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INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION IN THE IMPLEMENTATION OF THE COMMON SECURITY AND DEFENSE POLICY (CSDP)

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ABSTRACT

The present research is based on an inductive approach, with the aim, on the one hand, of highlighting the concrete results achieved in the field of defence and peacekeeping, and, on the other, of providing possible contributions with respect to the issues raised above, in particular what the impact of international law is under the Common Security and Defence Policy and the Common Foreign and Security Policy and how it is possible to configure the responsibility of the European Union and/or the participating states to international crimes committed in the performance of the various operations under European Union law. Our purpose is to analyse the current status of the EU's foreign and security policy following the entry into force of the Treaty of Lisbon.

Keywords: CSDP, CFSP, Article 340 TFUE, International Responsibility, EU Responsibility, Effective Control, International Organisation

Introduction

The development of a common defence policy and the ever-increasing number of EU operations has raised some legal problems. Our purpose is to analyse the current status of EU's foreign and security policy following the entry into force of the Treaty of Lisbon¹. The latter has generally introduced profound changes in the organization's structure, replacing the three old "pillars" that formed a single, all-encompassing, and apparently slimmer structure. The difficulty in finding some "border", or at least the exact division of "competences" in Common Security and Defence Policy (CSDP), makes the analysis of international law norms particularly interesting - both in terms of general and customary², such as agreements with third states and decisions of international organisations applicable in CSDP.

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¹ M. Cremona, 'Implementation of the Lisbon Treaty. Improving functioning of the EU: Foreign Affairs', Brussels: Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2016.

² N. Croquest, 'The import of international customary law into the EU legal order: The adequacy of a direct effect analysis', *Cambridge Yearbook of European Legal Studies*, 2013-15, pp. 48.

The topic and the theme of international responsibility profiles of the European Union³ emerges from the work of conducting CSDP missions. International responsibility is one of the topics that, in recent years, has aroused great interest in the literature⁴, especially following the codification work carried out by the Commission of International Law (ILC)⁵, which has come to the adoption of two important Projects of articles, one concerning the international responsibility of states⁶ (Project 2001) and the other the responsibility of international

³ The discourse on the internal legal responsibility of international organisations and, more specifically, of the EU is different. It derives directly from the legal personality of domestic law which, together with international subjectivity, all international organisations possess. In fact, the activities of the latter inevitably have importance also at national level, in particular in the legal systems of the member states or third parties; in other words, international organisations also have the capacity of private law, such as that of concluding contracts, of acquiring movable and immovable property, of being in court (see, for example, Article 335 of the TFEU which states that "each of the member states, the Union has the widest legal capacity accorded to legal persons by national legislation, and may in particular acquire or dispose of movable and immovable property and stand in court). These capacities are governed, with reference to the member states, by the Trust Act (the TEU and the TFEU with regard to the EU), while with reference to third states, by national rules or other international agreements, such as headquarters agreements (see article 218 of the TFEU which provides for the possibility for the Union to conclude international agreements with third states).

⁴ Indeed, the doctrine has devoted extensive investigations since the beginning of the last century to the issue of the responsibility of states. One can remember, among others, the contributions made by Anzilotti, Kelsen and Ago, which marked decisive turns in the arrangement of the matter. Moreover, already at the time of the League of Nations, various attempts at codification were made both by scientific institutions (Institut de Droit International, Harvard Law School), and within the Society itself, without leaving much trace. Since 1953 the ILC has undertaken the study of the topic, but a definitive project only came to light in 2001.

