does not specify what any of those rights or duties are, rather it simply confers the potential ability to have such rights or exercise certain competencies.<sup>192</sup> It is a starting point from which the ability to have powers is able to emerge but does not confer specific powers in itself, to determine the purposes and capacities of individual organisations need to be considered.<sup>193</sup> The powers and abilities of international organisations are determined by the will of the founders but there has been an acceptance of implied powers, those being powers essential to fulfil the functions of the organisation.<sup>194</sup> The development of this doctrine of implied powers shows, some have argued, a progression towards a greater independence of organisations within a coherent international community.<sup>195</sup> The overriding dependence on the will of Member States, however, somewhat weakens this idea and returns the nature of international law to one heavily grounded in the limitation of sovereignty.

Whatever perspective is taken on the identification of personality, ultimately the consideration has to be, in some form, the will of the founders of the organisation.<sup>196</sup> Whether this is by explicit statement, or by granting de facto personality through implication by considering the actions of the organisation, ultimately the will of the

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<sup>191</sup> P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at pp.469-470.

<sup>192</sup> N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at p.40.

<sup>193</sup> International Law Commission *Report on the work of its eleventh session* (1959) A/4169, in Extract from the Yearbook of the International Law Commission 1959, vol.II, A/CN.4/122, at p.96, para.8a; N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005), at p.32.

<sup>194</sup> *Reparations for injuries suffered in the service of the United Nations*, *Advisory Opinion ICJ Reports*, 1949, p.174 at p.182; *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, *Advisory Opinion of July 13<sup>th</sup> 1954 ICJ Reports* 1954 p.47.

<sup>195</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.63-64.

<sup>196</sup> P.Sands QC and P.Klein, *Bowett's Law of International Institutions*, 6<sup>th</sup> edn, (Sweet and Maxwell: London, 2009) at p.475.

founders is the focus.<sup>197</sup> The way in which the will of Member States remains the determining factor for establishing personality reflects the complexity at the core of organisations. In order to establish the extent to which the organisation is capable of acting independently and the extent to which it is moving towards an autonomous identity, the will of its Member States remains the determining factor. This continued dependence on Member States in moving towards an autonomous identity is one of the elements that shows the complex transparency at the core of organisations; institutions continue to exist in a way that is both an independent actor and also a collection of states. This complexity causes substantial difficulty for the principles of responsibility.

A determination of responsibility should flow from the existence of personality but the complexity of the nature of institutions means that responsibility is not this straightforward. What needs to be further considered is the extent to which organisations exist as autonomous actors. With responsibility existing to determine a singular actor as possessing responsibility, actors must possess a certain degree of autonomy to be established as a responsible actor. The extent to which organisations are capable of existing as distinct and autonomous actors is a difficult question. The idea of autonomy, however, is central to understanding the ability of international organisations to incur responsibility.

### **3.2.3. International Organisations as increasingly autonomous actors; the challenges for international responsibility.**

Autonomy is a flexible concept without a concrete definition. Autonomy means to have an element of independence and the ability to exercise authority to regulate your own behaviour.<sup>198</sup> While personality is an identifiable aspect that exists or does not, autonomy is relational; it exists in terms of degree.<sup>199</sup> It is used within the realms of international organisations to argue an element of independence and separate existence from the Member States of the organisation. There is an ability to move beyond simply cooperative

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<sup>197</sup> V.Engström, 'Powers of Organisation and the Many Faces of Autonomy' in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.213 at p.214.

<sup>198</sup> A.Sari, 'Autonomy, Attribution and Accountability. Reflections on the *Behrami* Case', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.257 at p.258.

<sup>199</sup> T.Gazzini, 'The Relationship between International Legal Personality and the Autonomy of International Organizations' in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.196 at pp.197-201; N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at pp.31-32.

state action and, as a corollary of personality, organisations can move beyond the members constituting it, and act independently. The very idea of international organisations necessarily exists around the idea of autonomy but as more modern international organisations have emerged, they are doing so with a greater degree of autonomy. The whole is considered to be more than the sum of its parts.<sup>200</sup> They have been created to enable and precipitate action that individual states would otherwise not participate in.

Autonomy, however, is a relational idea. It only works and has any meaning when juxtaposed with other legal orders.<sup>201</sup> The relational nature of autonomy is further considered through the different layers and forms of autonomy that may exist; the autonomy of an institution from the international legal system exists in a separate manner to the autonomy of the institution proper from its Member States. The gradual and flexible manner in which it exists, when compared with the black and white existence of personality, speaks to the nature of institutions as flexible entities. Autonomy cannot be identified as being there or not. This dependent and graduated nature of autonomy is something that affects the culpability of that 'independent' actor for its actions and, unfortunately, something that is not grasped by the international legal order when considering international organisations.

It is the attempt to consider organisations as entirely autonomous *and in consequence*, to have strict and complete independence from their Member States that determines the fundamental problems and questions at the heart of their responsibility. This clear-cut determination of who is acting is necessary for the current construction of responsibility but when considering the way in which organisations possess autonomy, it is often not possible. The extent to which organisations are considered as independent must be viewed together with the retention of a significant dependence by organisations on their Member States. As a result, it is this question of autonomy and, more particularly, the resulting transparency that requires a deeper examination of the law of responsibility in relation to these actors.

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<sup>200</sup> J.Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.120 at p.121.

<sup>201</sup> N.Tsagourias, 'Conceptualising the Autonomy of the European Union', in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.339 at p.345.

The autonomy of organisations goes to the core of the complexity that surrounds them. Bedermann described this complexity with organisations like the UN existing both as overarching ‘communities’, possessing a degree of autonomy and influence over their Member States and as independent legal persons co-existing on an equal plane to those same states.”<sup>202</sup> It is this dual existence that proves difficult for international law. While developing this autonomy, organisations are still constituted by, and limited by, states. In remaining, in some ways, instruments of states, responsibility remains something to be attributed back to the state as an actor. The gap that remains in international law in finding a way of adequately defining and addressing organisations results in this lacuna where it is often uncertain when the actions of organisations are those of organisations and when they are those of states. This has enormous consequences for the question of responsibility. Brölmann has helpfully termed this dual existence, the ‘transparent’ nature of organisations.

#### **3.2.4. Organisations as ‘transparent’ actors within international law.**

The transparent nature of international organisations creates a tension between the extent to which an organisation exists as a product of its Member States and the extent to which it exists and develops independently. This can relate to anything, such as the foundations of the organisation existing in a treaty and the extent to which a founding treaty possesses constitutional characteristics. It may address the ability of the organisation to develop its own powers or the extent to which the principle of implied powers exists. For the purposes of this research, however, this holds significant relevance for the potential responsibility of organisations and how actions can be considered that of the organisation or that of the Member States.<sup>203</sup>

The simultaneous independence and dependence and the resulting tension governing the law on international organisations has been discussed in terms of a ‘corporate’ or ‘institutional’ veil.<sup>204</sup> The analogy of piercing this veil has been used in considering the way in which to address these transparent organisations, with the argument being made that

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<sup>202</sup> D.J.Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’ (1996) 36 *Virginia Journal of International Law* p.275 at pp.371-374.

<sup>203</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at p.291; M.Hirsch *The Responsibility of International Organizations Toward Third Parties* (Boston and London: Dordrecht, 1995), see in particular chapter four; C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) at pp.32-33.

<sup>204</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at p.36; C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007).

on occasion, and in particular in the area of international responsibility, it may, on occasion, be necessary to determine a way of piercing the veil and tracing action back to Member States.

The idea of tracing responsibility through an organisation to its members goes against the very idea of organisations being autonomous actors, entirely separate from their members. Once international organisations possess international legal personality, to break through the veil and determine responsibility on the part of their members can offend the very basis of their personality. The House of Lords in the *Tin Council* case found it “impossible” to consider any form of joint or several liabilities on the part of Member States.<sup>205</sup> Much of this arose from the concern of breaking through the veil and the consequences that this may have for the integrity of an organisation. There exists some support for occasionally taking this action and piercing the institutional veil to determine responsibility, however, this is in combination with recognition of the autonomy of organisations not being able to be viewed in the traditional sense of meaning complete independence from its parts.<sup>206</sup> It cannot be possible to consider organisations to be independent of, and entirely separate from, their members and view their personality in the same way as that of states is viewed. It is the Member States that are responsible for creating the organisation along with controlling many of its actions, decisions and financial abilities.<sup>207</sup>

The concern in the literature that to prevent the piercing of this veil would enable the abuse of the legal personality of international organisations is a valid one.<sup>208</sup> Member States would potentially be able to evade responsibility by hiding behind this ‘veil’, or this stark division would generally prevent individuals from being able to find international justice in cases where for certain reasons responsibility of the organisation could not be determined.<sup>209</sup> This last concern can be seen in the breadth of literature critiquing the decision of the European Court of Human Rights in finding a lack of jurisdiction to hear the case of *Behrami* as the Court considered the disputed actions of the KFOR forces to be traceable not back to France, the state directly involved, but to the United Nations, over

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<sup>205</sup> *JH Rayner (Mincing Lane) Ltd. Appellants v Department of Trade and Industry and Others and Related Appeals Respondents* [1989] 3 WLR 969.

<sup>206</sup> J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at p.36; C.Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007).

<sup>207</sup> D.J.Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’, (1996) 36 *Virginia Journal of International Law* p.275.

<sup>208</sup> J.d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, (2007) 4 *International Organizations Law Review* p.91.

<sup>209</sup> *Ibid.*

whom the Court has no jurisdiction.<sup>210</sup> The way in which the claimants in *Behrami* were left without any way to determine the responsibility of any of the involved actors is precisely the concern in this area. While these are valid concerns, where the line on this could be drawn remains uncertain. There will be occasions when responsibility needs to go through the veil but how to conceive of this is far from certain.

The difficulty in 'piercing the veil' arises from the attempt to establish action as that of the organisation *or* that of one, or a number of, its Member States. It may be the case that there is a degree of interdependence or interaction between these actors. This may often be when the difficulty in deciding upon 'piercing the veil' is at its highest. It returns to the basic underlying idea of responsibility as a singular principle and the way in which this does not fit with the transparent nature of organisations. The nature of organisations does not easily allow for such a determination and in restricting the principles of responsibility to this foundation, they remain inevitably limited. A significant limitation in the foundation of responsibility that severely restricts the ability to address these transparent actors is that of moral agency, or the ability to link action and actor. The transparent nature of organisations shows that determining such a link would be fundamental and yet, it has had very little attention or development.

### **3.3. International Organisations and the Question of Moral Agency.**

The foundations of the law of responsibility are fundamentally limited and have retained a bilateral basis, showing itself through the singular concept of responsibility. This singular nature of responsibility has needed to ensure that responsibility must be determined on the part of the actor who has committed the wrongful acts. This becomes complicated in international law because of the prevalence of collective actors. This inevitably requires a concept of moral agency to determine where responsibility lies when considering these collective actors: when is it possible to trace action to an international actor, specifically to one that so substantially depends on interaction.

This is an element in the law of responsibility that has not been subject to any consideration and yet it is this that goes to the core of the difficulty of addressing any international actors within the law of responsibility. There was an attempt to address this question with states by developing the principle of attribution. The transparent nature of institutions poses an entirely new challenge, however. In order to definitively establish

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<sup>210</sup> See above chapter two pp.145-44; *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10.

action as that solely of an institutional entity, consideration must be had of moral agency. The only attempt thus far made to make the link between action and actor has been through further application of the principles of attribution. The limitations of this principle, and its inability to fully consider the potential for various international actors to possess the capacity for moral agency, is consequently a core problem within the law of responsibility. It is this complex, transparent nature of institutions and the unique nature of the EU that poses a significant challenge to the law of responsibility.

### **3.3.1. The Principle of Moral Agency.**

Even with its initial importance as a principle for reinforcing the sovereignty of states, the idea of responsibility inevitably has some moral element in its foundation.<sup>211</sup> The focus on responsibility as ensuring the rights of states can be said to have overtaken this moral element.<sup>212</sup> The basis of responsibility in the idea of obligation arises from the long recognised idea in human society that individuals should account for their actions.<sup>213</sup> Determining when an *individual* has committed any wrongs can be relatively straightforward; either individuals have acted or not and the way in which actions may be addressed has been long established in domestic systems. The dominance of collective entities in the international system provides an extra layer of complexity, which has not been addressed in any great detail within the international system.

When discussing collective actors a consideration needs to be had of moral agency to determine a link between the actor and the action: can collective actors be seen as acting in a singular manner and thus being able to take account for their actions? A moral agent must be an individual actor that exists as more than the sum of its parts. It has been considered to be an entity that is capable of reasoning action and deciding to act in a particular way; its action is determined and not spontaneous.<sup>214</sup> In international law terms, an analogy can be drawn with the discussions surrounding the autonomy of international actors; international actors must be autonomous in order to be capable of existing as a moral agent. It is this capacity for determining action that is central to determining any

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<sup>211</sup> C.Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928) at pp.3-5.

<sup>212</sup> C.Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928) at p.6.

<sup>213</sup> C.Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928) at p.3.

<sup>214</sup> T.Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and 'Quasi-States', in T.Erskine (ed.) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, (Palgrave MacMillan, 2003) p.19 at pp.23-24.

form of accountability, in particular international responsibility. It is only when an actor can be considered to have definitively committed action that they can be held to account for any consequences for their actions. This element of autonomy may be relatively straightforward with individuals. When it comes to collective actors, however, there is a greater degree of uncertainty. In spite of the prevalence of collective actors, and the need to consider moral agency in order to be able to identify a link between action and actor, it has had relatively little consideration.

The focus on the nature of moral agents in individual terms but not in terms of collectives shows a significant limitation as collective actors pervade almost all legal systems. French has argued that the understanding of moral agency has an “anthropocentric bias”. In considering corporations, French argues that some have interpreted the idea of a moral person so narrowly that it means that a corporation cannot be considered to be a moral person.<sup>215</sup> The focus has continued on individuals and their actions, when in reality they are only one of a number of types of actor. While not completely straightforward with individuals, it becomes more complex when considering the actions of collective actors. In international terms this is particularly pertinent, as collective actors constitute the entire system. Despite this being a complex question and one which goes to the core of responsibility in the international system, it is one that has simply not been considered in any developments on the law of international responsibility.

In philosophical terms, the nature of collectives as moral agents has been questioned and the determining factor seems to go to the core of the nature of collective actors. A distinction seems to have been made between collectives that can be considered to exist with a coherent core and the extent to which they possess a more disparate identity.<sup>216</sup> This coherence allows action from within the group to be established as action of the group as a whole; a degree of moral agency is established between the action and the collective. The extent to which this idea exists or has been considered within international law remains questionable and without any analysis determining the responsibility of the collective actors that exist internationally may suffer.

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<sup>215</sup> P.French, ‘The Corporation as a Moral Person’, (1979) 16 *American Philosophical Quarterly* p.207 at pp.207-208.

<sup>216</sup> *Ibid.*



### 3.3.2. The International Law of Responsibility and Moral Agency.

To determine a finding of responsibility, it must be possible to trace the action to an entity and it must be one that is capable and free to act, namely there must be an element of moral agency.<sup>217</sup> The international system concerns itself with regulating the actions of collective entities, most traditionally and predominantly, the state. The state may effectively be a fiction and ultimately a collection of individuals but it has grown into a capable and unified entity. The development of principles of responsibility by the international community has occurred without much discussion of the idea of moral agency. This did not cause too much of a difficulty when considering the state because of the manner in which the state has grown as a unified actor. The state has a significant degree of internal unity and its actions can be evidently defined as it's own and not those of its parts. It has evolved over time and now actions committed on the part of the state can be understood. The state has long been understood as a singular international actor and the need to explore its capacity to act as a cohesive whole within the law of state responsibility was minimal. The actions of states as unified actors are identifiable and, consequently, the potential responsibility for these actions can be determined and traced to the state as an actor. It is the growth of entities beyond the state has challenged this.

The role of organisations within the international system and, specifically their transparent nature when compared with the unified nature of the state, poses a far greater challenge for the idea of moral agency and, from this, to the law of responsibility. The expansion of the international system beyond the state has continued to see a focus on collective entities, for example, the European Union, international organisations and non-governmental organisations. Despite this prevalence of collective entities there has continued to be relatively little analysis on the ability of collective actors to be capable of acting and, as a result, to be capable of incurring responsibility for these actions. The question arises as to the extent to which any collective entities and, in particular, international actors are capable of existing as moral agents capable of understanding and adhering to certain principles. The transparent nature of international organisations raises a number of questions as to the capacity for these actors to possess moral agency. The extent to which these entities can be seen to have a unified core that is capable of action requires some consideration.

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<sup>217</sup> T.Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and 'Quasi-States', T.Erskine (ed.) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, (Palgrave MacMillan, 2003) p.19 at p.21.

The European Union's identity poses a particular challenge. Its capacity for moral agency requires more consideration in relation to the above characteristics of, firstly, a distinct existence separate from its constituent parts and, secondly, a capacity for that distinct identity to take purposive and decisive action. While the second question may be relatively clearly established, the first perhaps raises a few more questions in terms of the EU's international activities. The EU may be increasingly moving towards an independent international identity but this is all while it retains a dependence on its Member States. It is not so straightforward to consider the Union to have moved beyond its constituent parts and to exist solely separately from these internal parts in all of its external activities. It is possible that the Union may possess this ability to be a moral agent, but it is the interaction at the core of the EU's international action between it and its Member States that makes this more confused. The unique nature of the Union, in particular the interactions that exist between the EU and its Member States mean that moral agency cannot be declared with certainty in respect of *all* actions of the Union. The question of responsibility in relation to the Union needs more consideration than the standard way in which responsibility has been previously conceived.

This question of the nature of the European Union goes to the core of the difficulties in determining its international responsibilities and, at a broader level, developing the international law of responsibility. The European Union has an interactive and transparent nature and this is almost an extreme version of the nature of international organisations. The international law of responsibility has not considered this foundational part of the principle of responsibility. International law seems to have focused upon the idea of attribution as a way of determining action to be that of a responsible entity. Attribution, however, begins from the position that moral agency does exist with the actors being considered, rather than questioning this. Attribution is, therefore, grounded in the idea that responsibility is a singular principle. It seeks to attribute action to an individual perpetrator. This is where the foundations of responsibility are so limited and reflect the limitations of the international system. The difficulties with the principle of attribution and its inability to accommodate the EU consequently form the basis of the thesis.

The lack of consideration of moral agency within the law of responsibility has created a law with limited foundations. In not considering this idea within the law of state responsibility, the law was still able to respond to states as international actors because of their unified and coherent nature. In now trying to expand these principles, however, the limited foundations of the law have become exposed. While able to address states in their own right, the expansion beyond this has served only to further expose the broader weaknesses in this law because the law is grounded in a bilateral nature of action. The

weaknesses exposed can be seen within the principles of state responsibility and will only serve to show further problems as the law continues to evolve and expand. In establishing principles of responsibility in relation to international organisations without proper consideration of their moral agency results in a flawed system of responsibility that will not be capable of addressing the transparent nature of organisations.

### **3.4. Conclusion.**

It is the very ideas underpinning international law that cause difficulties in the development of international responsibility beyond its application to states. In existing with states at its foundation, the development of international law to apply to other actors is problematic. This chapter has argued that these foundations of international law inevitably limited the ability to develop international responsibility beyond state responsibility. The expansion of international organisations has changed the international arena and their identity challenges these foundations and the international system is not capable of addressing these actors. With the international legal system generally struggling to address these actors, attempts to develop the law of responsibility would always suffer from the same deficiencies. In particular, the law of responsibility has missed any consideration of the way in which these different actors could even be capable of possessing moral agency. There has been an attempt instead to apply the law of responsibility with only slight modifications to these different actors. While it remains grounded within these foundational ideas of international law, without a real consideration of the differences between these actors, there will be fundamental problems at the core of the law of responsibility.

While this is the case, no actor challenges the international system more than the European Union. The unique nature of the EU as a legal order that interacts with the international legal order poses the challenges envisaged by any attempt to expand the law beyond state responsibility. Those posed by the Union, however, go further than any other international actor potentially affected by these new rules of responsibility. The relationship that exists between the EU and international law is a unique one and one that must be understood in order to consider the difficulties in the application of the law of responsibility. While the EU may have been created using international law instruments and may have begun as a “new legal order of *international law*”, its significant integration as an autonomous legal order has pushed far beyond these origins. This progress towards autonomy exists alongside the continued dependence of the Union on its Member States, as well as on international law. The integration of the EU has meant that this has gone further than any international organisation and the EU consequently poses a particular

challenge for the law of responsibility. The international identity of the EU must be understood to fully grasp this challenge.

#### 4. The Evolution of the European Union as a Global Actor.

The problems posed by the transparent nature of organisations are substantially exacerbated when considering the international actions of the European Union. Since its creation, the EU's identity as an international actor has continued to develop, though this has arguably accelerated over the course of the last two decades. The external competences of the EU have been growing incrementally since the very beginning of the EU and have led the EU to an increasingly substantial international identity. The integration of the EU has shown an actor that has progressed further than any international organisation in terms of developing an autonomous identity. This is not without the continued importance of other legal orders in enabling the international actions of the EU, creating an even greater complexity with the Union than that previously identified with international organisations.

The EU's external actions now pervade such a broad range of activities and to such an extent that it is arguably, potentially most affected by the ARIO. Yet, the complexity of its international identity means a fundamental difficulty when determining international responsibility at the level of the EU and that the ARIO will struggle the most when faced with the Union's different nature. It is the complex international identity of the EU that is crucial for understanding its potential responsibility for breaches of international obligations.

The EU may have been created using international law instruments but it quickly moved beyond these foundations and away from the 'traditional' concept of an international organisation.<sup>218</sup> The idea of the EU as an autonomous legal order is one that has been developing since early on the European project, largely from the discussions by the CJEU and its attempts at developing and protecting this principle.<sup>219</sup> Autonomy, both in an internal and an external sense, arguably now forms the very premise upon which many

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<sup>218</sup> For a discussion on some of the 'traditional' ideas of an international organisation, see N.White, *The Law of International Organisations* 2<sup>nd</sup> edn (Manchester: Manchester University Press, 2005) at pp.1-2; J.Klabbers, *An Introduction to International Institutional Law*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 2009) at pp.11-12; P.Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (London: George Allen and Unwin, 1958) at p.195.

<sup>219</sup> See for further discussion on the CJEU development of the principle of autonomy, J.W.van Rossem, "The Autonomy of EU Law: More is Less?" in R.A.Wessel and S.Blockmans (eds.) *Between Autonomy and Dependence The EU Legal Order Under the Influence of International Organisations* (Asser Press, 2013) p.13.

foundational principles of EU law, such as supremacy, have been built.<sup>220</sup> This desire for autonomy must be viewed in combination with the continued desire and attempts by the Union to become an active part of a multilateral system, as well as its continued dependence upon its Member States. This chapter argues that these two simultaneous approaches of the Union both converge to create a unique identity: the desire for autonomy and independence in combination with the desire to be a part of a multilateral international system.

In order to pursue this argument, the chapter is divided into four main sections. It firstly, and briefly, considers the legal nature of the Union before, secondly, discussing the explicit external actions of the Union and the way in which the internal order of the EU acts at the external international level. The third section examines the ways in which the EU has progressed as an autonomous legal order and particularly considers the way in which the CJEU perceives of international law in the internal legal order of the Union. In drawing upon these two particular international roles, the chapter seeks to explain the complex identity of the EU and outline the way in which the interaction between the EU and international law continues to grow and change. The chapter considers that there is no strict hierarchy between these EU and international legal orders, but rather, that there is instead a continually evolving relationship and interaction between them. The international identity of the Union needs to be viewed as a comprehensive integrated legal system that is inextricably linked to international law, as well as to the EU's Member States. The Union is viewed as a highly integrated legal order that interacts with international law. There is, seemingly, a simultaneous dependence on, and independence from international law. It is this balance that determines the relationship between these legal orders and shapes the international identity of the Union. Consequently, the international identity of the EU is seen as a complex one with significant implications for attempts to apply rules of international responsibility. This principle of institutional balance will be discussed in the final section.

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<sup>220</sup> J.W.van Rossem, 'The Autonomy of EU Law: More is Less?' in R.A.Wessel and S.Blockmans (eds.) *Between Autonomy and Dependence The EU Legal Order Under the Influence of International Organisations* (Asser Press, 2013) p.13 at pp.14-18.

#### 4.1. The International Identity of the EU: a Unified International Legal Person.

Determining the international responsibility of the European Union requires it to exist as an autonomous international legal person.<sup>221</sup> The international legal personality of the previous European Communities had long since been affirmed by the CJEU and the interpretation of the previous Article 281 EC.<sup>222</sup> The explicit conferral of personality given in the Treaty of Lisbon clarified and confirmed this previous discussion.<sup>223</sup> In light of the functionalist interpretation by the ICJ in the *Reparations* case on the international legal personality of the UN, the personality of the EU was said by some to exist by implication, with it actually 'exercising and enjoying' components which could only be explained by the possession of international personality.<sup>224</sup> It is party to numerous international treaties and, where it has been possible to do so, it has become a member of international organisations.<sup>225</sup> In any event, legal personality has now been explicitly conferred.

In terms of the EU's international role and identity very little else is understood of the consequences of personality. Many have used the concept of personality to determine an identity as an international actor; an international legal person quite simply is an international actor.<sup>226</sup> It appears as if, perhaps, this is too simplistic both generally and in particular when considering the European Union. The explicit conferral of personality does not enable the Union to claim further powers or act beyond its competences; it will not be able to act outside the principle of conferral.<sup>227</sup> The identity of the Union remains very much governed by the Treaties and its legal order. It has also been stated that this

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<sup>221</sup> See above chapter three, at pp.65-74; Also, see generally E.Butkiewicz, 'The Premises of International Responsibility of Inter-Governmental Organizations', (1981) 11 *Polish Yearbook of International Law* p.117 at p.122.

<sup>222</sup> Case 22/70 *Commission v. Council* (ERTA) [1971] ECR 263, at paras.13-19.

<sup>223</sup> Article 47 TEU.

<sup>224</sup> *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion ICJ Reports, 1949, p.174 at p.179.

<sup>225</sup> S.Marchisio, 'EU's Membership in International Organisations', in E.Cannizzarro (ed.) *The European Union as an Actor in International Relations* (Kluwer, 2002); *Opinion 1/76 re Inland Waterways* [1977] ECR 741; See also United Nations General Assembly Resolution, 'Participation of the European Union in the work of the United Nations', A/65/L.64/Rev.1 21st April 2011.

<sup>226</sup> K.Lenaerts and E.De Smijter, 'The European Union as an Actor under International Law' (1999–2000) *Yearbook of European Law* p.95.

<sup>227</sup> Declaration No.24 annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, 2008/C 115/01, p.335.

will not change the divisions between the EU and its Member States and so will not affect the responsibilities of the Union or its Member States.<sup>228</sup>

In addition to questioning the personality of the Union, the previous lack of unity within the EU legal order also potentially caused difficulty for the determination of responsibility. International organisations may exist in a transparent sense, but the existence of a number of different actors within the EU legal order, namely the different European Communities and the European Union, caused an even higher degree of complexity when examining the international actions of the EU. The merging of the European Communities and the European Union in the Treaty of Lisbon to create a single European Union began to address the criticism of the lack of unity within the EU legal order.<sup>229</sup> There remains the question of the interaction of the different institutions, but the fact that the European legal order is now projecting one identity at the international level goes a long way in clarifying the overall international identity arising out of this legal system.<sup>230</sup> The extent to which this merging has actually resulted in a completely 'unified' EU does remain questionable. The division and sharing of competences between institutions, but also between the Union and its Member States often leads to confusion when it comes to responsibility.<sup>231</sup> Lisbon showed a determined move towards a more unified identity for the European Union but this is not entirely certain. The existence of the EU as a unified legal person has meant the capacity on the part of the Union to incur responsibility.

#### **4.2. The Development of the European Union as an International Actor: the Significant Growth of the EU's External Competences and an Increased Commitment to International Law.**

The substantial growth of the EU's external competences has meant an increased potential for the responsibility of the EU and a need to develop principles to address this. The different nature of the EU causes complexity in establishing such principles of responsibility due to its continued push towards autonomy, while retaining a strong dependence on its Member States and a commitment to an international system based in

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<sup>228</sup> Declarations no. 13 and 14, annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, 2008/C 115/01, p.335.

<sup>229</sup> Article 1 TEU.

<sup>230</sup> See the creation of the European External Action Service: Council Decision of 26 July 2010 establishing the Organisation and Functioning of a European External Action Service, 2010/427/EU, OJ L 201/30, 3.8.2010; Article 27(3) TEU; See the establishment of the High Representative for Foreign Affairs and Security Policy, Articles 18 and 27 TEU.

<sup>231</sup> See Articles 14-18 TEU on the Institutions.



“effective multilateralism”.<sup>232</sup> It is this identity that must be considered in order to understand the difficulties posed by the EU for the principles of responsibility. It is, initially, the growth of the Union’s external competences that may be demonstrative of the difficulties posed by the EU for principles of responsibility.

#### **4.2.1. The Growth of the European Union’s External Competences.**

The EU’s external competences have expanded so significantly that the Union is able to act in almost all areas of international action. External policy and competences have long been core to the integration and harmonisation process and also to the overall constitutionalisation of the Union.<sup>233</sup> Alongside the significant role played by the CJEU in expanding the competences of the EU, have occurred significant Treaty changes expanding EU capacity into policy areas such as freedom, security and justice, police and judicial cooperation.<sup>234</sup> In more recent years there has been an even greater expansion into a number of more explicitly ‘political’ areas that often form the basis for discussions in terms of international responsibility: the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).<sup>235</sup>

The constitutional origins of an external role for the EU in terms of policy areas can be found in the creation of the Common Commercial Policy (CCP); the first area of external action by the EU.<sup>236</sup> This was quite an obvious first area, as the basis for the original creation of the Coal and Steel Community was economic and what followed from there found its basis strongly in economic and trade policy: the European Economic Community.<sup>237</sup> The CCP is the longest standing area of external policy of the EU and the changes made in this area have provided much of the basis for the expansion of external policy and the foundation of general principles of external relations. While the explicit

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<sup>232</sup> ‘A Secure Europe in a Better World’, European Security Strategy, Brussels, 12 December 2003, p.9

<sup>233</sup> P.J.Cardwell, ‘Institutional Balances, Competences and Restraints: the EU as an Autonomous Foreign Policy Actor’, in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.353 at p.353.

<sup>234</sup> Articles 67-76 TFEU; Articles 81-89 TFEU.

<sup>235</sup> M.Zwanenburg, ‘Toward a more Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Missions’, in S.Blockmans (ed.) *The European Union and Crisis Management Policy and Legal Aspects* (The Hague: TMC Asser Press, 2008) p.395.

<sup>236</sup> P.Craig and G.de Burca, *EU Law. Text, Cases and Materials*, 4th edn (Oxford: Oxford University Press, 2008) at pp.182-183; *Opinion 1/75 (Understanding on a Local Cost Standard)* [1975] ECR 1355.

<sup>237</sup> Treaty establishing the European Economic Community (EEC), 25th March 1957.

purpose behind the CCP was trade and economics, there existed underlying political ideals. One of the original purposes of this common action was the political desire to prevent any more wars within Europe. There has always existed this external element to the basis of the European legal order and political purposes, rather than economic, have simply become more overt and accepted over time. Although it originated in economic policy, the Union has expanded now to have an involvement in almost every policy area, increasing the potential for its international responsibility.

The push by the Union into the area of foreign policy moved it into a new era in terms of its international capacity and its autonomous international status. The question of a common defence policy had been addressed as early as 1954 but was not fully pursued. In the 1970s and early 1980s, discussions began on pursuing political integration. This began with the Davignon Report in 1970 and following various ad hoc political discussions that took place, a system of intergovernmental cooperation under the guise of the European Political Cooperation (EPC) began to take place. This was a more ad hoc form of cooperation among Member States in this policy area and remained dependent on Member States for any use of this policy. It arose mainly when meetings or events were taking place and discussions may arise alongside this. The EPC was then recognised within the Single European Act in 1986.

The reluctance of Member States to develop this area stalled progress until the creation of the Common Foreign and Security Policy (CFSP) in the Treaty of the European Union in 1992. The aftermath of the fall of the Berlin Wall and the end of the Cold War saw the existence of a single superpower on the world stage and a renewed vigour from the EU to progress as an international actor. The EU's moves to develop CFSP and its claims towards its existence as an autonomous actor are integral to the constitutionalisation of the European Union.<sup>238</sup> The desire to evolve into this area was clear but it remained muted and limited, being clearly demarcated within the treaties from general areas of previous 'community' competence. It was part of the overall European system but from its beginning, it was very much a differentiated part, for example, being kept outside the realms of enforcement and being governed by distinct rules different to the other areas of competence. The unique instruments of common strategies, joint actions and common positions, now guidelines and decisions, were created to develop and implement the CFSP, rather than turning to existing forms of EU action.

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<sup>238</sup> P.J.Cardwell, 'Institutional Balances, Competences and Restraints: the EU as an Autonomous Foreign Policy Actor', in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.353 at p.353.

The interpretation of EU competences under the CFSP has further compounded the distinct manner of this area of action. In spite of its competences being potentially incredibly broad, with the definition of CFSP as covering “all areas of foreign policy”, as well as questions, “relating to the Union’s security”, this potentially broad scope has been interpreted in quite a precise manner. In particular, should there be any question of a more specific legal basis existing outside the area of CFSP, then this should be utilised rather than CFSP.<sup>239</sup> Even though some development has been seen, in further incorporating and expanding this area, the distinction between this and all other areas of Union action has remained following Lisbon. Even after unifying the EU legal order and encompassing most competences in the same Treaty, it is telling that competences and principles on the CFSP continue to remain separate from the rest.<sup>240</sup> Member States have, traditionally closely guarded this area as being a core part of their sovereignty. Such political sensitivities that have long plagued EU attempts to engage in foreign policy have perhaps not yet disappeared entirely.<sup>241</sup>

While this area is not the only way in which the EU acts externally, there is a clear desire with CFSP to pursue the international identity of the Union. Overall this area of ‘political’ foreign policy seems to fall at the very core of the conflict between the push towards a greater international role for the Union and the desire of Member States to restrict this in certain areas to retain their own autonomy and identity. The Union has shown some significant moves towards increased autonomy in this area, particularly following Lisbon and the introduction of more ‘European’ institutions in this area, in particular with the new role of the High Representative for Foreign Affairs, along with the new role of the President of the European Council.

To have an area that is so core to the rights of states, and that was so ring-fenced previously by States, move into the competences of the Union, in itself shows that the EU was growing in its ability to act as an independent international actor. The concern of Member States does continue, to an extent however, which leaves the EU falling somewhere between this traditional intergovernmental system supporting the autonomy of it’s Member States and its own growing autonomous identity. The internal nature of the

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<sup>239</sup> Case C 91/05 *Commission v Council (ECOWAS case)* [2008] ECR I-3651.

<sup>240</sup> Article 24 TEU.

<sup>241</sup> For further historical background on the EU in the area of foreign and security policy and the difficulties seen in the various EU attempts in this area, see P.Koutrakos, *EU International Relations Law* (Hart, 2006) at pp.383-387; R.Wessel, *The European Union’s Foreign and Security Policy: a Legal Institutional Perspective* (Martinus Nijhoff, 1999) at pp.1 and 5-10.

EU and its relationship with its Member States is key to this autonomy within the wider world. In particular the growth into a wider range of policy areas only serves to emphasise this balance. The Union may be moving towards an existence as a unified and autonomous global actor, but foreign policy seems to be falling somewhere between autonomy and a more cooperative approach on behalf of Member States.

The balance that exists in the area of CFSP can be seen in the basic way in which the Union pursues its powers in this area. The distinctions that exist between civilian missions and military missions must be considered when seeking to understand the way in which the Union acts in terms of these activities but also in order to understand the relationships at play here and the difficulties in determining responsibility. Civilian missions, such as rule of law or police operations, have become, to an extent, more integrated within the Union itself. They depend upon staff being seconded and then acting within the framework then provided. There is an attempt to develop a unified chain of command.<sup>242</sup> With that in mind, the chain of command is not entirely straightforward and does continue to involve a number of different actors, as can be illustrated by the documents establishing the EUJUST rule of law mission in Georgia:

“1. EUJUST THEMIS ... shall have a unified chain of command, as a crisis management operation. 2. The EUSR [EU Special Representative] shall report to the Council through the SG/HR [Secretary General/High Representative]. 3. The PSC [Political and Security Committee] shall provide the political control and strategic direction. 4. The Head of Mission shall lead EUJUST THEMIS and assume its day-to-day management. 5. The Head of Mission shall report to the SG/HR through the EUSR. 6/ The SG/HR shall give guidance to the Head of Mission through the EUSR.”<sup>243</sup>

There are a number of different individuals and bodies involved in the running of these missions, which can potentially lead to confusion as to where action has occurred. Military missions, furthermore, can be seen to lead to an even greater degree of confusion as to where action lies. While they too depend upon the secondment of individuals, there is a retention of criminal and disciplinary jurisdiction by the home state of those staff seconded to the Union. This leads to not only a cross over between different individuals and institutions involved in the actual running of a mission, but there is also the question as to the extent of the involvement of these home states. In particular, if they are involved

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<sup>242</sup> See below in chapter 6 at pp.141-146

<sup>243</sup> Article 1 and Article 8 of Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS, (2004) OJ L 228/2; See also Article 7 of Council Joint Action 2004/847/CFSP (2004) OJ L 367/30 with regard to EUPOL Kinshasa and Article 1 and 5 of Council Joint Action 2008/736/CFSP (2008) OJ L 248/26 with regard to EUMM Georgia 2008).

in disciplinary matters, the extent to which they may be involved in the way in which seconded individuals, or bodies, act must be considered. This is where the question of responsibility has often been raised and, according to this thesis, where the main difficulties with responsibility lie in terms of establishing where responsibility lies.

#### **4.2.2. The Increased Commitment of the European Union to a Role in a Multilateral System.**

The EU has continually grown in competence but also in its desire to act at the international level and to interact within the international legal order. There is a desire to pursue a role within “an international order based on effective multilateralism.”<sup>244</sup> The EU has continued to attempt engagement with the international system as its external competences have grown, most particularly voicing a desire for a role within an effective multilateral international legal system.<sup>245</sup> This has furthermore been emphasised by the European Council in its argument that Europe has “a leading role to play in a new world order.”<sup>246</sup> After the end of the Cold War, the argument that a new global system would be seen took hold within the EU, with the Council arguing for the Union to participate in this and “shoulder its responsibilities in the governance of globalisation”.<sup>247</sup> Although this new world order has seemingly not taken hold, the idea of the EU propelling its international role and showing some commitment to international law has continued. The revisions brought in by Lisbon have expanded the idea of developing the role of the Union within the international system, as well as the principle of sincere cooperation between the Union and its Member States and further enable a greater international presence for the Union.<sup>248</sup> Obligations now exist within the treaties for the Union to be obliged to contribute to “the strict observance and the development of international law” and to pursue its external activities in accordance with principles of international law.<sup>249</sup> There has been a commitment to “be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world”

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<sup>244</sup> ‘A Secure Europe in a Better World’, European Security Strategy, Brussels, 12 December 2003, p.9

<sup>245</sup> *Ibid.*

<sup>246</sup> Laeken Declaration on the Future of the European Union, 14-15 December 2001, at p.2.

<sup>247</sup> *Ibid.*

<sup>248</sup> Article 3(5) TEU, Article 21 TEU, See Article 34 on coordination in international organisations, Article 4(3) TEU.

<sup>249</sup> Article 3 TEU.

and “promote an international system based on stronger multilateral cooperation and good global governance.”<sup>250</sup>

These are significant treaty based commitments, showing a Union that claims to respect international law and recognises a role for international norms within the realms of the Union legal system. In some ways this can be seen as almost a principle of deference towards international law on the part of the Union. The approach of the CJEU has, furthermore, been very receptive towards international law obligations of the Union. The Court has, for example, found on a number of occasions that the EU has an obligation to act in accordance with international law.

While the basis for this may be clear with treaty-based obligations, the courts of the EU have, furthermore, made reference to customary international law on a number of occasions.<sup>251</sup> The case law shows an acceptance of the Union being bound by such customary principles but the reasoning behind this is quite particular. The CJEU has used such principles to limit or demarcate the international obligations of the Union and thus provide a way of understanding the role of the EU, or European norms, at the international level. While there has been explicit reliance on customary international law principles by the Court showing recognition of a binding nature of international obligations,<sup>252</sup> it ought to be recognised, that the Court’s acceptance of these principles has been limited. While initially viewing the EU as ‘receptive’ of international law or with a role within an international system, more recently a greater focus has been seen on the integrity of the EU. The case law of the CJEU addresses this question of the way in which international norms exist and interact within the EU legal order. This is a defining characteristic of the international identity of the EU but is something that is continuing to evolve.<sup>253</sup>

With such ideas in mind, the Union would likely recognise the binding nature of any customary principles that were codified within the ARIO by the ILC. Rather than do this

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<sup>250</sup> Article 21 TEU.

<sup>251</sup> Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Åhlström Osakeyhtiö v Commission* [1988] ECR 5193, para.18; Case C-405/92 *Etablissements Armand Mondiet v Amrmement Islais* [1993] ECR I-6133 paras.13-15; Case C-25/94 *Commission v Council* [1996] ECR I-1469, para.44.

<sup>252</sup> Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019, paras.9-10; Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39; Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655

<sup>253</sup> Case C-459/03 *Commission of the European Communities v Ireland (Mox Plant case)* [2006] ECR I-4653; J.W.van Rossem, ‘The Autonomy of EU Law: More is Less?’ in R.A.Wessel and S.Blockmans (eds.) *Between Autonomy and Dependence The EU Legal Order Under the Influence of International Organisations* (Asser Press, 2013) p.13 at pp.14-18.

explicitly, the Court may well reason that such principles form part of the Union legal order and are binding due to that fact. What is a larger question in this area, however, is whether any of the principles within the ARIO could appropriately be considered to be principles of customary international law when there exists so little in the way of state practice to demonstrate their status as such. A greater argument can be made that the vast majority of the ARIO are in fact progressive development by the ILC.<sup>254</sup>

The crucial additional aspect to this however is that the obligations exist as a result of norms of international law *forming a part of the EU legal order*.<sup>255</sup> This is central to the Court's reasoning. Even where there has been acceptance of international norms being binding, this is reasoned by the Court in a way that avoids any hierarchical associations. International norms are considered to be binding by their role within the Union legal order; the Courts seem to reason a degree of integration of norms, which then forms the basis for their binding role within the EU. This will be examined in greater detail later in the chapter, but it is important to note that even when there is apparent deference to the international system, this is done in accordance with the European legal order; despite the desire for respect and adherence to international law, the focus remains on the EU as an autonomous legal order. There is a continual movement between the EU and international law and an on-going interaction between these legal systems. This movement is seen in the implementation of norms by Member States and this interaction forms the basis for the international identity of the Union. This international identity is, however, complex and needs to be understood in order to understand the difficulties with the application of the principles of responsibility.

### **4.3. The Development of the EU into an Autonomous Legal Order.**

The creation of the Union using international instruments, as well as the classic pronouncement of this system as a "new legal order *of international law*" show the origins of the EU as determinedly within the international legal system.<sup>256</sup> There was, of course, a quick shift away from this but the EU had originally been created in a manner through which it could have been conceived of as a traditional international organisation acting within the international system. From early on the EU had a strong link with international

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<sup>254</sup> G.Hafner, 'Is the Topic of Responsibility Ripe for Codification? Some Critical Remarks', in U.Fastenrath, R.Geiger, D-E.Khan, A.Paulus, S.von Schorlemer and C.Vedder (eds.) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) p.695.

<sup>255</sup> Case 181/73 *R & V. Haegeman v Belgium* [1974] ECR 449; Case 98/78 *A Racke v Hauptzollamt Mainz* [1979] ECR 69.

<sup>256</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.

law, but from equally as early on there was a move, particularly from the CJEU to develop the Union into an autonomous legal actor.

The foundational case of *Van Gend en Loos* may have begun a constitutional revolution by seemingly retaining an international law focus with the pronouncement that a “new legal order of international law”<sup>257</sup> had been established, but these foundations were soon left behind. The year following *Van Gend* came the judgment of the Court in *Costa v ENEL* where it was argued that the Community had “created its own legal system”<sup>258</sup>. The CJEU had begun what would be a long road of distinguishing the European legal system as an autonomous entity: eventually a strong and significant international actor. This early ruling of the CJEU marked out the beginning of the Court’s work in demarcating the Union as a *sui generis* actor; the CJEU has continued to develop its jurisprudence determining the EU as a distinct, autonomous legal order.<sup>259</sup> It has taken on a significant role in elaborating upon the principles in the treaties and has helped extend the constitutional foundations of this order. In founding principles like direct effect and supremacy, as well as elaborating principles expanding upon the competences of the Union, there is an increasing move towards an autonomous order.

#### **4.3.1. The Idea of Autonomy.**

Autonomy is a complex idea generally, but the complexity deepens when considering the European Union. It is not set in its meaning but rather it is a relational concept that considers the way in which different legal orders interact with each other. The concept of autonomy is one that is often mentioned without there being any understanding of its meaning. It is quite an open term that can be understood and utilised in a number of ways. In its foundations, however, it is one that it is core to the nature and progress of the EU.<sup>260</sup> Autonomy is a relational, self-referential idea.<sup>261</sup> An autonomous legal order can be described as a self-referential order. It is an order distinct from others with its own

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<sup>257</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

<sup>258</sup> Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

<sup>259</sup> See for further discussion J.W.van Rossem, “The Autonomy of EU Law: More is Less?” in R.A.Wessel and S.Blockmans (eds.) *Between Autonomy and Dependence The EU Legal Order Under the Influence of International Organisations* (Asser Press, 2013) p.13 at pp.14-18.

<sup>260</sup> N.Tsagourias, ‘Conceptualising the autonomy of the European Union’, in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.339 at p.340.