⁵ The ILC is a subsidiary body of the General Assembly-constituted by the latter with resolution 174 of 21 November 1947-with the task of providing for the preparation of texts for the codification of the customary rules relating to certain subjects, proceeding to studies, collecting data of practice, sending questionnaires to the states and thus preparing projects of international multilateral conventions which then usually either in the General Assembly or in special and solemn State Conferences-are adopted and finally open to ratification and membership by the states themselves. The LC was created in order to perform the functions dictated by art. 13 of the UN Charter towards the General Assembly; the norm, in fact, provides that the latter "undertake studies and make recommendations in order to: a) promote international cooperation in the political field and encourage the progressive development of international law and its codification" (UN Charter, Article 13(1a)). The Statute of the ILC in articles 15-18, in particular, distinguishes between functions of "progressive development of international law" and "codification of international law", by arranging two different procedures. However, the ILC seems to have never practically made this distinction, at least until the beginning of the work on the international responsibility of the organizations. See Statute of the International Law Commission, 1947, A/RES/174 (II), 21 November 1947, U.N. Official Records, Second Session of the General Assembly, Resolutions, 16 September-29 November 1947. On the different modalities of codification of international law by the ILC. see S. D. Murphy, 'Codification, progressive development, or scholarly analysis? The art of packaging the ILC's work product', in M. Ragazzi (ed.), *Responsibility of International Organisations-Essays in Memory of Sir Ian Brownlie*, Leiden & Boston: Martinus Nijhoff Publishers 2013, pp. 29-40. N.M. Blokker, 'Preparing articles on responsibility of International Organisations: Does the International Law Commission take International Organisations seriously? A midterm view', in J. Klabbers & A. Wallendahl (eds), *Research handbook on the law of International Organisations*, Cheltenham: Edward Elgar Publishers 2011, pp. 313ss. F. Hoffmeister, 'Litigating against the European Union and its member states: Who responds under the ILC's draft articles on international responsibility of International Organisations?', *European Journal of International Law* 2010-21, pp. 724

⁶ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, UN Doc. A/56/10, pp. 31-143.

organisations⁷ (Project 2011)⁸. The ILC Statute originally envisaged two different types of projects by the ILC: “progressive development” projects and “codification” projects⁹. A project that progressively developed the law, by definition, created new rules, in that it addressed subjects which have not yet been regulated by international law or in regard “to which the law has not yet been sufficiently developed in the practice of states”¹⁰. The growing attention to the issue of international responsibility of intergovernmental organizations has been fuelled, first and foremost, by the increasingly incisive and pre-eminent role assumed by these non-state actors in the international community. This phenomenon is evidenced by the extension of the principle that, like the states, they are also required to exercise political and juridical power¹¹.

The Laeken Declaration on the Future of the Union, adopted by the European Council on 15 December 2001, repeatedly called for the duty of European Union to assume its responsibilities in light of the profound political changes taking place in many areas of the world and the advent of globalization¹². For its part, the European Security Strategy of the European Council of 12-13 December 2003 emphasizes that the growing convergence of European interests and the strengthening of EU's mutual solidarity makes all the participants credible and effective actors¹³. Europe must be ready to assume its share of responsibility for world security and building a better world¹⁴; the version adopted in 2009 states that “in the twenty-first century it is more true

⁷ ILC, Draft Articles on the Responsibility of International Organisations, with commentaries 2011, “Report of the International Law Commission on the Work of its Sixty-third session”, General Assembly Official Records, Supp. No. 10 (A/66/10), pp. 69-172.

⁸ International Law Commission in its 2011 Draft Articles on the Responsibility of International Organisations (DARIO Articles on the Responsibility of International Organisations, with commentaries, in Report of the International Law Commission on the work of its sixty-third session, UN Doc A/66/10, in (2011) Yearbook of the International Law Commission vol II, pt 2. The DARIO (adopted as a resolution by the UN General Assembly on 9 December 2011, Doc A/RES/66/10) were drafted on the model of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted as a resolution by the UN General Assembly on 12 December 2001 (International Law Commission, A/RES/56/83).

⁹ G. Nolte, ‘The International Law Commission facing the second decade of the twenty first century’, in U. Fastenrath et al., *From Bilateralism to Community Interests*, Oxford: Oxford University Press, 2011, pp. 782. S. Villalpando, ‘Codification light. A new trend in the codification of international law at the United Nations’, *Brazilian Yearbook of International Law*, 2013, pp. 118. Y. Chen, ‘Structural limitations and possible future of the work of the ILC’, *Chinese Journal of International Law*, 2010, pp. 478.