<sup>261</sup> N.Tsagourias, ‘Conceptualising the autonomy of the European Union’, in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.339 at p.339-340.



foundations and its own reference for development.<sup>262</sup> Autonomy is a concept that only has any meaning when juxtaposed with other legal orders and so for the progression of a distinct order, such as the EU, as compared to the international legal order. This distinctiveness and individuality has proved to be core to the constitutional nature of the EU. The claim by the EU to be an autonomous actor on the global stage goes to the very core of the European integration project and to the way in which the EU has been argued as having become increasingly constitutionalised.<sup>263</sup>

The question with any concept of autonomy, and also this particular idea within the realms of the EU, considers the way in which this independence relates to other autonomous orders, namely the international order and also to national legal orders. There will always be this interaction between legal orders, but the level of autonomy of any legal order in this circumstance will only be able to be retained if this interaction is regulated by the receiving order. In other words, the autonomy of the Union can only be ensured and retained if the relationship that it has with national orders or the international legal order is governed by the internal EU legal order.<sup>264</sup> It has a strong sense of self-identity with the creation of its own concepts and principles, such as subsidiarity, supremacy and direct effect. All of these concepts can be used when considering other legal orders, however, there is a particular meaning for them at the Union level. They can be used to promote a European identity and also a stronger level of uniformity. The creation of the Court and expansion of its jurisdiction along with the development of principles by the Court shows a level of self-development and progression that is demonstrative of a self-contained and independent order.

The establishment of a comprehensive Court system that is as integrated and evolved as at the EU level has founded a system that excludes other entities from exercising jurisdiction over norms of European law. Any review of norms within this legal order is carried out within this legal order. While this crucially prevents outside interference, it also ensures uniformity and consistency in interpretation. Any judicial involvement of national courts

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<sup>262</sup> N.Tsagourias, 'Conceptualising the autonomy of the European Union', in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.339 at p.339.

<sup>263</sup> P.J.Cardwell, 'Institutional Balances, Competences and Restraints: the EU as an Autonomous Foreign Policy Actor', in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.353 at p.353.

<sup>264</sup> N.Tsagourias, 'Conceptualising the autonomy of the European Union', in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.339 at p.345.

in reviewing EU law also supports this distinct nature, with the system of preliminary rulings ensuring that any uncertainties on the interpretation of European norms will be dealt with at the European level. The making of principles surrounding powers also shows a development in the individual nature of the legal order of the Union. The early advancement of the principle of implied powers enabled the EU to define its own “jurisdictional space”.<sup>265</sup> The Member States conferred powers on the EU<sup>266</sup> and the CJEU has been able to interpret and advance these principles and powers. Consequently, it is able to interpret and progress its own legal system.

This development of a judicial system together with its development of internal norms and instruments shows a Union that has evolved solely with reference to its own internal order. It has continued to make use of international instruments but it has simply utilised these instruments to confirm its changes. It has created its own executive, legislative and judicial functions without reference to or dependence on any other legal order. These are highly advanced functions that are performed by permanent and well-developed institutions, which can particularly be seen when comparing the Union to international processes, which are more focused around states and often far more ad hoc. There is a growing autonomous international identity for the EU but it is not possible for the Union to exist in isolation. While the EU continues to extend this role, it also has a desire to act at the international level and also to further increase the involvement it has with international law. This continued interaction is a complex one that requires a deeper understanding and it also shows that any move towards autonomy will always be limited. The balance between these commitments is, it is argued, at the very core of the international identity of the Union; there is a constant balancing act between independence and involvement.

From early on in the growth of the Union legal order, membership of the EU meant that Member States had “limited their sovereign rights, within limited fields”, as certain areas were governed by the Union and could not be affected by national legal systems.<sup>267</sup> In other words, the European legal order is separate from national legal orders and is not dependent upon these legal systems and nor can these legal systems invalidate Union

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<sup>265</sup> N.Tsagourias, ‘Conceptualising the autonomy of the European Union’, in R.Collins and N.White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.339 at p.342.

<sup>266</sup> Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

<sup>267</sup> *Ibid.*

norms.<sup>268</sup> The establishment of the principle of supremacy is significant in determining this, as this principle effectively leaves the Union governing the areas under which it has competence; national norms cannot affect or alter European norms as they have primacy. The fact that European norms are capable of having direct effect and being invoked within a national order again protects this, with national norms again unable to affect European norms as the latter are, on occasion, able to simply take full effect within the national order.

The case law of the CJEU continued to develop this principle of autonomy through its discussion of the relationship between the EU and international law. The approach of the Court in accepting the binding nature of international obligations has been to accept these obligations through their position as EU law obligations. Furthermore, in more recent years, it has been claimed that the Court has taken a more hostile approach to international law through its pursuit of an autonomous identity for the Union.<sup>269</sup> There may be a general loyalty and acceptance of obligations, but the Court is quick to ensure that this is addressed solely by reference to the internal EU legal order.

#### **4.3.2. Developing the Autonomy of the EU: the CJEU as ‘völkerrechtsfreundlich’?**

The CJEU has played a fundamental role in developing the EU as an autonomous international actor. The early judgments of the Court, for example, on direct effect began to uphold this idea of autonomy.<sup>270</sup> The Court’s use of the principles of implied powers and conferred powers has been key in constitutionally developing the EU as well as increasing the EU’s power to conclude international agreements. The CJEU has been central in asserting the Union’s identity at the international level.<sup>271</sup> This has inevitably made a huge contribution to the identity of the EU as an international actor. It also begins to show, however, the desire to extend its unique identity. When considering this principle, it is important to note its fundamental constitutional character, as no other organisations or any types of entities can be argued to have comparable powers. It is principles like this

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<sup>268</sup> Case 11/70 *Internationale Handelsgesellschaft mbh v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>269</sup> G.de Burca, ‘The EU, the European Court of Justice and the International Legal Order after Kadi’, (2009) Jean Monnet Working Paper 01/09.

<sup>270</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1; Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

<sup>271</sup> Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 263; Joined Cases 3, 4, and 6/76 *Kramer* [1976] ECR 1279; *Opinion 1/76 re Inland Waterways* [1977] ECR 741; *Opinion 2/91 re ILO Convention No 170* [1993] ECR I-1061; *Opinion 1/94 re WTO Agreement* [1994] ECR I-5267; *Opinion 2/94 re Accession to the ECHR* [1996] ECR I-1759.

that begin to simultaneously entrench international law within the European system, by enabling and encouraging its involvement, but also challenge the accepted workings of international law. Following the establishment of the unique and landmark legal principles within what was becoming a highly integrated legal order, it could no longer be simply argued that this was still just the newest 'legal order of international law'. This was the beginning of the European order pushing itself onto the international stage and arguing for its own unique identity. The external role of the EU in trade and economic terms became significant and enabled the beginning of the move beyond the international law foundations of the EU.

The reception of international law within the European legal order shows the changing international role of the Union. This has seen a fundamental constitutional role for the CJEU, with the way in which international law enters the European legal order evolving through the case law. The approach of the Court has been to put forward the Union as being bound by its international obligations. This has seemingly never been in conflict. While some have chosen to term this as "völkerrechtsfreundlich" or even as deferential to a greater overall legal order, this appears to perhaps be reading too much into a Court viewing an entity as being bound by obligations to which it has entered into freely. It is worth looking in a bit more detail at the way in which the Court has taken this view.

The initial consideration that is considered by the Court is whether the Union is bound by the international obligations in question. This is relatively uncontested when the Union is party to an agreement. The EU is party to a large number of international agreements. A large proportion of these are mixed agreements to which it is party to alongside its Member States. There are, therefore, a large number of international agreements that can affect the creation, and also the implementation of international law. The Court has taken what it has termed a "maximalist approach" to the enforcement of international treaty obligations.

The *Haegeman* case was an early example of the Court seeking to preserve the autonomy while respecting international law.<sup>272</sup> The Court considered an Association Agreement between the Community and Greece to 'form an integral part of Community law'.<sup>273</sup> It also considered that as it formed part of the legal order, it would have all the same characteristics of norms of the legal order, such as primacy. This is a principle that was further expanded by the Court in the years that followed with, for example, the *Bresciani*

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<sup>272</sup> Case 181/73 R & V. *Haegeman v. Belgium* [1974] ECR 449.

<sup>273</sup> Case 181/73 R & V. *Haegeman v. Belgium* [1974] ECR 449, at para.5

case, in which the Court held that association agreements could be used in national courts to challenge national law, in other words, these international obligations were capable of direct effect as European law obligations.<sup>274</sup> The direct effect of a bilateral trade agreement was confirmed in the *Kupferberg* judgment in 1982.<sup>275</sup>

The Court has also considered when the Union may be bound by obligations to which it has not directly become party to itself. The biggest example of this is in the *International Fruit Company* case, where the CJEU ruled that the Union had started to succeed to obligations under the GATT.<sup>276</sup> The Union was not a member of GATT but under this principle, it did find that it could be bound by these obligations, under certain strict conditions. The Court determined that for this to succeed all Member States must be party to the agreement, the transfer of obligations must have been intended by transferring exclusive competence to the EU and this succession must generally be accepted by the treaty parties.<sup>277</sup> This has obviously been quite a tough test, as it is relatively rare that *all* Member States will be party to an agreement, but more so, the division of competences between the Union and its members is often far from certain. While this may have been the criteria that the Court used in this case, this was limited in how it could be applied and the membership of the WTO and the norms arising from this evolved into a special case within the Union. Despite allowing direct effect of other multilateral treaties, this has always been explicitly rejected with the WTO agreement.<sup>278</sup>

The Court has adopted an open approach when considering international agreements; it has been receptive to accepting the binding nature of treaty obligations. The general language of the Court when considering international agreements is an open one. It has long been settled that “the primacy of international agreements concluded by the Community [Union] over secondary [...] legislation requires that the latter be interpreted, in so far as is possible, in conformity with those agreement.”<sup>279</sup> The Court has also examined questions of agreements to which only Member States are party. While the treaty has addressed the question of obligations entered into prior to joining the Union,

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<sup>274</sup> Case 87/75 *Bresciani v. Amministrazione Italiana della Finanze* [1976] ECR 129, at paras.12-14.

<sup>275</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641.

<sup>276</sup> Joined Cases 21 to 24/72 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

<sup>277</sup> *Ibid.*

<sup>278</sup> Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465.

<sup>279</sup> Case C-335/05 *Řízení Letového Provozu ČR, s. p. v. Bundesamt für Finanzen*, [2007] ECR I-4307, at para.16.

the questions on obligations entered into after this point has raised more problems for the Court with Member States being obliged to address and resolve any inconsistencies.<sup>280</sup>

The Court has also considered an approach on the binding nature of customary international law on the Union and its Member States.<sup>281</sup> The important aspect to note about these judgments is that the Court has considered these obligations to be binding through considering them to form a part of the internal European legal order. The direct effect of customary norms is not yet settled, although, they have been determined to be binding.<sup>282</sup>

The approach of the Court, therefore, while it is a positive one towards international obligations and enables a real effect of obligations within the EU legal order, still often requires an interpretation of Union law in order to enable the effect of international norms. While there has been a continual commitment on the part of the Union to international law, the perspective of the Court towards international law throughout its case law has been a complex one. It is not particularly helpful to consider the approach of the Court as either 'friendly' or 'unfriendly' towards international law.<sup>283</sup> Part of the Court's reasoning and approach has been outlined in the previous section; the Court views international law as forming an "integral part" of EU law.<sup>284</sup> This shows the focus of the CJEU on the interaction between the Union legal order and international law, rather than considering which dominates. Reasoning through this interaction then enables the effect of international law through the European legal order.

In focusing upon this interaction and not either explicitly allowing international obligations to overrule European norms or to attempt to make European norms override the international obligations, the CJEU avoided any kind of clash. Developing this interaction and avoiding any such clashes has actually further enabled the development of the EU towards an increasingly independent position. Rather than being hostile or

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<sup>280</sup> Article 351 TFEU; Case C-170/98 *Commission of the European Communities v. Kingdom of Belgium* [1999] ECR I-5493.

<sup>281</sup> Case 98/78 *A Racke v. Hauptzollamt Mainz* [1979] ECR 69; Opinion of the Advocate General Kokott in Case C-366/10 *The Air Transport Association of America and Others* delivered on 6 October 2011.

<sup>282</sup> Case 98/78 *A Racke v. Hauptzollamt Mainz* [1979] ECR 69.

<sup>283</sup> For a discussion of the question of 'völkerrechtsfreundlichkeit' and the CJEU, see J.Klabbers, 'Völkerrechtsfreundlich? International Law and the Union legal order', in P.Koutrakos (ed.), *European Foreign Policy Legal and Political Perspectives* (Elgar, 2011).

<sup>284</sup> Case 181/73 *R & V. Haegeman v. Belgium* [1974] ECR 449.

particularly 'friendly' towards the international system, the Court instead seems to approach this by enabling the validation of norms in both orders.

#### **4.3.3. Developing the Autonomy of the EU: the CJEU as Less 'Friendly' to International Law?**

There has been a sustained approach in the case law to attempt to uphold the autonomy of the EU and to move it into an increasingly independent position. Some have criticised it as being overly restrictive towards international law. There is concern at the European level to ensure the protection of the autonomy of the Union, particularly vis-à-vis international law. It can be considered that the Court was perhaps doing this rather than explicitly fighting against international law.<sup>285</sup> This approach has been of some interest when considering the involvement of various other systems as well as other judicial fora.

The early work on this by the Court was seen in *Opinion 1/91*, where there was a clear desire to demarcate and protect the Union legal order. In questioning the ability of the Union to become party to an international agreement, which may encompass a tribunal, the Court determined that this was not possible. The concern of the Court was that this would "adversely [...] affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order."<sup>286</sup> The Court showed a clear concern to establish autonomy as a principle within the EU; there was a view of a central aspect of the EU legal order that could not be affected by external influences.

In the *Van Parys* case, the Court furthermore continued to confirm this autonomy by considering that the WTO norms could not have direct effect, and that this would remain the case even where the WTO's Dispute Settlement Body had confirmed this direct effect.<sup>287</sup> The Court, therefore, refused to allow the ruling of an external judicial forum on principles of European law. While potentially showing a 'hostile' view to international law, what this judgment, along with others of the Courts in fact show is a desire to develop the EU system as an autonomous legal order. The concern of the Courts of the EU has always been, and continues to be, the development and protection of the European legal order. The aim of the Courts appears to have always been the development and protection of the European legal system. It appears that at times this will inevitably create a clash with the international system.

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<sup>285</sup> Case C-402/05 *P Yassin Abdullah Kadi v. Council and Commission*, Advocate General (AG) Maduro's opinion, 16 January 2008, at para.24.

<sup>286</sup> *Opinion 1/91 EEA Agreement* [1991] ECR I-6079, at para.2.

<sup>287</sup> Case C-377/02 *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465.

This can further be seen in the *Mox Plant* case, the European Commission brought infringement proceedings against Ireland for setting up an arbitration tribunal under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>288</sup> This international agreement considers areas of competence that fall under both national and European competence and is binding on both the Union and its Member States. The judgment found that international arbitration could not be used in a dispute between Member States when Union competences might be affected. The Court considered that “an international agreement cannot affect the allocation of responsibilities defined in the Treaties [...]”.<sup>289</sup> Ultimately, therefore, the focus of the Court is on the internal nature of the Union, which works in terms of its jurisdiction. Again, it does not seem to be explicitly ruling in a way to undermine or disrupt international obligations, but rather in order to advance the internal legal order of the Union.

The *Intertanko* case dealt with the enforceability of UNCLOS and MARPOL 73/78, an international convention on the prevention of pollution from ships.<sup>290</sup> The CJEU found UNCLOS to be binding on the Union but that MARPOL was binding only on the Member States. Irrespective of this, the Court still considered that it must take account of obligations contained within MARPOL when interpreting Union law in line with the principle of loyal cooperation in Article 4(3) TFEU and the general principle of good faith. The Court, therefore, did not review Union norms in line with binding international principles, but rather, took account of obligations of its Member States and made use of general international law principles. There was a respect for international law but no consideration that these principles may override EU principles.

This was again affirmed in the *Commune de Mesquer* case, where the CJEU delimited its doctrine on functional succession by finding that the Union will only be bound by agreements to which all Member States are party and where a full transfer of powers has taken place.<sup>291</sup> Union competence must cover all areas governed by the international agreement. The Court also addressed a question that had existed in relation to Article 351 TFEU and whether this could be applied in analogy to parts of international agreements

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<sup>288</sup> Case C-459/03 *Commission of the European Communities v. Ireland (Mox Plant case)* [2006] ECR I-4653.

<sup>289</sup> Case C-459/03 *Commission of the European Communities v. Ireland (Mox Plant case)* [2006] ECR I-4653, at para.123.

<sup>290</sup> Case C-308/06 *International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport* [2008] ECR I-4057.

<sup>291</sup> Case C-188/07 *Commune de Mesquer v. Total France SA and Total International Ltd* [2008] ECR I-4501.



into which Member States enter after their accession to the Union. The judgment found that both primary and secondary European law prevails over any and all subsequent international treaties concluded by Member States.

By far the most interesting and complex, however, were the *Kadi* decisions.<sup>292</sup> The way in which the different European Courts took distinct approaches in addressing a potential outright clash between European and international norms showed the confusion in this area. Even the Courts of the EU did not reason in a consistent way. The case concerned European norms that had been created to implement United Nations Security Council Resolutions on the asset freezing of individuals listed by the UN Sanctions Committee. The case concerned a challenge against the competency of the Council to adopt the regulation concerned, as well as a claim that the regulation breached the fundamental rights of the persons concerned, in particular the right to property and the right to a defence and to be heard. The main question of this case law, however, concerned the capacity of the courts to review norms that had initially come from the UN. It therefore concerned the relationship between these international provisions and the European Union legal system and the potential for review of these measures. The European legal system was being forced to confront a situation where there had been European implementation of action at the level of the UN and what this meant for the potential to review these measures. The relationships in question here were in no way defined or certain.

The judgment of the, then, Court of First Instance (CFI) is interesting in a number of ways. By determining that the EU was bound by the actions of the UN, despite it not being a member of the UN. It seemed to situate the EU in a systemic relationship with the UN in international law. In reasoning the power of review as only capable when higher norms were at stake, namely *jus cogens*, the CFI effectively sought to recognise a hierarchy of international law over the EU. This is significant for the role of the EU as it would place it as part of an overall system and as a result questions the autonomy and independence of the Union.

The judgment of the, then, ECJ provided quite a different view on this subject. The Court considered that in reviewing whether there had been a breach of fundamental rights, it was reviewing the legislation passed by the Community, which was consequently

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<sup>292</sup> Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3533 and Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533; Case C-402/05 P *Yassin Abdullah Kadi v. Council and Commission*, Advocate General (AG) Maduro's opinion, 16 January 2008; Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v. Council*, [2008] ECR I-6351.

amenable to judicial review by the European Courts and acts of European law would always be reviewable irrespective of their origin.<sup>293</sup> The Court, therefore, avoided any discussion of the relationship between the EU and the UN. It argues that the determination of the relationship between the EU and international law and the extent to which international legal norms form part of the European legal order is determined solely at the European level.<sup>294</sup>

This judgment has been critiqued in a number of ways. Some have argued that the ECJ failed to understand the role of the EU on the global stage,<sup>295</sup> others have cited it alongside case law concerning the WTO Agreement as an example of “selective multilateralism.”<sup>296</sup> The Court has been critiqued in this sense for only respecting international agreements when it is convenient. Much of this criticism, however, is focused around the idea of the EU as an ‘implementing’ order for the ‘international community’. The judgment of the ECJ in *Kadi* contributes a great deal to the expansion of the constitutional framework of the EU and its autonomy as an integrated legal order. The ECJ was perhaps slightly too narrow in its approach and could have taken more from the European Court of Human Rights and the approach taken in *Behrami* case,<sup>297</sup> that legal orders may exist separately but they do not exist in a vacuum. In going as far as the Court did in its concern about being “prejudiced” by an international agreement,<sup>298</sup> it went too far in ring fencing its own existence. This had the inevitable consequence of the complete failure to recognise the interaction of the Union with international law and the need of the Union to continue to develop this relationship in order to pursue a greater role as a global entity.

This line of case law may have been critiqued as ‘hostile’ to international law, but it is argued that a more accurate consideration would be that it shows the relationship between these legal orders. The Advocate General Opinion in the *Kadi* case, in particular, can perhaps be taken into account when considering this:

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<sup>293</sup> Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v. Council*, [2008] ECR I-6351 at para.278.

<sup>294</sup> Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v. Council*, [2008] ECR I-6351.

<sup>295</sup> D.Chalmers, G.Davies & G.Monti, *European Union Law*, 2nd edn, (Cambridge: Cambridge University Press, 2010) at p.658.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10.

<sup>298</sup> Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v. Council*, [2008] ECR I-6351 at para.316.

This does not mean, however, that the Community's municipal legal order and the international legal order pass by each other like ships in the night. On the contrary, the Community has traditionally played an active and constructive part on the international stage. The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments. The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.<sup>299</sup>

The international role of the EU is one that is still evolving. It is not necessary to view the judgments of the CJEU as necessarily 'friendly' or 'unfriendly' to international law. What is instead productive is to view these judgments as developing the autonomy of the EU and, in doing so, in developing a relationship with international law. The judgments of the Court seem to show a concern for the integrity of the EU legal order, rather than a particular friendliness or hostility to international law.<sup>300</sup> The various judgments of the Court show a work towards developing both the internal and external autonomy of the EU. In starting with *Van Gend* and *Costa*, the Court's concern was developing the independence of the Union through the principles of supremacy and direct effect; the EU existed in a distinct manner from its Member States and had developed as an independent source of law. As the jurisprudence of the Court has evolved, this idea of autonomy has become more deeply engrained in the EU legal order. As well as developing autonomy in an internal sense, the Court expanded this to the external level, progressing towards an existence independent from external influences, including international law. The idea of autonomy now exists within the EU legal order and, arguably, underpins a number of the basic principles of the Union.<sup>301</sup>

This is a distinct form of autonomy, however. The particular relationship that the EU has with the international legal system must be fully understood in order to fully understand this autonomy and the resulting identity of the Union. International law and the EU cannot remain completely separate. They impact upon each other. This is the key aspect to understanding the international identity of the EU. This case law is not about the hostility or not towards international law, but rather the focus of all parts of these cases has been about reviewing European norms. The more accurate conception of this relationship is

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<sup>299</sup> Case C-402/05 *P Yassin Abdullah Kadi v. Council and Commission*, Advocate General (AG) Maduro's opinion, 16 January 2008 at para.22.

<sup>300</sup> J.W.van Rossem, 'The Autonomy of EU Law: More is Less?' in R.A.Wessel and S.Blockmans (eds.) *Between Autonomy and Dependence The EU Legal Order Under the Influence of International Organisations* (Asser Press, 2013) p.13, at p.17.

<sup>301</sup> J.W.van Rossem, 'The Autonomy of EU Law: More is Less?' in R.A.Wessel and S.Blockmans (eds.) *Between Autonomy and Dependence The EU Legal Order Under the Influence of International Organisations* (Asser Press, 2013) p.13.

that it is a continually evolving interaction that is not governed by any form of hierarchy. Rather, each legal order is regulated by its own internal rules.

#### **4.4. The Principle of Mutual Interaction: The Relationship between the EU and International Law.**

The desire of the EU to interact with the international legal order and to respect and form part of this global order, has seen the Union clearly work towards breaking away from its original international law foundations towards greater independence. These may appear to be entirely conflicting approaches to the role of the Union; the EU as an autonomous legal order which cannot be prejudiced by international law and the EU as part of a multilateral order with international law forming an ‘integral part’ of the EU legal order. It is argued that it instead demonstrates a complementary relationship.

While many focus on the concept of hierarchy and insist on an analysis on the basis of outdated concepts of monism or dualism to determine this hierarchy, it appears as if this is a limited and inaccurate conception of the relationship.<sup>302</sup> What is far more appropriate is a more pluralist approach that views the existence of different and interacting norms and legal orders as possible and more accurate in its analysis of the international role of the EU. What exists is a balance between the EU as part of an overall system and the EU as its own independent actor. No legal order, be it international, European, or any national orders, now exist in isolation but rather have a continued interaction; no constitutions exist as “normative universum” but rather as “normative pluriversum”.<sup>303</sup> It is not so simple as to consider this relationship in hierarchical terms or in considering the Union as either ‘freundlich’ or not towards international law. In focusing upon norms as existing within a singular hierarchy, the point is completely missed that there is no single legal system within which these norms exist. This continues to show the difficulties with the development of the international system. There is an attempt to conceive of the EU within a system grounded in positivist mechanisms. When conceiving of the European Union and its external actions, therefore, what is needed is not a consideration of the way in which it ‘fits’ or does not within the international system because it is not an actor within this

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<sup>302</sup> A.Von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law’, (2008) *International Journal of Constitutional Law* (I.CON) p.397 at p.400.

<sup>303</sup> A.Von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law’, (2008) *International Journal of Constitutional Law* (I.CON) p.397 at p.401.

system. What would instead be productive would be a consideration of the way in which different norms from different systems interact.

The international identity of the Union is shaped by the way in which the Union legal order has this degree of interaction with the international order, rather than any form of hierarchy existing. The thesis considers that there is no hierarchy in existence, but rather that these legal orders interact with each other. This mutual interaction exists between the Union and international legal orders, but can also engage national legal orders. The manner in which these different legal orders interact is what drives the international actions and identity of the Union. The lack of a hierarchy and the reliance on this ad hoc development can leave the international identity of the Union in a confused state.

This is, it is argued, the way in which the EU needs to be perceived of as an international actor. There is an international legal order, a European legal order and there are also various domestic legal systems. All of these possess their own legal norms and hierarchies and continue to develop in their own right. They each, furthermore, possess their own jurisdictional space. It is when this space begins to overlap, or when actors are engaged within more than one of these systems, that the question of interaction begins to arise. Simply because there exist these collisions, or interactions, it cannot be judged that an overall hierarchy must exist in order to govern them. This simply is not the case. In more closely considering the interactions, themselves, however, a better understanding will exist of the nature of the EU and the way in which it acts at the international level.

The principle of mutual interaction shows, it is argued, the extreme development of the transparency seen within international organisations. The Union shows some similarities between this idea of international organisations existing as transparent actors: autonomous but through which the actions of members and other actors can continually be seen. Its progression and integration as a comprehensive legal order has progressed its move towards independent action further than that seen with any international organisation while retaining the involvement of its Member States to highly significant level. This interaction is, it is argued, mirrored by that seen between the Union and international law; as the EU progresses its international activities and becomes increasingly engaged at the international level, it seems to push further towards autonomy and independence from the international system. This only shows the continued importance of all involved agents here; there will not be a time when these three parts are completely detached from each other and thus the 'transparency' discussed in terms of international organisations within the international system can be considered here.

Mutual interaction between legal orders affects the nature of EU international action but that also affects the definition and understanding of this action and its consequences. In order to understand when the EU is acting internationally and when it is simply involved within international action, an understanding of this mutual interaction is necessary. As a result, this interaction will prove fundamental for any determination of responsibility of the EU, or even for determining no responsibility of the EU. Ultimately, any determination of Union responsibility must involve the internal workings of the EU and the way in which these internal workings interact with domestic and international legal systems.

#### **4.5. Conclusions.**

The expansion of the Union into almost every policy area has created a situation where the interaction with international law only continues to grow. As this interaction increases, the EU continues to extend its global role and identity and push towards a greater autonomous identity, despite the inherent limitations that this will always have. This uncertain and evolving relationship at the core of the global identity of the Union is the main issue with the overall project of the ILC and its applicability to the Union. A system that attempts to classify organisations as entirely distinct and autonomous actors, fails with the EU because of its complex and evolving identity.

The ILC's project views organisations in a relatively traditional way and the rules it has established generally reflect this traditional concept of organisation.

The very basis and approach of the ILC towards the ARIO shows a continued focus on organisations in a relatively traditional way and the rules it has established reflect such an approach. The focus of the definition created by the ILC is that the organisation has international legal personality and is created by states using an instrument governed by international law.<sup>304</sup> This follows the original idea of an organisation as being a collection of states and, consequently, does not respond to the development of organisations towards a more autonomous existence. As a result, the changing nature of the Union and the unique global identity that it possesses poses a particular challenge to the ARIO. This is so far beyond the traditional idea of an organisation that attempting to apply these rules to the Union will be problematic.

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<sup>304</sup> See discussion on ideas of international organisations and their definition above at pp.62-72

It is the foundations of responsibility and the way in which they remain so grounded in traditional ideas of international law that pose a substantial difficulty with the EU. When considering the fact that it is a system of interaction at the core of the Union that drives its international identity and its international actions, a law of responsibility that focuses upon unified international actors will struggle. The foundation of responsibility is of a set of principles that have emerged out of a system of bilateral state relations, particularly when you consider the very basis for identifying an internationally wrongful act. The principle of attribution, in particular, creates a basis for responsibility that just does not work with the European Union. Attribution is the way in which moral agency can be seen to have been considered within the law of responsibility and its very foundation as an individuated principle cannot sufficiently consider the international action of the European Union. The existence of attribution as a basic requirement for even determining responsibility makes it central to responsibility and the weaknesses with the application of this principle to the European Union form a substantial part of the critique of the ARIO.

## 5. The Principle of Attribution: Foundational Problems within the ARIO.

Attribution is a crucial aspect of responsibility. It exists to ensure that responsibility is incurred by the actor responsible for the commission of the breach of international law. In a system where only collective entities are acting, it is only appropriate that some sort of connection or link is made between the actor incurring responsibility and the breach that has been committed.<sup>305</sup> This is the idea of moral agency that is necessary within any legal system.<sup>306</sup> While the general idea of a link has been little considered within international law, the principles of attribution were developed to address this within the law on state responsibility.<sup>307</sup> Attribution therefore became entrenched in this role in the law of responsibility and has thus become central to the law of responsibility.

Attribution is one of the principles that show the 'general' approach of the ILC in drawing substantially on its previous work on the state responsibility. This is a logical approach; all international legal persons should be subject to the same principles. In not fully considering the differences between these actors, however, there are weaknesses to this approach. The difficulty with attribution, in particular, is that a fundamentally singular approach taken at the international level to this principle; attribution is there to determine which *individual* actor has committed a breach and thus incurs responsibility. In existing as a requirement of responsibility and furthermore having such a singular idea at its core, attribution then shapes the idea of responsibility as a singular principle.

The unified nature of the state means that this singular idea works but the interactive nature of the European Union's international identity significantly challenges this idea of attribution and, consequently, responsibility. As the EU continues to expand its international activities, its level of interdependence appears to only be increasing. In a number of areas of EU external action, the challenge posed by determining who has committed precise action within the overall framework is one that only seems to increase

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<sup>305</sup> F.Hoffmeister, 'Litigating against the European Union and Its Member States- Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations', (2010) *21 European Journal of International Law* p.723 at p.726. See further in S.Talmon, 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M.Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005), p.405 at p.410, drawing an analogy from the findings of the Permanent Court of International Justice that "States can act only by and through their agents and representatives": PCIJ *German Settlers in Poland*, Advisory Opinion, 1923, Series B, No.6 at 22.

<sup>306</sup> See above discussion of moral agency at pp.76-81

<sup>307</sup> Article 4 ARSIWA.



alongside the development of activities and competences.<sup>308</sup> This chapter considers the foundational difficulties that exist in the basis of the principles of attribution, as they have been drafted within the ARIIO. It first of all does this by considering the development of the principle of attribution and how this has created inherent problems in this area that limit its capacity to apply beyond the unified structure of the state. It then considers the way in which these problems have already begun to arise by looking at the case law that has already arisen in this area. Finally, the chapter considers the potential alternative approaches to attribution.

### **5.1. The Development of the Principle of Attribution**

Attribution is a central principle in the law of responsibility. The international legal system is one that does not address the actions of individuals but rather addresses collective entities. The result of this is a system full of actors who depend upon individuals or even other collective actors to carry out actions on their behalf. It is therefore necessary to make some kind of link between action committed and the actor that committed it, be that a state, an institution or another actor. Attribution provides this link. It determines:

“the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of a positive action or an omission, is to be characterized, from the point of view of international law, as an ‘act of the State’ (or the act of any entity possessing international legal personality).”<sup>309</sup>

This is a necessary principle and at its core is a simple idea; a link must exist between perpetrator and action. The approach taken towards this overall principle and the way it has been implemented within the international legal system is where problems can exist, however.

Principles on attribution were originally developed in the ILC’s ARSIWA and have since provided a substantial foundation from which to develop the principles included in the ARIIO. It is only with the identification of an internationally wrongful act that responsibility can be established. Under Article 2 ARSIWA and Article 4 ARIIO, an internationally wrongful act is identified by a breach of international law that is attributable to a state or an international organisation.

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<sup>308</sup> See for further discussion of development of external competences chapter four at pp.86-91.

<sup>309</sup> L. Condorelli and C. Kress ‘The Rules of Attribution: General Considerations’, in J. Crawford, A. Pellet, and S. Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University press, 2010) p.221 at p.221.

Addressing collective actors is not unusual within a legal system; in fact, it is necessarily quite a common occurrence.<sup>310</sup> What is unusual at the international level, however, is the lack of development of *how* to consider these actors. While national legal systems have sought to address this over time, the relatively expedient creation of principles of attribution at the international level has resulted in a simple approach being taken. This is especially problematic at the international level due to the focus of the international system on collective actors. The distinct nature of the EU causes a particular difficulty in terms of the lack of consideration of how to address different types of collective entities. This resulted in concerns surrounding the individual action of the Union being voiced from early on in the project and some calls were even made for particular rules addressing the conduct of the Union.<sup>311</sup> The work of the ILC, however, still did not seek to explore these difficulties and moved away from this special recognition. It instead followed a set of principles on attribution largely mapped from the ARSIWA.

There is the initial principle, largely similar to both sets of articles, that the actions of organs or agents will be considered to be those of the state, or institution.<sup>312</sup> This is irrespective of the position of the organ or agent in the organisation and the rules of the organisation will apply in determining the functions of the organs and agents. This originated from consideration of the actions of states as existing within a more 'traditional' idea of an international legal order focused around a collection of sovereign states. This view of an international order and, consequently, of states resulted in the ability to confidently view control of a territory by a state as meaning that the state would be in control. It also meant relative clarity in the existence of organs or agents of a state, therefore, there was logic in the inclusion of such a principle of attribution.

When translated to the law of responsibility in relation to organisations, the principle of attributing the acts of organs or agents of organisations to the organisation has also seen

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<sup>310</sup> C.Tomuschat, 'Attribution of International Responsibility: Direction and Control' in M.Evans and P.Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Hart, 2013) p.7 at p.7.

<sup>311</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004, at p.5; European Commission Comments, *Comments and Observations by Governments and International Organizations*, A/CN.4/556, 12 May 2005, at pp.5-6; European Commission Comments, *Comments and Observations received from International Organizations*, 14 February 2011, A/CN.4/637 at pp.7-8; EU Presidency Statement on the ILC Report 2004, New York, 5 November 2004, PRES04-298EN; A/C.6/59/SR.21 available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4020_en.htm)

<sup>312</sup> Article 4 ARSIWA; Article 6 ARIIO.

some acceptance, for example with the UN.<sup>313</sup> In spite of this, the changing nature of the international arena means that this approach suffers from two fundamental difficulties, however. There is the initial difficulty of how to determine when an organ or agent is that of a state, or now an organisation and secondly there is the difficulty that this approach to attribution no longer addresses the diversity of factual circumstances that arise with international operations.<sup>314</sup>

These difficulties, particularly the second of these problems, are then perpetuated by the other principle of attribution; the initial article 6 has been 'supplemented' by Article 7 ARIO, which states that the actions of organs or agents placed at the disposal of an organisation, and acting under its 'effective control', will be attributed to the organisation. This is, again, a principle derived from the ARSIWA, although it has been modified to an extent. In one sense this shows an acceptance of a change in the international system and a slight move away from the traditional paradigm. There is a recognition that sometimes actions will be carried out by other entities that will be connected with these overall legal persons, and that this principle is needed to allow for the existence of a greater level of interdependence.

This recognition is only taken so far, however. The reversion to traditional notions of international action continues with the clear desire by the ILC to draw substantially on the ARSIWA in order to draft the ARIO. While this may have had a positive aim in attempting a cohesive law of international responsibility, this was not achieved. Rather this approach actually entrenched existing flaws in the law of responsibility and also further developed the issue of whether attribution fully addresses the nature of international action. This 'translation' of principles from the ARSIWA into the ARIO has been subject to very little development and little consideration of the different actors to which they will apply. This has resulted in principles of attribution that are fundamentally flawed. These weaknesses affect the way they apply generally but also cause particular difficulties when faced with the EU. These are issues, which were identified by the European Commission during the drafting process when it was proposing ways in which to address the EU. The arguments put forward by the European Commission, as well as the response of the ILC, are quite illustrative in understanding the issues here, as well as what this has meant for how attribution has been shaped and its application to the Union.

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<sup>313</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999 p.62 at pp.88-89, para.66.

<sup>314</sup> C.Tomuschat, 'Attribution of International Responsibility: Direction and Control' in M.Evans and P.Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Hart, 2013) p.7 at p.8.

### 5.1.1. The European Union and the Development of Attribution within the ARIO.

Attribution, as a requirement for determining responsibility, depends upon a determination of precisely who has acted. The difficulties of such a determination when faced with the interactive nature of the European Union are what cause the biggest problem with the principle of attribution and the EU. There is now a determination that the EU possesses legal personality and any legal person must incur responsibility for any wrongful acts that they have committed. To go 'through the veil' of an institution, or in this case the EU, and attribute action to Member States too readily, would offend their foundation as international legal persons.<sup>315</sup>

The Union is more than just a framework for state cooperation where such a division of action could be fairly simply understood; it is a legal system. In fact, it is a complex and unique legal system that continues to be dependent upon other legal systems, namely those of its Member States. The international activities of the EU, in particular, show this significant paradox; as the Union progresses further towards an independent existence, it becomes increasingly dependent upon its Member States. This is an interaction that is core to the identity of the EU. Often the result is that making any determination of what individual actor has committed an individual actor is a complicated task. While international organisations pose a challenge with their transparent nature, the existence of the European Union as an integrated legal system poses an even greater challenge. It is this conflict that falls at the core of the arguments surrounding the EU and the principles of attribution. These concerns can be seen as the focus of the European Commission's arguments and proposals, in its comments, and the statements made on behalf of the Presidency when discussing the work of the ILC.<sup>316</sup>

It should initially be noted when considering the comments from the European Commission that these are solely limited to the area previously falling under the 'Community' umbrella. The European Commission made it clear that comments on the

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<sup>315</sup> P.Klein, 'The Attribution of Acts to International Organizations', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.297 at p.301.

<sup>316</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004, at pp.13-14; EU Presidency Statement on the ILC Report 2004, New York, 5 November 2004, PRES04-298EN; A/C.6/59/SR.21 available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4020_en.htm) at para.18; P-J.Kuijper and E.Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations', (2004) 1 *International Organisations Law Review* p.111; European Commission Comments, *Comments and Observations by Governments and International Organisations*, A/CN.4/556, 12 May 2005 at p.5.

need to address the particular nature of the Union and argued for a special rule of attribution but this was all clearly restricted to these previously 'Community' areas. The European Commission even, at times, explicitly refused to pass comment on areas that could be considered to be 'Union' areas of law, such as foreign policy.<sup>317</sup> It is worth noting that these comments were made prior to the Lisbon Treaty coming into force when the Community and the Union still remained separate legal orders. The Union legal order had not grown with the Community legal order to possess the same increasingly autonomous and supranational nature and consequently, the Commission remained keen to keep the distinction between these areas of Union action. This contributes to the argument that any consideration of particular rules in relation to the EU remains limited to Community areas and other Union areas, such as foreign policy, would still be addressed using the 'general' rules of attribution.

In its comments, the Commission outlines some of the distinct factors of the EU's identity, namely the way in which it exists as a legal order in its own right and is more than an organisation. The manner in which this legal order is structured and works in practice has a number of distinct factors that shape the issue of the Union in relation to attribution. The comments from the European Commission, as well as the various EU Presidency statements, continually argue that these distinct factors mean that the EU needs special attention within the articles.<sup>318</sup> The Commission argued for "common sense, practical solutions" in relation to any of the organisations that may be affected by these articles.<sup>319</sup>

From this initial consideration of the nature of the Union, the Commission identified two main concerns in relation to attribution. There is, firstly, the issue of the implementation of legal obligations of the EU by Member States because the EU itself does not have a Union-wide implementing authority. There is, secondly, the question of areas of mixed competence between the EU and its Member States and how any breaches in this area could be divided between the two.

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<sup>317</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004, at p.16.

<sup>318</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004, at p.5; European Commission Comments, *Comments and Observations by Governments and International Organisations*, A/CN.4/556, 12 May 2005, at pp.5-6; European Commission Comments, *Comments and Observations received from International Organizations*, 14 February 2011, A/CN.4/637 at pp.7-8; EU Presidency Statement on the ILC Report 2004, New York, 5 November 2004, PRES04-298EN; A/C.6/59/SR.21 available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4020_en.htm)

<sup>319</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004, at p.5

When considering the Commission's first concern, in relation to the complexity of Member States implementing obligations on behalf of the Union, any determination of responsibility will have to consider how to address this division: EU obligations but Member State(s) implementation. It raises the question as to whether the EU incurs responsibility for actions of its Member States in implementing these actions. The Commission considered that one of the ways in which to make such a determination with the complexity of the Union's legal order would be through reference to the rules of the organisation. The Commission had concerns about international principles attempting to make the determination of when actions are those of Member States and when such Member States are in fact implementing EU obligations, with the Union consequently taking responsibility.

The second concern of the Commission raised the difficulty of the horizontal relationship and the sharing of competences between the Union and its Member States and the difficulty of 'mixed agreements' to which both the Union and Member States are parties. The competences of the EU and the way in which these competences are divided between the EU and its Member States are also dynamic and fluid. This division can be hugely influential in determining who has acted and the only way in which this division can be understood is through the internal norms of the Union. This has often led to the argument that responsibility should follow from competence.<sup>320</sup> One way in which this has previously been addressed by the Union is through the use of declarations of competence to explain the division of competences between the Union and its Member States. Responsibility can then be established from these declarations by determining responsibility to fall with the body that possesses competence. An example can be seen in the Energy Charter Treaty, which contains such a provision:

The European Communities and the member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competencies.

While declarations of competence potentially form a basis by which the nature of Union action can be understood by third parties, there are a number of problems when such declarations are considered in practice. Such declarations can become out of date quite quickly and depend upon the Union and its Member States updating their detail, which

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<sup>320</sup> J.Heliskoski, 'EU Declarations of Competence and International Responsibility', M.Evans and P.Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Hart: Oxford, 2013), p.189 at pp.190-191.

often does not happen.<sup>321</sup> Competences are dynamic at the EU level and change is not limited to that made through Treaty revision but rather can evolve outside of this. The *ERTA* doctrine shows this with its consideration of the development of implied powers by the Union.<sup>322</sup> While this may now be codified in the Treaties, the initial creation of this doctrine shows the capacity for the Union to evolve outside of the Treaties.<sup>323</sup> This makes the obligation for updating even more onerous and even less likely. While declarations are supported on the basis of their potential to provide certainty for third parties in their legal relationships with the Union and its Member States, these basic problems raise the question of whether they are able to provide any such clarity and certainty.

There also remain substantial questions as to the extent to which third states are bound by such agreements, on the one hand, and also, on the other hand, the extent to which third states could rely on such agreements. To bind any third states to these agreements would go against the basic idea of norms only being binding upon the parties that have agreed to be bound; internal norms should only be *binding* internally.<sup>324</sup> While it has been argued that they can be considered to be instruments relating to the conclusion of a treaty and therefore be an interpretative tool, this is not entirely settled.<sup>325</sup>

This question of interpretation also raises a final question with regard to declarations of competence. The meaning and interpretation of such declarations may not be entirely clear, which, again, defeats their very purpose of providing legal certainty. The practice of the CJEU begins to show some of the concerns surrounding the clarity of declarations, for example with the ranging interpretations of the EU's UNCLOS declaration in the *Mox Plant* case.<sup>326</sup> AG Maduro, in this case, specifically commented the lack of clarity of the declaration in relation to UNCLOS on in his opinion.<sup>327</sup> The question has to be asked when

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<sup>321</sup> A. Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 no.4 *European Foreign Affairs Review* 491 at p.508.

<sup>322</sup> Case 22/70 *Commission v. Council (ERTA)* [1971] ECR 0263, para.16.

<sup>323</sup> Article 216 TFEU.

<sup>324</sup> Articles 26 and 34 Vienna Convention on the Law of Treaties 1969.

<sup>325</sup> Article 31(2) Vienna Convention on the Law of Treaties 1969; A. Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 no.4 *European Foreign Affairs Review* 491 at p.496.

<sup>326</sup> Case C-459/03, *Commission v. Ireland (Mox Plant)* [2006] ECR I-04635.

<sup>327</sup> Opinion of Advocate General Póitres Maduro in Case C-459/03, *Commission v. Ireland (Mox Plant)* [2006] ECR I-04635.

considering the various interpretations from this case as to whether it is appropriate to consider declarations to clarify anything for third states when EU institutions and Member States do not understand the interpretation and cannot agree on it.<sup>328</sup>

Practice, furthermore, does not clarify the understanding of the status of declarations. While the CJEU has made reference to such declarations on occasion, this has not been the beginning of international practice, which remains substantially limited.<sup>329</sup> Declarations have not been utilised or relied upon by any third parties or yet any international courts. In light of all of this, the extent to which such declarations can, or should, have any impact outside the EU legal order remains highly uncertain.

Both of the European Commission's significant concerns were accompanied with some suggestions on how to address the difficulties outlined. One of the ideas advocated by both the Commission and the Presidency was distinguishing the apportionment of responsibility from the question of attribution.<sup>330</sup> Many of the difficulties surround the capacity to distinguish between Union action and that of its Member States, leaving the basic idea of attribution as developed in the ARSIWA and then the ARIO as insufficient when faced with the actions and competences of the Union. To address this, the question of attribution would need to be a secondary one, to be answered once it has been determined that responsibility for the act would fall with the Member State or with the organisation.<sup>331</sup> Responsibility and apportionment would become two separate questions to be addressed, including the request or authorisation of state conduct by an international organisation.<sup>332</sup>

The European Commission also advocated the inclusion of references to the internal rules of the organisation, as the only source that can explain the relationship between the EU

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<sup>328</sup> A. Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 no.4 *European Foreign Affairs Review* 491 at pp.508-509.

<sup>329</sup> Case C-459/03, *Commission v. Ireland (Mox Plant)* [2006] ECR I-04635; A. Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 no.4 *European Foreign Affairs Review* 491.

<sup>330</sup> EU Presidency Statement on the ILC Report 2004, New York, 5 November 2004, PRES04-298EN; A/C.6/59/SR.21 available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4020_en.htm)

<sup>331</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004 at p.14; European Commission Comments, *Comments and Observations by Governments and International Organisations*, A/CN.4/556, 12 May 2005 at p.5.

<sup>332</sup> European Commission Comments, *Comments and Observations by Governments and International Organisations*, A/CN.4/556, 12 May 2005 at p.43.



and its Member States.<sup>333</sup> While clearly the initial place to start when considering the relationship between the EU and its Member States, there are complex questions with such references that will be addressed in more detail in a later chapter.<sup>334</sup>

With these initial concerns for maintaining the distinct identity of the EU, the European Commission then progressed on to proposing three more concrete solutions within the framework of the articles being drafted, which have also been supported in the Presidency statements that have been made.<sup>335</sup> These were, firstly, a special rule of attribution so that the actions of organs of Member States can be attributed to organisations.<sup>336</sup> The second possibility was the implementation of special rules of responsibility to enable responsibility to be charged to the organisation, even if the prime actors in the breach of the organisations obligation were the organs of Member States. The final option put forward was a special exemption or savings clause for the EU. This last option is the one that is least favoured by the European Commission.<sup>337</sup> All of these proposals carried the same idea; those actions that may *factually* be considered those of one actor may need to be considered differently when the normative relationships are considered. Interestingly, the aim of the European Commission throughout appears to have been mainly focused on upholding the distinct identity of the EU rather than having any particular aim in terms of the law of responsibility.

While the ILC showed some recognition of these concerns, it did so with caution. In spite of some recognition of the Union having particular circumstances, the debate surrounding the existence of any 'special rule' remained unsettled.<sup>338</sup> The ILC has, therefore, made some limited attempt to address the EU's concerns. The extent to which this attempt actually sufficiently addresses any of the concerns, however, remains questionable.

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<sup>333</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004 at p.13.

<sup>334</sup> See below at chapter seven at p.173-185

<sup>335</sup> EU Presidency Statement on the ILC Report 2004, New York, 5 November 2004, PRES04-298EN; A/C.6/59/SR.21 available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa-eu-un.org/articles/en/article_4020_en.htm) at para.18; P.-J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations', (2004) 1 *International Organizations Law Review* p.111.

<sup>336</sup> European Commission Comments, *Comments and Observations by Governments and International Organizations*, A/CN.4/556, 12 May 2005 at p.5.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Seventh Report on the Responsibility of International Organizations* by G. Gaja, Special Rapporteur, 27 May 2009, A/CN.4/610 at pp.38-39.

### **5.1.2. The Development of the Principles of Attribution: the ILC's approach to addressing the difficulties posed by the EU.**

From early on, Gaja recognised some of the distinct issues that affect the EU, for example, with recognition of certain situations where organisations have obligations that are dependent upon the conduct of Member States and if action were carried out by the organisation it would be clear that the organisation would be responsible and there would be no question of attribution.<sup>339</sup> Although there is a desire to engage with the EU's concerns, Gaja's engagement is to some extent limited by focusing upon the idea of attribution of responsibility rather than attribution of conduct.<sup>340</sup> This is mentioned particularly with reference to the United Nations Convention on the Law of the Sea (UNCLOS) and its requirements that parties make declarations on the division of competence.<sup>341</sup> Any breaches of the Convention that fall within a state or an organisation's declared area of competence will then be considered to be the responsibility of that state or organisation.<sup>342</sup> Any of these considerations of responsibility go without any consideration of conduct being attributed to the organisation or state. These distinct circumstances then have no impact upon the core nature of responsibility but are seen as additional circumstances that fall outside this.

Gaja's recognition of these issues was, therefore, somewhat limited. Not only can these limitations be seen in the ringfencing of such examples, but also through the restriction of any recognition of distinct rules to particular areas of Union activity. Outside of these special areas, any special consideration of attribution was ruled out with attribution being retained in its traditional conception.<sup>343</sup> It is also worth noting that in spite of recognising the distinct nature of certain areas of Union activity, in 2005, the ILC report utilised the relationship between the EU and its Member States to further underpin the rationale behind the traditional principles of attribution.<sup>344</sup> The ILC used three cases to elaborate

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<sup>339</sup> Second Report on the Responsibility of International Organizations, by G.Gaja, Special Rapporteur, A/CN.4/541, 2 April 2004 at p.6, para.11.

<sup>340</sup> Second Report on the Responsibility of International Organizations, by G.Gaja, Special Rapporteur, A/CN.4/541, 2 April 2004 at pp.5-8.

<sup>341</sup> Annex IX to the United Nations Convention on the Law of the Sea; European Commission Comments, Comments and Observations received from International Organizations, A/CN.4/545, 25 June 2004, at p.23.

<sup>342</sup> Annex IX to the United Nations Convention on the Law of the Sea.

<sup>343</sup> *Second Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, A/CN.4/541, 2 April 2004 at pp.5-8.

<sup>344</sup> International Law Commission *Report on the work of its fifty-seventh session (2005)* A/60/10, Commentary on Part One, Chapter IV, at pp.93-96.

upon this relationship; *M & Co v Germany* before the European Commission on Human Rights, the *Geographical Indications* case from a WTO panel, and the *Bosphorus* case from the European Court of Human Rights.<sup>345</sup> Considering the *Geographical Indications* case first of all, this showed an acceptance by the WTO Panels that Member States act 'de facto' as organs of the Community. This was made quite clear in this case with the focus particularly lying with competences having been passed from Member States to the EU. Any action carried out by Member States was entirely to implement action on behalf of the Union. This was a very clear-cut situation. Although, in consideration of the Union legal order and normative structures, this is very straightforward, this in no way uses the 'standard' principles of attribution.

Cases before the ECtHR, on the other hand, have continued to determine responsibility on the part of Member States. Considering the *Bosphorus* case, the ILC clearly stated the principle that arose out of this case; a state could not absolve itself of obligations under the European Convention on Human Rights by transferring competences and functions to an organisation.<sup>346</sup> Any obligations entered into after accession to the ECHR could not absolve a state of its obligations. The Court was clear that responsibility for a breach of Convention rights would remain on the part of a state unless, in transferring, its functions it had ensured that protection of those rights would be at least equivalent to the protection provided under the Convention. If such equivalent protection were provided, then the state will be deemed to have upheld its obligations, as was the case in *Bosphorus*.

The Court determined that competence and obligations still fell on the Member States; the Union remains, as yet, not party to the ECHR. The way in which this situation may change following accession of the Union is, as yet, unclear. Under the current arrangements, a determination that Member States were only acting as instruments of the Union would inhibit the jurisdiction of the ECtHR. The Court has, therefore, taken a pragmatic, arguably policy-driven, approach, seemingly wanting to ensure some sort of 'reserve responsibility'

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<sup>345</sup> WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States ('EC-Trademarks and Geographical Indications (US)')* WT/DS174/R, adopted on 15 March 2005; *M & Co v Germany* Application No.13258/87, Decision of 9 February 1990, (1990) 64 *Decisions and Reports*, p.138; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98.

<sup>346</sup> International Law Commission *Report on the work of its Sixty-First Session* (2009), A/64/10 at pp.89-90; See also *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98 at para.108.

of Member States in appropriate cases.<sup>347</sup> The Court has tended to avoid clear-cut statements on the direct responsibility of the EU for the actions of its institutions.<sup>348</sup> It has often found cases to be admissible, however, when brought against Member States, either collectively or individually even though the contested action was that of the Union.<sup>349</sup> The ECtHR has held that Member States cannot be allowed to use obligations of the EU to justify human rights violations.<sup>350</sup> This is in line with the reasoning of the Court in terms of the indirect responsibility of a state for any failure to implement rights, but this does seem slightly difficult. It may secure the responsibility of Member States where membership of an organisation potentially jeopardises rights, but it does raise broader questions on the capacity to attribute action more generally and the potential implications this has for the actions of Member States and, furthermore, the autonomy of institutions.

There is also, perhaps, a question of consistency with the implementation of obligations by Member States in one area, trade and the WTO, considered as actions of the Union and yet, the implementation of Union obligations, where they may breach human rights, remaining at the level of the Member State. It seems as if this is a policy decision. Overall, in spite of some recognition, the Union has continued to argue for special recognition of the nature of the Union as a whole in terms of attribution. This was furthered in some ways by the fact that the ILC utilised these distinct examples of the EU and responsibility to support the ‘translation’ of principles from the ARSIWA into the ARIO. This shows, to an extent, a lack of engagement with the distinct nature of the Union. The above areas were seen as supporting the ‘traditional’ idea of attribution and, in certain areas as exceptions, which were later addressed within the discussions on *lex specialis*.<sup>351</sup> The ILC has taken a limited approach to any sort of exceptional nature of the EU.

The ILC’s response to the Commission’s concerns also starts to reinforce the core problems identified with the two initial ideas of attribution, contained in Articles 6 and 7

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<sup>347</sup> F.Hoffmeister, ‘Litigating against the European Union and Its Member States- Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations’, (2010) 21 *European Journal of International Law* p.723 at p.731.

<sup>348</sup> *Emesa Sugar v the Netherlands*, Decision on Admissibility of 13 January 2005, Application no. 62023/00. The relevant EU case in question was Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* (2000) ECR I-665.

<sup>349</sup> *Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application no. 56672/00.

<sup>350</sup> *Matthews v the United Kingdom* Decision of 18 February 1999, Application No. 24833/94; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98, at para.153.

<sup>351</sup> See discussion in chapter seven at pp.185-206.

ARIO. The ARIO have followed the ARSIWA in being focused upon developing positive criteria in order to establish action as that of a single actor; it very much supports and indeed reinforces the idea of responsibility as a singular idea. The ILC did show acceptance in the ARIO that multiple attribution could not be excluded but it has not sought to address when this circumstance would arise or incorporate any provisions on attributing actions to more than one entity.<sup>352</sup> The focus remains on the ideas of attribution originally developed in the ARSIWA of attributing action to a single entity. This has raised some difficulties when considering the state as an actor and the manner in which it has changed, but the real difficulty with this has arisen since the beginning of the work on the ARIO. The different nature of organisations, along with the increasingly complex multi-level interactions that international organisations are involved with, creates substantial difficulties when faced with this requirement of determining, with clarity and certainty, which actor any breach should be traced back to. Practice in this area has not yet adequately built up enough to develop fully in response to the individual nature of organisations, and of the EU in particular. The concerns of the European Commission reflect this complexity and the manner in which the EU poses a particular difficulty.

While the ILC engaged with some discursive recognition of the European Commission's comments, this was limited and was while requiring the Union to be subject to these general principles of attribution, which does not really go any way to addressing the difficulties identified. The ILC did not really reason why but stated that it was preferable not to assume that there was a special rule of attribution in terms of Community law that meant that when Member States implemented a binding act of the Community, State authorities would act as organs or the Community.<sup>353</sup> The Special Rapporteur confirmed this line of thinking in 2009.<sup>354</sup> Consequently, the principles developed in relation to states have continued to be the focus, with the development of the *lex specialis* article in Article 64 ARIO providing a general potential exception.

It could be argued that the development of this principle does show some recognition of the individual nature of the EU. There are two issues with the development of the *lex specialis* principle, however. The first of these surrounds the way in which the provision

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<sup>352</sup> Commentary to Chapter II Attribution of Conduct to an International Organization, Articles on the Responsibility of International Organizations, with Commentaries 2011, Yearbook of the International Law Commission, 2011, vol.II, Part.Two, at para.4.

<sup>353</sup> International Law Commission *Report on the work of its fifty-seventh session* (2005) A/60/10, Commentary on Part One, Chapter IV, at p.95 para.7.

<sup>354</sup> *Seventh Report on the Responsibility of International Organisations* by G.Gaja, Special Rapporteur, 27 May 2009, A/CN.4/610 at pp.38-39.

has been drafted and whether it is appropriate, which will be considered in a later chapter.<sup>355</sup> The second issue is the substantially limited scope of this principle, as it applies only to those areas of Union activity previously encapsulated under the ‘Community’ umbrella.<sup>356</sup> An analogy cannot be made from the European Commission’s comments to apply this different rule to the areas of security and defence. First of all, the explicit refusal on the part of the European Commission to consider areas of Security and Defence does seem to limit these comments. Furthermore, the arguments put forward by the European Commission in claiming that these rules exist cannot be said to be relevant for the CFSP and CSDP. The focus of the Commission was on the concept of exclusivity; in areas of exclusivity, Member States are simply implementing EU measures and so responsibility should fall at the Union level. When considering CFSP and CSDP, there is no formal transfer of competence from Member States to the Union. Following the entry into force of Lisbon, competences may have been clarified in a number of areas, but in the area of CFSP/CSDP they seem to have been confused further, by falling into the area of a ‘special competence’. There is little clarity on what the ‘special competence’ is other than the fact that it does not amount to exclusive competence. Consequently, the proposed special rules of responsibility do not apply to crisis management missions. Any attempt to determine responsibility in that area would, therefore, require the application of these general principles of responsibility, and of attribution.

While the interactions above show the limited approach taken by the ILC towards the drafting of the articles, what is perhaps more concerning is the way in which these principles have since been applied and interpreted in the case law. This is an area that needs consideration before considering the practical difficulties when addressing the general principles of attribution to crisis management operations of the EU.

## **5.2. Foundational Weaknesses in Articles 6 and 7 ARIO: Issues in the Case Law: From *Behrami* to *Nuhanović*.**

While judicial consideration of principles of attribution within the ARIO while the articles were still being considered and drafted was perhaps premature, there does exist a bigger concern, in terms of the differing interpretations and application of these principles. When considering the case law significantly differing approaches can be seen both between

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<sup>355</sup> See discussion in chapter seven at pp.185-206.

<sup>356</sup> European Commission Comments, *Comments and Observations by Governments and International Organisations*, A/CN.4/556, 12 May 2005 at p.5.

judgments but also from the initial ideas of the Special Rapporteur in what had been originally intended. Three interpretations can be traced in the case law, none of which seek to override or overtly critique any of the others. These are, firstly, the *Behrami* case before the European Court of Human Rights (ECtHR), secondly, the *Al Jedda* case before the UK House of Lords and later the ECtHR and finally the recent case law in the Netherlands, with the *Nuhanović and Mustafić* judgments and more recently the judgment in the *Mothers of Srebrenica* case.<sup>357</sup>

In *Behrami*, the Court sought to apply the principle contained within Article 7 ARIO to determine whether the MNBs were under the control of the Member States, or under the control of the UN and consequently outside the jurisdiction of the ECtHR. The Court determined the latter. In questioning the attribution and where control lay, the Court focused on the “ultimate authority and control” of the UN.<sup>358</sup> The Court recognised that operational command had been delegated to NATO command. It argued, however, that this did not detract from the fact that ultimately the line of control could be traced back to the UN. The attribution of action to the UN by the Court in *Behrami* arose from its interpretation of command and control. While the Court acknowledged “the effectiveness or unity of NATO command in *operational* matters” as it concerned KFOR<sup>359</sup>, but also noted that the presence of KFOR in Kosovo was based upon a UN Security Council Resolution and concluded that “KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, ‘attributable’ to the UN within the meaning of the word outlined [in article 4 of the present articles]”<sup>360</sup> This idea of overall command

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<sup>357</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10; *R (on the application of Al-Jedda) v Secretary of State for Defence*, [2008] 1 AC 332; *Case of Al Jedda v the United Kingdom* Application no.27021/08, Judgment, 7<sup>th</sup> July 2011; *Nuhanović v. The Netherlands* Case number 265615/ HA ZA 06-1671, Judgment of 10 September 2008; *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672, *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011; *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6th September 2013, Supreme Court; *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court of July 16<sup>th</sup> 2014.

<sup>358</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10 at paras.133-134, 140.

<sup>359</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10 at para.139.

<sup>360</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10 at para.141.

was key. The UN itself has also supported the idea of “effective operational command” as determining responsibility.<sup>361</sup>

There are significant problems with the way in which the ECtHR applied this principle. It did not really engage in the factual determination that the ILC sought to promote. Instead, it sought to engage in determining where the action had originally been authorised, and considered this to demonstrate ‘control’. The Court overlooked the involvement between the various actors. While on the one hand this case shows a lack of understanding of the ILC’s principles, on the other hand, it also demonstrates some of the more fundamental difficulties with the idea of attribution. The circumstances in *Behrami* show the significant interactions that now exist within international activity, specifically peace and security operations, and any determination of the *singular* actor on which responsibility would have fallen here could have been subjected to criticism. While showing the way in which the control test may now form part of the implementation of the ARIIO, there remains a high degree of uncertainty that is concerning. This test was utilised to determine jurisdiction rather than solely in determining attribution. Control as a concept forms a major basis of the law of responsibility but the Court erred in using it in the area of jurisdiction.<sup>362</sup>

The court’s reasoning has been subject to a number of critiques, particularly in relation to its analysis of the chain of command.<sup>363</sup> In spite of such criticism, it is a decision that has been subsequently followed by the Court.<sup>364</sup> In *Kasumaj v. Greece*<sup>365</sup> and *Gajić v. Germany*<sup>366</sup> the ECHR reiterated its view on the attribution of the action of national contingents

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<sup>361</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 June 2008, S/2008/354, at para.16.

<sup>362</sup> A.Sari, ‘Autonomy, attribution and accountability. Reflections on the *Behrami* case’, in R.Collins and N.White (eds.) *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011) p.257; M.Milanovic and T.Papic, ‘As Bad as it Gets: The European Court of Human Rights’ *Behrami* and *Saramati* Decision and General international Law’, (2009) 58 *International Comparative law Review* 267

<sup>363</sup> P.-J.Kuijper, ‘International Responsibility for EU mixed Agreements’ in C.Hillion and P.Koutrakos (eds.), *Mixed Agreements Revisited, The EU and its Member States in the World*, (Oxford: Hart Publishing, 2010) p.208 at p.216.

<sup>364</sup> *Kasumaj v. Greece* Decision of July 5 2007, Application No. 6974/05; *Gajić v. Germany* Decision of August 28 2008, Application No. 31446/02; *Berić and others v. Bosnia and Herzegovina* Decision, Application No. 36357/04, 46 Eur HR Rep SE6 (2008).

<sup>365</sup> *Kasumaj v. Greece* Decision of July 5 2007, Application No. 6974/05

<sup>366</sup> *Gajić v. Germany* Decision of August 28 2008, Application No. 31446/02



allocated to KFOR to the United Nations. In *Berić and others v. Bosnia and Herzegovina*<sup>367</sup> the ECHR furthermore restated its decision in *Behrami and Saramati* when concluding that the conduct of the High Representative in Bosnia and Herzegovina was to be attributed to the United Nations. A more interesting distinction by the Court came in *Al Jedda*, however.<sup>368</sup>

*Al Jedda* shows a slightly different approach in its consideration of the actions of UK troops in the multinational action in Iraq.<sup>369</sup> The initial decision in the UK House of Lords does not attempt to contradict the views voiced in *Behrami*, but instead, the facts before the Court were distinguished from those in *Behrami*. There was a much stronger focus on who *factually* could be considered to be in control, with the Court finding that it could not “realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under command and control when they detained the appellant.”<sup>370</sup> This focus is far more in line with that advocated by the ILC Special Rapporteur, in terms of a focus on the factual situation.

This case was then brought before the European Court Human Rights<sup>371</sup>, which then had the opportunity to once again, engage in a discussion on the rules surrounding attribution within the context of an international peace and security operation. In spite of arguments from the UK that the principles of attribution could be applied to determine action on the part of the United Nations, the Court did not agree. The Court agreed with the reasoning put forward by the majority of judges in the House of Lords that there were fundamental factual distinctions between the UN’s operations in Iraq in 2004 and those of the UN in Kosovo in 1999. These distinctions, in the opinion of the Court, meant that the rules on attribution would not apply in the way that they had in *Behrami*; the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force. The applicant’s detention was not, therefore, attributable to the United Nations.”<sup>372</sup>

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<sup>367</sup> *Berić and others v. Bosnia and Herzegovina* Decision, Application No. 36357/04, 46 Eur HR Rep SE6 (2008).

<sup>368</sup> *Case of Al Jedda v the United Kingdom* Application no.27021/08, Judgment, 7<sup>th</sup> July 2011

<sup>369</sup> *R (on the application of Al-Jedda) v Secretary of State for Defence*, [2008] 1 AC 332.

<sup>370</sup> *R (on the application of Al-Jedda) v Secretary of State for Defence*, [2008] 1 AC 332 at p.349

<sup>371</sup> *Case of Al Jedda v the United Kingdom* Application no.27021/08, Judgment, 7<sup>th</sup> July 2011

<sup>372</sup> *Case of Al Jedda v the United Kingdom* Application no.27021/08, Judgment, 7<sup>th</sup> July 2011, p.49 §84

A significant difference in this case came in the founding basis of the action in Iraq being multinational cooperation rather than strictly *international* action. The distinction between these two types of international action is an understandable one; one was derived far more from UN action and the other from cooperation between states. The origins of action should not, however, be determinative, but rather the entire focus should be on the particular action. Consequently, while these are two different types of international action, it is uncertain why this should affect the application of *general* rules on attribution. This is only demonstrative of the overall problem of trying to draft a generic set of articles to apply to all international organisations, and the more particular problem of attempting to map the principles of states onto these entities.

The case of *Mukeshimana and Others v Belgium State and Others* before the Brussels Court of First Instance began to show recognition of some of the difficulties with attribution with a focus on the particular conduct at hand.<sup>373</sup> This case addressed the potential responsibility, and the apportionment of potential responsibility, between the UN and Belgium for the failure of Belgian UN peacekeepers to prevent massacres in Rwanda. This judgment provides an interesting recognition of the way in which control can switch and change within the chaos of a peace operation. In such operations this is often the case and, consequently, a much more flexible approach is needed than the clear-cut and blanket approach currently undertaken with attribution. In spite of recognising that such changes could happen, the court needed to engage with attribution and determine where it *precisely* lay at the point concerned. The court accepted that a switch in power had happened and that control had changed and no longer rested with the UN, but instead was being exercised by Belgium. The case also reinforced the important nature of *who* was exercising particular control in the precise circumstances being considered, not simply for the overall action. The latter aspect may have been positive, but still did not enable more than one actor to be considered. The need to attribute action to a single actor continues to limit this area.

This slightly more nuanced approach really began to develop in the *Nuhanović* cases in the Netherlands.<sup>374</sup> The Court of Appeal and the Supreme Court used the work of the ILC and the principle in Article 7 to question whether control over the battalion lay at the Member State level or at the level of the UN. The original judgment of the case before the District

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<sup>373</sup> *Mukeshimana and Others v Belgium State and Others* Case no RG 04/807/A and 07/15547/A (Brussels Court of First Instance, 8 December 2010) ILDC 1604 (BE 2010).

<sup>374</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672, *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011.

Court in The Hague made reference to the *Behrami* case and held that the actions in this situation were only attributable to the UN.<sup>375</sup>

*Nuhanović* and *Mustafić* appealed and the judgments of the Court of Appeal, and later the Supreme Court, in The Hague provide interesting reading in their determination of action being attributed to the Netherlands rather than the UN. The Court of Appeal rejected the approach taken in the previous decision by the District Court, which applied 'operational overall control' and also the test established in *Behrami*, which was 'ultimate authority and control'. The Court attempts to align itself with Article 7 ARIO and the elaboration of this by the Special Rapporteur. The Court can furthermore be said to be showing a determination to utilise this test solely in relation to the question of attribution, whereas in previous case law, it had been confused and used in a broader manner in questions, such as jurisdiction. This perhaps shows an increased degree of clarity in the law. The case was quite confused in its approach, however, with the Court choosing to utilise national legislation to determine whether a breach had been committed and then the international rules on attribution. This hybrid approach further undermines the clarity of the law of responsibility; it continues to lack in foundation.

The case does have the potential, however, to further an understanding of the approach taken towards attribution. The Court adopts a highly pragmatic approach to this test in arguing that what is meant is, not just whether conduct could be instructed, but whether it could be prevented. Whether or not failing to prevent something happening results in responsibility is a question of legal obligation and breach, but in terms of attribution, this is an interesting approach to determining control. The Court did restrict this decision to the particular facts of the case but the claim that a failure to prevent can give rise to a breach of international law has been recognised in other cases.<sup>376</sup> In terms of attribution, however, this develops some of the ideas of control and what is actually meant by this test. Surely, if an entity could have prevented something from happening, then it was factually in control of the situation.

The Dutch Court of Appeal and Supreme Court judgments appear to be the closest that any Court has come to what the ILC has been trying to approach with Article 7 in its focus on

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<sup>375</sup> *Nuhanović v. The Netherlands* Case number 265615/ HA ZA 06-1671, Judgment of 10 September 2008.

<sup>376</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, at p.3 at para.63.

the factual situation.<sup>377</sup> The Court utilised these various ideas of control and examined the situation as it happened. It was able to determine a turning point in the conflict where action became capable of being attributed to the Netherlands, due to the involvement of the Netherlands in planning the removal of troops from Srebrenica. There was an emphasis in both judgments in the way that the situation had changed resulting in the mission no longer being 'normal'. Although closer to the meaning of the ILC in its drafting of Article 7, this interpretation and focus is perhaps limited in the concept of any mission or operation being 'normal'.

While the Court's reasoning does show some progress, its focus on the effective control test was very much as a factual determination, more in line with the ILC's interpretation. The determination of attribution under article 7, therefore, goes beyond the chain of command. If the chain of command had simply been considered, it is possibly that, in line with the *Behrami* case, conduct would have been attributed to the UN. The Dutch Courts considered the detail of article 7 and its Commentary, however, and considered the test to be more complex than this; what matters is what has actually happened and who was *actually* in control of the situation at the time. While this is what is envisaged within Article 7 and moves away from some of the significant criticisms in *Behrami*, such a purely factual approach does have its own difficulties. It is questionable whether the factual circumstances of any EU operation could be established definitively and whether they would fully explain the actions at play. A factual control test that does not consider the normative relationship would not enable the appropriate understanding to be had of the command and control structures within a Union crisis management operation.

The judgment in *Nuhanović* was furthermore limited by the Court's willingness to only consider whether conduct could be attributed to the UN *or* to the Netherlands. It showed recognition of the idea of dual attribution but without engaging with it.<sup>378</sup> In spite of the fact that the crucial time period involved, in the words of the Court, a 'transitional' period, there was no consideration that conduct could, possibly, fall onto both of these actors. When looking at the discussion in the judgment in relation to effective control, the Court in fact states that during this period "**not only** the United Nations **but also** the Dutch government in The Hague had control over Dutchbat and also actually exercised this in

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<sup>377</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672, *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011; *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6th September 2013, Supreme Court.

<sup>378</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672, *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011, at para.5.9.

practice.”<sup>379</sup> From this statement it is clear that what was seen here was dual control over conduct and yet this could not be recognised in the application of article 7 and the attribution of conduct. The Court, however, continued to determine conduct on the part of one single actor, which is quite limiting in the law of responsibility.

This difficulty with collective action has also arisen in the *Mothers of Srebrenica* case.<sup>380</sup> This case was brought by ten claimants who had lost relatives following their eviction from a compound near Srebrenica, as well as the association ‘Mothers of Srebrenica’, which had previously had claims against the UN rejected due to the UN’s immunity. The claims made were wide ranging and the District Court in The Hague determined that the Dutch State was responsible for the deaths of around 300 men who had been evicted from the Dutchbat compound at Potočari. This was quite a limited approach compared to the broad range of claims made. The court continued the approach of applying the effective control test under Article 7 ARIO as the appropriate test.<sup>381</sup> The application of this test was highly limited, however, with the result that the determination of responsibility was limited to the deaths of the 300 men concerned.

This demarcation of responsibility was due to effective control being limited in three ways. Firstly, the state was only considered to be exercising effective control during the so-called ‘transitional period’. Secondly, the Netherlands was only considered to be exercising effective control within the ‘safe haven’. Finally, effective control only extended to conduct that related to “providing humanitarian assistance and preparing the evacuation of the refugees”.<sup>382</sup> This seems to be an incredibly limited approach and the reasoning behind it is far from clear due to the lack of discussion by the Court on the meaning of effective control.

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<sup>379</sup> *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6th September 2013, Supreme Court at para.3.12.2 (emphasis added)

<sup>380</sup> *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court of July 16<sup>th</sup> 2014.

<sup>381</sup> *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court of July 16<sup>th</sup> 2014 at para.4.33.

<sup>382</sup> *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court of July 16<sup>th</sup> 2014, at para.4.110

The judgment did seek, in some way, to address this question of collective action by reference to the idea of dual attribution. The claims were brought against both the Netherlands and the UN, with the UN not appearing as a party in the case. In such circumstances the Court considered that it did not need to consider the actions of the UN “also had effective control” due to the possibility of ‘dual attribution’.<sup>383</sup> Such an approach to collective action is incredibly problematic. Given that effective control in terms of attribution is defined in terms of an entity being completely dependent upon the responsible state or organisation, the ability to determine this on the part of two different actors does not seem possible. If there is dependence on the part of more than one actor, then the level of control will not amount to that necessary for attribution under article 7. While dual attribution shows some attempt to address the difficulties within the law of responsibility, it does so without addressing the core problems and so simply does not work. If anything, such an attempt by the Court continues to show the core difficulties within the law of responsibility. The foundation, the ‘Mothers of Srebrenica’ have attempted to bring a number of cases before a variety of judicial fora and have never received redress. The inability to determine which precise actor had *complete* control over any of the particular actions has meant a return to the issue that existed post-*Behrami*; there are breaches of international law for which individuals can gain no redress.

These judicial interpretations of attribution are all slightly different and have slightly different results. There has been an attempt throughout the jurisprudence to portray *Behrami* as reflecting the circumstances of the ‘normal’ situation with any deviation from this to be put down to exceptional circumstances. Factually, *Behrami* does, to an extent, show ‘normal’ circumstances of international activity, by showing the various actors that can potentially be involved in international actions. The determination of control seen in this case only serves to show the difficulties and uncertainties with this area of law. As has been seen from the previous cases that have been mentioned no two international missions are truly the same and so it appears to be a problematic and narrow analysis to consider that one structure provides a ‘normal’ idea. While the practical difficulties of this approach when faced with the EU will be considered in the following chapter, this chapter now considers how the principle could have been approached differently.

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<sup>383</sup> *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court of July 16<sup>th</sup> 2014 at para.4.45.

### 5.3. Alternative approaches to Attribution and Multiple Attribution?

There are a number of difficulties with the principles of attribution developed within the ARIO and their application to the European Union. A number of different approaches to attribution have been suggested when considering the Union and the variety of its international activity. Irrespective of the approach taken towards attribution, there will be difficulties with its application to the European Union. The one-dimensional nature of attribution restricts its development and its ability to respond to the actions of the EU. It may have been proposed that in complex circumstances involving a number of actors that multiple attributions could be put forward that would result in joint responsibility. Even this approach retains the difficulties that result in a law of responsibility that does not sufficiently address the actions that it proposes. The very idea of attribution within the law of international responsibility is flawed.

#### 5.3.1. Alternative approaches to attribution?

Kuijper and Paasivirta have considered three different models of attribution; the organic model, the competence model and the consensus model.<sup>384</sup> The organic approach can be seen as the strongly traditional approach towards attribution and largely similar to that already considered; the actions of organs of an institution are considered to be those of the organisation itself. This can be seen within the ILC's previous work on state responsibility and a similar approach has been taken within the ARIO; the actions of organs or agents are attributed to the organisation. This approach very much follows the traditional idea of responsibility and attribution and it has been argued that in doing so just does not sufficiently consider the individual nature of the Union. The interactions at the centre of the European Union mean that there is an inevitable struggle to establish different actors as 'organs' of the Union. The relationships in the EU that determine international action are not so easily definable.

The second model identified by Kuijper and Paasivirta is the competence model. This considers that responsibility should exist when an institution possesses competence in a particular area. The substantial cross over between the Union and its Member States has led to this logical approach when considering some of the difficulties that the EU poses for the law of responsibility. It addresses the obligations that show a cross over between the Union and Member States, for example with Union obligations implemented by Member

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<sup>384</sup> P-J.Kuijper and E.Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', M.Evans and P.Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Hart: Oxford, 2013) p.35 at p.48.

States. Member States must implement these obligations as they are legally bound by European Union obligations. Another issue that frequently arises under the question of the competence model is that of treaty law obligations of the Union, in particular mixed agreements, to which the Union and its Member States are both party. It is the internal norms and rules of the EU that determine where different powers and competences lie and the divide that exists between the Union and its Member States. The argument has been proposed that responsibility should flow from power, which is entirely in keeping with the idea of responsibility. When considering the European Union, competence and responsibility should correspond.<sup>385</sup>

There could be seen to be a shift in attribution if a greater correspondence was developed between competence and responsibility. The division of competences between the EU and its Member States is something, however, that can only be determined by internal norms of the Union and determining this division is the substantial difficulty. This has been previously been done through declarations of competence. These have been given in relation to the EU and are often made in the context of multilateral treaties in order to determine whether competence lies at the level of the EU or whether it is with the Member States. This is a useful tool for third states in understanding with which entity they are dealing in respect of different international obligations. The biggest example that is used in this context is that of the United Nations Convention on the Law of the SEA (UNCLOS), as it was the first treaty that saw the EU use a declaration of competence.<sup>386</sup> These declarations can, thus, have some positive aspects to them, but there are a number of mixed agreements that do not have any specific declarations. There are, also, a number of difficulties with declarations of competences in themselves, particularly due to the evolving nature of the competences of the European Union. The consequence of the changing nature of Union obligations is that any declarations of competences may have to be constantly updated otherwise they will end up out of date and irrelevant.<sup>387</sup> Making and understanding this division is problematic with the actions of the Union.

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<sup>385</sup> P.-J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', M. Evans and P. Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Oxford: Hart, 2013) p.35 at p.59.

<sup>386</sup> United Nations Convention on the Law of the Sea, Declarations, European Community Declaration made pursuant to article 5(1) of Annex IX to the Convention and to Article 4(4) of the Agreement.

<sup>387</sup> J. Heliskoski, 'EU Declarations of Competence and International Responsibility' in M. Evans and P. Koutrakos *The International Responsibility of the European Union. European and International Perspectives* (Oxford: Hart, 2013) p.189 at pp.205-206.



The difficulties in even making this determination are one problem with this approach when considering the Union. There remain the same, broader difficulties with this approach as seen with the approach taken within the ARIO. Ultimately a competence model still retains the idea of attribution as being a singular principle. There is an attempt to determine the division of action between the Union and its Member States and from this to determine responsibility. There is a continued approach towards responsibility as a principle that must be determined on the part of an individual actor. Although there may be some benefits to such an approach, the basis of attribution has been retained and so even if this approach were adopted it would continue to have difficulties with the actions of the EU.

Kuijper and Paasivirta also discuss the consensus model, which focuses on the idea of joint responsibility in some form when the EU and its Member States both participate. Some move towards this can be seen with the mechanisms developed by the EU in its negotiations on accession to the ECHR. The draft accession agreement provides that the EU may become a co-respondent alongside a Member State, where the alleged violation concerns a provision of European Union law.<sup>388</sup> The consequence of this would potentially be joint responsibility, unless one of the relevant parties requested the Court to attribute the violation to one of them.<sup>389</sup> This approach is very broad, however, and currently remains uncertain in its application to the Union. It could be argued that taking this approach in the co-respondent mechanism has simply been the pragmatic solution to the complex question of how to address the interaction between the EU and the ECtHR. It does, in a positive note, show some sort of shift beyond the limited approach of attribution. The difficulty, however, remains in this high level of uncertainty. It appears that this approach would only be taken in specified circumstances, when agreed by all concerned parties. The result of this is that it is difficult to see how it would form the basis of any objective system of international responsibility.

The idea of attributing action to the 'immediate actor' has also been proposed. This has been seen in the judgments of the European Court of Human Rights (ECtHR), for example

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<sup>388</sup> Article 3(2) and Article 3(3) Draft Legal instruments on the accession of the European Union to the European Convention on Human Rights, 8<sup>th</sup> Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights with the European Commission, CDDH-UE(2011)16 *Final Version*.

<sup>389</sup> Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH-UE(2011)16 *Final Version*, para.54.

with the *Bosphorus* case.<sup>390</sup> This is not a case that is generally helpful in questions of attribution, the Court focused on the only practical solution before it: to attribute action to the Member State concerned. The focus of the Court was, indeed, not on responsibility, but rather in upholding the obligations of States party to the ECHR. The judgment established that Member States could not absolve their obligations through transfer of competence in that area to another entity, for example the EU. If they were to transfer competence this would be under the understanding that an equal level of protection would be established. As such, while *Bosphorus*, does contribute to this area, it does so unintentionally. It's reasoning is focused on ensuring that Convention obligations are upheld and not on the consequences of it's reasoning for the law of responsibility and the principles of attribution.

When faced with this variety of approaches, it becomes clear that it is the very idea of attribution is one that struggles when faced with the Union. Attribution attempts to support the idea of responsibility as an individuated principle. It seeks to bypass detailed considerations of international actors as moral agents and develop some sort of link between action and perpetrators. There has been an attempt by the ILC to incorporate principles of attribution within the ARIO as they were previously developed within the ARSIWA. The ILC has taken an approach towards attribution that is more akin to the organic approach than anything else. It generally focuses upon the ability to consider different entities as organs or agents of the EU. It has generally taken the approach of determining responsibility 'from the outside in'; there has been an attempt to develop international principles, which will apply to all international actors concerned. Irrespective of the approach taken, however, there are difficulties within the underlying idea of attribution. A bigger shift in the foundations of attribution would be necessary in order to develop a system of responsibility that would be sufficiently capable of addressing the actions of the European Union.

### **5.3.2. Multiple attribution or Joint responsibility?**

The question of 'multiple attributions' has been the subject of a number of discussions addressing the newer type of interdependent international action and particularly the distinct nature of European Union crisis management operations. It has been argued that if

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<sup>390</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98.

joint control is exercised over action or if an action is indivisible, then the same action could be attributed to multiple actors. The UNSG phrased it:

“In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation. The principle that in coordinated operations liability for the combat-related damage in violation of international humanitarian law is vested in the entity in effective command and control of the operation or the specific action reflects a well-established principle of international responsibility.”<sup>391</sup>

While possible and supported by the UN comments to the ILC in its work on the ARIO<sup>392</sup>, a finding of joint responsibility is quite a remote possibility.<sup>393</sup> There has been some acceptance when considering the actions of the UN, but this acceptance seems to be limited to particular circumstances and seems to require a completely unified chain of command from which there is no distinction or division to be made, for example with the joint United Nations/African Union mission in Darfur.<sup>394</sup> In previous discussions, the frequent retention by home states of criminal and disciplinary jurisdiction over troops has raised questions as to the potential for ‘control’ to exist in different areas. Even the acceptance of multiple attributions does not seem to consider this a significant factor.

While the potential for multiple attributions shows some promise in moving beyond the limited foundations of the law of responsibility, this continues to have a restricted approach. Joint responsibility in terms of responsibility being established on the part of more than one actor for collective action, often discussed in terms of joint and several liability, has only been seen as possible in situations of entirely joint command and control. Rather than addressing the joint nature of action, however, joint responsibility requires attribution to be determined on the part of each actor. It is not really joint responsibility,

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<sup>391</sup> United Nations General Assembly, Report of the Secretary-General, ‘Administrative and Budgetary Aspects of the financing of the United Nations Peacekeeping Operations’ (20 September 1996) UN Doc. A/51/389 adopted by UN General Assembly Resolution 257, 17<sup>th</sup> July 1998, A/RES/52/247 at paras.18-19.

<sup>392</sup> Comments of the United Nations, *Comments and Observations received from International Organizations*, 25 June 2004, A/CN.4/545, at para.3

<sup>393</sup> N.Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.255.

<sup>394</sup> United Nations Security Council Resolution 1769 31<sup>st</sup> July 2007; N.Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.254.

as such, therefore, but rather recognition that responsibility for the same act can be *individually* established with more than one actor. This is quite a limited approach. The limited application of attribution just does not consider the interactions that exist within the international actions of the European Union and, most particularly, its crisis management missions. It may, like some of the considerations and approaches above, show some attempt to alter some of the underlying ideas of attribution but ultimately its core nature remains the same. The idea of singular attribution needs reconsidering to address the way in which international action has changed. There needs to be a greater consideration of the way in which to develop this important principle. Attribution plays a key role in responsibility in providing the essential link between perpetrator and action that enables a determination of responsibility to be made. When this determination becomes so artificial that establishing responsibility itself becomes artificial, then the nature of responsibility is jeopardised. The result of this will only be a weakening of the international legal system.

This idea of joint responsibility has been suggested in relation to the UN and its Member States and potential breaches of international humanitarian law in relation to the 1994 Rwandan genocide, where neither the UN, nor its members had acted to prevent action.<sup>395</sup> This has been purely a political acceptance thus far, however, with the simultaneous legal responsibilities between an organisation and Member States currently remaining hypothetical.

Provision has been made within the ARIIO to consider the involvement of Member States as an accomplice in the organisation's wrongful act.<sup>396</sup> This may provide some capacity to address the interdependent actions being considered here but the principle has had relatively little consideration. Bosnia-Herzegovina considered implementing this theory against the United Kingdom before the International Court when contesting the arms embargo imposed by Security Council Resolution 713(1999) on all entities arising out of the Former Yugoslavia. This appeared to be for the actions of the United Kingdom in voting for the measure, as well as permitting the adoption and maintenance of the embargo. This case was, however, discontinued and it is not possible to see what the result would have been. In the context of the ARIIO, this principle along with Articles 58-62 that address, among other areas, States incurring responsibility for the wrongful acts of an organisation due to coercion, direction and control or aid and assistance in relation to the

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<sup>395</sup> Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Report of 15 December 1999, S/1999/1257.

<sup>396</sup> Article 57 ARIIO.

wrongful act, begin to show some of the ways in which the ILC sought to address some of these relationships. The circumstances under which this idea of attribution could occur remain, however, quite narrow. It should also be understood that this is very much in combination with the principle of attribution. The idea remains that of determining the action as that of a singular entity. These provisions show some acceptance of the involvement of other actors but this remains limited. The difficulty continues to be with the basis of attribution and its application to the European Union.

#### **5.4. Conclusion.**

The principle of attribution may be a longstanding principle with customary international law status when considering the law on state responsibility, but an expansion beyond these initial principles shows significant problems with the principle of responsibility. The attempt to take the ideas behind the principle of attribution as developed in relation to the state and apply it to the European Union does not sufficiently take account of the different nature and, indeed, the variety of EU external action. The consequence is a law of responsibility simply cannot respond to the EU as an international actor. This seriously questions the capacity of this law to apply to the growing actions of the European Union. The EU may have continually shown its commitment to its international obligations and to accepting responsibility when necessary but this does not address the difficulty that may arise out of a lack of a framework that can address these wrongs.

The difficulty that exists with attribution and the EU is one that can be seen within the foundation of attribution. Attribution supports the idea of responsibility as a singular principle. When faced with the Union, any approach attempting to develop this individual approach will struggle as it does not consider the individuality of the European Union. This attempt to so definitively establish which individual perpetrator has committed an individual action, just cannot respond to the way in which the European Union acts in a substantially interactive manner. In order to consider this argument, the thesis now turns to the substantive critique of the difficulty in applying these principles to the EU, specifically to crisis management operations of the Union. The thesis argues that there are not only foundational difficulties with the principles on attribution, but rather that they also have fundamental flaws when considering how they will work in practice.

## 6. Attribution and European Union Crisis Management Operations.

The ILC's recognition of the distinct nature of the Union was limited to areas of action previously falling under the 'Community' umbrella; foreign policy was clearly kept outside of any development of special rules. Foreign policy, therefore, continues to be subject to the general rules of responsibility and, consequently, attribution. The existing case law regarding attribution has shown some uncertainty in the application of these principles but none of these cases have specifically concerned the EU. As such in light of the application in the case law, this chapter will now consider the potential application of the attribution principles to the EU. With the general principles of attribution still applying the EU and CFSP, this chapter will consider the difficulties in applying these general principles to crisis management operations.

The focus in the initial, core principles of attribution continues to be on the singular idea of responsibility. There is a continued attempt to determine action as having been committed by an individual actor. This determination, through attribution, is done, furthermore, by following a 'traditional' concept of the structures of the state. The core principles of attribution, in particular Articles 6 and 7, are focused upon the idea of determining actors to be organs or agents, or to be *entirely* under the control of the organisation concerned. While these concerns were shown in the previous chapter with some general critiques of attribution, when considering EU crisis management operations, these are core issues that arise. These structures and ideas are simply not reflective of the type of action with which the EU is involved in terms of its crisis management operations. The result is that these principles struggle in their application to the EU.

This chapter firstly considers the basis and structures of crisis management operations. It considers the development of these operations and explains their internal structures and procedures, as well as the external relationships sometimes developed. The chapter considers the two main principles of direct attribution in the ARIO, Articles 6 and 7, and the inability of these articles to sufficiently apply to the actions of crisis management missions of the EU. The chapter argues that actions, firstly, cannot be considered *de jure* or *de facto* organs or agents of the Union under Article 6. It then considers such missions in relation to Article 7, arguing that the test developed within Article 7 creates uncertainty and would struggle to address the structures of crisis management operations.

The chapter concludes by drawing on the previous chapters argument of attribution having foundational problems to argue that these are not simply theoretical question but that attribution, as currently conceived, struggles when faced with the area of EU action to

which it may need to be directed. This foundational part of responsibility simply cannot accommodate one of the main actors that the ARIO seek to address. The chapter argues that the idea of attribution as an individuated principle cannot address the different type of international activity seen by the European Union.

### **6.1. The Structure of EU Crisis Management Missions.**

EU foreign policy has had a long, slow development but in recent years its progress has been significant.<sup>397</sup> While the first crisis management operation was not launched until 2003, the EU has since launched over thirty different civilian and military operations covering a range of areas both geographically and in terms of type of engagement. The Union's ability to act has improved and expanded and the structures that now exist in the creation of such operations need to be understood in order to consider the application of the principles of attribution. The broad wording of the treaty allows CSDP missions to be highly flexible and to be developed and tailored to respond to the individual needs of the specific situation concerned.<sup>398</sup> Article 42(1) TEU, for example, states that the Common Security and Defence Policy (CSDP):

“shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.”