¹⁰ ILC Statute Art. 15 (“In the following articles the expression progressive development of international law is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states”). M. Wood, ‘The General Assembly and the International Law Commission: What happens to the Commission’s work and why?’, in I. Buffard et al., *International law between universalism and fragmentation*, The Hague: Martinus Nijhoff Publishers 2008, pp. 373. N. Jansen, *The making of legal authority. Non-legislative codifications in historical and corporating perspective*, Oxford: Oxford University Press 2010, pp. 8ss. P. Behrens, *Diplomatic interference and the law*, Oxford & Oregon: Hart Publishing 2016.

¹¹ K. E. Bonn, “New directions in responsibility: assessing the International Law Commission’s Draft Articles on the Responsibility of International Organisations”, *Yale Journal of International Law* 2011-37, pp. 4ss.

¹² J. Klabbers & A. Wallendahl, *supra* note 6.

¹³ H. Eldström & D. Gyllensporre, ‘Minding the gap between words and needs: Towards a new European Union strategy on security’, *European Foreign Affairs Review* 2015-25, pp. 6ss.

¹⁴ A Secure Europe in a Better World - European Security Strategy, Bruxelles, 12 December 2003.

than ever that sovereignty implies responsibility"¹⁵ and reiterates that Europe must be ready to assume its share of responsibility for world security"¹⁶. These statements, although they have little to do with the responsibility in the legal sense of the term in expressing mostly a "soft" concept of political responsibility, nevertheless highlight the centrality of the theme and its importance from the perspective of representation of the role of EU in the international scene. With the beginning of the work of ILC on the responsibility of international organisations, the theme of the international responsibility of the organization has also begun to attract the attention of scholars, both internationalists and pro-Europeans¹⁷, who previously never dealt with the issue¹⁸.

I. The *Sui Generis* Nature of the European Union and its Applicability to the General Regime on the Responsibility of International Organisations

To address the issue of international responsibility of the European Union in the context of CSDP missions, due importance must be given to the fact that we are confronted with a subject of international law with particular characteristics in various respects¹⁹. First of all, the legal nature of the European Union is that of one international organisation with, in part, elements of "supra-nationality" (especially as regards the policies relating to the single market), and partly of an "intergovernmental" type, therefore with more extensive and articulated skills than the traditional forms of association between states (as found in the sector of the Common Foreign and Security Policy (CFSP) and of CSDP), but not such as to be able to speak of a constitutional or federal body. It is above all the element of "supra-nationality" that distinguishes the European Union from "traditional" international organisations, which, on the other hand, carry out their competences exclusively based on "intergovernmental" cooperation between the governments of their respective member states²⁰. Furthermore, the relationship between the European Union, as a legal entity, and its member states, as material executors of the various policies, is closer and more penetrating than is the case for all the other existing international

¹⁵ A. Nollkaemper & I. Plakokefalos (eds.), *Principles of shared responsibility in international law. An appraisal of the state of the art*, Cambridge: Cambridge University Press 2014.

¹⁶ M. Evans & P. Koutrakos (eds.), *The International Responsibility of the European Union. European and international perspectives*, Oxford & Oregon: Hart Publishing 2013, pp. 6ss.

¹⁷ P. Eeckhout, 'The EU and its Member States in the WTO-Issues of responsibility', in L. Bartels, F. Ortino (eds.), *Regional trade agreements and the WTO legal system*, Oxford: Oxford University Press 2006, pp. 450ss. F. Hoffmeister, *supra* note 6, pp. 724ss. A. Delgado Casteleiro, 'The international responsibility of the European Union-The EU perspective: between pragmatism and proceduralisation', *Cambridge Yearbook of European Legal Studies* 2012-2013-15, pp. 564ss. M. Szabó, 'International legal responsibility of the European Union according to the Draft Articles of the International Law Commission', in M. Szabó (ed.), *State responsibility and the law of treaties*, The Hague: Eleven International 2009, pp. 186ss. V. Lanovoy, *Complicity and its limits in the law of international responsibility*, Oxford & Oregon: Hart Publishing 2016.

¹⁸ P. Klein, *La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit des Gens*, ed. Bruylant, Bruxelles, 1998. Hirsch, 'The Responsibility of International Organisations toward third parties', Leiden & Boston: Martinus Nijhoff Publishers 1995. M. Perez Gonzalez, *Les organisations internationales et le droit de la responsabilité*, *Revue Générale de Droit International Public*, 1988-92, pp. 63-102.