These operations have ranged substantially from military operations providing peacekeeping and post-conflict rebuilding support to a range of operations within the remit of civilian operations. The latter have included border assistance, police training and support and security sector reform amongst others.<sup>399</sup> This range is one of the ways in which operations can seem to differ so substantially.

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<sup>397</sup> See above at pp.86-93.

<sup>398</sup> Article 43 TEU.

<sup>399</sup> Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission; Council Joint Action 2003/681/CFSP of 29 September 2003 on the European Union Police Mission in the Former Yugoslav Republic of Macedonia (FYROM 'Proxima'); Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS; Council Joint Action 2004/847/CFSP of 9 December 2004 on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL 'Kinshasa'); Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq; Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo; Council Joint Action 2005/643/CFSP of 9 September 2005 on European Union Monitoring Mission in Aceh

As operations have developed, the Union has established consistent ways of establishing and structuring missions. Operations are established and governed by Council decision, passed under Articles 28, 42 and 43 TEU, using the voting mechanisms in Articles 31 and 42(4) TEU. It is this Council Decision that determines and states the “objectives, scope, the means to be made available to the Union, if necessary [the] duration [of the mission], and the conditions for [the mission’s] implementation.”<sup>400</sup> This governing instrument usually sets out the mandate and structure of the mission as well as including details such as the location of its headquarters, the command and control relations and structure. It may also include information such as the status of forces of the mission, the costs of the mission, relations with other international bodies and third states. It will generally include information on the launching and termination of the mission. In the cases of military operations, this last part will often be included in a separate Council decision. Following this decision, there is usually a further Council decision to launch the operation, together with the Operation plan and the rules of engagement.

This consistency does not just lie in the creation of operations. Over time the EU has established a number of bodies and individuals to enable and support the Council. There are a core of ‘European’ bodies involved in establishing operations. These include the High Representative for Foreign Affairs and Security Policy, assisted by the European External Action Service (EEAS). Within the EEAS there are a number of other structures that support the overall body. This includes the EU Military staff, the Civilian Planning and Conduct Capability (CPCC) and the Crisis Management and Planning Directorate. Within

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(Indonesia) (Aceh Monitoring Mission AMM); Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories; Council Joint Action 2005/826/CFSP of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (FYROM); Council Joint Action 2005/889/CFSP of 2 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah); Council Joint Action 2007/369/CFSP of 30 May 2007 on establishment of a European Union Police Mission in Afghanistan (EUPOL Afghanistan); Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union Police Mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo); Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo; Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU); Council Joint Action 2008/736/CFSP of 5 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia; Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP Mission in South Sudan; Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR); Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CFSP Mission in Niger (EUCAP Sahel Niger); Council Decision 2013/33/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya).

<sup>400</sup> Article 28(1) TEU.



the Council itself, there are also a number of significant bodies involved in the planning and preparation of such operations, the main ones, for present purposes, being the Political and Security Committee (PSC), the EU Military Committee (EUMC), the Political-Military Group and the Committee for Civilian Aspects of Crisis Management

The creation of these institutional structures has meant that the commonalities between operations do not end with the processes to create them, but also exist in the structures that operationalise missions. Once the Council has created an operation, the PSC will be vested with the political control and strategic direction of EU operations.<sup>401</sup> It directs and defines policies and is authorised to take decisions in this regard in accordance with Article 38 TEU.<sup>402</sup> It acts under the auspices of the Council and reports back to the Council, but the PSC is a distinct actor within this chain of command. The European Union Military Committee (EUMC) is constituted by the Heads of Defence from each of the Member States and provides advice and recommendations to the PSC. The Crisis Management and Planning Directorate (CMPD) contributes to the objectives of the EEAS, the CSDP and the political-strategic planning of any civilian or military missions carried out under the auspices of the CSDP. There is no EU standing army and so any military staff are seconded from Member States and the EEAS. There is also the Civilian Planning and Conduct Capability (CPCC), which is a part of the EEAS. This is a permanent structure responsible for the operational conduct of civilian CSDP operations. This is a strongly 'European' body, being under the direction and control of the PSC and under the authority of the High Representative.

It could also be seen that this level of 'European' command goes further than the overarching institutional structures. With military operations, for example, every mission has an Operation Commander who possesses the highest level of military command. When Member States place forces at the disposal of an EU mission, the normal procedure is that authority over these troops is transferred to the Operation Commander.<sup>403</sup> He then

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<sup>401</sup> Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee; Council Doc. 11096/03 EXT 1 of 26 July 2006 at p.5.

<sup>402</sup> Articles 5-7 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast; Articles 4-6 of Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya); Articles 4, 11 and 12 of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo.

<sup>403</sup> Council Doc. 11096/03 EXT 1 of 26 July 2006, see especially pp.14-15.

exercises overall authority over the troops, as implemented and exercised in the field by the Force Commander. This transfer of authority is not necessarily final and situations can arise where there is a 'reverse transfer of authority' and the line of command is transferred from the Operation Commander back to the national level.<sup>404</sup> The EU Military Committee (EUMC) monitors the execution of military CSDP operations and receives reports from the Operation Commander. The Chairman of the EUMC is the primary point of contact for the Operation Commander. The EUMC is then able to report back to the Council on this.

In spite of the variety of bodies involved here, it is clear that the internal arrangements of the Union are relatively settled. There are established Union structures in place that are common between operations. The Union has also, in more recent years, developed model agreements to determine the status of forces or personnel in the host state of the operation governed by Articles 37 TEU and 218 TFEU. The Status of Forces Agreement (SOFA) and the Status of Mission Agreement (SOMA) are now consistently used in the creation of operations. These agreements create some clear ground rules on the relationships between personnel and forces acting in EU operations and third states. The benefits to such agreements resulted in the conclusion of model agreements to form the basis of any agreements.<sup>405</sup> The agreements address the need for forces and personnel to respect laws and regulations of the host state<sup>406</sup>, the immunities and privileges of personnel and forces and liability for actions resulting in death, injury, damage or loss,<sup>407</sup> among other areas.

These mechanisms have created a relatively clear and established method of setting up, planning and operationalising EU crisis management operations. EU instruments and EU planning documents govern operations. The objectives, strategic direction and rules of

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<sup>404</sup> F.Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', Institute for International Law Working Paper No.151, October 2011, at p.11.

<sup>405</sup> See EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR I of 5 December 2007 in relation to Status of Forces Agreements (SOFAs) and 17141/08 of 15 December 2008 in relation to Status of Mission Agreements (SOMAs).

<sup>406</sup> Article 2(1) Model SOMA, EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR I of 5 December 2007 in relation to Status of Forces Agreements (SOFAs) and 17141/08 of 15 December 2008 in relation to Status of Mission Agreements (SOMAs)

<sup>407</sup> EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR I of 5 December 2007 in relation to Status of Forces Agreements (SOFAs) and 17141/08 of 15 December 2008 in relation to Status of Mission Agreements (SOMAs)

engagement are all created and contained within EU instruments. The overall control and direction of an operation is governed by the PSC, an EU actor, and all forces or personnel are under the command and control of the Force/Operation Commander. It must be remembered that the Union continues to be reliant upon its Member States to staff such operations but the implications of this will be considered below in relation to the potential application of articles 6 and 7 ARIO. The question arises as to whether the strong coherence that now exists within EU crisis management operations is sufficient to enable clarity in the application of Articles 6 or 7 ARIO.

There is, first of all, however, an issue in considering which principle of attribution should be considered in relation to EU crisis management operations: Article 6 or Article 7. The ILC determined the distinction between these articles as a simple one. When organs or agents have been 'fully' seconded to the organisation, article 6 will apply, whereas when they have been only partially seconded, article 7 will apply, and the attribution of acts will be determined by the factual 'effective control' test. This may be an appropriate distinction to make in terms of states, but it causes substantial difficulty when considering the complexity of organisations generally and, more specifically the EU. It is artificial to consider that any organs or agents are ever 'fully' seconded to an organisation.<sup>408</sup> Despite this, the ILC has still attempted this firm distinction between fully and partially seconded organs in article 6, which simply does not work. Consequently, basic aspects of the principles of attribution are not responsive to the legal actors that they are addressing.

With the distinction between these two articles being far from certain, there are problems with the basic ideas behind these principles before even considering the complex nature of the Union and its crisis management operations. This uncertainty with Article 6 has raised some questions and Wessel and Sari have made the argument that perhaps its application is more a question of difference of degree rather than of principle.<sup>409</sup> This could mean that entities with a dual status could have their actions attributed to the receiving organisation under Article 6 ARIO and the principle would then have some capacity for application, so the potential for this will be considered. With this idea in mind, the potential application of both articles will be considered. Article 6 will be considered initially with the reasoning that it must be capable of some application beyond 'fully' seconded organs otherwise it would be entirely pointless.

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<sup>408</sup> A.Sari and R.Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B.Van Vooren, S.Blockmans and J.Wouters (eds.) *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2013) p.126 at pp.133-135.

<sup>409</sup> *Ibid.*

## 6.2. Article 6- EU Crisis Management Personnel or Forces as Organs or Agents of the Union?

Article 6 ARIO is the initial principle on attribution and considers the conduct of organs or agents of an international organisation. It states that:

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.

The rules of the organization shall apply in the determination of the functions of its organs and agents.

This article covers bodies that are de jure or de facto organs or agents, acting in their official capacity and is drawn from the idea of attribution as originally developed in relation to the state.<sup>410</sup> The idea of attributing actions of organs and agents to organisations has also already seen some acceptance.<sup>411</sup> As organs frequently do not have international legal personality, the organisation is the only connected entity capable of incurring responsibility, so attributing their actions to the organisation is positive in enabling responsibility to be taken.<sup>412</sup> The ILC makes it quite clear that the statement in Article 6 (1) of “in the performance of the functions of that organ or agent” is a deliberate one to clarify that conduct of an organ or agent will be attributable only when it acts as an organ or agent and not when it acts in any other capacity.

This may appear a straightforward idea but there are very few institutions that have permanent organs or agents under their auspices, and that act on their behalf and the disjointed nature of the European Union means that it does not explicitly define its ‘organs’ and ‘agents’. It, furthermore, frequently relies on the implementing authorities of others, be it other organisations or their Member States. The question of when these actors can be considered to be organs or agents of the Union is not as simple as it first seemed. The argument has been made that when implementing or enforcing EU policies, Member States

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<sup>410</sup> Article 4 ARSIWA.

<sup>411</sup> Swiss Federal Council Decision of 30 October 1996, as cited in Commentary to Article 6 Articles on the Responsibility of International Organizations, with Commentaries 2011, Yearbook of the International Law Commission, 2011, vol.II, Part.Two, at p.18 para.4.

<sup>412</sup> P.Klein, ‘The Attribution of Acts to International Organizations’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.297 at p.299; F.Seyersted, ‘International Personality of Intergovernmental Organizations: Do their Capacities really Depend upon their Constitutions’ (1964) 4 *Indian Journal of International Law* p.1 at p.63; M.Arsanjani, ‘Claims Against International Organizations: *quis custodiet ipsos custodiet*’ (1981) *Yale Studies in World Public Order* p.155.

disappear behind the 'veil' of the EU and constitute organs of the Union and that there is little need to consider any special principles in relation to the EU.<sup>413</sup> Gaja rejected this approach during the drafting of the ARIO.<sup>414</sup> It is argued that the ideas of organs and agents need particular consideration with the EU and it is difficult to consider actions of Union action as falling under the auspices to Article 6. It should be considered, first of all, whether the legal framework and practice of the EU in military operations means that such missions could constitute organs of the EU, be it *de jure* or *de facto*. The result would be that their actions would be attributable to the EU. To question this, the definitions of organs and agents must firstly be considered.

Gaja and the ILC have made use of some definitions of organs and agents, but importantly, the article itself has provided some guidance with a reference to the rules of the organisation. This is highly significant as it shows recognition that a determination of an organ or agent is only something that can be done by the institutional framework of the organisation itself. The inclusion of this reference does also show an innate contradiction within the article, however. The focus within the ARIO on whether article 6 or 7 is considered is actually on a factual test rather than the reference to the institutional norms as mentioned in article 6. This is the factual test of whether organs or agents have been *fully* seconded.<sup>415</sup> In reverting to a factual test, the ILC has moved away from the only real way in which to determine whether something is an organ or agent of an organisation: the institutional framework of that organisation.

Considering the discussions of the ILC, it is interesting that despite mention of the rules of the organisation, it is this factual approach that is addressed; the focus is the actual situation that has occurred. This can also be seen with various definitions that exist on these entities. An organ of an international organisation is considered to be an "[e]lement of the structure of an international organisation through which the latter acts, expresses its will and discharges its duties".<sup>416</sup> An agent, on the other hand, is "any person who...has

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<sup>413</sup> J.d'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' SHARES Research Paper 22 (2013), ACIL 2013-04, at pp.6-7.

<sup>414</sup> *Seventh Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, 27 May 2009, A/CN.4/610.

<sup>415</sup> See above at pp.145-146.

<sup>416</sup> J.Salmon (ed.) *Dictionnaire de droit international public* (Brussels: Bruylant, 2001), at p.791 quoted in P.Klein, 'The Attribution of Acts to International Organizations', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.297 at p.298.

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”.<sup>417</sup>

The ILC has further elaborated on the requirements for an organ or agent to be that of an institution predominantly through an examination of jurisprudence concerning the United Nations, as well as general practice concerning the UN, where a flexible approach has been taken. The concept of ‘agent’ of an international organisation adopted by the International Court in its 1949 *Reparations* Advisory Opinion, and later by the ILC, shows that it is necessary to look beyond formal links and to consider the actual relations of individuals with an organisation in a given situation.<sup>418</sup> The Court interpreted this in the “most liberal sense” and this approach then formed the foundation for the ILC commentary.<sup>419</sup> This approach has further been seen with it being immaterial what type of power exercised by the organ, or the position of the organ or agent in the organisation.<sup>420</sup> It has also termed peacekeeping forces, and also disaster relief units established by the UN, as “subsidiary organ[s] of the United Nations.”<sup>421</sup> Where the UN exercises operational control in the course of wrongful acts that have been committed, the UN has itself accepted responsibility for relevant acts. The most prominent example of this was the UN operation in Congo (ONUC) and this practice has been confirmed since and it’s understood to reflect an established practice.<sup>422</sup> Control is an important factor for attribution as it guarantees effectiveness by ensuring actions are attributed to the correct actor.<sup>423</sup> Control forms the

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<sup>417</sup> *Reparations for Injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports*, 1949, p.174 at p.177.

<sup>418</sup> *Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949*, p.174 at p.177; Commentary to Article 6 Articles on the Responsibility of International Organizations, with Commentaries 2011, Yearbook of the International Law Commission, 2011, vol.II, Part.Two, at p.18.

<sup>419</sup> *Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949*, p.174 at p.177.

<sup>420</sup> P.Klein, ‘The Attribution of Acts to International Organizations’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) p.297 at p.299.

<sup>421</sup> ‘Legal Status of Disaster Relief Units made available through the United Nations’, (1971) United Nations Juridical Yearbook p.187 at p.187.

<sup>422</sup> D.Bowett, *United Nations Forces- A Legal Study of United Nations Practice* (London, Stevens, 1964) at p.245; D.Shraga, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’ (2000) 94 *American Journal of International Law* p.406 at p.412.

<sup>423</sup> P.de Visscher, ‘Les conditions d’application des lois de la guerre aux opérations militaires des Nations Unies’ (1971) 54-I *Annuaire IDI* p.48 at p.56, quoted in P.Klein, ‘The Attribution of Acts to International Organizations’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.297 at p.301.

basis of the test in Article 7, but it also has a role in identifying the organs and agents of institutions in relation to Article 6.

Further case law is referred to by the ILC to support this notion of considering the actions and powers of bodies when considering whether they amount to organs or agents of the organisation.<sup>424</sup> In developing an understanding of the necessary level of control much of what has been examined has been experience of peacekeeping. These definitions are not entirely clear, however. With the UN only 'executive' action has been attributed to it, but the question of 'judicial' or 'legislative' action being equally attributed is not one that has been addressed. With the EU, the question arises as to whether an analogy could be developed to perceive as organs, the institutions in passing secondary legislation. This is an area already addressed by the internal legal order of the EU, but if they can fall under the definition of 'organ' then could a third party use these articles to claim legal responsibility? There have been some doctrinal suggestions that the conduct of state organs should be attributed to the international organisation where the former act as agents of the latter.<sup>425</sup> Gaja rejected this, seeking justification from international jurisprudence. He drew comparisons between WTO Panel Reports and judgments of the ECtHR, but with a heavy focus on the latter, in particular the cases of *Bosphorus* and *Kadi*, arguing that in no way can these two decisions be seen as supporting the idea that Member State conduct implementing a binding act with no discretion should be attributed to the organisation.<sup>426</sup> Gaja, therefore, did not see the need for special attribution rules, but rather favoured a more general solution through retaining a broad concept of responsibility that would, it was considered, have the capacity for addressing a broad range of actions. Instead of considering the internal structures of the Union and what this might mean in terms of 'organs' or 'agents' within the drafted framework, Gaja took a broader, fact-based approach.

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<sup>424</sup> *Applicability of article VI, section 22 of the Convention on the Privileges and Immunities of the United Nations* ICJ Reports 1989, p.194 para.48; *Difference Relating to immunity from legal Process of a Special Rapporteur of the Commission on Human Rights* ICJ Reports 1999, pp.88-89, para.66.

<sup>425</sup> P.-J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations', (2004) 1 *International Organisations Law Review* p.111 at p.127; S. Talmon, 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M. Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005) p.405 at pp.412-414.

<sup>426</sup> *Seventh Report on the Responsibility of International Organisations* by G. Gaja, Special Rapporteur, 27 May 2009, A/CN.4/610 at para.33.

This practice has led to arguments that a presumption should exist in favour of UN peacekeeping operations existing as organs of the UN, if not *de jure* then *de facto*.<sup>427</sup> This arises from the transfer of authority over national contingents to the UN, which would, it is argued, create a presumption that they act only on behalf of the UN and so their actions are attributable to the organisation and not the contributing State. This transfer of authority, arguably, surpasses a certain level and as a result these contingents need to gain the status of organs of the UN. This is a presumption that may be rebutted, however, when national contingents take direct instructions from their home State and they fall outside the control of the UN. This approach would respect the constitutional rules and practice of the UN but also recognise the dual status of national contingents. Arguments surrounding such a presumption are interesting ones as the commentary to Article 7 specifically mentions UN peacekeeping operations as falling under Article 7 for consideration and *not* under Article 6 as an organ or agent of the UN.<sup>428</sup>

In spite of this exclusion within the commentary, such a presumption would potentially be beneficial with structures and missions like these, and with the EU and military missions. It would be far more straightforward in structural terms and determining responsibility. The actions of the Union in the CFSP, in particular in crisis management missions do differ, however and it is argued that this presumption cannot exist with its military operations. It is argued that this is the case due to the transfer of control and command from Member States to the EU being insufficient to consider missions to *de jure* or *de facto* exist as organs or agents under Article 6. This argument will now be pursued by considering the structures of crisis management operations and the extent to which they have been integrated within the institutional framework of the Union.

### **6.2.1. EU Crisis Management Personnel as Organs or Agents or de Jure Organs or Agents under Article 6 ARIO?**

EU crisis management operations are complex structures. The Union depends upon the personnel of Member States and draws upon these actors in order to fulfil missions. The status of crisis management operations is far from certain. They have not previously been

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<sup>427</sup> A.Sari and R.Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B.Van Vooren, S.Blockmans and J.Wouters (eds.) *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2013) p.126.

<sup>428</sup> Commentary to Article 7, Articles on the Responsibility of International Organizations, with Commentaries 2011, Yearbook of the International Law Commission, 2011, vol.II, Part.Two, at para.1.



named as organs or agents of the Union, however, this does not necessarily rule out a determination. If personnel were incorporated within the treaties as organs or agents then this would make establishing this far more certain. It has been argued, however, that as it is possible to consider, in relation to states, personnel as *effectively* organs or agents, or *de facto* organs or agents, then such a possibility must be the case with organisations.<sup>429</sup> Initially, the question of whether they are *de jure* organs or agents must be considered. Wessel and Sari have further argued that it is possible to consider the personnel of crisis management missions to fall under Article 6 if two requirements can be fulfilled:

- The contributing States must transfer legal authority over national contingents to the EU.<sup>430</sup>
- These contingents must then be incorporated into the institutional structure of the EU as an organ of the Union.<sup>431</sup>

The first condition here seems more strongly dependent on an *explicit determination* by the Union. When the Union creates a crisis management mission, however, there is no official transfer of legal authority; this explicit determination does not exist. While there always exists an EU Operational Commander who possesses operational command, the level of authority possessed by this post is limited. This alone does not seem to be sufficient in determining national contingents as *de jure* organs of the Union. It could be argued that if the second condition of incorporating personnel into the institutional structure of the Union is sufficiently established, then these contingents could be presumed to be organs of the Union. Again, *explicitly*, the EU does not, and has not, termed military operations as organs in their establishing legal acts. It could be argued that this is only a question of terminology and that, effectively, they do have this status.

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<sup>429</sup> A.Sari and R.Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B.Van Vooren, S.Blockmans and J.Wouters (eds.) *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2013) p.126 at p.142.

<sup>430</sup> A.Sari and R.Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B.Van Vooren, S.Blockmans and J.Wouters (eds.) *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2013) p.126 at p.137.

<sup>431</sup> A.Sari and R.Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B.Van Vooren, S.Blockmans and J.Wouters (eds.) *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2013) p.126 at p.137.

First of all, in considering whether operations exist as *de jure* organs of the Union, the structure of the operations need to be questioned. It needs to be considered whether the commonalities in the internal structure could lead to the conclusion that operations as a whole could be considered as organs or agents. They could, arguably, be considered as having been incorporated within the institutional structures of the EU. Under the “liberal sense” of the terms as referred to by the ILC in the commentary to article six, an operation would have been created to pursue purposes of the Union and, therefore, could be considered to be an organ or agent. It is argued that this is not the case.

The CJEU has, in fact, already considered the ability for an operation to exist as an organ or agent. In the case of *H v Council and Commission*, the Court determined that the EU Police Mission (EUPM) in Bosnia and Herzegovina was not classified as a body, office or agency of the Union subject to judicial review under Article 263 TFEU. The Court instead viewed it as simply “a ‘mission’, in other words, a simple activity” of limited duration.<sup>432</sup> It had never been given an official legal status of an agency nor given legal personality. Due to the fact that all EU operations are created in the same way and possess the same structures, it is difficult to consider how an operation could be considered to be an organ or agent of the EU when another has been definitively established to not be.

While crisis management missions do not possess legal personality, this is not a prerequisite for an existence as a subsidiary organ and neither must they be permanent. What is important to consider, however, is the way in which they have been established. Article 28 TEU is capable of being used to establish institutional agencies of the EU, for example, the European Defence Agency. In the Joint Action establishing the European Defence Agency it states that it would act under the authority of the Council “within the single institutional framework of the European Union.”<sup>433</sup> The potential for bodies to be created and incorporated within the institutional framework of the Union does exist, but this is a potential that has not been seized upon by the Council in relation to crisis management operations. This can be seen in the language of the founding documents of the operations, as compared to that in the document establishing the European Defence Agency. While the Council used Article 28 to create both, it definitively stated the EDA to be “within the single institutional framework” of the EU, but no such statement has been made in relation to crisis management operations. When discussing the control and command structures, furthermore, there is continued mention of involvement of national

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<sup>432</sup> Case T-271/10 *H v Council and Commission*, Order of the General Court of 22 July 2010, at para.19.

<sup>433</sup> Article 1(2), Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ [2004] L245/17.

governments. While the Council has the opportunity to utilise Article 28 to establish an entity within the institutional framework of the EU, the Council has never utilised this article for that purpose with crisis management operations.

Without incorporation within the institutional framework of the Union, it is also possible that operations may be organs through their existence as subsidiary organs of the Council, as it is only the Council that can establish such operations and the Council is an organ of the EU. The Council possesses the competence to establish its own organs through its competence to determine the organisation of its General Secretariat, such as the EU Military Committee and Military Staff.<sup>434</sup> It also laid down rules applicable to national military staff on secondment to the General Secretariat. This shows the capacity of the Council to temporarily incorporate the military personnel of Member States into its own institutional structure. While this is a possibility, the Council has never utilised Article 240 TFEU to establish crisis management operations in this manner. It has instead relied on Article 28 TEU, and its predecessor, and has never purposefully incorporated missions into its institutional structure, in spite of its ability to do so. Without being able to establish an intention to incorporate military missions into the institutional structure of the Council under Article 240, or of the Union as a whole under Article 28, it cannot be argued that they exist as organs of the Union. Without this, there cannot exist a presumption of attributing the wrongful conduct of national contingents in these operations to the EU.

#### **6.2.2. EU Crisis Management Operations as *de facto* organs or agents under Article 6 ARIO?**

If it is not possible to consider such operations to exist as *de jure* organs, then their potential as *de facto* organs or agents under Article 6 must be considered. What must be discussed here is whether, irrespective of the lack of official incorporation of the entities within the institutional structures, they have *effectively* been incorporated at a factual level. In order to consider whether an appropriate level of dependence exists with the forces and personnel of Union crisis management operations to create a *de facto* incorporation, there needs to be “complete dependence” so that such forces or personnel are no more than an instrument of the organisation.<sup>435</sup> This has been interpreted to a very strict degree.

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<sup>434</sup> Article 240 TFEU.

<sup>435</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p.14 at paras.109-112.

The measurement of whether something is a *de facto* organ or agent begins with the discussions in the *Nicaragua* and *Genocide* cases. In the *Nicaragua* case law, the ICJ focused upon the idea of factual control, in particular ‘effective control’, to establish whether certain actions could be attributed to a state. The discussions in the case on entities being *de facto* organs or agents of the state then took this high degree of control even further. In considering that such a determination would establish organs and agents, even when the internal norms of the state did not establish this, the Court was particularly stringent in its discussions on this. The Court considered that *complete dependence* from the entity concerned on the state would be necessary. This requirement of entire dependence considers the practical assistance and support and must amount to the fact that the persons or body are effectively incorporated into the structures of the state. This continued with the discussion in the *Genocide* case, with the ICJ stating that:

“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: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.”<sup>436</sup>

The determinations of the ICJ have therefore considered that establishing a *de facto* organ or agent would necessarily be “exceptional.”<sup>437</sup> The level of dependence was determined to be such that should any “qualified, but real, margin of independence” exists then the entity will not be considered as a *de facto* organ.<sup>438</sup> This shows the stringent nature of the test. It is difficult to consider how EU operations could meet this incredibly high standard as such operations would need to be established as being *entirely* dependent upon the Union with no potential for any exception to this. The interrelationship between the EU and Member States that is central to any of the Union’s actions and, in particular, to operations being created, operationalised and run brings this into question.

It is clear from the founding Decisions of EU operations that there is a single chain of command running from the political level down to the military-strategic, operational and

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<sup>436</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, para.392. (emphasis added)

<sup>437</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, para.393.

<sup>438</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, para.394

tactical levels. At the top of this chain sits the Council, with overall responsibility for the operation. It is the Council that launches and terminates the mission, determines the mandate, appoints the Operation and Force Commanders and approves key documents such as Operation Plan and the Rules of Engagement. Below the Council acts the PSC, which exercises political control and strategic direction on a day-to-day basis. It sets political-military objectives and, acting through the EUMC, translates these into military guidance and directives for the Operation Commander. The Operation Commander then implements these and reports back on the operation. From a political and military-strategic point of view, therefore, it can be argued that EU military missions are completely dependent upon the EU. This would, perhaps initially, appear as if the test is satisfied and Union operations could be considered as *de facto* organs or agents under Article 6. This becomes a difficult claim, however, when the high standard emphasised in the case law, goes far beyond this basic idea of tracing a level of *strategic* control. It instead requires such a high degree of *factual* control as to amount to the operations being entirely dependent on the EU and, effectively integrated within its institutional framework. As such, although there is an EU institutional framework, there are issues that mean that this in itself is not sufficient.

It is, first of all, difficult to determine the core normative relationships as entirely settled and lying at the level of the EU when competence in the areas of CFSP and CSDP continues to be complex and uncertain as compared to any other area of competence within the EU.<sup>439</sup> The potential crossover in competence between the Union and its Member States begins to throw some doubt on operations being *entirely* dependent upon the Union.

What, in fact, needs to be considered when applying the test is the practical and factual level of dependence. When focusing upon this with crisis management operations, it is actually the contributing states and third parties that provide the financial and practical support. The dependence in crisis management operations is, therefore, clearly not satisfied in relation to the Union, but rather is actually the other way around; the EU depends upon the contributing states and third parties.<sup>440</sup> When considering the command structures, things become further confused. The *factual* extent to which command is transferred by Member States to be exercised by the Union is, in spite of the clear

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<sup>439</sup> Article 2 TFEU and Article 24(1) TEU show the way in which CFSP continues to be treated separately from other areas.

<sup>440</sup> Article 12 Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council Resolution 1816 (2008) (EU NAVCO)

statements of single chains of command, not clear. When looking at the EUBAM Libya mission, for example, the Council Decision establishing the operation states that the Operation Commander will “exercise command and control of EUBAM Libya at the strategic level.”<sup>441</sup> This appears quite straightforward. When reading further, however, the Decision goes on to state that:

All seconded staff shall remain under the full command of the national authorities of the seconding State(s) in accordance with national rules, of the Union institution concerned or of the European External Action Service (EEAS). Those authorities shall transfer Operational Control (OPCON) of their personnel, teams and units to the Civilian Operation Commander.<sup>442</sup>

This starts to show the integration and overlap that exists in terms of command and control in EU civilian operations. Council Decisions, or Joint Actions if prior to Lisbon, frequently include very similar provisions to the above that make this explicit recognition of continued authority or command by Member States over personnel that they second to an operation<sup>443</sup>, alongside the transfer of ‘operational control’ to the Operation

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<sup>441</sup> Article 5(2) Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)

<sup>442</sup> Article 5(5) Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)

<sup>443</sup> Article 4(3) Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission; Article 5(3) Council Joint Action 2003/681/CFSP of 29 September 2003 on the European Union Police Mission in the Former Yugoslav Republic of Macedonia (FYROM ‘Proxima’); Article 4(3) Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS; Article 5(3) Council Joint Action 2004/847/CFSP of 9 December 2004 on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL ‘Kinshasa’); Article 6(4) Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX; Article 5(3) Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo; Article 7(4) Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Dafur region on Sudan; Article 5(3) Council Joint Action 2005/643/CFSP of 9 September 2005 on European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission AMM); Article 8(5) Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories; Article 5(7) Council Joint Action 2005/826/CFSP of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (FYROM); Article 7(5) Council Joint Action 2005/889/CFSP of 2 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah); Article 7(5) Council Joint Action 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan; Article 6(3) Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union Police Mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo); Article 7(4) Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo; Article 4(4) Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU); Article 5(4) Council Joint Action 2008/736/CFSP of 5 September 2008 on the European Union Monitoring Mission in Georgia,

Commander. When this is, furthermore, considered together with the articles within such founding Decisions determining the continued liability of Member States for claims from or concerning any staff that they have seconded, it is difficult to consider how such personnel could be considered to be sufficiently dependent upon the Union, rather than their home state to amount to an organ of the EU.<sup>444</sup> This has also been the case in some documents governing military operations.<sup>445</sup> The additional references within these

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EUMM Georgia; Article 5(5) Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP Mission in South Sudan (EUAVSEC- South Sudan); Article 5(6) Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR); Article 5(5) Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CFSP Mission in Niger (EUCAP Sahel Niger); Article 5(5) Council Decision 2013/33/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya);

<sup>444</sup> Article 11(2) Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission; Article 13(2) Council Joint Action 2003/681/CFSP of 29 September 2003 on the European Union Police Mission in the Former Yugoslav Republic of Macedonia (FYROM 'Proxima'); Article 7(2) Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS; Article 13(2) Council Joint Action 2004/847/CFSP of 9 December 2004 on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL 'Kinshasa'); Article 7(2) Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX; Article 13 Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo; Article 12(2) Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan; Article 7(2) Council Joint Action 2005/643/CFSP of 9 September 2005 on European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission AMM); Article 8(2) Council Joint Action 2005/889/CFSP of 2 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EUBAM Rafah); Article 9(2) Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories; Article 11(2) Council Joint Action 2005/826/CFSP of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (FYROM); Article 8(2) Council Joint Action 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN); Article 13(2) Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union Police Mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo); Article 10(2) Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo; Article 13(2) Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU); Article 8(2) Council Joint Action 2008/736/CFSP of 5 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia; Article 7(3) Council Decision 2013/33/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya); Article 7(2) Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP Mission in South Sudan (EUAVSEC- South Sudan); Article 7(2) Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR); Article 7(2) Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CFSP Mission in Niger (EUCAP Sahel Niger)

<sup>445</sup> Article 11 Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council Resolution 1816 (2008) (EU NAVCO);

governing documents to continued disciplinary control by the home State or organisation raises this uncertainty even further.<sup>446</sup> The potential for uncertainty does exist to an extent, however, with some documents not necessarily stating this explicitly.<sup>447</sup> When considering all of the above, however, it cannot be argued that there is sufficient clarity as to claim that there is a 'complete dependence' by operations upon the EU. When considering that the ICJ stated that should the potential *de facto* organ have any independence from the state or organisation then this will result in a determination that it is not a *de facto* organ. With this in mind, the uncertainty in the status of the operations mean that it is difficult to consider how a presumption could be *clearly* interpreted that civilian crisis management operations exist as *de facto* organs of the EU.

The situation with military operations must be considered individually due to some distinctions between civilian and military operations. The structures of military

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<sup>446</sup> Article 4(4) Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission; Article 5(4) Council Joint Action 2003/681/CFSP of 29 September 2003 on the European Union Police Mission in the Former Yugoslav Republic of Macedonia (FYROM 'Proxima'); Article 5(4) Council Joint Action 2004/847/CFSP of 9 December 2004 on the European Union Police Mission in Kinshasa (DRC) regarding the Integrated Police Unit (EUPOL 'Kinshasa'); Article 5(4) Council Joint Action 2005/643/CFSP of 9 September 2005 on European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission AMM); Article 1(3) Council Joint Action 2005/889/CFSP of 2 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah); Article 6(2) Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories; Article 5(2) Council Joint Action 2005/826/CFSP of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (FYROM); Article 6(4) Council Joint Action 2007/369/CFSP of 30 May 2007 on establishment of a European Union Police Mission in Afghanistan (EUPOL Afghanistan); Article 5(4) Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union Police Mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo); Article 8(6) Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo; Article 5(5) Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU); Article 6(5) Council Joint Action 2008/736/CFSP of 5 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia; Article 6(5) Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP in South Sudan (EUAVSEC-South Sudan); Article 6(5) Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR); Article 6(2) Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CFSP Mission in Niger (EUCAP Sahel Niger); Article 6(5) Council Decision 2013/33/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)

<sup>447</sup> Article 4(1) Council Joint Action 2004/523/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS; Article 4(1) Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX; Article 5(1) Council Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo; Article 7(2) Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan.



operations are, on the face of it, much more clearly and definitively 'European'. When compared with those establishing civilian operations, there is no mention of any continued link with the state or organisation from which forces are seconded. The Decisions, instead, set out the chain of command in terms of the Union structures.<sup>448</sup> While there is this strongly 'European' element within military operations, there is, however, a continued strong dependence upon Member States of the EU, in particular in requiring personnel. Member States enable their forces and personnel to act on behalf of the EU; they transfer some powers of command and control to the Union to enable the operation to be carried out. While states therefore limit their ability to control their forces, they do not completely transfer over this control. Personnel remain under the disciplinary command and control of their home State, even if operational command is transferred to the Union.<sup>449</sup> This is quite a different situation to that of the Union in other areas where competence is transferred by Member States, for example in trade and the Union's activities in relation to the WTO. The retention of dependence upon Member States seems to leave a determination of operations as being *de facto* Union organs or agents as highly problematic; it would be highly difficult to argue that such operations are 'completely dependent' upon the Union.

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<sup>448</sup> Articles 3-5 Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia; Articles 6-8 Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of the Congo; Articles 5-8 Council Joint Action 2004/570/CFSP on the European Union military mission in Bosnia-Herzegovina; Articles 4-5 Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Dafur region of Sudan; Articles 5-8 Council Joint Action 2006/319/CFSP of 27 April 2006 on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process; Articles 5-8 Council Joint Action 2007/677/CFSP of 5 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic; Articles 5-8 Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council Resolution 1816 (2008) (EU NAVCO); Articles 5-7 Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military Mission to contribute to the training of the Somali security forces; Articles 5-7 Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya); Articles 5-7 Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali); Articles 5-7 Council Decision 2014/73/CFSP of 10 February 2014 on a European Union military operation in the Central African Republic (EUFOR RCA)

<sup>449</sup> See, for example, Article 17, Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context, (EU SOFA) (2003/C 321/02), 31<sup>st</sup> December 2003; Council Document, 8373/3/05 on Generic Standards of Behaviour for ESDP Operations, 18<sup>th</sup> May 2005 at p.11 at 9.1

Furthermore, while such retention of disciplinary control has been argued as being entirely separate to a command structure and therefore irrelevant to control and attribution,<sup>450</sup> it does have some relevance. This specific element is actually mentioned within the ARIO as maintaining a sufficient link with the home state that would mean that Article 6 could not be applied.<sup>451</sup> In addition to this, when the model SOFA is considered, the sending state still has a high degree of involvement which does question the extent to which there is a clear division under which 'control' could be clearly understood. To argue that it does not have relevance ignores the fact that determining anything as *de facto* organ or agent goes beyond the idea of 'effective control' towards the test of entire dependence. Inevitably, if an operation still returns to their home state for some sort of disciplinary command, some sort of "qualified, but real, margin of independence" from the Union will exist in line with the criteria established by the ICJ for refusing a determination of a body as a *de facto* organ or agent.<sup>452</sup>

In addition to the link with Member States, there is a final complexity across all types of Union crisis management operations, whether civilian or military, in terms of the frequent involvement of external actors. The Union's political preference is that any civilian and military operations that are launched should either be created at the invitation of the host country, through a United Nations mandate, or through a justification in general international law.<sup>453</sup> In considering EUFOR CONCORDIA, for example, this was the very first military operation that the Union launched and was only the second CSDP mission to be launched. The central nature of this operation was a very close relationship with NATO; the EU operation was due to take over from NATO so coordination between the two institutions was crucial. Article 10 of Joint Action 2003/92/CFSP specifically sought to address this. If nothing else, it can be seen that this only involves further actors, such as NATO or the UN, and may create the possibility of attributing the actions of personnel to

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<sup>450</sup> F.Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', Institute for International Law Working Paper No.151, October 2011, at p.11

<sup>451</sup> Commentary to Article 7, Articles on the Responsibility of International Organizations, with Commentaries 2011, Yearbook of the International Law Commission, 2011, vol.II, Part.Two, at para.1.

<sup>452</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, para.394.

<sup>453</sup> G-J.Van Hegelsom, "International Humanitarian law and Operations conducted by the European Union" in International Humanitarian law, Human Rights and peace operations- 31<sup>st</sup> Round Table on Current Problems in International Humanitarian Law, Gian Luca Beruto ed., International Institute of Humanitarian Law (in collaboration with the International Committee of the Red Cross) (San Remo: 4-6 September 2008) at p.107.

another entity. The number of different possibilities that exist and the manner in which the EU responds to the varied situations means that every different operation must be considered on a case-by-case basis.

The case law in this area may be limited but it is, furthermore, consistent in stating that in cases such as the above, dealing with military operations, Article 6 would not be the appropriate provision to apply here.<sup>454</sup> The joined *Behrami* and *Saramati* cases before the ECtHR, for example, addressed the question of which of these provisions would apply. In determining that the case was not admissible, the Court did determine that UNMIK was an organ of the UN. It established that UNMIK had been created within a UN instrument and had been incorporated within the institutional framework of the UN. It was very much a UN body. The Court did not establish action of UNMIK on the part of the UN by establishing UNMIK as an organ or agent under the principles of attribution, however. The Court turned to Article 5 DARIO, which is the current Article 7 under the ARIIO to determine whether 'effective control' was exercised over the conduct rather than determining attribution from establishing UNMIK and KFOR as organs of the UN. The Court may have gone on to determine that UNMIK was an organ of the UN,<sup>455</sup> but the determination of attribution focused around the question of 'effective control' over the conduct in question.

If we further consider the recent *Nuhanovic* case in the Netherlands, this also shows a similar approach. The Court of Appeal in the Netherlands determined attribution in line with Article 7 ARIIO:

“The generally accepted view is that where a State has placed troops at the disposal of the United Nations to carry out a peace mission, the answer to the question as to which of them specific conduct of such troops must be attributed depends on which of them had effective control over the conduct in question.”<sup>456</sup>

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<sup>454</sup> See section 5.2 above at pp.124-133 where all cases refer to the principle under Article 7 and not Article 6.

<sup>455</sup> *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10 at para.129.

<sup>456</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672, *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011, at

The appeal before the Supreme Court sought to argue that this was incorrect and Article 6 should, in fact, have been the determining article.<sup>457</sup> The Court, however, did not agree. In making reference to the Commentary to article 7, the court considered that the retention of control by the Netherlands, as the troop-contributing state, over the personal affairs of personnel concerned retained a sufficient link to require article 7 to be the governing provision here and not article 6. This is quite a significant judgment. It dealt with the area and institution that is most often argued as showing *de facto* organs capable of falling under Article 6 ARIO: the UN and a peacekeeping operation. In spite of many arguing that when considering the UN this can be considered as an organ, the Court here completely rejected that argument in favour of considering Article 7. The Court made specific reference to the Commentary to article 7:

“Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding state or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.”<sup>458</sup>

The Commentary is, therefore, quite clear that in those circumstances and, arguably by analogy to those with Union crisis management operations, Article 6 is not the appropriate article for consideration. Article 7 and consideration of whether there is effective control over the conduct in question would be the only possibility. While a link is retained with the sending state, as it always is in this area, Article 6 should not be considered. This does raise a number of questions as to whether Article 6 has any use within the articles. If it is *only* to be used where an organ or agent has been *fully* seconded then the likelihood is that this will be rare. If an argument is to be made that Article 6, or a principle closely aligned to this, would be best to address the actions of organisations in circumstances such as these, then the provision requires further work in order to ensure that it appropriately addresses such actions and also that it is clear to those judicial fora implementing these provisions that it is the provision to be used.

As the ARIO stand, Article 7 perhaps has the greater potential for application, both generally, and when faced with Union crisis management operations, as it judges each one

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<sup>457</sup> *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6th September 2013, Supreme Court.

<sup>458</sup> *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6th September 2013, Supreme Court.

and each action individually. There remain limitations with the principle contained within Article 7 as well, however. It is to these difficulties that the thesis now turns.

### **6.3. Article 7- Personnel under the “Effective Control” of the Union?**

With the principle under Article 6 having significantly limited application, Article 7 ARIO shows some recognition of the disjointed nature of institutions in addressing the actions of organs or agents placed at the disposal of an institution. It considers the more frequent actions of international organisations by stating:

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.

Article 7 has been developed with the same underlying ideas as those developed in Article 6 ARSIWA, most particularly, the legal test concerned is a factual test of “effective control”. This is a very similar approach to that stated under Article 6 ARSIWA but without using the wording of “elements of governmental authority”, which was considered inappropriate in terms of international organisations.<sup>459</sup> In the context of states this was a provision that came to consider the manner in which the international actions have evolved, for example, it has frequently been used in relation to state links to rebel groups.<sup>460</sup> This reflected the need to address a different type of relationship that may not be formally within the infrastructure of the state.

This perhaps shows a greater alignment with the relationships developed by the European Union; very few of the entities acting on behalf of the Union internationally are actually core institutions of the Union or entities that could be considered to be permanent organs or agents of the Union. The relationship of the Union with both international law and the national legal orders means that the Union is often dependent on elements from other actors to propel its international identity and to carry out and implement its actions. If attribution is to be maintained as a core element of identifying an internationally wrongful act, then an element of control is then necessary to determine the relationship that exists to establish whether it is the Union that can be seen as being the overall international legal person to which actions can be traced.

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<sup>459</sup> International Law Commission *Report on the work of its Sixty-First Session* (2009), A/64/10 at p.62, para.3.

<sup>460</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p.14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment (2007) ICJ Rep 15.

### 6.3.1. Article 7: Factual Control?

The question must first of all be considered as to whether the test of being ‘placed at the disposal of’ is a relevant one when considering the relationship between an organisation and its member States. It is only if such a question can be answered in the affirmative that Article 7 can have any relevance in considering the extent to which the EU can have control over Member States in the areas of CFSP and CSDP. The commentaries to this article largely consider civilian and military operations, most particularly, those concerning the United Nations and its peacekeeping operations. The commentaries seem to create a general rule that the UN will, in principle, bear responsibility as it exercises effective control. In spite of these being the type of activities that Article 7 often serves to address, the test of effective control becomes complex when faced with them due to the number of different actors often involved in this activity.

Operational command being given over to the organisation by the Member State is what is decisive here. Wrongful conduct committed under the operational command of the United Nations triggers the responsibility of the UN, or regional organisation, whereas all other operations remain the responsibility of the troop-sending state. This consideration will, inevitably, require some case-by-case consideration of competences, powers, allegiance and action by organisations to look at the extent of control.<sup>461</sup> It comes down to the ‘effectiveness’ of the control being exercised, which plays a huge role in the attribution of wrongful acts committed by bodies common to several international organisations, such as the European institutions and the previous numerous Communities, or by organs ‘borrowed’ from another international organisation.<sup>462</sup> The test of effective control has been considered to be a productive and even “pragmatic” one, which seeks to determine responsibility on the part of the direct perpetrator of the act.<sup>463</sup>

Such a pragmatic test is entirely inappropriate when faced with the EU. When considering the nature of the Union and its relationships with its Member States, it would only be by addressing the normative relationships at play that any adequate consideration could be

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<sup>461</sup> P.de Visscher, ‘Les conditions d’application des lois de la guerre aux opérations militaires des Nations Unies’ (1971) 54-I *Annuaire IDI* 48 cited in P.Klein, ‘The Attribution of Acts to International Organizations’, in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.297 at p.300.

<sup>462</sup> M.Hirsch, *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles* (Boston and London: Dordrecht, 1995) p.64.

<sup>463</sup> N.Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.264.

had of who had committed any particular act. This is one of the core difficulties that exists with the application of this test to the Union. Often it cannot be said that the EU has 'effective control' over its Member States to be able to achieve the appropriate level of attribution.<sup>464</sup> The EU has sought to argue, again, that it is the internal rules of the organisation that need to be referenced here in order to explain this relationship. The European Commission Statements and the Presidency Statements argue that the internal division of competence explain the extent of links and ties and control between Member States and the EU itself would better explain the way in which responsibility should be determined.<sup>465</sup> While these comments were made only in relation to particular areas of Union action, namely those previously seen as 'Community' areas of law, the difficulties discussed show some of the central ideas that define the Unions external activities.

While effective control generally attempts to establish the direct and individual actor who has committed a wrongful act, the potential does exist to have multiple attributions and, as a result, multiple responsibility. The argument has been made that if action is exercised jointly or cannot be divided, then the same action can be attributed to a variety of different actors.<sup>466</sup> This remains, however, uncertain and still does not really recognise the potential overlap of conduct or even the indivisible nature of international action. The uncertainty as to the level of involvement that will constitute command or control does mean that joint responsibility as a result of multiple attributions is quite remote.<sup>467</sup> There remain questions as to the extent to which interaction between, for example the EU and NATO in carrying out a mission would mean the attribution of action to both bodies, or even the extent to which it would involve a Member State. The question of multiple attributions does not solve the question of the meaning of effective control and the level which involvement would need to reach before it satisfies the test for attribution. When considering the principle of attribution in itself, however, the Special Rapporteur has supported the view shared by a number of scholars that the decisive element that should

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<sup>464</sup> H.G.Schermers and D.Waelbroeck, *Judicial Protection in the European Communities*, 5<sup>th</sup> edn, (Kluwer, 1992) at p.353.

<sup>465</sup> European Commission Comments, *Comments and Observations received from International Organizations*, A/CN.4/545, 25 June 2004, at pp.13-14; EU Presidency Statement on the ILC Report 2004, New York, 5 November 2004, PRES04-298EN; A/C.6/59/SR.21 available at: [www.europa-eu-un.org/articles/en/article\\_4020\\_en.htm](http://www.europa.eu-un.org/articles/en/article_4020_en.htm)

<sup>466</sup> N.Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.253.

<sup>467</sup> N.Tsagourias, 'The Responsibility of International Organisations for Military Missions', in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.255.

be focused upon is a factual one concerning the specific conduct in question; did the organisation or the state have control over *that particular* conduct. There is an attempt to determine the individual perpetrator. This is where the problematic aspect arises when considering the European Union.

### 6.3.2. Factual Control and EU Crisis Management?

The initial test to consider when applying this test of “effective control” to the military operations of the Union is that which was established in relation to state responsibility, if only because this is far more certain. The *Nicaragua* and *Genocide* cases showed a strict approach from the ICJ in defining and applying the idea of a *de facto* organ.<sup>468</sup> Groups or entities may be a *de facto* organ if they act in ‘complete dependence’ of the State. The result is that, ultimately, the group is simply an instrument of the state. It requires “proof of a particularly great degree of State control.”<sup>469</sup> It also considered the test of “effective control” in terms of understanding organs or agents placed at the disposal of a state. To adapt this to international organisations, a similar level of dependence and high degree of control should be identified.

The question arises as to the level of involvement that constitutes command or control. In terms of civilian and military missions, the factor that has continually been focused upon in questioning the involvement of states or institutions, has been the retention of criminal and disciplinary jurisdiction. The consequence of this retention is somewhat contested. While some have considered that it shows a continued involvement and importance of the home state of troops, others have argued that jurisdiction cannot be the basis of control for the purposes of attribution.<sup>470</sup> The *Behrami* case has been the basis for this argument, showing recognition by the ECtHR that retention of some control by states that contributed troops did not necessarily extend to affecting the command and control of those troops.<sup>471</sup>

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<sup>468</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits (1986) ICJ Rep.14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment (2007) ICJ Rep 15.

<sup>469</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment (2007) ICJ Rep 15, at para.393.

<sup>470</sup> N.Tsagourias, ‘The Responsibility of International Organisations for Military Missions’, in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.255.

<sup>471</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10 at para.139; N.Tsagourias, ‘The Responsibility of International Organisations



If, first of all, a 'standard', EU military operation is considered. It could be argued that EU military missions do, to an extent, satisfy this test with the consequence that actions of personnel would be traced back to the Union. Operations have, first of all, a single chain of strategic and political command and a single chain of operational and tactical command. Ultimately, it is the Council that establishes missions and determines the mandate and capacities of missions. The Council appoints the Operation and Force Commanders and key decisions and documents, such as the Rules of Engagement are decided at this European level. The day-to-day control and strategic direction of missions can, furthermore, be seen to lie at the European level, being the responsibility of the PSC, which acts under the authority of the Council. The PSC also sets political-military objectives and, acting through the EU Military Committee; it develops these objectives into guidance for the Operation Commander. There is a chain of command that flows from the EU through the Operation Commander. From a political and military-strategic point of view, it could be argued that EU military missions are completely dependent on the EU.

Member States furthermore depend on the Union, to an extent, in terms of mandate and strategic direction. It could also be argued that in transferring forces to the Union, Member States are limiting what they can do with these forces. States have to agree to the mandates and competences of the mission as decided by the Union, as well as having a duty of loyal cooperation towards the Union and its actions. There is, therefore, some level of control by the Union over military operations. Whether this is a sufficient level of control is questionable. It does not meet the level determined with the original test, but whether this is necessary is also an uncertain question. This test was challenged in the *Tadić* case before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>472</sup> This case lowered the threshold of control to one of "overall control" but the consequences of this in terms of enabling the actions of organs to be considered those of the organisation mean that this is perhaps inappropriate. There is an argument here that 'control' in the sense that it was interpreted in *Behrami* would be achieved here. There is a clear line that could be traced through, with "overall control" lying with the Union.

There are a number of factors, however, that give rise to concern when considering the potential application of this principle to Union crisis management. The first of these

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for Military Missions', in M.Odello and R.Piotrowicz (eds.) *International Military Missions and International Law* (Nijhoff, 2011) p.245 at p.255.

<sup>472</sup> ICTY, *Prosecutor v Tadić* Case No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, 124 ILR 61.

concerns is that this is not what was aimed for with Article 7. It appears that Article 7 very much depends on a determination of who has effective control “over the conduct in question”.<sup>473</sup> The more recent interpretations of Article 7, for example in *Nuhanović*, seem to continue the requirement of a high level of control but with this recognition that this can change according to circumstances. It is, first of all considered, that the interpretation and application of this principle has been left in a quite uncertain position through the case law. In this sense, it is difficult to consider how it would apply in relation to Union crisis management operations as it seems to depend entirely upon the situation at hand. This is not a satisfactory situation as it leaves the law in a highly uncertain position.

There is another concern in this area as to how such effective control could be determined. There is such a complex interaction of actors involved in these operations that the question arises as to whether a simple factual determination is capable of comprehending the situation. There is very much a focus on this notion of factual control and no real consideration of the legal relationship between the Union and the organs acting on its behalf. This idea of factual control is hugely limiting, however, and is perhaps the core of why these tests don’t really work with the Union. What would perhaps be more appropriate would be more of a concept of normative control or of considering the institutional relationship at question here.

One way in which this concern could be understood is through the acceptance of the distinct relationship between the EU and the WTO. In examining this relationship, the concern is never for a factual control link, but for the determination of an institutional relationship. This relationship has been determined more in the sense of Member States acting “*de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general.”<sup>474</sup> There is an important consideration here, however, which is that this reflects the reality of the situation but would not be the case if a *factual* test were applied. In a narrow sense, the EU is dependent on the Member States for the execution of EU law and not the other way around. When considering this area, it is only by understanding the normative complexities of the relationships at play that an true understanding can be had.

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<sup>473</sup> *Second Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, A/CN.4/541, 2 April 2004 at p.19.

<sup>474</sup> European Communities Second Oral Statement, para.148 as cited in the WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States (‘EC-Trademarks and Geographical Indications (US)’)* WT/DS174/R, adopted on 15 March 2005 at para.7.339.

While there are significant differences between these areas of EU competence and any analogies should be made with caution, this shows perhaps that the relationship at stake is significant and perhaps a better measure than a test of factual control. When considering crisis management operations, however, there are equally complex relationships at stake. While there is a Union framework, this is implemented by Member States, which retain *some* control over the forces which they second to these operations. A focus on a factual test of control would be superficial and incapable of picking up on the nuances of the relationship between the Union and its Member States. This is clear when considering that while there is a clear *institutional* line of command, the retention of some control by the Member States could be interpreted in some circumstances as “effective control”. This gives rise to a certain degree of confusion about how such a principle could be applied.

Crisis management missions often also involve external actors, such as the UN, NATO, other organisations or third states. There may also be an agreement concluded between the state or organisation lending and that, which is receiving, but this agreement cannot be said to be conclusive. These agreements simply govern the relations between the State or organisation contributing and that which is receiving, and cannot therefore be used to deprive a third party of any rights under international law.<sup>475</sup> The way in which agreements explain or elaborate on the relationships at play and the extent to which they explain where control lies is highly uncertain. It is only by reference to these norms that relationships can be understood but these agreements often do not definitively clarify relationships and the extent to which they can assist is determining where effective control lies remains limited. When considering the case law that has arisen, it has often been the inter-institutional relationships that have posed the greatest difficulties. This can be seen, for example, in *Behrami*, with the involvement of the UN, NATO and various states resulting in a lack of clarity as to where control lay and what the determining ‘type’ of control was.<sup>476</sup> It can also be seen in the case law that has arisen in relation to the events at Srebrenica. The difficulty in the line of *Nuhanovic* case law, as well as the more recent *Mothers of Srebrenica* has been how to determine whether control lay with the UN or with the Netherlands and how to establish when and how this changes.<sup>477</sup> The EU bases its crisis management operations around working with other actors and this pragmatic factual test cannot address the collective and interactive nature of this. Such a test of

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<sup>475</sup> International Law Commission *Report on the work of its Sixty-First Session* (2009), A/64/10 at p.63 para.2.

<sup>476</sup> See above in chapter 5 at pp.124-133

<sup>477</sup> See above in chapter 5 at pp. 124-133

attribution would need to be responsive to the normative relationships that exist rather than relying on factual circumstances.

Ultimately, the difficulties with the underlying idea of attribution as determining which singular actor has committed an action continue to be central to these problems. When considering the interaction central to the EU's international activities, this is a complex and difficult requirement. With this central difficulty within attribution, it is questionable whether any approach could have been taken towards this principle that would have been capable of addressing these complex actions.

#### **6.4. Conclusion**

There are a number of fundamental weaknesses with the principles of attribution but these are exacerbated when faced with the complexity of the EU and its crisis management operations. These operations continue to be covered by the general principles of responsibility in spite of some limited acceptance of the different nature of the Union in some areas.

In terms of the EU crisis management, internally the structures remain largely the same with regards to the way in which operations are planned and overseen. If we consider the relationships between the Council, the PSC and the Commanders, for example, then the same patterns can be seen in all operations. This is also true of the relationships that, *generally*, exist between the Union structures and commanders running an operation and the Member State forces and personnel given over to such an operation. This does show some consistency and potential for clarity but the principles of attribution are too limited in their basic approach to be able to address these actions. There may be a clear EU institutional framework but this does not clearly integrate these missions into the structures of the Union and the continued interdependence of the Union and its Member States means that there is insufficient clarity to establish crisis management operations as either *de jure* or *de facto* organs of the Union.

This is further exacerbated when considering the range of external actors that can be involved in such operations. While the EU has retained largely the same structures in its internal development and planning of operations, it is necessary for it to retain a degree of flexibility with the external aspects of all operations in order to fully respond to the situation on the ground; every operation is acting within a unique environment. If we consider the different levels of control and the changing nature of control, this is a highly limited test to try and apply to these complex situations.

At its simplest, the fundamental difficulty with the principle of attribution is that its core premise is that a single actor has committed an act. When faced with the Union, which at its core has the nature of interaction and interdependence, there will always be a struggle to address crisis management operations. While in some ways it appears that the idea behind Article 6 has potential to apply, the confusion in its drafting means that any application to EU crisis management is highly uncertain. It is argued that the relevance and ability of Article 6 to apply within the ARIO does significantly come into question. There also appears to be quite a significant overlap between the attempts to apply Article 6 and Article 7, as it currently exists. While there are some ideas within these principles of attribution that have some potential behind them, the way in which they are drafted creates a high degree of complexity and legal uncertainty.

The ILC has shown some recognition of the challenges posed by attempting to apply principles developed in relation to states to the variety of actors addressed by the ARIO. Its attempt to address the critique levelled against it has been to include some references that would enable the individual nature of each actor to be considered, most particularly this can be seen with references to the 'rules of the organisation' and the attempt to develop a *lex specialis* provision. While these references may show the beginnings of an attempt to properly consider the individual nature of the Union and take fully account of its varied international activities, the next chapter will consider the limitations of this as an approach.

## 7. The 'Rules of the Organisation' and *Lex Specialis*: Determining International Responsibility from within the European Union?

The way in which the individual nature of the EU is to be addressed within a broad system of international responsibility is a complex question. In developing a set of international principles, these articles must be *international* in nature. The individual nature of the Union can only really be determined, however, by the internal norms and principles of the EU. There needs to therefore exist a balance, whereby the individuality of the Union is addressed, while enabling international principles to develop. The Special Rapporteur Gaja has recognised and attempted to address this difficult question through the inclusion of references to the rules of the organisation and a *lex specialis* principle.<sup>478</sup> There arises a question as to the extent to which this approach enables the development of a system of responsibility but also the extent to which it enables the balance between the internal nature of the Union and a system of international principles.

The rules of the EU determine its relationship with its Member States and, as a result, would determine when the 'veil' of the Union could be pierced and cause responsibility to lie with Member States. This division is only something that can be established with reference to Union norms. Responsibility, however, should only be determined at the international level. To not determine it at that level and to allow too much of an influence for the Union would offend the international law status of these principles. As seen with the principles of attribution, however, insufficient reference to the internal workings of the Union does not allow the principles to take sufficient account of the EU and consequently they do not work. This is, therefore, a necessary and important balance to achieve. This chapter argues that this balance has not been achieved in the references developed by the ILC.

This chapter begins by critiquing the references made to the 'rules of the organisation', which appear in various parts of the ARIIO, for example, in the determination of what constitute organs and agents for the purposes of attribution, as well as the breach of an international obligation and the obligation to make reparation. This chapter argues that there is a degree of confusion on the status of the 'rules of the organisation' and whether they exist as norms of international law or norms internal to the organisation. The attempt to apply these confused principles to the EU, does not address the difficulties and the criticisms, but rather it exacerbates them due to the uncertainty in the status of these

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<sup>478</sup> Articles 6(2), 10(2), 32, 22(2)(b) ARIIO Article 64 ARIIO.

principles. Those principles that seek to determine the internal rules of the Union as international law principles do not address the Union's nature and those that recognise their internal status are unclear on how this balance between the internal and the international will be achieved.

The chapter then questions the *lex specialis* principle developed within the ARIO and considers that the weaknesses within the drafting of this article have resulted in a principle that does not actually consider '*lex specialis*'. There exist further questions, related to the initial consideration of the references to the 'rules of the organisation' and their status within the articles as to whether it would even be appropriate to have a *lex specialis* principle as this would suffer from the same weaknesses of the references to the rules of the organisation; there are significant questions about how to integrate and address the internal norms and principles of an organisation within a set of international law principles. While the previous chapter considered the international attempts to develop principles of responsibility and thus consider the international responsibility of the European Union, 'from the outside in', there is another perspective. There is an argument that the only way to fully address the individual nature of the Union in principles of responsibility is to have these principles developing 'from the inside out', or to develop from and give fully effect to the internal individual nature of institutions.

The weaknesses in the drafting of the *lex specialis* principle and the references to the rules of the organisation have significant consequences. The result is principles that, either, do not recognise the internal integrity of the Union thereby jeopardising their application to this legal actor, or potentially seek to translate internal norms of an organisation to the level of international law, thereby potentially binding third parties to norms to which they have not agreed. Rather than have the effect of broadening the application of the ARIO, these references most prominently serve to further weaken the ARIO and expose a number of bigger problems in the overall law of responsibility. The second concern surrounding these references is the consequence of confusing the international status of the EU and indeed, perhaps even threatening the constitutional structure of the Union.

### **7.1. The 'Rules of the Organisation': addressing the individual nature of the EU?**

The critique of the ARIO as simply attempting to apply the rules developed in relation to states to institutions and failing to consider the way in which these institutional actors differ did not go unnoticed by the ILC. The substantial challenge posed by the Union in particular was recognised. There was particular discussion of the external action of the Union in its more traditional areas of action, those falling under the previous 'Community'

umbrella. These areas show a dynamic international actor, which the law of responsibility in its traditional form cannot sufficiently address.

The substantial differences between the Union and a state have raised a number of critiques on the potential for the articles to apply and work with the EU. The identity of a state is understood. When an entity is defined as a state, it then possesses all the rights and duties conferred by international law.<sup>479</sup> The EU depends upon its treaties in order to determine its competences. Unlike a state it possesses only those powers granted to it, or which can be implied in order to pursue its conferred powers. It is only by reference to the internal norms of the EU that its powers can be fully understood. The workings of the EU furthermore in exercising these powers are quite different. The involvement of Member States in carrying out Union obligations raises a number of questions as to the determination of when the EU itself is acting. It is, again, only when examining the rules that the complex relationship can be dissected and its actions understood. There is an understanding that these rules need to form part of the international system of responsibility. The references made to the rules of the organisation throughout the ARIO, show an attempt to recognise and respond to this critique. Making these references is a positive step towards developing a workable system of responsibility. As long as the rules are rational and comprehensive and their integration is appropriately done, then they are able to form a valid and important part of the law of responsibility. While the ILC has taken an important step in making these references, the way in which they have been made and the confusion surrounding the status of these norms only confuses the application of these principles to the Union.

#### **7.1.1. The 'rules of the organisation': the definition.**

The rules of the organisation may be referred to in attributing conduct of organs and agents, determining a breach of an international obligation, determining the obligation to make reparation, countermeasures against international organisations and *lex specialis*.<sup>480</sup> This is a wide range of areas, covering, at the very least in a general sense, almost every aspect of responsibility considered by ARIO. This recognition by the ILC of the need to include these references came from the beginning of its work on the ARIO.<sup>481</sup> It saw fit to

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<sup>479</sup> *Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion ICJ Reports, 1949, p.174 at p.179.*

<sup>480</sup> Articles 6(2), 10(2), 32, 22(2)(b) ARIO.

<sup>481</sup> See initial mention of the rules of the organisations in First Report on the Responsibility of International Organizations, by G.Gaja, Special Rapporteur, A/CN.4/532, 26 March 2003, at pp.19-



include a definition of the 'rules of the organisation' at the beginning of the ARIO, in order to enable a broad range of references to be made throughout the work.

Article 2(b) states that:

'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."<sup>482</sup>

The need to incorporate references to the rules of an organisation within a set of international principles first arose in the work of the ILC on the law of treaties. This work culminated in the 1969 Vienna Convention on the Law of Treaties, wherein it is stated that any application of the rules within the Convention to the treaty of an organisation was without prejudice to the rules of the organisation.<sup>483</sup> A definition was first developed, however, in the later work of the ILC on the 1975 Vienna Convention on the Representation of States in Relations with International Organizations.<sup>484</sup> This definition then found its way into the 1986 Convention on the Law of Treaties between International Organisations and States or between International Organisations.<sup>485</sup> Having already considered the idea of a definition, the ILC then largely used this earlier definition in drafting the one contained within ARIO.<sup>486</sup> Its precise meaning was subject to little scrutiny.<sup>487</sup> The further difficulty that arose was the question of the status that these rules have in the international legal order. This is an issue that has continued with the references made within the ARIO.

The only real change between the definition in the original work on treaties and that in ARIO is a significant broadening of the definition through reference to "other acts of the

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20; In more detail *Second Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, A/CN.4/541, 2 April 2004 at pp.10-14.

<sup>482</sup> Article 2(b) ARIO.

<sup>483</sup> Article 5 Vienna Convention on the Law of Treaties 1969 1155 UNTS 331.

<sup>484</sup> Article 3 1975 Vienna Convention on the Representation of States in Relations with International Organizations, United Nations Conference on the Representation of States in Relations with International Organizations, 4 February-14 March 1975 Doc/A/CONF.67/4.

<sup>485</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, A/CONF.129/15, Article 2(1)(j).

<sup>486</sup> Commentary to Article 2 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.16.

<sup>487</sup> See general discussion in *Second Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, A/CN.4/541, 2 April 2004 at pp.10-14; The definition of rules of the organisation was then included in the draft articles, see International Law Commission, *Report on the Work of its fifty-sixth Session (2004)*, A/59/10, at p.95.

organization".<sup>488</sup> The further mention in article 2(b) to "established practice of the organization" also serves to develop the definition further. Gaja has shown acceptance and understanding that organisations are not static entities. He recognised a need to obtain a balance between those rules explicitly created and agreed to by members and enshrined in formal instruments and the need to enable the development of the organisation.<sup>489</sup>

This definition is a productive and well thought out one, when considering the EU. The broad range of actions that the Union is capable of would be capable of being addressed. The evolutionary nature of the EU necessarily needs a broad definition to cover all of the potential rules and norms of an organisation. The reference made by the ILC to 'other acts of the organisation' does enable this flexibility. When considering the way in which the Union has evolved into an integrated legal order, this is most pertinent. The role of the jurisprudence in developing practice and principles within the Union legal order has been significant and would need to form a part of any reference to the 'rules' of the EU.<sup>490</sup> NATO commented on this definition, for example, in stating that:

"the fundamental internal rule governing the functioning of the organization- that of consensus decision-making- is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of practice of the organization."<sup>491</sup>

The ILC may have recognised this flexibility, but the retention of the phrase 'in particular' retains the focus on those 'traditional' rules of the organisation, explicitly accepted by members. It has also been stated that perhaps some form of hierarchy can be said to exist with the rules of organisations with, for example, the constituent instruments generally not being derogable.<sup>492</sup> The same may not always be said for other rules, for example, principles implied on the basis of practice.<sup>493</sup> This broad conception is precisely what is

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<sup>488</sup> Commentary to Article 2 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.16.

<sup>489</sup> Commentary to Article 2 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.18.

<sup>490</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1; Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>491</sup> Comments given by NATO, *Comments and observations received from international Organizations*, 14 February 2011, A/CN.4/637 at p.40.

<sup>492</sup> Commentary to Article 2 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, para.19.

<sup>493</sup> *Ibid.*

required when developing principles that apply to the Union. This is, most particularly, in terms of being able to include the practice and the jurisprudence of the Courts.<sup>494</sup>

The extent to which the internal rules of any organisation, and specifically the EU, can be considered or invoked by, or even bind third parties is questionable. Rules of the Union legal order are precisely that: internal norms. Projecting these norms externally to be used by or bind third parties raises significant questions with regard to the basic principle of international law as being a system based around the principle of consent as a basis upon which states are bound by obligations. The one area that raises some slight potential for the ability to have expectations of third states with regards to internal Union norms is in the area of declarations of competence. When considering such declarations of competence, it has been argued that they could potentially be considered as interpretative aids as instruments made in relation to the conclusion of a treaty.<sup>495</sup> This is not entirely clear, however, and the nature and benefit of such declarations in providing clarity in areas such as these is highly questionable.<sup>496</sup> As such, it appears appropriate that such declarations are currently not relied upon to determine such relationships.

It is clear, however, that from a Union perspective the internal workings of the EU are always going to be the starting point for any consideration of the division of competences and action between the Union and its Member States. The European Commission argued for the inclusion of references to the rules of the organisation in its comments on the work of the ILC.<sup>497</sup> It argued that the relationship between the Union and its Member States is one that can only be understood by reference to the rules of the organisation. Consequently, determining whether the Union, or indeed one of its Member States, has an obligation under international law and whether this obligation has been breached, should only be determined with reference to the internal norms of the organisation. The interrelationship between the Union and its Member States is so developed that the actions and obligations of each of them can only really be determined by reference to the internal rules of the EU.<sup>498</sup> With the Union this is, furthermore, a dynamic relationship that

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<sup>494</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1; Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>495</sup> Article 31(2) Vienna Convention on the Law of Treaties.

<sup>496</sup> See above discussion at pp.116-118

<sup>497</sup> Comments of the European Commission, *Comments and Observations Received from international organizations*, 25 June 2004, A/CN.4/545 at p.13.

<sup>498</sup> See for further explanation chapter four at pp.106-108.

is relatively fluid and continues to evolve.<sup>499</sup> The European Commission saw this as particularly important with the difficulties in determining attribution of conduct.<sup>500</sup> It even argued that determining the apportionment of obligations should be a step taken prior to attribution, in order to determine that the obligation is in fact that of the Union and not of one of its Member States.<sup>501</sup> While the ILC did not follow the comments of this Commission in creating a special rule of attribution for the Union, these references to the rules of the organisation do go some way towards what was being requested. The ILC showed an attempt to move towards addressing the individual nature of the Union but still attempted to do this in a general system of international rules rather than considering the actual international identity of the Union.

In spite of this clearly being the basic place to begin with any consideration on this area, the fundamental difficulty remains as to the status that these rules have and how they fit within the international legal order. The ILC is not completely certain on what status these rules have, in spite of continued references to them; are they internal norms of the organisation, or, when engaged in this forum, are they norms of international law? The difficulty in making reference to the norms of the organisation is one aspect that is difficult but a further problem arises with the work of the ILC in that this has not been tackled within the articles. What exists within the ARIO is a confused approach, which seems to be attempting to address them as both internal and international. This confusion makes the application of these principles problematic. To include these rules, the integrity of these rules needs to be maintained and upheld. Without doing so, the confused status of the Union norms, risks not only undermining the application of the ARIO, but also threatening the international identity of the Union. Further questions have to be considered on the extent to which these rules are able to bind other organisations or non-Member States. In an international system that continues to be based around the principle of consent, these are principles that have not been consented to. Internal norms of the Union cannot simply be externalised and established as binding upon parties which have not agreed.

### **7.1.2. The status of the 'rules of the organisation'?**

The internal norms of the European Union determine its competences, its processes and most importantly, its relationship with its Member States. They are norms developed

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<sup>499</sup> *Ibid.*

<sup>500</sup> Article 6(2) ARIO.

<sup>501</sup> Comments of the European Commission, *Comments and Observations Received from International Organizations*, 25 June 2004, A/CN.4/545 at p.14.

within the Union legal order that exist solely within this legal order. The questions surrounding the references made by the ILC have thus surrounded one general issue: whether, within this context of international responsibility, they remain only internal provisions of the organisation or whether they gain some international legal status. EU norms may be developed within the Union legal order and exist within that legal order, but the question arises as to whether, when referred to within this international law framework, they gain some international law status.

The European Union may have been created using international legal instruments in the form of treaties but since that time it has sought to develop and grow and push towards an increasingly autonomous international identity as a legal order distinct from international law.<sup>502</sup> It now exists far beyond what was originally contemplated; it is far more than a cooperative between states governed by a treaty, but rather is an increasingly integrated legal order. While the EU is far from entirely independent and still relies heavily on its Member States, arguably more so than any international organisation, its push towards an international identity sets it apart. It has created a legal order that develops its own internal rules. Consequently, these norms need to remain internal to this Union legal order. Any attempt to transplant them into an existence as general international provisions would serve to further weaken the overall responsibility project and to further raise tensions in determining the global identity of the Union.

The ILC has created a great deal of uncertainty in this area. To attempt to transplant these norms and somehow treat them as international norms would create uncertainty on the way in which this would work. The consequences for the constitutional integrity of the EU are furthermore an even greater cause for concern. In places norms are termed as if they are purely internal to the institution, while in others they appear to have more of a status within the general international system. While considering them within international law as a blanket rule would have been detrimental, the confusion caused by this approach is just as problematic.

The ILC has drafted a number of articles within the ARIO that indicate that rules of the organisation should be considered to be solely internal to that organisation; they have no status as general international legal provisions. One such provision would be in article 6(2), which states that these rules apply “to the determination of the functions of its

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<sup>502</sup> See for further discussion above chapter four at pp.93-106.

organs and agents.”<sup>503</sup> This has shown that any consideration of the relationship between an organisation and the entities acting on its behalf must be determined by the organisation itself. This is an internal matter and should be treated accordingly.

There are, furthermore, provisions that show the rules of the organisation as internal, through their inability to justify non-compliance with international law provisions.<sup>504</sup> This was intended to follow the approach in Article 27 ARSIWA, in that this provision on state responsibility establishes that a state cannot rely on its internal law. There was also a similar provision in the ILC work on treaties and international organisations. This parallel drawn here with the internal law of a state does suggest a stronger view on the rules of the organisation as being, to an extent, the ‘internal law’ of the organisation. That said, the commentary to this provision does refer to the various parts of the articles that can be affected by the rules of the organisation, but this is in relation to the organisation and its Member States only, in terms of reparation or attribution.<sup>505</sup> The key element here is that this provision only applies in relation to obligations between an organisation and its Member States.<sup>506</sup> It can in no way apply to relations with third states or other organisations; these are purely internal to the organisation.

Article 40 also designates that members of a responsible organisation be required to take “in accordance with the rules of the organisation” all appropriate measures to provide the IO with the means for effectively fulfilling its obligation of reparation. This is an obligation between an organisation and its Member States; any relationship between an organisation and its members is between these two and is not governed by international law. The article recognises there is a certain level of dependence by an organisation on its Member States and that it may rely upon its members to fulfil its obligations. This reliance flows from a relationship between the organisation and its members, a relationship governed by the rules of the organisation. Requiring Member States to provide the means for an organisation to fulfil its obligations is an obligation that is governed by the rules of the organisation, which does not stem from international law. The article has an expository character, intending to remind members to enable an organisation to fulfil its

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<sup>503</sup> Article 6(2) ARIIO.

<sup>504</sup> Article 32(1) ARIIO.

<sup>505</sup> Commentary to Article 32 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at paras.3-5.

<sup>506</sup> Commentary to Article 32 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.5.

obligations.<sup>507</sup> It shows with clarity the reasons why certain references may need to be made within the articles; the relationship between the EU and its Member States determines the obligations that exist between them.

While this does show some acceptance of rules of an organisation being solely internal to that organisation, there are areas of the ARIO where the ILC has indicated that these rules have an international legal nature. This raises substantial questions. In allowing rules that are purely internal to an organisation to have any type of effect outside the realms of the organisation, this ignores some basic precepts. Internal rules have been agreed by the parties to the organisation and, consequently, are binding *only* on the parties to that organisation. To take them at a broader level and consider them to have a status under general international law would broaden this impact and potentially bind third states, which are not a party to the relevant treaties.

While this difficulty, in itself, raises problems, Article 5 and its commentary take a different approach towards the status of these rules and potentially confuse the situation even further. Article 5 establishes that characterising an internationally wrongful act is done by international law *only*. This is based on the provision on state responsibility that does not allow the internal law of a state to determine an internationally wrongful act as lawful. While the idea of this provision is understandable and seems to retain a distinction between international law and the rules of the organisation as internal law, the commentary to Article 5 seems to confuse their status further:

“The difficulty in stating a similar principle for international organizations arises from the fact that the rules of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; other rules of the organization may be viewed as part of international law.”<sup>508</sup>

It could be said that this is recognising the circumstances with some organisations where their rules have grown from or developed into international legal principles, for example the United Nations and the rule on the use of force and the peaceful settlement of disputes.<sup>509</sup> The various arguments on the particular nature of the UN Charter and its

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<sup>507</sup> Commentary to Article 32 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.4.

<sup>508</sup> Commentary to Article 5, Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.2.

<sup>509</sup> Articles 2(4) and 33 United Nations Charter.

precise status at the international level, raise the argument that this instrument is provides an individual case example.<sup>510</sup>

Irrespective of the UN Charter, however, the commentary to Article 5 does require some consideration. The consequences for the Union could be severe. This commentary seems to state that rules of the organisation may be considered to be rules of international law. In fact, there seems to be a distinction made from the provision in the rules of state responsibility upon which this article was based; the difficulty in comparing the rules of the organisation with the internal law of the state is that rules of the organisation may be part of international law rather than just being internal to the organisation. As opposed to previous articles, this provision seems to argue that there are significant differences between the rules of an organisation and the internal law of a state and that drawing comparisons should be done cautiously.

Article 10(2) extends the existence of a breach by an organisation to the violation of “an international obligation that may arise under the rules of the organisation.” This may only be in relation to the members of an organisation, however, this does still determine rules of the organisation to exist as provisions of international law. Articles 22 and 52 ARIO further preclude an organisation or Member States from taking countermeasures vis-a-vis each other unless they “are not inconsistent with the rules of the organization”.<sup>511</sup> This brings the rules of the organisation into international law by enabling them to affect when these provisions of international law are able to apply.

The final provision where a more international status for the rules of the organisation is, arguably, quite a significant one: Article 64, the *lex specialis* principle. This principle determines that “rules of the organization applicable to the relations between the international organization and its members” may constitute “special rules of international law” allowing for derogation from the general rules of the ARIO. This provision goes a step further than those discussed above. The previous articles show the potential to be interpreted as rules of international law, whereas Article 64 *explicitly* states them to have the capacity for this.<sup>512</sup> The heavy focus on the Union within the commentary to this article seems to identify the Union rules as norms of international law. This is entirely inaccurate

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<sup>510</sup> B.Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009).

<sup>511</sup> Article 22(2)(b) and Article 52(1)(b) ARIO.

<sup>512</sup> See below for further discussion at pp.185-195.



in responding to the international activity of the Union and in building a good foundation for a responsibility project.

It is, therefore, far from certain within the ARIO what status these rules should have. The previous work of the ILC on treaties also did not determine this definitively, but the preparatory works did suggest that these references to the rules of the organisation existed to respect the autonomous relationships within an organisation.<sup>513</sup> The references contained within the ARIO do not seem to have been drafted with the same concerns in mind. There does not seem to be any consistent consideration of what these rules are and what the consequences may be of including them within this law of responsibility.

The European Commission may have continually argued for references to the rules of the organisation, but even with these references, in its final comments on the ARIO, it questioned whether the ARIO were ready for adoption or whether further work was needed.<sup>514</sup> The European Commission argued that the particular nature of the EU is not addressed and nor is the diversity of organisations.<sup>515</sup> The European Commission has stated that it:

“remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organizations such as the European Union, even when account is taken of some of the nuances now set out in the commentaries.”<sup>516</sup>

The ILC sought to include these references in order to address these very critiques. This manner of addressing the substantial critique of these articles avoided considering the ‘dual’ nature that is possessed by organisations and also by the rules of these organisations. The very incorporation of references to the rules of the organisation, along with this indeterminate view on their legal nature, tries to address the different identities that an organisation can possess. The dual identity possessed by institutions, in terms of being simultaneously autonomous and also collections of their Member States is reflected here and is taken further by the external action of the EU than with any other actor

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<sup>513</sup> C.Ahlborn, ‘The Rules of International Organizations and the Law of international Responsibility’, ACIL Research Paper No 2011-03 (SHARES Series) at p.5.

<sup>514</sup> European Commission Comments, *Comments and observations received from international Organizations*, 14 February 2011, A/CN.4/637 at p.8.

<sup>515</sup> European Commission Comments, *Comments and observations received from international Organizations*, 14 February 2011, A/CN.4/637 at pp.7-8.

<sup>516</sup> European Commission Comments, *Comments and observations received from international Organizations*, 14 February 2011, A/CN.4/637 at p.8.

addressed by the ARIO. The ILC has recognised the internal nature of rules, but in some places in the ARIO, it has swung to the other extreme in addressing norms as principles of international law. Consequently, it has sought to address these rules with two extreme identities, rather than their true transparent nature. This leaves the ARIO being balanced between the internal and international nature of institutions and having a constantly changing scope of application. It is the question of transparency and the institutional veil that really challenge the application of the law of the responsibility to the European Union.<sup>517</sup> Yet, it is this core questions on the identity of these actors that the ILC fundamentally has not engaged with and which it seemed to be attempting to bypass through references to the rules of the organisation.

The European Union has gone further in developing this transparent international identity. It has pushed towards an autonomous identity further than any international institution, but is arguably even more dependent on its Member States, creating a strange paradox that pervades its international action.<sup>518</sup> The international action of the Union depends upon interdependence and interaction, both between the Union and its Member States but also between the EU and other international actors. The EU may continue to push towards an autonomous international identity, but this is all while it continues its dependence on others. The internal norms of the Union are simply that; norms internal and integral to the EU and not subject to any other legal orders. The conflict existing between accepting the internal norms as internal legal provisions of the entity concerned and the argument that they, in fact, constitute international legal norms is reflective of the conflict surrounding the global identity of the Union; is it an autonomous legal order that interacts with international law or is it simply an international organisation that forms part of the international legal order?

While recognising the potential individuality of the EU and the need to allow its unique legal system to be addressed, the conception of EU norms as principles of international law is where the complexity lies. This determination may be true of some international organisations, when considering the Union, however, determining its internal provisions as those of international law has the potential to be destructive to the EU legal order, rather than to be of any benefit to the system of responsibility. The result of trying to characterise Union norms as general norms of international law is to undermine the

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<sup>517</sup> For further discussion on the idea of 'transparency' see C. Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, (Oxford: Hart, 2007) and above chapter three at pp.74-76. For further discussion on the complexity of the EU's identity see above chapter four at pp.106-108.

<sup>518</sup> See above chapter four at pp.106-108.

autonomous nature of the EU legal order. To characterise internal norms as having the status of international principles also raises further concerns in terms of attempting to bind States or organisations which are not parties to the Treaties, going against the basic idea of international law as based around the idea of consent.

The rules of the organisation need to be recognised as internal law of the organisation and not international law or even *lex specialis*. The general idea of giving recognition to the Union does potentially show an understanding of the unique identity of the EU. A careful balance needed to be achieved here; norms need to remain internal to the EU but it is important to have the capacity to make reference to them in the determination of responsibility. The way in which this has been pursued, however, only serves to raise concerns in relation to both the status of the Union but also in relation to confusing the application of norms to entities to whom they do not apply. The ARIIO further complicate the status of the EU within the international legal system, but also to jeopardise the application of the law of responsibility.

While enabling the internal provisions of the Union to govern the relationship that it has with its Member States and the powers that it has is only right, it is the status of these norms and the way that they are referred to that potentially causes a substantial difficulty. The internal provisions of the Union need to be what governs this relationship but this cannot be just additional to a set of articles that are built around the state as an actor. The references to the rules of the organisation are only one way in which the ILC sought to make reference to the individual nature of the Union. The ILC has also recognised that there are occasions not just where the internal rules of the institution need to be referred to, but furthermore, where they have developed into special rules of international law in themselves. The development of a *lex specialis* provision has formed the basis of this response.

## **7.2. Lex Specialis.**

This *lex specialis* article is a more specific manner by which the Special Rapporteur sought to address the general critiques that the ARIIO do not address the variety of organisations but also the more specific criticism that they do not address the individual nature of the Union. Gaja first mentioned the idea of including a *lex specialis* provision in his fifth report

in 2007 and it was first introduced into the ARIO in 2009.<sup>519</sup> The final version of this provision was contained in Article 64 ARIO and states:

“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 an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. *Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.*”

Article 64 is based around the maxim *lex specialis derogat legi generali*. This means that where more specialised principles exist; they will apply in place of general principles of international law.<sup>520</sup> There has to be an inconsistency between these two rules, or at the very least, “a discernible intention that one provision is to exclude the other”.<sup>521</sup> The general rule is not displaced completely, but rather the extent of the displacement depends on the special rule. Derogation from international law is, therefore, a matter of degree or ‘extent’ and this depends on the particular circumstances. It is designed to cover ‘strong’ forms of *lex specialis*, including self-contained regimes, and ‘weak’ forms, such as specific treaty provisions on certain points. The *lex specialis* rule can only apply where it applies to precisely the same subject matter as the general rule and, indeed, that they have the same status.<sup>522</sup>

*Lex specialis* can refer to ‘weak’ provisions, such as individual provisions or ‘strong’ elements of *lex specialis*, meaning “self-contained regimes”, a term originally coined by the Permanent Court of International Justice (PCIJ) in the *SS Wimbledon* case.<sup>523</sup> This idea of ‘self contained regimes’ has come to mean specific secondary norms, for example norms contained within the Vienna Convention on Diplomatic Relations.<sup>524</sup> No norm can exist in isolation and there will always be some interaction with general international law principles. The idea of developing an argument of autonomous and even semi-autonomous

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<sup>519</sup> *Fifth Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, 2 May 2007 A/CN.4/583 at p.4, para.7; *Seventh Report on the Responsibility of International Organisations* by G.Gaja, Special Rapporteur, 27 May 2009, A/CN.4/610 at pp.39-40.

<sup>520</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at para.1.

<sup>521</sup> Commentary to Article 55 of the Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the ILC (2001), vol. II, Part Two, A/56/10 at p.140, para.4.

<sup>522</sup> Statement by R.Ago, ILC Yearbook 1968, vol.I, Summary records of the 20<sup>th</sup> Session, 27 May- 2 Aug 1968 at p.31, para.24.

<sup>523</sup> *S.S. Wimbledon case*, PCIJ, Series A, No.1 (1923), at pp.23-24.

<sup>524</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, at p.3.

legal systems existing as self-contained regimes in terms of *lex specialis* is misconceived. These systems interact with international law but the Union, in particular, exists in its own manner and with its own legal system. This individual nature of the EU needs to be respected and the attempt to develop a *lex specialis* principle in response to the action of the Union shows an understanding of the individual nature of the EU at the international level. It is the way in which the *lex specialis* article has been incorporated and developed, however, that poses a difficulty for the law of responsibility and also the EU itself. The development of the *lex specialis*, however, shows the individuality of the EU and an understanding of this by the international system.

The ILC developed a further response to the critique that the ARIO were not sufficiently taking account of the individual nature of the European Union.<sup>525</sup> The Special Rapporteur argued that it was not necessary for all articles to be relevant to all organisations and that many provisions within the ARIO were general provisions, which consequently were quite right to not take account of the individual nature of any particular actors. He did consider, however, that special rules may exist with certain organisations that may affect the application of some of the rules in ARIO and, consequently, the ability should exist to make reference to these special rules and, on these occasions, deviate from the general principles.<sup>526</sup> Gaja considered the inclusion of a *lex specialis* article to sufficiently allow this and respond to the critique of the articles.<sup>527</sup> The first consideration of a *lex specialis* provision in 2007 with the initial introduction in 2009 showed a relatively late inclusion. The Special Rapporteur recognised that there may be special rules surrounding, for example, attribution that could fall under this provision. The critique surrounding the ability of the ARIO to apply sufficiently to a number of actors, including the EU had persisted throughout the project. It seems that this later development showed an attempt to address this criticism before the conclusion of the project.

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<sup>525</sup> *Fifth Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, 2 May 2007 A/CN.4/583, at p.4, para.7; See Comments of the European Commission' *Comments and Observations Received from international organizations*, 25 June 2004, A/CN.4/545 at p.5; 'Comments of the International Monetary Fund', *Comments and Observations Received from international organizations*, 25 June 2004, A/CN.4/545 at p.7; N.Blokker, 'Preparing articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations seriously? A mid-term review', in J.Klabbers and A.Wallendahl (eds.) *Research Handbook on the Law of international Organizations* (Edward Elgar, 2011) p.313 at p.321.

<sup>526</sup> *Fifth Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, 2 May 2007 A/CN.4/583 at p.4, para.7.

<sup>527</sup> *Ibid.*

### 7.2.1. *Lex Specialis*: What does it mean?

*Lex specialis* is an accepted general principle of international law that was included within the work on state responsibility. There exists, however, very little jurisprudence on this principle. It is, in fact, relatively little understood. An example can be seen, however in the *INA Corporation* decision before the Iran-US Claims Tribunal. It determined that the more liberal standard of compensation contained in the Treaty of Amity for nationalisation of property prevailed over the standards provided under general international law. Thus far, whenever a Court has engaged with *lex specialis*, they have examined the relevant general rules of international law before turning to the more specialised treaty provisions and considering how they might apply.<sup>528</sup> These are provisions that relate to the same area of law and which have the same status; in *INA Corporation* they were both provisions of international law relating to compensation over the nationalisation of property. This is relatively straightforward. The extent to which the subject matter must align is, however, uncertain. Would, for example, a norm relating to non-compliance relate to the same subject matter as a general norm relating to breach? The question after establishing that the same subject area is referred to, is determining how far the ‘special’ principle can apply; what is its scope of application? Could the circumstance arise where it was simply the more preferable rules being applied?

Article 64 was, like many other provisions in the ARIO, based upon a provision in the ARSIWA, which stated that the articles were residual and would not apply where responsibility is governed by “special rules of international law”. Article 55 ARSIWA is designed to address all kinds of rules, from weak forms of specialty that modify specific points of the general regime, to strong forms such as self-contained regimes that seek to exclude the entire body of general rules of state responsibility.

The various Special Rapporteurs of the ILC’s project on state responsibility took different approaches to the idea of ‘self-contained regimes’. There was initial move towards the idea of specialised subsystems,<sup>529</sup> then criticism of the idea of these systems<sup>530</sup> and finally the

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<sup>528</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Judgment ICJ Reports 1997, p.7; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p.14, at pp.137-138; Iran-US Claims Tribunal *INA Corporation v. The Government of the Islamic Republic of Iran (Case No.161)* (1985) 8 Iran-US Claims Tribunal Reports p.373.

<sup>529</sup> *Third Report on the content, forms and degrees of international responsibility*, Special Rapporteur for State Responsibility, W.Riphagen, A/CN.4/354, Yearbook of the International Law Commission (1982) vol.II(1) at p.24, para.16.

<sup>530</sup> *Fourth Report on State Responsibility*, Special Rapporteur G.Arangio-Ruiz, A/CN.4/444, Yearbook of the International Law Commission (1992) vol.II(1) at p.35.

ARSIWA concluding with an acceptance that any existing subsystems could *potentially* apply.<sup>531</sup> The final commentaries do not clarify what is actually meant by this term and whether a closed system on responsibility outside of state responsibility may exist and what it may be shaped like. In fact, the ILC avoided the term ‘self-contained regime’, with it instead referring to ‘strong’ forms of *lex specialis*, which has often been interpreted to mean self-contained regimes. In the work of the ILC on the fragmentation of international law, it held that it was entirely possible for there to exist special subsystems within an overall system of international law. The ILC sought to further explore and elaborate on the idea of subsystems of international law. A special regime is defined as “a group of rules and principles concerned with a particular subject matter”.<sup>532</sup> It sought to consider the different types of specialised regimes that may exist and the relationship between special and general principles. Following the uncertainty after the project on state responsibility, this analysis showed significant progression and acceptance in this area.