¹⁹ M. Hlavac, 'Less than a State, more than an International Organisations: the sui generis nature of the European Union', *MPRA paper* 2010. W. Phelan, 'What is sui generis about the European Union? Costly international cooperation in a self-contained regime', *International Studies Review* 2012-3, pp. 368ss.

²⁰ To this end, they usually set up referendums to decide on access to the Union; on the other hand, the sale of a part of sovereignty "is (...) a politically sensitive matter" according to M. Hlavac, *supra* note 20.

organisations. It also has consequences for the theme of the international organization's international responsibility in various aspects. The most important is certainly the one related to the complex issue of the attribution of illicit conduct to the Union and/or to the states that contribute to the implementation of crisis management operations.

There is good reason to compare the competence of the Union in the CFSP and, more specifically, with reference to the CSDP, to a concurrent competency. This provides that both the member states and the Union can take the necessary measures to implement that policy, but the competence of the former can only be exercised to the extent that the Union has not exercised its own.²¹ Although the pre-emption mechanism²² does not presumably find application in CFSP²³, it is difficult to admit that international decisions and agreements in this area do not restrict member states' freedom to act in external relations²⁴.

The problem of heterogeneity of international organisations, and the specific characteristics of the European Union that cannot be found in other bodies, have characterized the codification work carried out by ILC²⁵. One of the major problems faced by the European Commission (EC) was in fact to find a legal framework that could adapt to all international organisations without distinction. This was not an easy task because of the diversity in terms of objectives, functions, and size of existing international organisations. In this regard, the EC noted that the "one size fits all" approach could not work, due to the significant differences between "traditional" international organisations and, on the other, like the European Union²⁶. To address the problem of the different legal nature of international organisations, with reference, in the first place, to the characteristics of the Union, ILC decided to include in the Project of 2011 a specific provision, namely, article 64 on the *lex specialis* which establishes: "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 IO, or a state in connection with the conduct of an IO, 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 IO and its members"²⁷. According to us, it is worth emphasizing that creating *lex specialis* is not considered a devious and troubling technique of states to evade obligations under general international law. To the contrary, *lex specialis* offers states a way to achieve more tailored and more effective regulation. Thus, customary international law and general principles need not categorically bind international

²¹ Article 2(2) TFEU.

²² It provides that, if the EU decides to adopt a complete and detailed framework in a certain area of shared competence, any intervention by the Member States would be precluded and in certain cases the competing competence of the Union would become, in fact, exclusive.

²³ M. Cremona, B. de Witte, 'EU Foreign Relations Law - Constitutional Fundamentals', Oxford: Oxford University Press 2008, pp. 65ss.

²⁴ R.A. Wessel, 'Division of international responsibility between the EU and its member States in the area of foreign policy, security and defence policy', *Amsterdam Law Forum*, 2011-3, pp. 44.

²⁵ According to the opinion of G. Gaja: "(...) there are considerable differences among States, but these have not prevented codification conventions and other instruments from setting forth rules applying to all states. Unlike states, international organisations are established for specific functions which characterize their activities. They are very diverse, given the enormous variety in their size, membership, functions and resources (...)". Articles on the Responsibility of International Organisations, Introductory Note, New York, 9 December 2011, pp. 5ss.

²⁶ ILC, Responsibility of International Organisations-Comments and observations received from International Organisations, A/CN.4/637, European Commission, p. 7.

²⁷ *Ibid.*

organisations the way that *jus cogens* norms do. The International Monetary Fund explicitly framed the argument in terms of *lex specialis*:

"[W]hen an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a "peremptory norm" (*jus cogens*) or arises from a specific obligation that has been incurred by the organization in the course of its activities (e.g., by entering into a separate treaty with another subject of international law). However, towards all other norms of international law, both the charter and the internal rules of the organization would be *lex specialis* as far as the organization's responsibility is concerned and, accordingly, cannot be overridden by *lex generalis*, which would include the provisions of the draft articles"²⁸.