There have been various opinions towards the inclusion of a *lex specialis* article within the ARIO. Some considered it to be key<sup>533</sup> in order to enable the individuality of legal orders to be fully incorporated and addressed. For some states, however, it was too broad in scope<sup>534</sup> and others were concerned about the potential for states to utilise this provision to justify breaches of international obligations.<sup>535</sup> Another opinion was that this idea of *lex specialis* should be limited to the internal law of the organisation concerned.<sup>536</sup> This seemed, to an extent, to be supported by the ILC, with it considering that most special rules would be contained in the rules of the organisation.<sup>537</sup>

This focus by the ILC on the rules of the organisation within this *lex specialis* article can be seen through the only change made to this article from the first reading to the second

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<sup>531</sup> International Law Commission, *Report on the work of its fifty-third session, Official Records of the General Assembly*, (A/56/10) at p.359, para.5.

<sup>532</sup> Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *International Law Commission Yearbook of the International Law Commission 2006*, vol.II, Part Two at para.11.

<sup>533</sup> Comments of the International Labour Organization, *Comments and observations received from international Organizations*, 14 February 2011, A/CN.4/637 at paras.1-2.

<sup>534</sup> Comments from Belgium, *Comments and Observations received from Governments*, 14 February 2011, A/CN.4/636 at p.41.

<sup>535</sup> Ghana Comments, *Summary record of the 17<sup>th</sup> Meeting of the Sixth Committee*, 8 February 2010, A/C.6/64/SR.17 at p.3, para. 14.

<sup>536</sup> Belarus Comments, *Summary record of the 15<sup>th</sup> Meeting of the Sixth Committee*, 4 December 2009, A/C.6/64/SR.15 at para. 41.

<sup>537</sup> Commentary to Draft Article 63, in *Seventh Report on the Responsibility of International Organizations*, by G.Gaja, Special Rapporteur, 27 May 2009, A/CN.4/610 at para.115.

reading. There is one significant difference with the provision contained within the ARIO, however, and that is the reference to the rules of the organisation. From the initial inclusion of the principle in the 2009 report to the final set of articles were adopted on second reading by the ILC, only one change was made to this provision and this was to strengthen the reference to these rules. The Drafting Committee altered the original wording of ‘such as the rules of the organization’ to that of ‘including the rules of the organization’.<sup>538</sup> The Committee considered this to better emphasise the specific and varied nature of organisations and strengthen the resolve that these articles needed to be applied in a flexible way.<sup>539</sup> Following this, the rules of the organisation were given a strong emphasis in this provision.

There has been an influence by the EU on the development of this provision. The EU has been the only actor recognised within the commentary to Article 64 as amounting to a system of *lex specialis*. It is arguable that the individual nature of the EU has resulted in the development of this provision and thus far it is the only actor where these rules can be identified. The status of the WTO, as a developed and self-contained regime has challenged this individual status of the Union. This is not on the same level as the Union, however. From its beginnings in the GATT, furthermore, it has been seen to be firmly within the overall system of general international law and “is not to be read in clinical isolation from public international law”.<sup>540</sup> Whereas there has been a distinct attempt to demarcate the EU from the international system, there has been a continuous commitment of the WTO to working within the international legal system. The WTO shows distinction but not necessarily the individuality of the Union and thus far it is the Union that has the most potential for the application of the *lex specialis* principle.

The difficulty is that with a large majority of international organisations, their internal norms and also principles that they create are norms of international law. This can be seen with the WTO, and one of the substantial ways in which it differs from the EU but also the UN, for example. The interaction of the Union with international law and the interdependence that exists between the Union and international law, as well as the Union and its Member States shows that the Union exists in a distinct and unique way. Any norms of the Union are entirely internal to the Union and as previously argued, to attempt

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<sup>538</sup> Statement of Drafting Committee, Statement of the Chairman of the Drafting Committee M.Vázquez-Bermúdez, 6 July 2009 at p.6.

<sup>539</sup> Statement of Drafting Committee, Statement of the Chairman of the Drafting Committee M.Vázquez-Bermúdez, 6 July 2009 at p.7.

<sup>540</sup> *United States- Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R at p.17.



to consider them as norms of international law or the Union as a subsystem of international law does not reflect the nature of the EU.<sup>541</sup>

Enabling the reference and understanding of what can be quite fine differences, was a difficult challenge for the ILC in developing general rules of international law. This poses a significant difficulty for the project pursued by the ILC; how can it be determined that a set of general international principles apply to one actor addressed by the ARIO but not to another? The ILC has pursued this problematic question through the creation of the *lex specialis* principle. The inclusion of this article results in the ability to make a distinction. The consequence of this provision is the recognition of unique 'special' systems and most particularly the recognition of the European Union as a specialised system of law.

The fact that rules of the European Union are not provisions of international law means that it is questionable whether they fulfil any of the requirements of a *lex specialis* principle; rules of an international organisation and principles of international responsibility are not going to have the same 'status'. Whether it can be said that they refer to the same subject matter is also a difficult area; can internal provisions relating to the relationship between an organisation and its Member States be said to be the same subject matter as rules of international law on responsibility? If they do not relate to the same subject matter then it cannot be said that *lex specialis* exist. The development by the ILC of a *lex specialis* principle has recognised the unique nature of the Union. The way in which the ILC has developed Article 64, however, has resulted in a *lex specialis* principle that exists as a misnomer. While this has consequences for the law of responsibility, there are further consequences for the constitutional integrity of the Union. The EU cannot be sufficiently considered within the boundaries set by the ILC because of its unique nature and any attempt to consider the Union within the foundations set is potentially damaging. The approach in creating this principle may show an understanding of the Union as a unique international actor but the way in which the Article has been developed only serves to threaten this. There is an attempt to treat the EU with some respect for the individual nature that its norms possess but the approach taken towards this principle fundamentally fails to do this. There is a complete lack of understanding of the way in which a *lex specialis* principle would address the Union and the consequences of the article drafted are dangerous for the status of EU at the international level.

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<sup>541</sup> For an ultra formalist view defending this reading, see G.Arangio-Ruiz's Appendix to *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen aan den Rijn (NL): Sijthoff & Noordhoff, 1979), in particular see pp.290-301.

In the area of state responsibility, *lex specialis* reflected the situation where States have made special provision for the legal consequences of any breaches of international law in the relations between them. This provision is fairly broad in its conception, as it has been stated that it is not possible to identify every potential rule that would fall under this provision, let alone the scope of these rules.<sup>542</sup> The commentary does state that it is a rule that may encompass the relations that certain types of organisations, or a particular organisation, may have with a State, or a number of States, or indeed an organisation or other organisations.<sup>543</sup> It is therefore a wide-ranging rule. The examples used by the ILC in the commentary to article 64 refer exclusively to the European Union. In particular, the commentary considers the areas where Member States implement binding acts of the EU, focusing on examples given by the European Commission in its arguments that the area of attribution should include a special rule for the EU.<sup>544</sup> Rather than respond to this in the area of attribution, the ILC instead utilised them in this general *lex specialis* article, arguing that from one of the examples given from a WTO Dispute Panel, the “existence of a special rule of attribution” was admitted,<sup>545</sup> with the Panel accepting:

“the European Communities’ explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its Member States which, in certain situations, ‘act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general’.”<sup>546</sup>

The ILC uses further examples from the European Commission of Human Rights<sup>547</sup>, and the European Court of Human Rights<sup>548</sup> to elaborate on situations when the Union will be

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<sup>542</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at para.2.

<sup>543</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at para.1.

<sup>544</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at paras.2-6; Comments of the European Commission’ *Comments and Observations received from International Organizations*, 25 June 2004, A/CN.4/545 at pp.18-25.

<sup>545</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at para.4.

<sup>546</sup> WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States (‘EC-Trademarks and Geographical Indications (US)’)* WT/DS174/R, adopted on 15 March 2005 at para.7.725.

<sup>547</sup> *M & Co v Germany* Application No.13258/87, Decision of 9 February 1990, (1990) 64 *Decisions and Reports* p.138.

<sup>548</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98 at para.153; *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*, of 20 January 2009, Application no.13645/05.

responsible for the actions of its Member States in implementing binding acts of the EU.<sup>549</sup> There is recognition of the continued practice of the Union in accepting responsibility for the actions of Member States in implementing binding EU acts. The ILC considered the case law and concluded the implication of “the existence of a special rule of attribution, to the effect that, in the case of a European Community act binding a Member State, State authorities would be considered as acting as organs of the Community.”<sup>550</sup> This has been the practice of the Union in addressing the interrelationship between the EU and its Member States and the focus on the EU shows an understanding by the ILC that this practice needs to be possible within the law of responsibility.

The commentary to this article shows that the unique situation of the EU incurring responsibility for actions of Member States in fulfilling their EU obligations is the main circumstances contemplated by the ILC with the implementation of this article. It is addressing the difficulties that arise with the complex nature of the Union’s international identity. Instead of addressing the general nature of organisations, or the specific identity of the EU, the ILC has created this general exception. This does raise a number of questions, however, not least because of the focus that must inevitably be had on the internal rules of the EU and the internal relationships between the Union and its Member States. In other words, the rules of the organisation yet again come into play here. The more concerning aspect to this provision, however, is the strength with which it attempts to determine internal rules of the EU as ‘special rules of international law’. This can be further seen at the end of the commentary to article 64:

“Given the particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members, a specific reference to the rules of the organization has been added at the end of the present article.”<sup>551</sup>

To include this reference is arguably contrary to the nature and underpinning ideas of the *lex specialis* maxim. To consider these areas of EU law as *lex specialis* is, furthermore, damaging to both the idea of the principle itself but also to the developing global role of the EU.

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<sup>549</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at paras.3-6.

<sup>550</sup> General Commentary to the Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.4.

<sup>551</sup> Commentary to Article 64 Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission 2011, vol. II, Part Two at para.8.

The concept of *lex specialis* recognises the horizontal relationships between subjects of international law and allows these relationships to take precedence over general principles of international law. The extent of these horizontal relationships allows these subjects of international law to contract out of the general obligations under international law. The relationship between an organisation and its Member States on the other hand, is a vertical relationship. The rules are about the internal order of the organisation. If the reliance on these examples, however, refers only to internal rules and relationships between the Union and its Member States, then are they actually *lex specialis* or is the ILC, in establishing these rules as *lex specialis*, not defining them as rules of international law? The *lex specialis* principle refers to a collision of international legal principles, both of which apply to the same circumstance; where this situation occurs, the more specialised principle will prevail. To allow this with the rules of the organisation not only undermines the relationships upon which this principle developed, but completely ignores the fact that a general principle of international law and an internal norm of an organisation are not rules of the same order applying to precisely the same situation.

The original purpose of *lex specialis* in the rules on State responsibility was to connect the law of responsibility as a regime of international law with autonomous legal systems that interact with international law. This is controversial when attempting to include the increasingly independent European Union.<sup>552</sup> As the EU's autonomy grows, it is arguable that its relationship with international law is becoming increasingly complex. The consequence of this is that it is increasingly difficult to address it with principles of international law, such as the system of international responsibility. To apply the term *lex specialis* to the EU is, furthermore, inaccurate and even problematic, in spite of the fact that it is EU actions that are most often utilised as examples of strong *lex specialis*. The inaccuracy in this provision not only weakens the principle itself, but determining these areas of EU competence as being *lex specialis* rests on the presumption that the Union is simply a subset of international law and its internal rules are to be considered as rules of international law.

The EU certainly has special procedures and functions but instruments and principles internal to the organisation define these functions and nature. This does not mean that international law is not involved here but its influence and impact is conditioned by the internal order of the Union. It is too simplistic to consider the rules of the Union to be *lex specialis*.

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<sup>552</sup> See for further explanation chapter four at 106-108.

### 7.2.2. Can the rules within the EU be considered to be *lex specialis*?

Decentralised implementation is core to European Union law. In most cases, the Union relies on the administration and courts of Member States to implement and apply European Union law.<sup>553</sup> The implementation by Member States of obligations that then, for example, raise questions as to human rights obligations under the European Convention on Human Rights, or of financial obligations due to the WTO, have been the focus in establishing the *lex specialis* provision. These are the areas that have been focused upon in arguing that *lex specialis* provisions exist. A number of these areas have seen determinations of responsibility on the part of the Union automatically, with the consequence being that responsibility is not determined by reference to the general principles. The Court has determined that even in cases where a dispute in international law fall within the ambit of the Union and the determination of legality lies at the Union level.<sup>554</sup> The international regulatory competence of the Union translates into the international responsibility for measures taken under the normative authority of the Union. It is this kind of practice that has led to the argument that EU action in these previously 'Community' areas amount to principles of *lex specialis*.

The ILC incorporated only examples from the previous 'Community' areas of the EU in its commentary to the *lex specialis* provision, in particular the areas where implementation of EU actions and provisions are carried out by Member States and their authorities. A number of different examples of these areas of European action are given within the commentary, but it is questionable whether any can actually be considered to be *lex specialis*. This is not the most accurate way of analysing these areas of action, nor yet, the most appropriate way of addressing these actions within the framework of international responsibility.

While Gaja had previously distinguished between human rights and WTO case law, the report of the ILC saw no need for this and, in the commentary to Article 64, referred to both areas equally.<sup>555</sup> It appears as if the question of whether the general rules of attribution and responsibility will apply to the European Union has been left open. The EU has continued to assist in the development of the general rules on attribution and, at least

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<sup>553</sup> Declaration (No. 19) on the implementation of Community law annexed to the Final Act of the TEU, done at Maastricht on 7 Feb. 1992, OJ (1992)C 191/1 at p.95.

<sup>554</sup> Case C-459/03 *Commission of the European Communities v Ireland (Mox Plant case)* [2006] ECR I-4653.

<sup>555</sup> Commentary to Draft Article 63, in International Law Commission, *Report on the Work of its Sixty-First Session*, (A/64/10), at pp.173-175.

in some areas, the general principles of the ARIIO will attempt to apply to the Union. The EU, and in particular those areas considered to fall previously under the 'Community' umbrella, has however been central to the development of the *lex specialis* principle. A potential special rule has been identified which would allow derogation from these general principles of responsibility.

In the relationship between the EU and the WTO, the Union has been held responsible directly, or has accepted responsibility, for acts committed by its institutions or bodies.<sup>556</sup> This has been with regulatory directives<sup>557</sup> or other trade measures<sup>558</sup> adopted by its institutions. The dispute settlement mechanisms of the WTO have, furthermore, recognised the responsibility of the Union for the actions of Member State authorities implementing Union actions. The WTO Panels and Appellate Bodies focused on the idea of competence and in areas such as customs administration, which fall within exclusive EU competence mean that responsibility would fall onto the EU.<sup>559</sup> When Member States' are simply implementing Union regulations in the areas of exclusive competence, it appears that the Union will bear sole responsibility for these actions, under WTO law and international law in general.<sup>560</sup>

The references made by the ILC to the WTO are understandable because of the interesting relationship between the Union and the WTO. It is one of the traditional 'Community' areas of action and could be the basis for individual rules under Article 64. The relationship between the EU and the WTO is a long-standing one. The continual involvement of the EU in the dispute settlement mechanism of the WTO is also quite telling in understanding the way in which responsibility is established on the part of the Union but also the way in which actions between the EU and its Member States are addressed. There have been 458 disputes submitted to the dispute settlement of the WTO,

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<sup>556</sup> *European Communities- Measures concerning Meat and Meat Products (Hormones)* WT/DS26; *European Communities- Regime for the Importation, Sale and Distribution of Bananas* WT/DS27; *European Communities- Trade Description of Sardines* WT/DS231.

<sup>557</sup> *European Communities- Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291, DS292 and DS293.

<sup>558</sup> *European Communities- Anti-Dumping measures on imports of Cotton-Type Bed-Linen from India* WT/DS141; *European Communities- Measures Affecting Trade in Commercial Vessels* WT/DS301; *European Communities- Definitive Safeguards on Salmon* WT/DS326 and WT/DS328.

<sup>559</sup> *European Communities- Customs Classification of Certain Computer Equipment* Appellate Body Report of 5 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R.

<sup>560</sup> WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States ('EC-Trademarks and Geographical Indications (US)')* WT/DS174/R, adopted on 15 March 2005 at para.7.725.

292 of which the EU has participated in either as claimant, respondent or third party.<sup>561</sup> There has been a continual involvement by the EU in these disputes. This is an area where Member States have shown a more passive role and enabled the EU to gain in significance, in its own right and on their behalf.

The WTO Agreement was concluded with no consideration or allocation of the different obligations of the Union and its Member States towards third parties.<sup>562</sup> The general principle here applies; where there is no division or apportionment of responsibilities then each party is responsible for the entirety of the agreement. The potential for joint responsibility to arise, however, depends upon the particular act committed. This simply has not arisen with the EU, however. There is an established practice that has been set out by the EU and which has met with no dispute from the WTO or from any third parties.

The main question in these traditional areas of Union action and the growth of the EU internationally has been the implementation of Union law by its Member States, or its so-called 'Executive Federalism'.<sup>563</sup> These cases continually develop this understanding. Within the WTO dispute settlement, the EU takes responsibility. It seems to act on the basis that in implementing EU obligations, Member States are functioning as organs of the Union.<sup>564</sup> This practical solution and approach has been continually accepted by the WTO and by third parties. There appears to be no dispute on these questions. The Union perspective was seen in the *LAN* dispute, where the EU declared itself:

"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 [EU] level or at the level of Member States."<sup>565</sup>

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<sup>561</sup> See [http://www.wto.org/english/tratop\\_e/dispu\\_e/Dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/Dispu_status_e.htm)

<sup>562</sup> Case C-53/96 *Hermés* [1998] ECR I-3603 at para.24

<sup>563</sup> A.Delgado Casteleiro and J.Larik, 'The 'Odd Couple': The Responsibility of the EU at the WTO' in M.Evans and P.Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Hart: 2013) p.233 at p.243; R.Schütze, 'From Rome to Lisbon: 'Executive Federalism' in the (new) European Union' (2010) 47 *Common Market Law Review* p.1385.

<sup>564</sup> P-J.Kuijper, 'International Responsibility for EU mixed Agreements' in C.Hillion and P.Koutrakos (eds.), *Mixed Agreements Revisited, The EU and its Member States in the World*, (Oxford: Hart Publishing, 2010) p.208 at p.214.

<sup>565</sup> WTO, Oral Pleading of the European Commission to the Panel 'European Communities- Customs Classification of Certain Computer Equipment', 12 June 1997, para.6, unpublished, as cited in Commentary to Article 9 Draft Articles on the Responsibility of International Organizations, para.3, Yearbook of the International Law Commission 2011, vol. II, Part Two.

There has been a determination by the EU that any disputes ought to be settled by the EU. As a result, this could be seen as a 'special rule'. It becomes more problematic, however, when considering it within the terms developed within Article 64. The references to the relationship between the EU and the WTO are understandable but the way in which the *lex specialis* provision has been constructed causes some difficulties.

Questions have also arisen in relation to the European Convention on Human Rights. The EU is not, as yet, party to the Convention and so its actions cannot be directly challenged.<sup>566</sup> Although this situation should, in time, change as following the Treaty of Lisbon there is now a legal obligation on the EU to accede to the ECHR.<sup>567</sup> When actions of Member States, in fulfilling Union obligations may breach the Convention, however, the complex relations at play mean that the consequences remain far from certain. The European Court of Human Rights has approached this problem in a pragmatic and policy driven manner, by determining a kind of 'reserve responsibility' of Member States in these circumstances.<sup>568</sup> The Court has avoided any direct statements on the responsibility of the Union for actions of its institutions.<sup>569</sup> The Court has frequently found cases to be inadmissible when action has been brought against Member States, either collectively or individually even though the contested action was that of the Union.<sup>570</sup> Member States have incurred responsibility for breaches where they are effectively using Union obligations to attempt to justify human rights violations.<sup>571</sup> While this is slightly problematic in terms of not fully recognising the separate authority of the Union and potentially having wide-reaching effects for the founding States of an organisation, it does

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<sup>566</sup> *Matthews v the United Kingdom* Decision of 18 February 1999, Application No. 24833/94, at para.32

<sup>567</sup> Article 6(2) TEU; See also Draft Legal Instruments on the accession of the European Union to the European Convention on Human Rights, 8<sup>th</sup> Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention of Human Rights (CDDH-UE) with the European Commission, CDDH-UE(2011) 16 final version.

<sup>568</sup> F.Hoffmeister, 'Litigating against the European Union and Its Member States- Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations', (2010) 21 *European Journal of International Law* p. 723 at p.731.

<sup>569</sup> See Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* (2000) ECR I-665.

<sup>570</sup> *Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application no. 56672/00.

<sup>571</sup> *Matthews v the United Kingdom* Decision of 18 February 1999, Application No. 24833/94; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98 at para.153; App No 56672/00; *Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application no. 56672/00.



enable jurisdiction over contested issues. The separate authority of the Union had previously been emphasised by the former European Commission on Human Rights.<sup>572</sup>

As well as the jurisprudence on the EU in relation to the WTO and the ECHR, there have been the beginnings of judicial questioning in other international courts and tribunals. There have been cases brought under the Energy Charter Treaty, to which both the EU and its Member States are parties; cases have been brought against Member States for actions carrying out Union obligations. These cases show an area where the EU has some competence and some link can thus be seen with the previous case law. In spite of the Union being party to the treaty, investors have only thus far brought claims against Member States, even where there has been an EU element.<sup>573</sup> The EU has only been involved as a non-disputing third party. Investors are able, however, to request the EU and its Member States to identify the correct respondent party, and make a determination within 30 days.<sup>574</sup> A case before the International Tribunal of the Law of the Sea between Chile and the European Communities gives rise to questions surrounding the division of action between the Union and its Member States.<sup>575</sup> The action had been that of Member States implementing Union actions and yet, when the liability for these actions was questioned, it was the EU that became a respondent and not the involved Member States.

Since September 2005, the Rules of the Court concerning the International Court of Justice (ICJ) have changed to now state that any international organisation being party to a convention that is invoked in a contentious case before the court may express its views on the matter arising under the convention.<sup>576</sup> The European Communities have previously declined intervention to express views as an interested party on a number of cases. In two cases concerning maritime delimitation, it considered that the matters fell outside of its

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<sup>572</sup> *Confederation Francaise Democratique du Travail (CFDT) v The European Communities and their Member States*, Decision of the European Commission on Human Rights of the 10 July 1978, Application No. 8030/77, 13 Decisions and Reports p.231.

<sup>573</sup> International Centre for the Settlement of Investment Disputes (ICSID) Case No. ARB/07/19 *Electrabel S.A. v the Republic of Hungary* Decision of the 30 November 2012; International Centre for the Settlement of Investment Disputes (ICSID) Case No. ARB/05/20 *Ioan Micula, Viorel Micula and others v. Romania*, Cases pending; International Centre for the Settlement of Investment Disputes (ICSID) Case No. ARB/07/22 *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary*, decision of 23 September 2010.

<sup>574</sup> Statement submitted by the European Communities to the Secretariat of the Energy Charter, pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaties, OJ(1998) L69/115 at 115.

<sup>575</sup> International Tribunal for the Law of the Sea (ITLOS), Case No.7 *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)* Order 2009/1 16 December 2009.

<sup>576</sup> Article 43(2) Rules of the Court, International Court of Justice, adopted on 14<sup>th</sup> April 1978, entered into force 1<sup>st</sup> July 1978.

competence and so it should not intervene.<sup>577</sup> This may perhaps show that the involvement of the Union in the activities of Member States, or perhaps more accurately the actions of Member States in areas of Union competence, are not so intertwined that the EU will always be involved in disputes. Consequently, there may have been some examples of Union responsibility for the actions of Member States and more particular rules of responsibility but the extent to which these have developed, or will continue to develop, is as yet still uncertain. It has, thus far, seemingly relied upon the idea of competence. This is an area that continues to develop and, which continues to be subject to change. As a result, relying on this division to determine rules would not currently be possible.

In first addressing the capacity of international organisations to incur responsibility as a result of state behaviour, there have been a number of cases that address the relations between the EU and its Member States.<sup>578</sup> This question of responsibility has always been rejected on jurisdictional grounds.<sup>579</sup> One case in particular is used to demonstrate the acceptance of the *sui generis* constitutional nature of the EU and the consequent responsibility of the EU for actions of the Member States, which effectively act as administrative organs of the EU.<sup>580</sup> This implies the argument of an exception for the EU and its Member States in the generation of legal principles.<sup>581</sup> In the *Bosphorus* case it was held to be irrelevant whether an act or omission was a consequence of domestic law or as a result of compliance with international obligations, responsibility still fell on the

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<sup>577</sup> *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras (Nicaragua v Honduras)*, judgment of 8 October 2007, at para.4; *Case concerning Delimitation in the Black Sea (Romania v Ukraine)* Judgment of 3 Feb 2009, at para.3.

<sup>578</sup> *M & Co v Germany* Application No.13258/87, Decision of 9 February 1990, (1990) 64 *Decisions and Reports*, p.138; WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States ('EC-Trademarks and Geographical Indications (US)')* WT/DS174/R, adopted on 15 March 2005; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Decision of 13 January 2005, Application No. 45036/98.

<sup>579</sup> International Law Commission, *Report on the work of its fifty-seventh session (2005)* A/60/10 at pp.93-95. See *M & Co v Germany* Application No.13258/87, Decision of 9 February 1990, (1990) 64 *Decisions and Reports* p.138; *Matthews v the United Kingdom* Decision of 18 February 1999, Application No. 24833/94; *Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application no. 56672/00.

<sup>580</sup> WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States ('EC-Trademarks and Geographical Indications (US)')* WT/DS174/R, adopted on 15 March 2005, para.7.725; see Third Report on Responsibility of International Organisations by G.Gaja, Special Rapporteur A/CN.4/553, at p.4; *European Communities- Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291/R, WT/DS292/R AND WT/DS293/R)* at para.7.101.

<sup>581</sup> International Law Commission, *Report on the work of its fifty-seventh session (2005)* A/60/10 at p.95.

contracting party. As a result, the assumption is made that no special rule currently exists.<sup>582</sup> This same view was expressed by the ECJ in *Kadi*.<sup>583</sup>

With cases addressing state responsibility for implementing actions of organisations, this too has been rejected. In cases before the Bundes Gerichtshof in Germany it was decided that as Germany was simply implementing EU acts which had direct effect, that it could not incur responsibility.<sup>584</sup> The same principle has been seen in a case before the EU.<sup>585</sup> The extent of responsibility of the EU for the implementation of acts by national authorities is complex to determine but has been examined in the *Krohn* case and the *Dorsch Consult* case.<sup>586</sup> The CJEU has also discussed the difficulties in this area in the case on the Lomé Convention. Considering that, in the context of this bilateral mixed agreement:

“in the absence of derogations expressly laid down in the [Lomé] Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.”<sup>587</sup>

From this, competence has been important within the EU in determining and establishing responsibility. Competence, and the division of competence, governs the determination of responsibility. In areas of exclusive Union competence, it has been argued that the Union should incur responsibility, irrespective of whether the relevant obligations have been carried out by the Union itself or by Member States. The EU is an international legal person and any breaches of powers that it possesses should result in responsibility for the Union. The discussions concerning the Lomé Convention, however, show that sometimes, establishing a division is highly complex and that on occasion, without a determination being possible, joint responsibility should be possible. It should be remembered, however, that this did concern a bilateral mixed agreement, which inevitably affected the judgment. The idea of joint and several responsibilities has been argued as being limited to bilateral

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<sup>582</sup> International Law Commission, *Report on the work of its fifty-seventh session* (2005) A/60/10 at p.96.

<sup>583</sup> Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v Council*, [2008] ECR I-6351.

<sup>584</sup> *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)*, 125, 27, also in *Neue Juristische Wochenschrift (NJW)* 1994 p.858.

<sup>585</sup> Case T-184/95 *Dorsch Consult v. Council and Commission* ECR 1998, II-667.

<sup>586</sup> Comments of the European Commission, *Comments and Observations by Governments and International Organisations*, 12 May 2005 A/CN.4/556 at pp.59-60; Case T-231/94 *New Europe Consulting and Brown v. Commission*, (1999) ECR II-2403; cf. Case C-146/91 *KYDEP v. Commission*, [1994] ECR I-4199, para.19ff; Third Report on Responsibility of International Organisations by G.Gaja, Special Rapporteur A/CN.4/553 at p.14.

<sup>587</sup> Case C-316/91 *Parliament v Council* [1994] ECR 661 at para.29.

agreements.<sup>588</sup> To expand beyond this to multilateral agreements, such as the WTO would not be appropriate.<sup>589</sup> To have considered the possibility of joint responsibility, however, shows a move by the CJEU to support the indivisible nature of action of the Union and its Member States.

It is the capacity for shared competence between the EU and its Member States that raises a number of questions. As seen from the previous case, the interaction of the Union with its Member States in these areas of shared competence raises a great deal of confusion as to where the division between these various actors lies. On occasion declarations of competence are made delimiting the differing competences of the Union and the Member States. While one of these declarations was made for UNCLOS, in order to “indicate the competence of the European Economic Community in matters governed by the Convention”<sup>590</sup> they are not always made. In WTO disputes the Union and Member States coordinate internally to determine the correct respondent in a case. The duty of sincere cooperation enshrined in Article 4(3) TEU is a reassurance for third states that there will be an identification of the party bearing the international obligation. Some envisage the idea of standardised clauses in agreements.<sup>591</sup> Some argue that the internal rules of the EU on the delimitation of competences between the Union and its Member States are of “primordial importance” for the third state or applicant, and for the Union and its Member States.<sup>592</sup>

The horizontal relationship concerns areas of shared competences and mixed agreements and has a number of questions surrounding it as the division of competence between the Union and its Member States.<sup>593</sup> The EU only has the competences as have been conferred on it by Member States. In order to act in certain areas, the EU will need to work together

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<sup>588</sup> A.Delgado Casteleiro and J. Larik, ‘The ‘Odd Couple’: The Responsibility of the EU at the WTO’ in M.Evans and P.Koutrakos (eds.) *The International Responsibility of the European Union. European and International Perspectives* (Hart, 2013) p.233 at p.237.

<sup>589</sup> *Ibid.*

<sup>590</sup> United Nations Convention on the Law of the Sea, Declarations, European Community Declaration made pursuant to article 5(1) of Annex IX to the Convention and to Article 4(4) of the Agreement.

<sup>591</sup> F.Hoffmeister, ‘Litigating against the European Union and Its Member States- Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations’, (2010) 21 *European Journal of International Law* p.723 at pp.744-745.

<sup>592</sup> F.Hoffmeister, ‘Litigating against the European Union and Its Member States- Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations’, (2010) 21 *European Journal of International Law* p.723 at p.745.

<sup>593</sup> Comments of the European Commission’ *Comments and Observations Received from international organizations*, 25 June 2004, A/CN.4/545 at p.18.

with Member States in order to almost 'top up' its competence. The complexities that this causes in the area of attribution and determining which actor owes obligations to whom, are questions that have been addressed by the EU and the Special Rapporteur.<sup>594</sup> One solution to the question of mixed agreements is the use of declarations of competence. There now exist around thirty agreements to which both the EU and some, or all, of its Member States are a party and which oblige the parties concerned to submit a declaration of competence.<sup>595</sup> These declarations highlight separate responsibilities of the EU and its Member States in accordance with their competences, and make this division clear to third parties. These are not, however, always and consistently used and without any clarity of roles, the problems surrounding attribution and responsibility still arise. The most well known is the obligation created under Annex IX of the United Nations Convention on the Law of the Sea, which states that:

“[t]he instrument of formal confirmation or of accession of an international organisation shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organisation by its Member States which are Parties to this Convention.”<sup>596</sup>

The provisions on declarations of competence in UNCLOS provide an unusual example by requiring institutions to make a declaration at the time when they sign the treaty.<sup>597</sup> The provisions also require Member States to make their own declarations of competence.<sup>598</sup> These obligations go significantly further than any other treaty has done but the fact that these requirements were the very first show some of the questions that arise in this area.

The EU has developed its own principles in terms of the responsibility of the Union and its institutions<sup>599</sup> and the responsibility of Member States.<sup>600</sup> It has its own internal responsibility regimes to address a variety of circumstances. These should not be considered as *lex specialis*. They are not rules of international law but rules of European

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<sup>594</sup> EU Presidency Statement 5 November 2004 PRES04-298EN; *Sixth Report on the Responsibility of International Organisations* by G.Gaja, Special Rapporteur, A/CN.4/597 at pp.8-9.

<sup>595</sup> J.Heliskoski, 'EU Declarations of Competence and International Responsibility', in M.Evans and P.Koutrakos, *The International Responsibility of the European Union. European and International Perspectives* (Oxford: Hart, 2013) p.189 at pp.189-190.

<sup>596</sup> Article 5(1) Annex IX UNCLOS.

<sup>597</sup> Article 2 Annex IX UNCLOS.

<sup>598</sup> Article 5(2) Annex IX UNCLOS.

<sup>599</sup> Article 340(2) TFEU.

<sup>600</sup> Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.

Union law. There are distinctions to be made, with international responsibility being engaged for any breach of international law and European mechanisms being limited to serious violations concerning rights that confer rights on obligations. While the EU has European mechanisms and has established some practice accepting liability or responsibility, it does not have any express mechanisms that can determine international responsibility on the part of the EU or its Member States. There are no rules within the EU legal order on international responsibility, so it is difficult to see how there can be any rules constituting *lex specialis* for international responsibility.<sup>601</sup>

When considering the work of the ILC in this area, it appears as if the *lex specialis* provision was an attempt to address the Union legal order and the particular legal relationships that exist between the EU and its Member States or between the Member States. The relationship between the Union and its Member States is the only example given by the ILC as one of these such relationships. Any potential impact of the *lex specialis* is, therefore, limited to these relationships. This remains problematic due to the inability to consider such relationships as being governed by rules that could be termed '*lex specialis*'. When considering the particular status of the EU in the development of this provision, it is difficult to see whether the inclusion of *lex specialis* had any benefit at all, if the only rules to which it purports to address cannot appropriately be considered to be *lex specialis*.

### **7.2.3. Is the inclusion of any form of *lex specialis* within the ARIO beneficial?**

It is inaccurate to consider the rules of the organisation to be *lex specialis*, simply as a result of their existence as rules. Reference to the rules of the organisation as amounting to *lex specialis* may give the impression that organisations are able to avoid compliance with these provisions on responsibility through reference to their internal norms. The idea of circumventing obligations and responsibility by reference to the internal norms of an organisation is something that the ARIO explicitly seeks to prevent.<sup>602</sup> Article 61 ARIO, furthermore, holds a state responsible for attempting to circumvent obligations by enabling action by the organisation against the obligations of the state. The inclusion of these provisions is only necessary because of the uncertainty surrounding the status of the "rules of the organization". If they were, definitively, established as internal law of the organisation, then no circumvention could take place. This limited consideration of *lex*

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<sup>601</sup> J.d'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' SHARES Research Paper 22 (2013), ACIL 2013-04, at pp.8-11.

<sup>602</sup> Articles 16 and 61 ARIO.

*specialis* then puts in doubt the capacity for this provision to address the problems of the ARIO in relying so heavily upon the rules of state responsibility. The intention of the *lex specialis* provision was to address this critique, but the drafting of the article in this particular way has left the provisions in an even more uncertain and weak situation.

To consider the internal provisions of an organisation as *lex specialis*, or special rules of international law, is to undermine the autonomy of legal orders. As identified above, the concept of *lex specialis* requires a provision of international law on the same subject but more specialised than another international law provision. Certainly, without a reference to the rules of the organisation, the *lex specialis* provision will better reflect the traditional concept of *lex specialis*. The question then arises, however, as to what this provision would actually entail and whether it would be in any way beneficial in addressing the area that this provision ultimately sought to consider; the identity of an organisation and its relationship with its Member States. Ultimately, it seems as if the answer here is no. If it can be determined that more specialised provisions of international law exist in relation to responsibility of organisations then this provision of *lex specialis* may be useful.

With the EU, when considering the potential identity and applicability of this principle, the interactive nature of the Union and the strong dependence the EU has on its own internal provisions is fundamental. The EU does not seek to depend on international law, unless there is some kind of benefit to the progression of the internal constitutional nature of the Union. In order to determine its international identity, the Union refers to its own internal provisions and, furthermore, when determining its international obligations, the potential impact of international norms is determined with reference to the international nature of the Union. The jurisprudence of the EU has stated that the inclusion or acceptance of international norms within this Union legal order can only be determined by the Union. As a result, it is difficult to consider any areas of international law that would amount to specialised principles and have the status of international legal provision. The one possible exception that seems to have potential would be in the conclusion of treaties, on specific issues, between the Union and other international legal persons agreeing to variations on the general principles of responsibility. Any aspect that would be considered internal to the Union simply cannot be considered thus. Perhaps the particular declarations of competence made by the Union under the UN Convention on the Law of the Sea, in determining the division of responsibility may fall into this category. This technique has its own critiques, however, for example with declarations becoming out dated or being insufficiently precise to fully determine situations of responsibility. As a result, it seems as if *lex specialis* achieves nothing more than to further confuse the situation of responsibility, but also of the nature of the international actors in question.

### 7.3. Conclusion.

The critique of the ARIO as being too dependent upon principles developed in relation to states and therefore not taking sufficient account of the actors that it seeks to address did not go unnoticed by the ILC. The need to address the individuality of actors was recognised throughout the ARIO project. This recognition has extended to an acknowledgement of the Union as having a unique external identity. There is a need to allow the internal provisions of the EU to govern its relationship with its Member States. It is this relationship that needs understanding in determining the responsibility of the European Union.

At the core of this difficult question of the responsibility of the EU, and the potential special rules of responsibility, lies the complex international identity of the Union as an autonomous, but yet dependent, international actor.<sup>603</sup> This is the difficulty at the centre of the overall responsibility project pursued by the ILC: how is this dual identity of organisations to be addressed? Rather than address this difficult question, however, the ILC has seemingly sought to avoid it. The ARIO project was not about the Union and its international identity, nor yet the international identity of organisations, and yet this is a question that is foundational to this project and which is core to answering many of the questions arising from this project. Instead of addressing this dual nature, the ILC has addressed the two extremes that constitute this nature. This does not address the real difficulty here and only serves to leave the project in a weak and uncertain position.

The intention surrounding the rules is to address the complex nature of entities, such as the Union, arising from its interacting nature with international law and its dependence on its Member States. This nature and the relationship that exists between the Union and international law, as well as between the Union and its Member States is central to considering the international actions of the Union and its potential responsibilities. Rather than address this relationship, the ILC has sought to refer back to it but has done so without fully considering the consequences. The Union's legal order is so significantly developed and integrated, that to attempt to consider its rules as international norms is, at best, inaccurate. To create this level of uncertainty surrounding the status of legal norms serves only to further weaken the ARIO rather than strengthen them. The provisions are uncertain and, consequently, leave the scope of the articles in a state of uncertainty.

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<sup>603</sup> See for further explanation chapter four at pp.106-109.



The internal provisions of the Union are internal Union norms and can in no way be considered as international norms. As well as impacting on the articles, this approach from the ILC affects the relationship between the EU and international law and further exacerbates unnecessary tensions. The references to the rules of the organisation scattered throughout these articles create this general sense of uncertainty throughout the law of responsibility. The *lex specialis* provision, however, creates a larger and more overt risk of undermining the overall project but also in complicating the identity of the Union and its growth as an international actor. The ILC has created a general exception here to these provisions, seemingly willing to allow the Union, to an extent, to dictate when these general provisions will not apply. A divided approach towards this project has been pursued by the ILC and, in pursuing this, it has simply reinforced the uncertainty as to the relationship between the Union and international law and significantly affected the potential of the Union as an international actor. While it cannot be said that the ILC should focused upon the EU's international status within a project on responsibility, it has arisen as a consequence. It appears that this individual nature of the Union and the multi-layered identity that it possesses were avoided by the ILC here. In avoiding the tension surrounding the transparent, semi-autonomous nature of the EU, the ILC has only created further uncertainty and potentially problematic consequences. It might allow the exceptions argued for by the European Commission, but the way in which these are achieved creates uncertainty and dangerous consequences of the law of responsibility.

## **8. Addressing the difficulties with the Law of Responsibility: scaling back the Legal Framework.**

Responsibility is central to the international legal system.<sup>604</sup> The need to ensure control over activities and, from this, to prevent and address abuses of power, plays a central role in the assurance of the rule of law at the international level.<sup>605</sup> The challenge posed by the European Union in upholding these principles and ensuring the international rule of law only continues to grow alongside the expansion of the powers of the Union. The work of the ILC on the ARIO has some core difficulties in applying to the EU, however. The interactive nature of the EU sets it apart from other international actors and is central to the challenge to the ARIO. With the continued one-dimensional foundations of the international legal system, the territorial state has retained an impermeable central role. The expansion of actors to include international organisations has been a complex development. These transparent actors cannot fit within the binary nature of the international system and the consequence is a continuing tension at the very base of the international system.

Developments to address this tension would truly address the way in which any actors beyond the state are addressed by international principles, but the foundations of the legal system show that this is unlikely. The ILC was, evidently, never going to examine the changing international environment or more specifically, the precise nature of the Union as an international actor prior to undertaking this project. The articles consequently simply do not have the capacity to address this different actor. This chapter will consider what alternatives might be proposed in order to address the difficulties that exist in relation to the ARIO. Any alternative approach to the law of responsibility must exist within the boundaries of this binary system in order to function within the system.

This chapter begins from the premise that the ARIO simply do not work when faced with the EU, which as an increasingly active international actor arguably could be the most affected by principles of international responsibility. Perhaps some further consideration of the actions of the Union and the way in which principles of responsibility could be implemented may have helped with this. The thesis considers that the attempt by the ILC to set down legal principles was premature due to the little practice underpinning them. The lack of development of these principles in response to practice has resulted in

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<sup>604</sup> See for further detail chapter two at pp.28-36.

<sup>605</sup> C.Eagleton, "International Organizations and the Law of Responsibility", (1950-I) vol.76 *Recueil des cours* p.323; See for further detail chapter two at pp.30-36.

principles that do not respond to the actors to whom they purport to address. This is as detrimental, if not more so, than having no law at all in the area. The law of responsibility, beyond state responsibility, is an area of law that is only at the beginning of its development and this needs recognition. While it is possible that development would have seen the same insufficient principles evolve, a full consideration and active development of the way in which principles would work when faced with the Union would only be beneficial. In attempting to expand the law of responsibility without a real basis from which this can work, larger problems in the very foundations of the law of responsibility as a whole have only been exposed and further exacerbated.<sup>606</sup> This is the basic issue from which the proposed framework is developed. It aims to propose a potential framework for responsibility that would enable this area of law to develop.

There were conceptual difficulties in the original work on the ARSIWA in the attempt to create a uniform system of responsibility by, rather superficially, leaving out any subjective elements, such as fault.<sup>607</sup> While these flaws existed within the ARSIWA, they were not alarming or problematic for the law of responsibility. The difficulty came when basing the ARIO on the ideas contained within the ARSIWA, as these original flaws were then entirely transplanted into the ARIO without being fully addressed. When considering states, the flaws could be addressed within judicial fora and the difficulties were minimised. The lack of law-applying authorities when considering international organisations as compared to states results in little capacity to address the difficulties in the base of responsibility and begin to show the weaknesses in the law of responsibility as a whole.

This chapter proceeds with a brief examination of the difficulties in addressing the responsibility of the EU within the confines of the project as defined by the ILC and within the boundaries of the international legal system. The preferred approach is then outlined. This chapter proposes a scaled back framework to allow the law to develop in response to practice. This is the core idea behind the framework; it is intended to allow development of the law. A significant feature of this framework is a move away from the Commission's approach towards attribution by proposing instead a rebuttable presumption of responsibility on the basis of a nexus of involvement in an internationally wrongful act. The preferred approach would start with the principle that where there is a breach then

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<sup>606</sup> J.d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', (2012) Amsterdam Law School Legal Studies Research Paper No.2012-95.

<sup>607</sup> *Ibid.*

responsibility must result. Once a breach has been established, a factual nexus of action would determine any actors who were involved in that breach. As a result of that factual determination, a rebuttable presumption of responsibility would exist on the part of any actor involved in the breach. The framework would, therefore, enable shared responsibility. This is fundamental to the new approach. This chapter finally seeks to apply this framework to two examples involving external action of the Union before drawing some conclusions on the way in which it is preferable to the ARIO. As there have, as yet, been no actual examples of breaches of law by the Union, this chapter considers the *Nuhanović and Mustafić v the Netherlands* case involving the UN and the actions of NATO in the Libya conflict. These situations have been specifically chosen as being plausible situations within which the Union could become involved and they are thus considered as if they did involve the Union. The chapter considers the possible questions of legal responsibility that might have emerged with the potential involvement of an EU supporting mission.

### **8.1. The Need for an Alternative to the ARIO and the Focus on Attribution.**

The thesis considers that responsibility is central to the international legal system but that the overall approach taken by the ILC has resulted in a system of responsibility that has two core difficulties that would need to be fully addressed within any alternative approach. There is, firstly, the question of the lack of practice and foundations upon which these principles are based and, consequently, the existence of a set of principles orientated around unified international actors. There is also, secondly, the related question of understanding the complex nature of these actors. It is the internal nature and workings of an institution that are central to understanding their activities and powers and therefore necessarily must form a part of any system on the responsibility of international actions. The ILC's work is substantially weakened by the confusion over the status of internal rules of an organisation and whether they can, or do, exist as principles of international law.

The ILC pursued a unified system of legal responsibility applicable to all international legal persons.<sup>608</sup> In doing so the ILC has sought to develop a common system of responsibility where the obligations of all legal persons will be measured against the same legal principles. This would further strengthen the basis of these principles as a complete system of responsibility; indeed, any secondary rules of responsibility must intrinsically

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<sup>608</sup> Report of the Working Group, Chapter VIII Responsibility of International Organizations, in International Law Commission, *Report on the work of its fifty-fourth session (2002) A/57/10*, at pp.228-229.

have some sort of unity. The difficulty is, however, that the ILC is attempting an approach with rules that unfortunately have substantial flaws when considered within the system of responsibility. Developing principles in relation to states and then expanding them to institutions does not achieve a comprehensive system. It would be achievable through an overall examination of the law of responsibility and developing comprehensive principles in relation to all entities. The result of this is that the difficulties with the work of the ILC go back to the very origins of this project in terms of it following from the Articles on State Responsibility and taking a lead from these principles. It is questionable whether this work was even ready to be undertaken by the ILC and whether it even fits the criteria of a topic for codification.<sup>609</sup>

The purpose of the ILC was to codify “necessary and desirable”<sup>610</sup> topics of law and for progressive development to arise from these established areas.<sup>611</sup> The ILC has also stated that topics should (i) “reflect the needs of States in respect of the progressive development and codification of international law”; (ii) “be sufficiently advanced in stage in terms of State practice to permit progressive development and codification” and should be (iii) “concrete and feasible for progressive development and codification”.<sup>612</sup> Within its work on the ARIO, however, the lack of established practice and accepted principles has continually been a problem and does raise questions about the choice of this area for codification.<sup>613</sup> There is a lack of practice, raising questions as to the ability to consider this an advanced and developed topic.<sup>614</sup> The work of the ILC in the ARIO has been largely progressive development, raising questions about whether this was an appropriate time, and approach, to pursue this topic.

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<sup>609</sup> G.Hafner, ‘Is the Topic of Responsibility Ripe for Codification? Some Critical Remarks’, in U.Fastenrath, R.Geiger, D-E.Khan, A.Paulus, S.von Schorlemer and C.Vedder (eds.) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) p.695.

<sup>610</sup> Article 18(2) Statute of the International Law Commission 1947.

<sup>611</sup> Article 1(1) Statute of the International Law Commission 1947.

<sup>612</sup> International Law Commission *Report of the on the work of its fifty-second session*, (2000) A/55/10.

<sup>613</sup> N.Blokker, ‘Preparing Articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations seriously? A mid-term review’, in J.Klabbers and A.Wallendahl (eds.) *Research Handbook on the Law of international Organizations* (Edward Elgar, 2011) p.313 at p.337.

<sup>614</sup> J.Wouters and J.Odermatt ‘Are all International Organizations created Equal? Reflections on the ILC’s Draft Articles of Responsibility of International Organizations’, Leuven Centre for Global Governance Studies, Global Governance Opinions, March 2012 at pp.2-3; G.Hafner, ‘Is the Topic of Responsibility Ripe for Codification? Some Critical Remarks’, in U.Fastenrath, R.Geiger, D-E.Khan, A.Paulus, S.von Schorlemer and C.Vedder (eds.) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011) p.695 at pp.700-704.

While it is certainly important for there to be some form of mechanism for addressing the growing power of the EU and keeping a check on potential abuses, it is debatable whether codification of rules of responsibility was the route to address this question. Other bodies, such as the International Law Association in its work on accountability<sup>615</sup>, as well as the considerations of the *Institut de Droit International* on the responsibility of Member States of institutions,<sup>616</sup> have begun to consider the importance of checking the power of institutions. While the work of the *Institut* does show a move towards addressing the question of responsibility, the limited focus on Member States left a substantial area of the law of responsibility unaddressed: when can an institution incur responsibility for actions? The work of the ILA, on the other hand, focuses entirely on the idea of accountability and develops a number of broad ideas, from which further work could develop. These principles are, however, largely *de lege ferenda*, so while beneficial this is an area that continues to require research.<sup>617</sup>

Accountability has its place in the international system but a system of legal responsibility is necessary to deal with any breaches of the law that may arise. It is a legal part of accountability.<sup>618</sup> Consequently, beginning from the idea of accountability and understanding the weaknesses that exist may, in fact, provide a more solid foundation for the law of responsibility. Now that the international system has begun to address these questions of responsibility, however, it would be preferable to continue a project like this one, perhaps in conjunction with the ideas of accountability.<sup>619</sup>

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<sup>615</sup> *Final Report of the ILA Committee on the Accountability of International Organizations* (Berlin Conference, April 2004)

<sup>616</sup> Institut de Droit International Session of Lisbonne 1995, 'The Legal Consequences for Member States of Non-fulfilment by international Organizations of their Obligations toward Third Parties', Fifth Commission, Rapporteur: Mrs Rosalyn Higgins.

<sup>617</sup> B.Kingsbury, N.Krisch and R.Stewart 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* p.15; S. Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law', (2008) 14 *Global Governance* p.39; S.Ratner, J.S.Abrams and J.L.Bischoff *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3<sup>rd</sup> edn, (Oxford University Press, 2009); B.Kingsbury and R.B.Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations', United Nations Administrative Tribunal Conference *International Administrative Tribunals in a Changing World* (Esperia, 2008).

<sup>618</sup> See for further detail introduction at p.15; chapter two at pp.39-40.

<sup>619</sup> S.Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law', (2008) 14 *Global Governance* p.39; S.Ratner, J.S.Abrams and J.L.Bischoff *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 3<sup>rd</sup> edn, (Oxford University Press, 2009); B.Kingsbury and R.B.Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations', United Nations

The ILC could have addressed this important principle by initially engaging in a substantial examination of the way in which the international system has changed. From this a set of principles, far more detailed and tailored more to the specific nature of international organisations than those in the ARIO, could have been created. This study could be comparable to the more general approach taken by the ILC towards the fragmentation of international law.<sup>620</sup> While the ILC has engaged in some brief exploration of the nature of IOs, this did not succeed in capturing the complex nature of these entities.<sup>621</sup>

It is understandable that the ILC did not tackle the controversial area of the nature of international organisations when these are questions that go to the heart of the contested issue of the nature of the international legal system itself. While an examination may have provided the foundations for a good understanding of how to develop a number of areas of law, not least responsibility, but it is perhaps unrealistic to expect the ILC to manage to reach agreement on questions such as these. However, by taking the approach they did – by drawing so substantially on the principles of state responsibility and seeking only to adapt them quite simply- the consequence was a set of principles that do not adequately address the entity that they claim to, so as to have the potential to be quite damaging. The law of responsibility gets caught up in the tension that exists between the foundation of the international legal system as a bilateral system of law and the transparent actors that the law of responsibility is trying to now address. It furthermore suffers from the defects and tensions developed within the original work on state responsibility.<sup>622</sup>

There is clearly a difficulty here in terms of the law of responsibility having emerged from very uncertain foundations and the result of this is a set of principles that have substantial issues with their practical application. The thesis considers that it is crucial that such a system of responsibility exists but that it needs to respond to the individual nature of any actors that it addresses. With this in mind, the focus of the proposed alternative is to reduce the law in this area. The thesis proposes that the law needs to be scaled back to

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Administrative Tribunal Conference *International Administrative Tribunals in a Changing World* (Esperia, 2008).

<sup>620</sup> Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, International Law Commission *Yearbook of the International Law Commission 2006*, vol.II, Part Two .

<sup>621</sup> International Law Commission *Report on the work of its fifty-fourth session (2002) A/57/10*, at pp.229-230; Commentary to Draft Article 2, International Law Commission *Report on the work of its fifty-fifth session (2003) A/58/10*, at pp.38-44.

<sup>622</sup> J.d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', (2012) Amsterdam Law School Legal Studies Research Paper No.2012-95.

enable it to respond to the emerging practice. Such an approach would allow the development of principles of responsibility, which are central to the international legal system, but would give the opportunity to develop such principles in response to the actors concerned. This is crucial both for the law of responsibility but also for respecting the integrity of the actors concerned, in particular the EU.

A largely scaled back approach is proposed with the focus being upon the very core nature of responsibility as being incurred for a breach of international law. The main change in this framework that will be made is in the area of attribution. Accordingly, the framework of responsibility proposed in this chapter takes account of the fundamental differences between states and international organisations without necessarily having to take a position on some contested questions on the nature of the international legal order and the status of non-state actors therein.<sup>623</sup>

This scaled-back approach would address this initial problem in the ILC's work having been based on so little practice. A general framework would also address the difficulty of taking account of the differences that exist *between* different institutions by being general enough to apply to all. It would also attempt to tackle the need to allow the internal nature of organisations to be incorporated within a legal framework of responsibility, as this is where the relationships between an organisation and its Member States are established. A core aspect of the thesis was the need to recognise the individual nature of the EU but also recognising the interaction at play between the Union and international law. The proposed alternative framework continues to attempt to recognise the need to ensure the constitutional integrity but also while recognising the need to respect core norms of international law, in particular responsibility.

To achieve this a difficult balance needs to be struck, recognising the individuality of the EU whilst not mistakenly labelling Union norms as provisions of international law. The dominant area of Union action relies upon substantial interaction between the Union and Member States and this is also the one that requires the most attention within the framework of responsibility. As a result, questions on the internal provisions of the Union have been central to much of the work here. Some have questioned whether the way in which an individual reference should be achieved for the Union is by a special rule of

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<sup>623</sup> See generally, J. d'Aspremont (ed) *Participants in the International Legal System. Multiple perspectives on non-state actors in international law* (Routledge, 2011).



attribution or of responsibility in relation to the EU.<sup>624</sup> While some may have come to the conclusion that this was unnecessary<sup>625</sup>, there remains a need to consider the internal nature of the Union in some manner.<sup>626</sup> A special rule would not achieve a balance and the question of how to achieve this balance is a difficult one and one which forms a significant aspect of the proposed framework.

The internal nature of the Union is incredibly significant for determining what type of action has occurred and where responsibility lies, it is difficult to draw any conclusions as to the status of internal legal norms within international law as a whole. From the internal perspective of the Union, they should remain solely internal, but there is an inevitable involvement at the international level. Without some significant theoretical justification, internal norms of institutions cannot simply be classified as international law.<sup>627</sup> It is fundamental that any framework in this area be attuned to the fine balancing act that must be achieved here; norms may become operative at the international level, but they must not be established as international norms. Without some consideration of these rules evolving into and being accepted as international principles, either through adoption within a treaty or through establishment as customary international law, to simply translate them to the international level is inappropriate.

The framework would retain the foundational idea of responsibility arising from an internationally wrongful act but the principles of attribution would change substantially. The framework would also, fundamentally, change one of the foundations of the law of responsibility in enabling and developing shared responsibility. Instead of attribution, the framework utilises a nexus of action to determine which actors were involved and then there will exist a rebuttable presumption of responsibility on the part of any involved actors. Institutional frameworks involved would be able to rebut this presumption of responsibility using the internal norms of the organisation without these internal norms being taken to the level of the international system.

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<sup>624</sup> E.Paasivirta and P-J.Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', (2005) 36 *Netherlands Yearbook of International Law* p.169; S.Talmon, 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M.Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005) p.405.

<sup>625</sup> S.Talmon, 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M.Ragazzi (ed.) *International Responsibility Today* (Leiden: Brill, 2005) p.405.

<sup>626</sup> E.Paasivirta and P-J.Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', (2005) 36 *Netherlands Yearbook of International Law* p.169.

<sup>627</sup> See for further explanation in relation to the EU, chapter six at pp.173-185.

## 8.2. An Alternative to the ARIO: The Framework of Responsibility.

The proposed framework of responsibility would contain only the most foundational and uncontroversial of principles. Most importantly, responsibility would result from a breach of international law. With the essentials established, a foundation would have been laid from which the law could then begin to develop and expand in response to circumstances. This also allows for the potential of differentiated regimes of responsibility to better address the overall way in which the international system has changed. The ILC's motive in attempting a unified approach to the law of responsibility was a logical one but the international system now includes a breadth of actors that possess a wide range of obligations, and consequently, that unity is more limiting. The law of responsibility needs to be able to address new and emerging entities, different actions and obligations but also an increased interdependence and tendency towards collective action. This framework attempts to uphold the foundational tenet of responsibility in international law while allowing for this development. It therefore seeks to uphold the initial premise of the thesis that responsibility is central to international law but it seeks to enable respect for the individual actors within the international system, in particular the European Union.

The principle of responsibility existing for any breach of international law is one which is central to the international legal system and which must be retained in some form. The central principle within this framework would, therefore, contain this initial principle; when a breach of an international obligation is committed, then this will incur legal responsibility. As a result of this foundation, the main principle that would be contained in this revised framework would be a slightly modified version of article 3 of the ARIO:

“Every breach of international law will entail the international responsibility for that breach.”

The framework will focus upon this as the central principle and will substantially simplify the idea of attribution. It is the principle of attribution that is most complex in the area of responsibility, in particular when considering the EU.<sup>628</sup> It is this area of responsibility that needs to be capable of developing in line with the continuous development that is being seen in terms of the identity and competences of the EU. The interaction between the Union and Member States in the external action of the EU complicates the nature of attribution as a principle that is so focused upon responsibility as an individual concept; attribution is seemingly used to definitively establish action as that of a singular entity.

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<sup>628</sup> See generally chapter five.

This is the core difficulty identified within the thesis, whether this be within the general principles of attribution or through the attempts of the ILC to attempt to address the individual nature of the EU through references to the rules of the organisation and the *lex specialis* principle. Any concept of attribution within the law of responsibility continually returns to the core idea of singular attribution being required in order to *establish* responsibility. This causes difficulties with the way in which international action has moved beyond traditional bilateral state relations to a more pluralistic international activity. The different type of activity posed by the EU poses even further problems for the traditional bilateral basis of international law. Consequently, this framework would enable a renewed approach towards these actions and in tackling the problems that had developed in relation to the principle of attribution. There would be a much broader approach to determining where responsibility lies by using a nexus of action to determine the actors that could be considered to be involved.<sup>629</sup>

A link between perpetrator and breach is certainly necessary but there are issues with the basis of attribution that the proposed framework seeks to address by simplifying the principle and through shifting the basis of this principle. There are two main ways in which attribution changes in this new framework. The first of these would be the timing of attribution and what its role within the law of responsibility is. While in the ARIO, attribution has an early role within determining responsibility and is *required to establish* responsibility, this would not be the case with the proposed framework. In the proposed alternative, the alternative approach to attribution would be addressed after the determination of responsibility; it would be a case of allocating responsibility rather than establishing it.

The second way in which attribution alters is through the substance of the idea. While the ILC's framework does suggest a normative framework for determining attribution, the implementation of these principles is based around the uncertain factual test of control. This framework changes the basis of attribution and develops it into a much broader principle. Attribution would be presumed on the part of all actors involved, namely a factual nexus. This would potentially involve a concept of shared responsibility. In order to determine responsibility in a more precise manner, the actors who have fallen under this factual determination would be able to rebut the presumption by demonstrating their factual involvement, or not, through reference to their normative framework.

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<sup>629</sup> See below for further explanation at pp.223-228.

In considering attribution, the main problem in determining responsibility is addressed, namely attempting to establish which individual actor committed particular breaches of international law in line with the way in which the international system attempts to view responsibility as a largely singular concept. This has been evident with the difficulties that have surrounded attribution and the focus that has been placed on this in the literature.<sup>630</sup> The basis of responsibility as providing redress when a wrong occurs is established, but within the international system it has on occasion become difficult to establish responsibility because the particular actor that committed the breach cannot be definitively identified. This is where the failure to consider the distinct nature of organisations both compared to states and when compared to other organisations, is most apparent. It is this aspect of responsibility that needs reconceptualising and which provides the main focus for the framework.

The framework takes two approaches in order to address this. The first is in allowing responsibility to be shared among concerned entities. The framework recognises the transparent nature of organisations generally, for example, the difficulty of distinguishing actions of the institution from those of its Member States and, more specifically, it considers the way in which the Union in particular often operates externally through its Member States. On occasion, this interaction will be so complex that determining who precisely has acted will not be possible. In these circumstances, enabling shared responsibility will ensure responsibility for breaches of international law. No responsibility should be lost for want of being able to precisely attribute actions to a single actor.

The second approach of the framework is its generality and the way in which this would enable the distinct nature of all entities, in particular the Union, to be recognised in allocating responsibility. It would be the internal workings of the EU that would determine where responsibility is allocated in this approach. The internal norms and principles of the EU are the only way in which the interaction between the Union and its Member States and also the Union and international law can be understood. By taking account of the interactions that the Union has with its Member States and other actors at the

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<sup>630</sup> A.Nollkaemper, 'Dual Attribution. Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', (2011) 9 *Journal of International Criminal Justice* p.1143; B.Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping', (2012) 25 *Leiden Journal of International Law* p.521; K.M.Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008) 19(3) *European Journal of international Law* p.509.

international level, some understanding can be had of who is acting in any particular set of circumstances.

These concerns will be addressed through the alternative approach to attribution, with the existence of a factual nexus and a rebuttable presumption. A factual nexus will be used to consider which actors were involved. When this nexus determines action as that of an integrated organisation or action in an area of shared competence between both the institution and Member States, responsibility will be presumed on the part of that institutional framework and on the part of any 'involved' States. This would not mean a presumption of responsibility on the part of Member States by the very reason of their membership of an institution, but rather when they had a level of involvement with the breach. This presumption would be rebuttable by *factually* demonstrating that it should be excluded, because it lies, for example, entirely with a Member State or entirely with an institution, or because it needs to be shared with another institution or with other Member States. In making a factual evaluation, the internal norms and provisions of the institution could be utilised, but this would be a strictly factual, not legal determination.

A difficult balancing act must, however, be made here. Inevitably, the rules on responsibility being developed must be rules of international law but the internal norms and system of the Union must play a part, without being labelled or considered as norms of international law. While some have contemplated, and even advocated a special rule of responsibility for the Union, this does not address many of the difficulties and, in fact, raises a number of further questions.<sup>631</sup> In the main areas of Union action, and importantly the areas that are most problematic for responsibility, the framework seeks to enable reference to internal norms and principles by creating a rebuttable presumption of responsibility on the part of any actors involved in the breach. This could then be rebutted by the Union, for example, by utilising its internal provisions to make a *factual* determination of which actors were involved.

When the Union is involved in international action, there have been questions as to whether the Union would incur responsibility, or whether responsibility might fall on the Member States. This framework contemplates three scenarios that might involve the EU acting internationally; cases where action has definitely been that of a single state, cases where action has been that solely of the EU, and finally the most common cases in which action is intertwined between a combination of actors.

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<sup>631</sup> See discussion on the difficulties with *lex specialis* and the EU in chapter seven at pp.185-206.

The first route would be when action is that solely of a state. If it is entirely without doubt that it was singular action on the part of the state then no consideration of the EU's responsibility should even be made. This will be a situation entirely concerned with state responsibility but warrants mentioning here as it may be that there is some incidental EU involvement which leads to consideration of Union responsibility. This will not be a frequent case. If we consider the example of an EU military mission, then responsibility may be found for states acting alongside the mission, but not under its auspices. There would be a firm distinction between the two.

Equally, in terms of the second route, if the action has definitively come from the Union and has only occurred at the Union level with no potential involvement of Member States, then there will be no consideration of state responsibility. This second determination of responsibility will also largely be infrequent. This may be a situation where a decision has been made at the EU level and is then carried out and implemented by Union bodies rather than by Member States and their authorities. It may also, for example, involve actions by EU bodies or representatives that can only be considered to be part of the EU, for example the High Representative for Foreign Affairs and Security Policy or the European Commission. Action that is entirely that of the Union should raise no real questions about where responsibility should lie. This will be particularly straightforward to establish when considering the way in which responsibility will be determined through identifying a nexus of action; only the Union would be identified within the nexus of action. It is worth recognising, however, the limitations of any singular determination of Union responsibility will have its practical limitations, as there are no real avenues through which the Union can be held to account. This does lead to the question of whether there should be a continuation of Member State responsibility in certain circumstances. This would fail to recognise the nature of the action as that of the EU, however, and could potentially impact on the desire of Member States to enable the further development of the EU's external competences. The first two routes will be the least used and the simplest to address.

In these two situations, having considered the circumstances under the factual nexus, it would be apparent that action was either entirely that of a state, or that of the Union and consequently there would be definitive responsibility of either of these entities. This would be a factual determination and would only be the case when there was definitely no involvement from any other actor. By 'factual' determination, the framework would consider what actors had any involvement in the breach. It would not use any form of

'control' mechanism as a measurement, as has been the case with the principle of attribution.<sup>632</sup>

The framework seeks to remove the necessity of attribution as a normative requirement of responsibility. The ideas contained in the principles on attribution, in particular Article 4 ARSIWA and Article 6 ARIO, can provide some assistance on how to implement this factual determination. This would only be assistance, however, and in existing as a factual rule, greater flexibility would exist. Up to this point, a high degree of similarity may be seen, at a practical level, with the proposed approach and that already taken in Article 4 ARSIWA and Article 6 ARIO. The key distinction to be understood, however, is the focus in the nexus making a factual, rather than developing any kind of legal principle and making any attempt at any type of normative determination. The weaknesses in the original law of responsibility developed further by orienting the law of responsibility around determining which particular actor had committed a breach through the principles of attribution. In removing this determination and making a factual decision on who is involved, a greater degree of flexibility is enabled to address a variety of international action. The focus then moves to determining responsibility for a breach of international law and not losing such a determination for want of the ability to trace a breach to a precise actor. A factual determination is necessary to enable responsibility to be determined in any way. In moving away from the principles contained within Article 4 ARSIWA and Article 6 ARIO, the approach attempts to move away from attribution having a central role in determining responsibility. Obviously some form of this principle is important in responsibility as a whole, but the framework seeks to shift the emphasis of responsibility; the form of attribution developed in the framework would determine where responsibility lay and not determine responsibility itself.

These two initial scenarios reflect the way in which 'traditional' forms of international action are viewed; there are only a couple of involved actors and that action can be defined as that of a particular actor. In taking this approach towards these two types of scenario, the framework seeks to support the principle that where an actor has international legal personality, it should incur responsibility for its actions and not to do so would offend the basis of its personality. This is an important principle to uphold. The difficulty comes when no determination of a single actor can be made and that is when the third, and arguably far more frequent, scenario needs to be considered.

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<sup>632</sup> Article 7 ARIO.

The factual nexus would seek to consider the entire set of circumstances that have occurred and from this use a factual nexus to establish who was involved in the action. The actors who were involved in the action will then determine which route is taken; if the action can only be considered to be that of a state, then state responsibility will be pursued and the principles contained in the Articles on State Responsibility will determine this.<sup>633</sup> If, on the other hand, it is solely Union action then responsibility will be determined to lie solely with the EU through the factual determination using the nexus of the framework on the responsibility of international institutions. Consequently, this would be largely similar to the principle stated under Article 6 ARIO<sup>634</sup>; the actions of organs and agents of an institution will be those of the institution and a determination will be made under the rules of the organisation. The difference, however, would be that the nexus would consider any involved actors to fall within this nexus and the only involved actors would be those from within the Union, for example the High Representative. This would be a factual determination and would not require any consideration of 'control' or any involvement of the internal norms of the organisation. These first two scenarios largely consider the traditional idea of international action where a singular actor is acting.

The final option for a situation where responsibility may come into play is that where a combination of actors are involved. This is the situation that is more reflective of the way in which international action has changed and which most precipitates the need for an alternative framework of responsibility. When there is a question of responsibility that concerns any action of an institution, this is the most likely outcome, due to the substantial interaction upon which the actions of institutions and, more so, the European Union, are based. While the factual nexus will again be utilised in order to determine which actors were at all involved, the determining factor here will be the rebuttable presumption of responsibility on the part of those entities which have been factually determined to have been involved.

The idea of this approach is that it develops the capacity to fully consider all types of international activity and it is so broad to do so. There would not be a need to address

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<sup>633</sup> Article 4 ARISWA: 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

<sup>634</sup> "1. 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. 2. The rules of the organization shall apply in the determination of the functions of its organs and agents."



different types of action. In the ARIO, there was an attempt to address some of the weaknesses seen within the law of responsibility and its difficulties in addressing the broad range of international action, by including a set of provisions addressing questions such as coercion, control, and facilitation. A question may be raised about the extent to which these provisions can be catered for within this framework. It is argued that the main reason behind the inclusion of these principles, in particular in the ARIO, was an attempt to address the complexity of international action that was generally unable to be addressed due to the difficulties in the basis of responsibility. Principles, such as complicity and control, were seemingly developed to capture situations that the idea of responsibility was not able to address. When developing a framework that determines responsibility on the part of any actors involved within a breach, the capacity to address a variety of situations is envisaged, including the involvement of several actors in a breach. This involvement of several actors should have the capacity to address international action where the breach is indivisible, for example considering those actions of the EU where dependence is had on Member States to implement action. The capacity should also exist, however, to deal with situations where the involvement of another actor arises from coercion or facilitation.

The use of a factual determinant is something that is entirely dependent on the circumstances of each case. The capacity to turn to the internal norms of an institution to assist in a determination must be a fundamental part of any framework. The subjective nature of this test, however, means that in advocating this, no precise measure of involvement is developed. This is both a benefit and a weakness. There may be no certainty and a lack of clarity on how this may be applied in practice, but the thinking underpinning this framework is to develop a beginning from which the law can grow. The purpose of this alternative is that it is a 'framework' and not a 'system' and that it can begin to provide the basis that was lacking when the ILC began its work on the ARIO. It is argued that by creating a broad framework, an approach will be capable of evolving that will be able to respond to each individual case. This evolution will then inform whether and how this rule might in fact be constructed in the future.

### **8.2.1. Rethinking the Approach towards Attribution: a Nexus of Action for Determining Responsibility and a Rebuttable Presumption Of Responsibility?**

The framework moves away from a control test making a definitive and singular determination of responsibility and instead proposes a much broader tool in terms of a factual nexus of action. This will be preferred to the control test or standards included within the attribution provisions in the ARIO, as it will focus upon determining the factual

circumstances and will not amount to any form of legal determination. This nexus will simply look at any connections by actors involved in the breach. Once there has been a breach of an obligation, the precise circumstances will be considered and the actors involved identified. This nexus will also, importantly, allow the determination of responsibility on the part of more than one actor.<sup>635</sup> As a result, this broad approach would determine responsibility on the part of any actors that could be connected to the breach. The main provisions that could be considered in place of the main ideas in the ARIO might be drafted like this:

- (1) Every breach of international law will entail the international responsibility for that breach.
- (2) Any and all involved actors will incur responsibility for the breach.
- (3) This determination of involvement will be made on a factual basis and 'involvement' will include any type of involvement, whether this is practical involvement or involvement in the establishment of any type of normative systems involved in the breach.
- (4) Once such a determination has been made, the presumption of responsibility on the part of all actors, is able to be rebutted by the actors involved in favour of a determination of responsibility for action based upon the normative framework that exists between the actors concerned.

From this, it is clear that while a nexus will be used in place of any question of attribution, this will not be used to make any precise determinations of responsibility. Responsibility would flow from a breach of international law. The nexus developed differs from attribution in focusing on a factual determination of where responsibility lies, rather than a normative one. The nexus would not include any set test or control requirement. It would simply look at which actors were, in any way, involved. The nexus would entirely depend upon the circumstances involved. While this may be seen as a negative aspect in terms of enabling legal certainty, it is argued that this initial approach would allow this framework to take on the role as an initial step in the law from which it can begin to develop. The current lack of practice has been a significant hindrance to the work of the ILC thus far. Providing a broad idea of norms from which the law can develop would allow an organic evolution of this legal system that may provide principles that respond more fully to the actors that they address. Flexibility and enabling principles to develop as a response to factual circumstances are fundamental to this approach.

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<sup>635</sup> See below for further elaboration at pp.228-235.

Where there is an institutional framework involved in a breach of an international obligation, then the factual nexus will determine responsibility on the part of that institution, as well as any involved States. To enable a presumption on the part of any actors who were involved in a breach, then a broad variety of actions could potentially be addressed. As well as the general interactions now seen within international law, the potential would also exist for other types of involvement by international actors; the involvement of actors in facilitating breaches, or in coercing or controlling breaches, for example, could be caught within the framework. This is quite a broad framework, which could be subject to a critique of being too broad. The very basis of the framework, however, is its flexibility and the capacity for these norms to develop and gain further certainty following further examples of practice.

The presumption proposed would determine responsibility on the part of any actors involved in a breach. That may involve responsibility on the part of a singular actor, or it may mean responsibility on the part of a number of institutional frameworks and states. This flexibility begins to recognise the way in which international action has moved beyond bilateral relations and there is now an increase in interdependent international action that concerns a broad range of actors. This ability to develop collective responsibility and to enable the sharing of responsibility is central to the framework. When there is more than one actor involved, the presumption will lie on all actors concerned.

When institutions are involved, to simply presume responsibility on the part of any concerned institutions may simply subject the framework to a number of similar weaknesses to those found within the ARIO. In the same manner as responsibility not simply being presumed on the part of an institution, there will not be a presumption of responsibility on the part of Member States purely by reason of their membership of an institution, but rather if they have been specifically involved in the action. This determination will be a rebuttable presumption of responsibility on the part of any actors upon which it falls, however. With any institutions upon which this falls, the involvement of an institutional framework will show a link with a breach. Should any institutions be involved, the framework will presume responsibility on the part of concerned institutions to ensure respect for the autonomous nature of those institutions, in particular the EU. It will not automatically involve Member States within this presumption, but rather such a presumption would only arise with some involvement of particular Member States. As a result, any involvement of the Union in a breach of an obligation would establish some responsibility on the part of the EU. This would ensure respect for the integrity of the Union's international identity.

The framework attempts to recognise the pragmatic difficulties that may exist with responsibility falling on the part of an institution, in terms of, for example, there existing no judicial fora within which to raise questions or claims of responsibility as against institutions. It may be that an individual would prefer to bring a claim as against a state because there will be a method by which to do this.

When the institutional framework of an entity is seen to fall within the factual nexus then there will be a presumption of responsibility on the part of that institution. The presumption will also exist on the part of any *involved* Member States, which would also be determined through the nexus of action. This will be some form of joint and several responsibilities but the detail of this would need to be developed. There are some difficulties with the idea of joint and several responsibilities, but the basic idea would address some of the issues at the core of the law of responsibility. A detailed consideration of the precise appropriate form of joint and several responsibility is beyond the scope of this study.

The benefits of such an approach can be understood if you consider the difficulties that can be seen with the actions of institutional frameworks. The often used example of states implementing a United Nations Security Council resolution or states operating under a UN mandate, show the significant level of interaction involved in much international activity. There is the potential for involvement between the states from which personnel are seconded, the United Nations, as well as other potentially involved actors, such as the EU. It may not always be entirely possible to determine the division of action or of 'control' and a presumption of responsibility on the part of all involved actors would allow a greater consideration of this type of complex international action. The potential for greater transparency would then prevent the failure of responsibility for want of having a definitive determination on the part of a singular actor. Even when examining lesser-considered examples, such as states implementing IMF-led reforms, there are benefits to a much broader consideration of responsibility. When questions of responsibility arise in this area, there may be a difficulty in determining whether there is a problem with the policy or with its implementation. There may be difficulties with both. The potential for shared responsibility could address these problems. When considering the activities of the EU, furthermore, the flexibility allowed by this approach would be highly beneficial. With both the above examples, furthermore, there is less of an onus on third parties to know and understand individual relationships or rules. Responsibility would be established and it would be down to the individual actors to rebut this responsibility, when appropriate. This potential for a presumption to be rebutted is crucial. The key aspect to this thesis is the way in which the presumption is far more appropriate in its application to the EU.

When considering the potential impact of these principles in relation to the EU, it would have the benefit of ensuring a system of responsibility as well as reflecting and supporting the nature of the Union as an international legal person and an increasingly autonomous legal order. The desire within the EU to promote and develop the international nature of the Union, as well as Treaty provisions incorporating this commitment to supporting international law and pursuing a role at the international level.<sup>636</sup> The EU cannot seek to do this and then shirk away from international responsibility that may fall within its remit. As an international legal person, the EU must incur responsibility for its actions. Any time the EU had any involvement with a breach, the presumption would fall on the Union but the potential would exist for such a presumption to fall on other involved actors as well. The ability to presume that actions involving the EU are the responsibility of the EU, retains this concern and respects the nature of the EU as an autonomous entity.

It is worth remembering that although these principles would be preferred in developing responsibility in relation to the EU and that it is important to defend these principles, on occasion it may be preferable and more pragmatic to pursue states that have been involved. This explains the reasoning behind an additional presumption on the part of any Member States that were involved in the action in question. These jurisdictional questions, again, come down to the nature of international law. The practical implications of these principles remain uncertain without any court or tribunal to apply them. National courts have discussed the work of the ILC and attempted some application, but this has always been in relation to establishing, or denying, state responsibility when a state has been involved with the action of an institution. They have not been used in establishing institutional responsibility, their very purpose, nor yet is it certain how this would be done. These considerations are beyond the scope of this thesis but may be areas of research worth pursuing in the future. In light of this it is also worth recognising the pragmatic benefits to pursuing the responsibility of a state that has been involved in a wrongful activity, as there already exist judicial fora within which relevant claims can be made.

The lack of judicial determination of responsibility to date does not diminish the importance of a more fitting legal framework. There are increasing possibilities for judicial determinations of these principles and so the need to have some sort of legal framework is increasing. The potential accession of the Union to treaties that have developed further judicial systems, such as the European Convention on Human Rights, only increases this potential and the need for some sort of framework to be in place. There remains the need

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<sup>636</sup> For further discussion, see pp.91-93; Article 3(5) TEU and Article 21 TEU.

to determine rules of responsibility, even if the potential upholding and enforcing of the principles of responsibility is currently highly uncertain. One difficulty within the current framework is its inability to account for and consider the individual nature of institutions. The attempt within the ARIO to make reference to the internal rules of an organisation has only served to further complicate the law of responsibility. Within an alternative framework, there needs to be the potential for the internal norms of any institutional framework to have a role. The approach taken towards this reference to internal norms needs to be fully considered, with a sensitive approach towards incorporation.

### **8.2.2. The Incorporation of the Internal Norms of an Institutional Framework.**

In enabling any presumptions of responsibility to be rebutted, the framework allows reference to the internal norms of an institutional framework. The complex nature of the Union and the extent to which it relies upon actions of its Member States goes to the core of its international actions. As a result, it is fundamental that in determining who has acted at any particular time, it is the internal norms of the Union that make this determination. It is furthermore fundamental that in no way are the internal provisions of the EU ever confused with, or considered to be, norms of international law. They must remain the internal provisions of the Union. To do anything otherwise would be to confuse the nature of the EU and weaken the system of responsibility. Rather than recognise it as an autonomous legal system, this would have the consequence of considering it to be simply a subsystem of international law.<sup>637</sup> This is a difficult balance to achieve; relevant EU norms must be taken into consideration in understanding the EU's involvement in any putatively unlawful actions, but they should not be confused with international legal principles having any specific determinative factor under the general rules of international legal responsibility.

### **8.2.3. Sharing Responsibility as a Core Principle in the Framework and the Potential for Multiple Responsibilities.**

It is a core claim within the thesis that the singular conception of international responsibility is misguided and fails to recognise the overlapping layers of agency that exist within many institutional frameworks. To attempt to determine any action as singularly that of one entity or another, is limiting and only weakens the law of responsibility as a whole. The fundamental difficulty in determining responsibility with the Union is in attempting to establish with any clarity *who* precisely has acted. It ought to

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<sup>637</sup> See for further explanation chapter seven at pp.173-185.

be recognised that this will often be a determination that cannot be made. Whether this is because a number of different actions may have resulted in a single wrong or injury<sup>638</sup>, or a number of actors have been involved in a breach and it is difficult to establish who committed the particular wrong,<sup>639</sup> it ought to be recognised that focusing entirely on individuated responsibility is perhaps only serving to restrict the capacity of international responsibility.

The benefits of shared responsibility can be considered by referring to certain critique that arose from the *Behrami* case before the European Court of Human Rights (ECtHR).<sup>640</sup> A particular difficulty with the *Behrami* case was the way in which it enabled a responsibility vacuum to emerge in this scenario; ultimately no one incurred responsibility. The certainty of the Court that the UN was responsible and the inability of the UN to be a party before the Court meant that no case could be heard. The limited vision of the Court on *who* had been involved here resulted in no responsibility being determined.<sup>641</sup> The attempt to determine responsibility resulted in the ECtHR finding that it did not have jurisdiction in the case, which meant that responsibility could not be questioned in relation to the UN and thus there was no responsibility. Consequently, the attempt to determine responsibility in a singular and individuated way meant the blocking of any method to determine responsibility at all. The development of shared responsibility does go towards addressing this difficulty. If there were recognition of responsibility as more of a shared concept, then it could always rest somewhere. In *Behrami*, for example, while determining action to be solely that of France, Germany or Norway was not possible, it may have been possible that a shared concept of responsibility would have been possible and would have allowed some form of redress. Shared responsibility may open up a potential avenue to address breaches of international law.

Shared responsibility could have been embraced at an earlier stage. It is understandable that, in practice, this would have been difficult, however, the principle of shared responsibility could, and should, have been accepted earlier. The early recognition of the

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<sup>638</sup> *Corfu Channel, Merits, ICJ Reports 1949*, p.3

<sup>639</sup> *Legality of the Use of Force, Request for the Indication of Provisional Measures, Order of 2 June 1999, ICJ Reports 1999*, p.124; *Certain Phosphate Lands in Nauru (Nauru v Australia)*, *ICJ Reports 1992*, p.240.

<sup>640</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10.

<sup>641</sup> *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, (2007) 45 EHRR SE10.

potential responsibility of organisations could have been seized upon by the ILC to develop an overall system. This was rejected, however, in favour of reinforcing the primary status of the state in the international legal system.<sup>642</sup>

The ILC commentaries state that shared responsibility is considered to be an exceptional case.<sup>643</sup> Determining wrongful acts is generally an exclusive and individual concept. Early comments by Ago show this in relation to when an organ of a state is placed at the disposal of another state.<sup>644</sup> Despite recognising that action may not necessarily mean that the organ is prevented from continuing to act as an organ of its home state, this did not lead to recognition of shared responsibility. Rather, the emphasis remained on determining who, precisely, the organ was acting for when the wrong occurred.<sup>645</sup> Ago argued that organs can only ever be acting under the auspices of one of these states at any one time.<sup>646</sup> Despite recognising the collective nature of wrongs, there has not been satisfactory consideration of the idea of shared responsibility. When working on the ARIIO, the ILC did claim that the responsibility of an organisation would not preclude that of a state or states, but went no further than this.<sup>647</sup> It is also worth recognising that this would still be addressed in an individual manner; a wrongful act would be found and attributed to the organisation, and again distinctly to any state involved. This approach towards shared responsibility would be too limited.

First of all, shared responsibility needs to be a possibility and, particularly with the EU and international organisations it is in fact likely and desirable. In fact, there already exist some examples of this at the international level.<sup>648</sup> There has already been some

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<sup>642</sup> First Report by A.El-Erian, Special Rapporteur, 'Relations Between States and inter-Governmental Organizations, Document A/CN.4/161 and Add.1, contained in ILC Yearbook (1963) Vol.II, A/CN.4/SER.A/1963/ADD.1, p.159 at p.184; Report by R.Ago Chairman of the Sub-Committee on State Responsibility, 16<sup>th</sup> January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1 at p.234.

<sup>643</sup> Commentary to Chapter II 'Attribution of conduct to an international organization' Articles on the Responsibility of International Organizations, para.8, Yearbook of the International Law Commission 2011, vol. II, Part Two, at para.4.

<sup>644</sup> *Third Report on State Responsibility by R.Ago, Special Rapporteur*, UN Doc A/CN.4/246 and Add.1-3 (F), *ILC Yearbook 1971*, Vol. II(1), p.199 at paras.201-206.

<sup>645</sup> *Third Report on State Responsibility by R.Ago, Special Rapporteur*, UN Doc A/CN.4/246 and Add.1-3 (F), *ILC Yearbook 1971*, Vol. II(1), p.199 at paras.201-202.

<sup>646</sup> *Third Report on State Responsibility by R.Ago, Special Rapporteur*, UN Doc A/CN.4/246 and Add.1-3 (F), *ILC Yearbook 1971*, Vol. II(1), p.199 at paras.202 and 206.

<sup>647</sup> Articles 58-63 ARIIO.

<sup>648</sup> United Nations Convention on the Law of the Sea of 10 December 1982 1833 UNTS 397; Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, No. 17, ITLOS, 1 February 2011, at para.201.



recognition that there is a problem with a system that can hold an entity entirely responsible for some act with which it was only partially involved. It ought to be possible that all entities involved in a breach should incur responsibility. On the other hand, there is also a problem with a system that prevents a finding of responsibility solely on the basis that there is not a judicial forum before which relevant claims can be brought. As a result, the framework considers the overall circumstances concerning a breach and, from this, allows the identification of any and all actors involved. The type of obligation will be central to this possibility. If the obligation is an entirely individual one that is only possessed by a single actor, then shared responsibility will not be contemplated. If, however, as is more frequent and indeed more likely, the obligation is one that is shared by a number of entities, shared responsibility needs to be considered. This may begin to address some of the problems in the very foundation of the law of responsibility.

A finding of shared, or collective, responsibility, which could be established on the part of any concerned actors may, furthermore, enable a determination of responsibility and redress for individuals in two distinct and difficult situations. In the first of these, there may be a circumstance, as outlined above, where although an institution is involved, there is no forum before which it can be brought. There is a second possibility, however, which begins to address some of the distinct issues that have been seen with the Union; discussions on the EU often consider the extent to which it is feasible to expect third states or other external entities to know and understand the division of competences and actions within the EU and between the EU and its Member States. The possibility of shared responsibility would remove that onus from the person seeking to establish responsibility. The potential would exist for them to approach the EU as a whole and leave the division of responsibilities as an internal matter.

Although rejected in some case law, joint and several liability has been contained in some treaties,<sup>649</sup> and furthermore has been considered in some more recent judicial fora.<sup>650</sup> Any rejections in the case law have, furthermore, previously been out of concern surrounding

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<sup>649</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies, 27 January 1967, 610 *UNTS* 205, art. VII; Convention on International Liability for Damage Caused by Space Objects, 29 March 1972, 961 *UNTS* 187, arts I(c), IV(1)(a), V(I) and XXII(3). Both of these treaties recognise liability on the part of the 'launching state' while recognising that more than one state may be defined as the 'launching state'

<sup>650</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No.17, Advisory Opinion of Feb.1 2011, 11 *ITLOS Rep.* 10 §201; The European Court of Human Rights has found breaches and obligations to pay compensation to lie with more than one state for a breach, see *Ilaşcu and others v Moldova and Russia* (App No. 48787/99), *ECHR Rep.* 2004-VII.

offending the personality of organisations or states.<sup>651</sup> Such a perspective, however, in fact fails to grasp the transparent nature of organisations and that, on occasion, considering action as that of an organisation together with its Member States actually better recognises this. The limitations of international law fail to consider the way in which the international system has developed beyond traditional forms of state based action. The manner in which the international system now works is much more complex and involves a much greater degree of interdependence. This is not only true when considering non-state actors but also when considering the way in which states have changed the nature of their actions. International action has become increasingly pluralistic and the international system needs to adapt to address such collective action.

The difficulties that have arisen with sharing responsibility in the current international system surround the issues with the question of multiple attribution of action, which is far from settled in international responsibility, as well as the lack of consideration of attributing responsibility rather than action. There are issues with joint and several responsibility in terms of its application to 'public' law settings, as opposed to its private law origins. While there are difficulties with this, it may be possible to transpose some of the ideas of joint responsibility as developed in areas such as international criminal law.<sup>652</sup>

There is also the difficulty of the lack of international judicial fora in which to bring cases against certain actors and also the lack of compulsory jurisdiction in courts that do exist. The first of these is one of the fundamental difficulties, however, with any system of responsibility that purports to apply beyond the state and will continue to be an issue until further developments are seen in the international system. The second of these causes slightly more concern as it could result in the focusing of claims and the need for reparation continually on particular actors. One way of addressing this would be if the party required to provide reparation could then require other responsible parties to provide their share, but the limitation in terms of international judicial settings again make this unlikely and problematic.

The actions of the Union in, for example, crisis management missions show some of the interactions at play here. The implementation by the EU of UN Security Council Resolutions by the secondment of personnel by Member States and the cooperation and

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<sup>651</sup> *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257

<sup>652</sup> Article 25(3) Rome Statute of the International Criminal Court, July 17 1998, 2187 UNTS 3; see discussion on the collective nature of crimes at the international level and Joint Criminal Enterprise in A.Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2008) at pp.188-191.

coordination with Member States shows a level of interaction that making any determination of which singular actor could be established as the 'responsible' actor is highly complex. A system allowing shared responsibility would enable the collective nature of action to be recognised and addressed by the law of responsibility. It may be that the breach could be considered to have factually involved the EU, UN, and any Member States which have seconded forces. The EU would then potentially be able to rebut this factual presumption in favour of a determination of sole EU responsibility. The breach could then be brought solely against the Union, making this straightforward to understand from an external perspective. With established Union provisions on internal breaches and accountability, any questions arising could be dealt with internally.

A particular view of shared responsibility is taken. The framework does not follow the view advocated by some that Member States should incur responsibility in conjunction with institutions as an automatic consequence of membership. A general rule of automatic Member State responsibility has been rejected by a number of academics in favour of ensuring the credibility and autonomy of institutions.<sup>653</sup> Policy considerations on ensuring the autonomy of institutions seem to have informed previous studies on accountability and responsibility undertaken by ILA and the Institut de Droit International, not to mention the ILC's Special Rapporteur, Giorgio Gaja.<sup>654</sup> In the proposed framework, there must be some sort of factual involvement for additional responsibility to arise.

In some ways it appears as if the policy reasons against an automatic presumption of responsibility on the part of Member States have been used to largely exclude any considerations of shared responsibility, which is too limited. Considering acts of institutions to be always those of its Member States fails to respect the integrity and personality of institutions. In enabling a system of shared responsibility, however, these concerns are in fact issues that could be addressed by the international system. In this framework these policy concerns form one of the reasons for developing a system of

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<sup>653</sup> C.Ryngaert and H.Buchanan, 'Member State responsibility for the acts of international organizations', (2011) Vol.7 Issue 1, *Utrecht Law Review* p.131 at pp.137-138; A.Sturmer, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' (2007) 48 *Harvard International Law Journal* at p.553; Institut de Droit International Session of Lisbonne 1995, 'The Legal Consequences for Member States of Non-fulfilment by international Organizations of their Obligations toward Third Parties', Fifth Commission, Rapporteur: Mrs Rosalyn Higgins, Article 8.

<sup>654</sup> *Final Report of the ILA Committee on the Accountability of International Organizations* (Berlin Conference, April 2004) at p.26; Institut de Droit International Session of Lisbonne 1995, 'The Legal Consequences for Member States of Non-fulfilment by international Organizations of their Obligations toward Third Parties', Fifth Commission, Rapporteur: Mrs Rosalyn Higgins, Article 6(a); *Fourth Report on Responsibility of International Organizations* by G.Gaja, Special Rapporteur, Addendum, 20 April 2006, A/CN.4/564/Add.2 at para.94.

shared responsibility. Shared responsibility in this framework is formed on the basis of some kind of action or involvement of all of the entities on which responsibility is to fall. The principle of shared responsibility in this framework does not determine that responsibility should be shared between institutions and Member States purely as a result of their membership. It determines that responsibility will be shared between any entities that are actually involved in a breach of international law thus reducing the potential for responsibility to affect the autonomy of institutions. Any automatic determination of shared responsibility would quite simply fall foul of the same weaknesses of the ILC's work in misunderstanding the nature of international institutions, including principally the EU in its external relations.

Shared responsibility has the potential for a number of different meanings in practice. This framework proposes it in the sense of joint and several responsibilities. This would allow responsibility to be established and claims to be made. Those who had suffered a breach would be able to claim against any or all of the concerned entities.<sup>655</sup> This question of jurisdiction and the current inability to bring claims against institutions forms the basis of much of the critique of determining responsibility in favour of institutions; there is no forum where claims could be brought which would undermine one of the foundations of responsibility in terms of failing to provide anywhere that responsibility can be claimed and reparation can be made. Shared responsibility addresses the need to establish responsibility, while also respecting the institutional autonomy of concerned organisations. It is argued that the need to maintain this balance simply reinforces the difficulties surrounding international action in terms of the extent of its interdependence. In ensuring responsibility on the part of all entities, respect is paid to the autonomy of all involved actors.

While shared responsibility addresses some of the difficulties of responsibility in terms of recognising the need for a form of redress for individuals, whilst also respecting the autonomy of institutions, there are a number of problems with this approach. It gives rise to a number of procedural questions, such as how to address the division of responsibility and how responsible entities are able to go about claiming back costs from other actors. This is beyond the scope of this thesis, but needs to be acknowledged.

While, theoretically, the alternative approach seems to provide some solutions to the problems seen in the ARIO, and the law of responsibility as a whole, in order to consider

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<sup>655</sup> See, for example, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, No.17 ITLOS, 1 February 2011 at para.201.

the benefits of this approach, the framework must be considered in practice. An understanding must be had of the way in which this approach provides a preferable system to the traditional system of responsibility developed within the ARIO. It is also worth considering that having such a flexible framework would enable the division of responsibility and the recognition that different actors may incur different responsibilities. If a wrong has occurred it may be that it arises as a breach in different ways for different actors.

### **8.3. The Framework in Practice.**

This framework is by no means a complete solution but it is proposed with the aim that it may improve the current system. A core aspect to this chapter is the consideration of whether this system does actually improve upon the difficulties seen with the application of the ARIO to the European Union. In order to consider this, the framework will now be examined in practice using two examples. These examples must be hypothetical as there have not, as yet, been any actual claims of responsibility against the EU. In order to make the examples plausible, real claims of responsibility made in relation to other international organisations will be used as cases in which potential Union involvement might also be plausible. The first of these examples will be the *Nuhanović* and *Mustafić* cases (Dutchbat cases) that appeared before courts in The Hague.<sup>656</sup> The second example involves a Council of Europe report on the tragic death at sea of a number of persons attempting to flee Libya during the 2011 conflict. Both of these will be considered as though the EU were involved in the breach of international law. The real circumstances will be outlined, followed by the way in which the EU could have been involved. These new circumstances will then be considered in light of the framework proposed to show how it will work in practice.

#### **8.3.1. Example One: Nuhanović and Mustafić v the Netherlands.**

These cases dealt with claims against the Netherlands by family members of individuals who were expelled from the Srebrenica compound being protected by Dutch forces in the UNPROFOR mission. The cases concerned the deaths of three Bosnian-Muslim men who had been killed after being expelled from the UNPROFOR facilities in Srebrenica. The Court of Appeal in The Hague overturned the decisions of the Courts at First Instance and found the Dutch State responsible for their deaths due to the Dutch peacekeepers that had

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<sup>656</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672, *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011.

expelled them from the compound. The Court of Appeal, and later the Supreme Court, determined attribution by using the 'effective control' standard contained in Article 7 of the ARIO. In applying this standard the Courts established that the conduct of the peacekeepers could be considered as action attributable to the Dutch State rather than to the UN. It considered that usually action would be attributable to the UN in such circumstances, as it would have effective control. There was recognition that there had been a changing point where control began to be lost by the UN and taken by the Netherlands. In interpreting and applying the principles, the Courts did not rule out multiple attribution of responsibility but in spite of the number of different actors involved, this was not applied here. The focus of responsibility in this case law remained in a singular way, with a focus only on the actions of a single actor. The Courts sought to discuss the effective control test and whether it could be satisfied in relation to individual actors involved, rather than considering the complete circumstances and all of the entities involved.

With the *Nuhanović* and *Mustafić* cases, there was an acceptance that a wrong had been committed and the determination of this would ensure responsibility for that wrong. The determination of responsibility and assurance that this would lie somewhere is significant. The main difficulty in these cases was always attribution and determining where responsibility lay. The initial finding was that responsibility could be attributed to the UN, while the more recent findings before the Court of Appeal and Supreme Court, which relied upon Article 7 of the ARIO, considered responsibility to lie with the Netherlands.<sup>657</sup> There was no question surrounding the identification of a breach in either of these cases, the central question in both surrounded attribution and being able to establish responsibility through establishing the responsibility of a particular actor.

It is possible to conceive of a hypothetical Union action in similar circumstances. This would be a Union military mission acting under the auspices of a United Nations Security Council Resolution drawing on the logistical support of Member States. As a result, it could be considered that this responsibility may lie with the Union, with the United Nations or even with the Member State that has provided the troops accused of having committed the wrongful conduct in question, or perhaps to any number of them in combination. The wrong in this case was committed by Dutch troops that were a part of the UN action. If we contemplate a Union mission which would draw on the troops of Member States and which, under similar circumstances, would be acting under a UN mandate, then the

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<sup>657</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672 and *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011.

involvement of the EU within this type of mission can be considered. This would then raise, predominantly, the same difficulties as those raised in the *Nuhanović* cases, in terms of the interactions that exist. The example considers the situation if the Dutch troops involved in expelling people from Srebrenica had in fact been acting within a Union mission that had launched to support the UN action. The question of responsibility would then not only involve the Netherlands and the UN, as it did in the actual case, but also the EU. As has been shown in earlier chapters, there are a number of difficulties with applying the principles drafted in ARIO to this situation and it would only be more difficult with involvement of the Union.

#### ***8.3.1.1. Applying the Framework of Responsibility: a Breach of International Law?***

The initial aspect of the framework is that of identifying a breach of international law. When considering an EU mission protecting the Srebrenica compound, if a wrong is committed by a member of the military of an EU Member State, then under the new framework responsibility would exist as a result of the breach. When considering the actions taken in the Dutchbat cases, the Court determined that there had been wrongful conduct. The unusual aspect of the Court's reasoning was that it turned to Bosnian law rather than international law in order to determine the expulsion of these individuals from the compound as unlawful. This led to a confused approach towards responsibility and any framework would need to determine this by reference to international norms. Having undertaken this reasoning, it is possible to consider them to be wrongful under international law, for example Articles 2 and 3 ECHR. Any action committed by personnel of a Member State of the EU when acting under a Union mandate would produce similar conclusions. To expel them from the compound where they would face certain death and inhumane treatment would certainly be a breach of international norms. A breach would consequently be definitively established, satisfying the aspect to the framework and the next question would be where this responsibility lay. The following question on determining where action lies is where the real difficulty lies and where the framework needs to improve on the current system.

#### ***8.3.1.2. Applying the Framework of Responsibility: Nexus of Institutional Framework and a Rebuttable Presumption***

If the wrong has been committed at the level of the mission and does not exist within the mandate, then responsibility lies somewhere at the level of the EU, or the Member State from which the troops were drawn. Within this framework, this would result in the presumption of responsibility of the EU and the Netherlands, unless either sought to rebut

this presumption. This responsibility would be shared between the actors involved. When establishing responsibility on the part of the Netherlands in the *Nuhanović* and *Mustafić* cases, the Court of Appeal in The Hague took into account the fact that there had been a transfer of authority and the UN was no longer exercising complete control over the troops. In rebutting a presumption of responsibility, the Union could use similar logic. It should be understood that the situations under which military missions operate often change quickly and substantially on the ground when they are operating. In the *Nuhanović* and *Mustafić* case law, this was seen with the greater involvement of the Netherlands in direct instructions to their troops on the ground. This was partly as a result of the decision to begin removing the troops from the area. As a result, the Netherlands had to be involved in order to begin giving instructions as to when troops would be pulled out. There was a cross over between the time when the UN was solely in charge and when the Netherlands began to become more involved.

These changes are worth considering. It is also worth considering that the relationship between the Union and its Member States and the staff seconded to work under the auspices of an EU mission is determined only by reference to the documents that have created the mission and which determine its mandate. It is these changes, in addition to the different way in which an EU military mission may be constituted, that require the internal provisions of the Union to be referred to. If, through reference to its internal establishment of the mission and the capacities of the mission, the Union can factually show that the actions carried out can, exceptionally, be considered that solely of a Member State, such as the Netherlands, then this determination is sufficient to shift responsibility. If it were, for example, the same situation as that with Dutchbat, then the Union could make reference to the mandate of the mission as well as internal reports on the status of the mission to show the way in which communications changed. If it could factually show that actions did not belong to the Union but to another entity then it would be able to rebut this responsibility.

The difficult, and uncertain, aspect of this framework would be if all concerned actors sought to rebut responsibility. When considering the little practice that does exist in relation to the EU, this is unlikely to be an issue. There is a tendency on the part of the Union to accept its share of responsibility.<sup>658</sup> In the event that there were to be an attempt on the part of all actors to rebut responsibility, it is important to consider how a situation

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<sup>658</sup> European Communities Second Oral Statement, para.148 as cited in the WTO Panel Report, *European Communities- Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs- Complaint by the United States ('EC-Trademarks and Geographical Indications (US)')* WT/DS174/R, adopted on 15 March 2005 at para.7.339.



such as these would be addressed. Having determined actors as being involved in a breach, the burden would lie with the actor concerned in rebutting this presumption. In putting the burden onto the actors concerned it is, initially, argued that this would reduce the potential for all concerned actors to rebut a presumption. The Court, before which the case was being heard, furthermore, would require a high level of proof in order to make a rebuttal. The purpose in having a rebuttable presumption would be to ensure the focus remained on determining responsibility. In requiring a high standard of proof to allow a rebuttal, this assurance would be maintained. In the event that all actors were able to rebut a presumption, the question would have to be raised as to whether the factual circumstances had been fully understood when considering the nexus of action.

It may be that the Union was somewhat involved in action but did not act alone. In fact, a culmination of acts could be seen to have resulted in a wrong. If this were the case, then it would be possible for the Union to partially rebut responsibility and for a degree of shared responsibility to occur. If we take the Dutchbat situation, considering an EU involvement, once again, it may be that from the mandate and the reports it was possible to show that both the EU and a Member State had the power to prevent a wrong from occurring. Both could have given orders not to expel individuals from the compound. Both could have acted to keep people within this area. If this were the case and, again, the Union could factually show the involvement of another actor in its own right, rather than just acting to implement and act on Union norms and policy, then responsibility can be found to be shared between the Union and this Member State.

It may also be the case that the determination of the involved actors in the breach through the nexus of action could determine different responsibilities on the part of the different involved actors. With regards to the Dutchbat situation, it may be that the main decision to expel individuals had come from either the EU, *or* a Member State, but that other involved actors had the power to prevent the wrong from occurring. This may in fact lead to the establishment of a different wrong for which one, or several, of the actors involved may incur responsibility.

It is also important, however, that this is a rebuttable presumption and not simply a rule of absolute liability. Some have considered that a rule of absolute liability could have been beneficial. This was the view of the Court in the *Nuhanović* and *Mustafić* cases before the District Court of The Hague in 2008:

“All this means that the acts or omissions Dutchbat is reproached for should be assessed as actions of a contingent of troops made available to the United Nations for the benefit of the UNPROFOR mission [and][...] with reference to the legal

framework for assessment [...] these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations.<sup>659</sup>

The Court made this consideration in light of the 'direction and control' test. It was considered that when forces are made available to the United Nations, they are placed under the direction and control of the UN and as a result any actions should be considered to be those of the UN. It should incur responsibility for the actions of troops under its command strictly and absolutely. While this approach has been argued by some, it is worth considering that this is a decision of a domestic court, but it is also a decision that has since been overturned in both the Court of Appeal and the Supreme Court.<sup>660</sup> When considering these decisions, together with international jurisprudence, strict liability is not something that has been accepted as it offends the basis of legal personality of such actors. Any ideas of strict liability are not ones that are promoted within this framework.

This decision is premised on the idea that responsibility flows from legal personality. To respect this legal personality, actions of the Union should be respected as those of the Union and consequently any breaches should mean the responsibility of the Union. This has resulted in the argument for the approach of absolute liability. There are a number of difficulties with this, however, not least the fact that the complex identity of the Union means that its actions are always entirely its own with nothing to do with its Member States. There have been discussions on whether the state actors that implement and fulfil EU obligations should be considered to be organs or agents of the Union and as a result for all of their actions to be considered to be those of the EU. This fails to recognise the control that is maintained by states over these entities. They are never going to lose their status as entities of the state. To attempt to give them this status means that the real nature of action is not being understood. It is possible that these 'borrowed' organs, agents and other entities may well, on occasion, act on behalf of the state and not the EU. As a result, it is important to retain the possibility that responsibility will be that of the state. Within this framework and in relation to the responsibility of institutions, this will be something that will be secondary and will only arise if it can be shown as a matter of fact that a state was involved. State responsibility will remain important in a pragmatic sense, as it may be the only way in which reparation can be sought. The current lack of a judicial arena within

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<sup>659</sup> *Nuhanović v. The Netherlands* Case number 265618/ HA ZA 06-1672 and *Mustafić v Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011, at paras.4.10-4.11.

<sup>660</sup> *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6th September 2013, Supreme Court.

which to challenge the responsibility of the Union means that many may choose to continue to challenge states where possible.

### **8.3.2. Example Two: Libya and the Council of Europe.**

Another example that can be utilised in terms of the external actions of the EU is the EUFOR Libya mission that was mandated by Council Decision 2011/210/CFSP but never launched. This example highlights, in particular, the significance of the idea of shared responsibility. Although unimplemented, the mission's foundations were determined and it was ready to be launched and provide humanitarian assistance should a request have been made by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA).<sup>661</sup> In the end no request was ever made. It is entirely plausible that the Union could have been involved in this mission. This would have involved coordination and interaction between the EU, Member States, non-Member States, the UN and NATO; the latter of which took a leading role in coordinating actions on the ground.

In April 2012 the Council of Europe published a report that was concerned with the number of people that had died while attempting to cross the Mediterranean while fleeing from the conflict in Libya.<sup>662</sup> There were significant numbers of people attempting to make this crossing in order to escape conflicts occurring during the Arab Spring. At least 1500 people were known to have died while trying to cross the sea, which made it one of the deadliest periods for so-called "boat people" in this area.<sup>663</sup> Most particularly, the report focused upon a boat that had left Libya with seventy-two people on board, only to drift back to Libya two weeks later with only nine survivors.<sup>664</sup> The vessel made a number of distress calls, one of which is known to have been logged by the Italian Maritime Rescue Coordination Centre. Contact was also made with a number of fishing vessels, which refused to provide assistance, a helicopter that dropped water onto the boat but did not return and a large military vessel, which was in close contact with the boat, but which ignored distress calls.

The two main states involved here, Libya and Italy, failed to launch any form of search and rescue mission, and neither did NATO respond to any distress calls, despite military

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<sup>661</sup> Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) OJ 5.4.2011 L 89/17.

<sup>662</sup> Council of Europe Report, 'Lives lost in the Mediterranean', Committee on Migration, Refugees and Displaced Person, Rapporteur T.Strik, Doc.12895 5<sup>th</sup> April 2012.

<sup>663</sup> *Ibid.*

<sup>664</sup> *Ibid.*

vessels having been in close proximity to the boat. NATO and the states involved in intervention in Libya failed to anticipate and respond to the exodus of asylum seekers and refugees. The failure of military actors, in particular the military boat and the helicopter that came into contact with the boat, raises questions as to who was in control and who therefore should take responsibility for these actions.

If we contemplate the EUFOR Libya mission having been launched, it is entirely plausible to consider potential Union involvement. The international action of the EU frequently depends upon interaction, both in terms of Member State involvement in implementing actions of the Union but also in terms of the involvement of other international actors, such as the UN or NATO. The result of this is that a number of different actors may be involved in responsibility terms. This may be in terms of several actors being involved in a single breach, or several actors committing various different breaches, any one of which may have been the cause of damage. The EUFOR Libya mission is an example of the type of action that the Union is increasingly involved with at the international level.

#### ***8.3.2.1. Applying the Framework of Responsibility: a Breach of International Law?***

The initial step with questioning the responsibility for actions would be the identification of a breach. From the Council of Europe report on these events it seems as if this would be possible. The report identified a number of obligations that would have required assistance to have been given to the boat, for example in UNCLOS on the duty to render assistance,<sup>665</sup> which is further elaborated upon in the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Search and Rescue (SAR).<sup>666</sup> These instruments together develop a duty to render assistance that should be fulfilled irrespective of nationality, status or circumstances of the persons in distress. The report engaged in discussions on the various obligations of the different coastal states involved, as well as failures and potential failures of states, as well as the UN, NATO and flag states of the vessels involved. The involvement of the EU in this situation would raise the question of its obligations in this scenario. An interesting aspect to this scenario is that UNCLOS is one of the multilateral conventions to which the EU is a party and, consequently, it has undertaken the obligations contained therein. As a result it would be bound by the duties to render assistance that are contained within UNCLOS.

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<sup>665</sup> Article 98 UNCLOS.

<sup>666</sup> International Convention on Maritime Search and Rescue (SAR) 1985 1405 UNTS 118, Articles 4.5.4 and 6.7; 1974 International Convention for the Safety of Life at Sea (SOLAS) 1980 UNTS 276, Regulation 10, Chapter V.

### **8.3.2.2. Applying the Framework of Responsibility: Nexus of Institutional Framework and a Rebuttable Presumption**

Once it has been established that there has been a breach of international law, then the next step in the framework is to examine which actors were involved in a breach. This is where the nexus of involvement would be examined. With the above situation, for example, the UN, NATO, the EU, Italy and the flag states of the involved ships would be involved somehow. In applying the framework to these circumstances, there are two states and three institutional frameworks that are potentially involved here: Libya, Italy, the EU, the UN and NATO.

The Council of Europe report states that it was not possible to establish precisely who had acted in any of the circumstances, nor yet which of these particular actions, if any specifically, could be seen as having been *the* act that resulted in the deaths of the individuals in the boat. There were a number of different actions, each of which could have *prevented* the deaths, but which to designate as the precise one at fault was not possible. In circumstances such as these, the framework would consider the fact that there has been a wrong, or indeed wrongs, and identify the involved entities. The framework would presume responsibility of all actors, as all three institutional frameworks along with both states would have been potentially involved.

Without a sufficient amount of information, which was not provided to the Rapporteur, it is difficult to come up with any definitive conclusions on who had committed various actions and therefore who should incur responsibility. The presumption of responsibility of all actors, however, shifts the burden to each of the actors concerned to rebut the presumption. This has the potential to mean a higher degree of honesty and transparency on the circumstances that have occurred. This could then address some of the main difficulties seen in the present system of responsibility, in the way that attribution of action provides the basis around which the law of responsibility is articulated. The failure to determine responsibility as a result of difficulty in determining who had committed a singular action would be addressed.

A number of interesting findings and statements are made within the report, however, that are worth considering. It was noted, for example, that when the military vessel was sighted close to the boat, this was after NATO had taken sole command of the international

military effort.<sup>667</sup> Although NATO did not answer queries by the Rapporteur on this subject, this may contribute towards any attempt to establish *who* was in command or control of the vessel. Further consideration is made of the question of control, however, with the explicit question of whether NATO incurs responsibility. The Rapporteur concludes that without further information on the boat itself, where it came from, and the relationship between NATO and national command, it is not possible to make any definitive conclusions.

The most interesting statements and conclusions of the Rapporteur, Tineke Strik, come in her discussion on ‘Who is responsible?’ under the heading “A collective failure”.<sup>668</sup> A very pragmatic approach is taken towards this incident, with Strik considering that failures existed at every level and by every actor involved in the process.<sup>669</sup> It seems that in gathering information and in writing this report, Strik came across the very difficulty that plagues many attempts to explore international responsibility; international action is now so intertwined that it is difficult to term any single actor as possessing full responsibility.

“There was a collective failure of NATO, the United Nations and individual States in planning the Libya military operations and preparing for an expected exodus by sea. There was a failure in coordinating the specific rescue of the boat, despite the fact that a distress signal had been sent and coordinates of the boat had been logged.”<sup>670</sup>

It can be seen that a number of facts are unknown here and that the Rapporteur is keen to fill in a number of gaps that exist.<sup>671</sup> It could be argued by some that if facts were known then perhaps the questions of who acted at various times may be capable of being answered. The Rapporteur does seem to emphasise, however, the way in which the deaths of the people on the boat seemed to result from a collection of actions, rather than one simple event, making it even harder to distinguish who was responsible for the deaths of the Libyan refugees. Had the Union also been involved in this action, it can be considered that further actions may have been carried out, or significantly not carried out, that may have only added to layers of actions that resulted in the deaths of these individuals.

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<sup>667</sup> Council of Europe Report, ‘Lives lost in the Mediterranean’, Committee on Migration, Refugees and Displaced Person, Rapporteur T.Strik, Doc.12895 5<sup>th</sup> April 2012, at p.18, para.98.

<sup>668</sup> Council of Europe Report, ‘Lives lost in the Mediterranean’, Committee on Migration, Refugees and Displaced Person, Rapporteur T.Strik, Doc.12895 5<sup>th</sup> April 2012, at p.22, paras.133-136.

<sup>669</sup> Council of Europe Report, ‘Lives lost in the Mediterranean’, Committee on Migration, Refugees and Displaced Person, Rapporteur T.Strik, Doc.12895 5<sup>th</sup> April 2012, at p.22, para.133.

<sup>670</sup> *Ibid.*

<sup>671</sup> Council of Europe Report, ‘Lives lost in the Mediterranean’, Committee on Migration, Refugees and Displaced Person, Rapporteur T.Strik, Doc.12895 5<sup>th</sup> April 2012, at p.24, para.154.

The recognition of collective responsibility addresses two main difficulties highlighted by this incident; there is the obvious problem of establishing who precisely has acted, but also the Union's international role and layered structure provides a particular challenge. Collective responsibility enables responsibility to be determined without this uncertainty causing a block. There is, furthermore, the difficulty with these situations, where there is a combination of different actions and it cannot be determined which action has resulted in the wrong in question. If a more coherent principle of shared responsibility can be developed, then in these circumstances responsibility can be established on the part of all actors who are involved in the situation. In this a case a number of key elements would be established, for example, there would be a finding of responsibility for a breach of international law.

The agreement establishing EUFOR Libya stated this mission as one being carried out in close cooperation with the OCHA, as the body coordinating the response, and other actors such as NATO.<sup>672</sup> This shows the mission as one that must act in coordination with other international entities, but no real hierarchy is established, beyond the OCHA coordinating action. Any action of the EUFOR Libya would, consequently, be interlinked with the actions of NATO and involved states, acting under the coordination of the UN. The Council is established as responsible for the political control and strategic direction of EUFOR Libya.<sup>673</sup> With action such as that in the Council of Europe report, the crucial aspect was the number of different potential breaches by different actors. This would be exactly the same if the Union had been involved, but simply adding another layer of complexity into the mission. The core aspect to this nexus would be establishing the involvement of the Union in not having fulfilled its obligations, as well as other actors, such as NATO, the UN, Italy and Libya. This nexus would determine that all of these actors were involved and they would all consequently incur some form of responsibility; it is shared between them. An attempt would have to be made to determine more facts but the involvement of the Union as an institutional framework, as well as NATO and the UN would create a rebuttable presumption on these institutional frameworks. It would be possible for the Union to rebut this factually by showing that it was not involved in the circumstances that resulted in the deaths of the individuals on the boat.

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<sup>672</sup> Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) OJ 5.4.2011 L 89/17, Article 8.

<sup>673</sup> Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) OJ 5.4.2011 L 89/17, Article 5.

It would also be entirely possible that different entities had committed different breaches, all of which amounted to the final result of the boat sinking. It may be, for example, that it was a NATO ship that heard a distress call and failed to respond, in combination with the Italian authorities receiving distress signals that were not answered and Union involvement with helicopters and vessels that refused to provide assistance. In this situation, utilising the framework, it may be the case that the nexus would initially determine responsibility on the part of all involved actors, only then for the different entities to rebut and determine the different responsibilities between themselves.

The central nature of this thesis, and indeed international law, requires there to be responsibility for any breach of international law. As a result there must always be some finding of responsibility and the difficulty in determining who has acted is really a poor reason for failing to determine responsibility. In ensuring a presumption of responsibility in these particular circumstances, this framework would ensure that this important nature of responsibility was respected. In this sense, a presumption would benefit the nature of the EU as an international actor and its attempts to develop this role, but also international law and the law of responsibility. In terms of this example, it is entirely possible that the Union may be able to rebut a presumption by making reference to internal documents or norms that show the creation or the workings of the concerned mission to be able to show that, factually, there had been no Union involvement. This would need to be done on the basis of internal provisions of the Union, however. There would need to be a factual determination that the EU had not been involved as had been established under the factual nexus.

#### **8.4. Conclusion.**

Responsibility exists as a central idea in the international system: the very corollary of international law.<sup>674</sup> It is fundamental to have a system of responsibility at the international level to ensure limits on the exercise of power and consequences for any abuse of power. This is crucial. It is, furthermore, fundamental that such a system of responsibility works and is effective and this simply cannot be the case within the realms of the ARIO. The thesis has sought to consider the individual nature of the EU and has argued that it is this distinct identity that means that the ARIO struggle when faced with the Union. The weaknesses of the work of the ILC, when considering the Union continually

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<sup>674</sup> A.Pellet, 'The Definition of Responsibility in International Law', in J.Crawford, A.Pellet and S.Olleson (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) p.3 at p.3



return to its lack of consideration of the distinct nature of the EU. The ILC sought to set down and develop necessary principles of responsibility but without the foundation of the understanding of the way in which the international legal system has changed and the role of the EU within this distinct system.

With these difficulties in mind, it became clear that the ILC had, understandably, missed a stage in the development of the law; the principles of responsibility were developed without the foundation of an understanding of the changed, and changing, international system and the role of the EU within this. It is for this very reason that the proposition for an alternative approach begins in the way that it does, with a clear aim for reducing the law in this area.

This proposed alternative is not put forward as the solution to the problem outlined earlier, but to put it forward as a preferred approach. It is proposed as a way in which responsibility could be ensured and addressed while allowing the law to evolve in a manner that would mean that it would respond to the actors to whom it is addressed. This would, hopefully, result in a system of responsibility that would actually address the actions of the EU, and other entities, at the international level. With responsibility having such a central role within the international legal system, it is crucial that it works and responds to all the actors within the system. The thesis has argued that this is a changing system with distinct and unique actors within it, not least the EU. To reduce the law and enable it to respond to these distinct actors will not only benefit the law of responsibility but would potentially enable a broader recognition of the individual nature of such actors within the international legal system and further enable their development.

This chapter began with the premise that an alternative to the ARIO, and in particular towards attribution, needed to be developed. The thesis has critiqued the system of responsibility as it stands and proposed scaling back this framework to allow the law to develop and in particular seeks to change the approach towards attribution. It attempts to develop an approach that responds to the interactive nature of the international actors within the global system. The only way that is perceived as being capable of addressing this interactive nature is to have a rebuttable presumption on the part of anyone involved in a breach of international law. This would allow any involved entity to be held responsible. It would also move away from the singular nature of responsibility and begin to recognise the interactive and overlapping nature of international action. This recognises the difficulties that have been addressed within the thesis in terms of international action no longer being as individual as it once was but now being much more based upon collective action. The possibility would exist to prove no responsibility should exist and

this would allow inaccurate findings of responsibility to be corrected. This is only appropriate in order to address and respect the constitutional integrity of the actors concerned; it would be inappropriate for responsibility to be placed on actors who had done no wrong.

There remain pragmatic difficulties with any question of responsibility with the European Union, such as the lack of a judicial arena within which claims against the Union can be made. Often it may be the case that it will be more productive for individuals to make claims against states due to the availability of judicial fora with appropriate jurisdiction and would, currently, be more likely to result in some form of reparation for the harm suffered. The principle of establishing responsibility for breaches of international law, however, is a fundamental one that needs to exist within the international legal system. The pragmatic difficulties of implementing this principle need to be recognised but this is beyond the boundaries of this thesis.

It may appear as if in some ways this framework does not differ so substantially to that proposed within the ARIO. The framework proposes establishing who a particular action belonged to and allocating responsibility accordingly. It could be argued perhaps, that this is not so dissimilar to the principle of attribution and the various tests of control that have been discussed. The crucial difference is the flexibility and openness that this framework seeks to retain. At no point is this approach proposed as a complete and flawless solution. The work of the ILC on the ARIO has highlighted substantial weaknesses within the overall law of responsibility and these are difficulties that go to the core of the system of international law. The result of this is that when attempting to work within the current framework, a flawless solution cannot be developed.

The proposed alternative attempts to remain within the boundaries of the international system, even in spite of considering these boundaries to have dictated the difficulties within the law of responsibility. Having done so, the proposed system does remain somewhat radical in proposing a substantially different role for the principle of attribution. Within the law of state responsibility the principle of attribution has arguably gained the status of customary international law. To propose this shift for attribution is not done lightly. It is argued that having considered there to be a fundamental weakness within the law of responsibility, any lesser approach would not address the weaknesses identified and not respond to the critique proposed within the thesis. Even this proposed significant change would not completely address these problems and would have its own weaknesses. What is hoped for by proposing this approach is a preferable idea, rather than proposing a complete solution.

To solve the problems within the law of responsibility entirely would require a greater shift within the international system that will begin to develop a more comprehensive approach to non-state actors at the global level. To do so, however, would fail to recognise the nature of the system within which we are working. It is preferable to work within the system that exists, and develop something plausible, and to openly acknowledge these struggles with the law of responsibility in order to minimise the problems that may arise. The move towards this framework may begin this process by allowing more development within the law to encourage a system to evolve that may begin to address these issues.

## 9. Conclusion.

The dynamic international role of the Union exists in a fundamentally different way to the activities of other international actors. This distinct role poses a significant challenge to the attempt to develop the law of responsibility and as the EU evolves, the need for this development in the law only increases. As the law currently stands, responsibility does not sufficiently address the actions of the EU. This study was shaped by the importance of responsibility within the international legal system and it has consistently argued for the need to ensure this principle. A strong rule of law is fundamental for the international legal system to exist as a developed and effective legal system. The inability of the law of responsibility to sufficiently account for some international actors, in particular one as active as the EU, is currently jeopardising the foundational role of responsibility at the international level.

As the EU continues to increase its activities beyond its borders, then putting the principle of responsibility into practice will become increasingly important. The EU may possess checks addressing the internal actions of the Union but the lack of engagement with understanding the international actions of the Union potentially leaves the EU continually expanding with no external checks. As this research has shown, this will only serve to undermine the international legal system and also the role of the EU within this system. The Union has itself recognised the need to work within the bounds of the international legal system and to take responsibility for its global actions.<sup>675</sup> This acceptance is a positive move from the Union in terms of enabling the application of the law of responsibility, but also in developing an accepted significant role at the international level. The only way in which the law of responsibility will be fully developed and capable of understanding the dynamic and individual actions of the EU, however, is by developing an understanding of the EU in its own right. These initial concerns on the difficulties of the principles of responsibility addressing the EU are reflected in the research question that the thesis sought to address. It questioned the extent to which international principles of responsibility can apply to the EU and ensure the application of the law of responsibility.

In spite of the importance of the principle of responsibility and the need for it to be further developed, there were substantial difficulties in enabling this development. The law of responsibility was, in fact, flawed from its very beginnings. The original development of responsibility as a law of state responsibility was a logical approach within an emerging

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<sup>675</sup> 'A Secure Europe in a Better World', European Security Strategy, Brussels, 12 December 2003, at p.1.

legal system grounded in ideas of bilateral state cooperation. This view quickly became out dated, however, as the international system grew to encompass further international actors, such as the European Union. Even when considering the original development of the law of state responsibility, the creation of the Articles on the Responsibility of States for Internationally Wrongful Acts were limited and significant flaws were left within these principles, predominantly the limited way in which this 'objective' system of responsibility was pursued. The focus of the law around the principle of attribution showed this particular difficulty. In order to develop an 'objective' system of responsibility, the ILC removed any sort of subjective elements, such as fault, and instead created a focus on the idea of attribution. This construction of responsibility had severe limitations and seemed to be developed as a broad fix to the question of how to construct an objective system that moved beyond responsibility as regulating the relationships between states. As a result, there were weaknesses within the very foundational idea of responsibility. While these weaknesses initially had little pragmatic effect in terms of state responsibility, the result of such limitations when considering the expansion of the law is harm to the overall effectiveness of this fundamental principle. The way in which the European Union, in particular, simply by reason of its role within the international legal system, poses a challenge in terms of the law of responsibility was focused upon by the first part of this thesis. This first part, therefore, began to address my research question, which asked:

**To what extent is the emerging legal regime on responsibility able to acknowledge the complex nature of the European Union and the distinct relations it has with Member States?**

The first part of the thesis addressed the theoretical areas in the research question. The reason that the Union highlights the difficulties in the law of responsibility is twofold. There is first of all the fact that these weaknesses exist in the first place and the fact that they arise from the grounding of the law of responsibility in the international legal system's focus around the state as a primary actor. There is, secondly, the different nature of the Union's international action and the significant challenge posed by this substantially different actor when faced with this limited system. These two core aspects were initially considered within the thesis in order to understand that the difficulties that the EU poses for the rules on responsibility have been heavily entrenched within the foundations of the international system. It is important to understand what the difficulties posed by the Union were, but also the problems in attempting to resolve any of these issues.

These initial considerations of the theoretical ways in which the weaknesses in the law of responsibility are exposed by the nature of the EU's international action are addressed

across three chapters. Chapter two discussed the basis of the law of responsibility, arguing that its strong foundations within the limitations of the international legal system inevitably meant that the expansion of this law beyond its origins of state responsibility was going to be a struggle. The chapter argued that there were always problems at the very foundations of the law of responsibility that the actions of the Union would so prominently expose and exacerbate. The chapter explains the weaknesses that already existed in the law of responsibility and how such weaknesses then formed the foundation for the difficulties in the expansion of the responsibility project to international organisations. The research question asks the extent to which the EU exposes problems within the law of responsibility in relation to institutions; this chapter considers that there were in fact problems within this area to be exposed.

Chapter three then considered the difficulties at the basis of the law of responsibility that pose such a difficulty; the system of international law struggles when attempting to address international actors other than states. It is the tension that exists within the foundation of the international legal system in struggling in its attempts to move beyond a state-based system that has shaped and distorted the development of the law of responsibility. This chapter continued to build on the first substantive chapter by examining the identity of international organisations within the international legal system and the fundamental issues with the international system accommodating these actors. These first two substantive chapters therefore laid the foundations in addressing the research question. The difficulties with the law of responsibility are, however, further exacerbated when considering the external activities of the Union, which is the subject of the chapter four. The three chapters together addressed the underlying issues in the research question; the individuality of the EU at the international level would always have been a struggle for a set of norms stunted by foundations grounded in the tension at the core of the international legal system. Any system of responsibility grounded within the current international legal framework would have been unable to address the distinct nature of the European Union.

Once the thesis had considered the difficulties in the foundations of responsibility, as well as its potential application to the Union, the thesis took a slightly more practical approach in attempting to consider the way in which the particular principles that have been drafted *actually* struggle when faced with the EU. The initial part may have shown that theoretical difficulties were inevitable; the second part argued that these problems are not limited to the theoretical. The thesis focused on the principle of attribution, in particular, to show the particular challenges, both to the law of responsibility and to the difficulties in applying this law to the EU.

Chapter five argued that requiring a link between wrong and perpetrator in the law of responsibility was necessary, particularly in a system constituted by collective actors. The approach towards attribution and the normative status of this principle is flawed when addressing the activities of the European Union. The approach towards attribution shows a lack of consideration of the idea of moral agency that is necessary in developing workable principles of responsibility, particularly in response to collective actors.

In addressing collective actors, either states or international organisations, or the EU, the principles of attribution remain based around the idea that action should, and can, be established on the part of a single actor in order to establish responsibility. This attempt at such a singular idea of responsibility does not fully consider the way in which this singular link is to be made with collective actors and consequently does not respond to the activities of the Union. There may have been an attempt to address the individuality of the actors to which the ARIO are addressed with references to the rules of the organisation and the attempt at the development of a *lex specialis* article, but these references do not go any way toward enabling sufficient consideration to be made of the EU's international activities. The attempts at recognising the individual nature of the EU's action in no way address the underlying idea of responsibility that action needs to be identified as that of a singular actor. While this singular identification of a responsible actor remains a requirement for responsibility, the law will be limited in its development and certainly will struggle in response to the EU.

Chapter six then took these principles and analysed the extent to which they apply to EU crisis management operations. It argues that the weaknesses identified in the basic nature of the principles in chapter five can then be seen in practice with crisis management operations. There are substantial inadequacies in these principles and in the basic approach to the responsibility of the EU.

The individuality of the EU and its relationship with the international system poses a challenge like no other to these rules that have been so grounded within the limitations in the international legal system. The weaknesses that exist within the law of responsibility are pushed to the limit with this different international actor. The initial part of the thesis sought to get to the core of what these difficulties are, while the second part, in considering the articles on attribution and then the references to 'the rules of the organisation' and the *lex specialis* article has argued that this difficulty goes beyond the theoretical. These principles cannot address the EU and as it continues to expand its activities further, it only serves to further challenge the articles drafted. The very nature of the EU and its international activities show substantial difficulties with the law of

responsibility by the exacerbation of issues already within the foundations of responsibility. The EU poses a substantial difficulty to the law of responsibility. The principles of responsibility, as they stand, cannot address the EU, but the bigger issue posed is the extent to which this inability to address the EU shows the ARIO as being inadequate; they cannot fully and properly apply to one of the most pertinent actors to which they would be relevant. The EU shows the ARIO, and consequently the overall law of responsibility, as having substantial weaknesses both in the very foundations of the law but also in their failure to work in practice.

The initial part of the thesis, in particular chapter four, critiqued the relationship between the EU and the international legal system. Chapter four argued that it is important to view the international legal system and the EU legal system, and to an extent, domestic legal systems, as existing in a symbiotic relationship. This relationship needs to be understood and rather than an attempt to determine actors as existing within a defined hierarchy, it is more accurate to understand them as existing in an interdependent relationship. It is this relationship that defines the international actions of the EU; the Union depends upon interaction and interdependence with other actors for its international activities. This relationship begins to show the tensions that exist with the Union as an international actor; it is a unique and autonomous legal order but is simultaneously an actor in the international system. The thesis argues that this tension not only exists, but actually it is the tension between the EU as a unique international actor and as an actor within the international legal system that defines the EU's international relationship and its external activities.

The discussion in chapter seven on the *lex specialis* principle took these considerations on the international identity of the EU to the practical level. Examining the tension that exists in the drafting of the *lex specialis* principle showed the way in which the EU exists around this tension when acting at the international level. There was an attempt to recognise the autonomy of the EU's norms and principles but the precise construction of a principle of *lex specialis* attempts to define these 'special regimes' as principles of international law. While recognising the individuality of the EU and the autonomy of its legal system, the ILC has attempted to bring its norms within some kind of framework or hierarchy of international principles, thus negating any understanding of the integrity of Union norms as solely norms within the EU legal order. The EU's international activities are defined by the interdependence that exists between it and international law and the debates surrounding the *lex specialis* principle show the problems that arise from this.



The final chapter of the thesis sought to conclude the research question. The previous chapters had demonstrated that the regime of responsibility was flawed from the outset when considering the European Union and that particular issues exist with the principles that have been drafted. Having identified such flaws, the final chapter sought to outline a preferred approach. As the thesis progressed, however, addressing the research question brought into question the extent to which it was possible to develop an alternative. The first part of the thesis had developed the argument that any system of responsibility within the current framework of international law would have suffered from flaws when faced with the European Union. The difficulties with the EU and the law of responsibility go so centrally to issues at the base of the law of responsibility, that questions arise as to whether it is plausible to develop an alternative within the framework of the current international system. The problems within the law of responsibility have arisen from development within an international legal system struggling to move beyond its foundations as being substantially oriented around the state. The nature of the EU as an international actor is shaped by a continual balance between an existence as an autonomous legal system and an actor within general international law that it exposes the weaknesses within the law of responsibility further than any other international actor. These are difficulties that cannot be solved without addressing the weaknesses and tensions within the core of the international legal system. In drawing this conclusion, the final chapter proposed an alternative approach that may consider some of the difficulties.

The approach proposed significantly scaling back the law of responsibility and it put forward an alternative to the principle of attribution. The approach focused on responsibility as a consequence for a breach of international law. Attribution would be replaced with a factual nexus determining which actors were involved in a breach of international law and a rebuttable presumption of responsibility on the part of any involved actors, thus allowing for shared responsibility. This approach is limited and has a number of flaws. This is inevitable, as the difficulties within the international legal system that are so central to the issues in responsibility will not have been addressed. It is argued, however, that it is preferable to the current system and that in providing this framework it may enable a more organic development of the law of responsibility. While the international legal system retains limited foundations and continues to develop with a tension between its basis and the actors that it addresses, the law of responsibility will continue to be flawed. If the EU is only continuing to expand in its international activities then, as it does, the relationship that defines its external activities will get ever more dynamic. The Union continues to push towards an independent existence but, as it does, it seemingly becomes ever more interlinked with international law and, ever more

dependent upon the actions of its Member States. The increased complexity of this relationship will continue to challenge the limited nature of international law, in particular the law of responsibility. With the central role of responsibility within the international legal system and the ever growing activities of the EU, the continued difficulties in these principles addressing these actions is concerning, for the status of the Union as an international actor but more so for the integrity of the international legal system.

### **9.1. Implications and further research.**

This thesis has provided a broad foundation to two main areas of law from which further work can be explored. The international role of the EU and the way in which this identity has grown is ripe for consideration as it is not a set area; this identity will only continue to change. It will, therefore, continue to form the basis of future research. It is this identity that affects the way in which the Union acts as well as what it is capable of doing. Any future research on international actions of the Union must have as its foundation further consideration of this identity.

Second of all, the law of responsibility remains an area for discussion. The precise consideration of how to determine the international responsibility of the EU is also an area that is only going to continue to expand. This thesis has continually recognised the basis of this discussion as, currently, largely theoretical; there has been little practical consideration of the EU breaching international principles. As the EU continues to expand, however, then this may become much more of a practical problem. This will inevitably raise further questions. While the thesis has questioned the application of the ARIO to the Union, the way the EU will respond in practice will only truly be seen when these situations arise.

One of the areas that may begin to show further concern and where the practical implications of the area of responsibility may begin to arise is through the accession of the EU to the European Convention on Human Rights. The case law involving the EU and breaches of convention rights has been a significant aspect of the work on the responsibility of the EU. The complexities arising out of the accession of the EU to the European Convention on Human Rights do not necessarily affect the rights that the EU considers itself to be bound by; the Union has already worked on incorporating rights within its legal order and utilised the Convention as one source for those rights. The bigger questions with the EU and the Convention are what the consequences of a breach would be; would a breach be that of the Union or of a Member State? The agreement made between the EU and the Council of Europe sought to establish the practical consequences

of a breach, namely when breaches will be examined in front of the Court of Justice of the European Union and when a case against the EU could be brought before the Court of Human Rights. One of the interesting aspects to the agreement made between the Union and the Council of Europe has been the co-respondent mechanism that has been proposed. This is the way in which the potential overlap between two judicial systems has been addressed and will give rise to further research.

While this is one example of the practical questions that may arise and provide the basis for further research, there are a number of others, in particular due to the growing actions of the Union in security and defence. The repercussions of actions in these areas provide an area for further consideration. The growth of the EU as an international actor has the potential for research in its own right. It is continuing to expand and the relationship it possesses with international law will only continue to change because the actions of the Union only continue to change. The international actions of the EU and the status of the EU as an international actor are ripe for further research.

There are also a number of broader areas that could be developed from this work. While this thesis has focused on the question of an entity beyond the state, it does raise questions of the way in which identities and relationships have changed generally at the international level. The basis of the thesis, in the international role of the EU, has begun to touch on the question of institutional relationships and the way in which these develop internationally and the impact that this has. This is an area that is only going to continue to grow and expand. In addition to this, the nature of the state is one that has also evolved. The state now exists in a number of ways. The existence and acknowledgment of failing and failed states, as well as emerging states, poses questions as to the role and place that these entities have internationally. The changing nature of the state is a topic that is ripe for further research and interest.

The thesis has provided a firm foundation for a number of areas of research. Responsibility is not a settled area with determined principles and yet it is an area where principles will be needed. The foundations of responsibility have still not been fully addressed in scholarship or in practice and the difficulties posed by the issues within these very foundations will continue to be an area in need of research. The law of responsibility needs to be developed, both in terms of the ARIO, but also in recognition of other potential international actors and the changing actions of states. Further research into the difficulties with the basis of the law of responsibility will continue to be pertinent. Particular research on the responsibility of the EU will also have potential. Although presently the European project seems more contested than ever before, there remains an

emphasis on the EU having the ability to act beyond its borders. When it does so, any potential breaches that consequently arise need to be addressed. The law as it stands does not address this, as this thesis has shown. Only further development of principles along with response to further factual circumstances will serve to clarify the situation. It is fundamental that responsibility continues to be the subject of research and in particular that a greater understanding of the international role of the EU is developed.

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