The "special" rules of international law referred to in the article may be the constituting instruments of an organization, such as the treaty that gave rise to it, or the rules deriving from them; in turn, these rules may include decisions, resolutions and other acts of the organization, including agreements concluded with third parties²⁹. The purpose and the principle underlying the provision are peaceful, that is to better regulate the will of the parties thanks to the specificity and therefore to the greater concreteness and applicability of the special rules, to the detriment of the general ones³⁰, in compliance with the criterion according to which the special law derogates compared to the general one. Precisely with regard to this aspect, the Project of 2011 has been criticized³¹, since it seems not to give enough importance to the element of speciality,

²⁸ Int'l Law Comm'n, Responsibility of International Organisations: Comments and Observations Received from International Organisations, U.N. Doc. A/CN.4/582, at 5 (May 1, 2007).

²⁹ K. E. Bonn, 'The role of *lex specialis* in the Articles on the responsibility of International Organisations', in M. Ragazzi, *supra* note 6.

³⁰ The concept was also expressed by Martti Koskenniemi, President of the Study Group entitled "Fragmentation of international law: Difficulty arising from the diversification and expansion of international law", which, with reference to the function and purpose of the *lex norm specialis* and the question of self-contained regimes, he noted that the rule in question - compared to that of a general nature - is more pragmatic and ensures greater clarity and precision; moreover, it can regulate a specific legal question more effectively and efficiently, as it better reflects the will of the parties. Koskenniemi added that although there is no formal hierarchy in the sources of international law, there is however a kind of informal hierarchy "which emerged pragmatically as a forensic "or" natural "aspect of legal reasoning, preferring the special standard to the ... more general one". This hierarchy would express the consensual nature of international law, in which the particular rule is preferred, as it best reflects the intent of the parties that are bound to it. ILC, "Report of the International Law Commission Fifty-sixth session" (3 May-4 June and 5 July-6 August 2004), General Assembly Official Records, Supp. No. 10 (A/59/10), pp. 285-286, parr. 305-307.

³¹ See the comments of Pambou-Tchivounda A/CN.4/SR.2801, pp. 75-76, para. 22-24, Pellet (A/CN.4/SR.2962, p. 6), McRae (A/CN.4/SR.3081, p. 4) and Pellet (A/CN.4/SR.3082, p. 4), see in Yearbook of International Law Commission, 2006, vol. I. In the same spirit see also the observation of from the UN: ILC, Responsibility of International Organisations-Comments and observations received from International Organisations, 17 February 2011, A/CN.4/637/Add.1, p. 4, par. 1 and from other International Organisations in the matter of Responsibility of International Organisations-Comments and observations received from International Organisations, 25 June 2004, A/CN.4/545: UE (p. 22, par. 5); International Monetary Fund (pp. 22-23, parr. 6-8). See also, A/CN.4/637: International Organisations of Labour (p. 8); International Monetary Fund (pp. 9-10), "joint submission" (p. 11, par. 3) and Organization for Cooperation and Economic Development (p. 13). in argument: A. Pellet, International Organisations are definitely not States. Cursory remarks on the ILC Articles on the responsibility of International Organisations, in M. Ragazzi, *supra* note 6. Proux, An uneasy transition? Linkages between the law of State responsibility and the law governing the responsibility of international of International Organisations, in M. Ragazzi, *supra* note 6, K.E. Bonn, *supra* note 30, pp. 41-54, 109-

which – as also affirmed by the International Court of Justice (ICJ)³² – is a key principle of organisations³³. In the intentions of ILC³⁴, however, the article seems to fit quite well with the characteristics of the European Union, particularly regarding the special rules concerning the allocation to the organization of the conduct of its member states when they are implementing them to binding acts³⁵. The ILC, commenting on the article in question, makes extensive reference to the practice arising on the attribution of a given behaviour to the European Union and its member states when they have to implement a binding Union decision as a possible example of the existence of a "special rule"³⁶. In fact, the Project cites some law cases³⁷ that would

120 and 135-145. P. J. Kuijper & E. Paasivirta, EU international responsibility and its attribution: From the inside looking out, in M. Evans & P. Koutrakos, *supra* note 17.

³² "The rights and duties of an entity such as the organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice". ICJ Reports, 1949, p. 180. See in particular the opinion from the ICJ (Legality of the Use by a State of Nuclear Weapons in Armed Conflict, advisory opinion, 8 July 1966, ICJ Reports, 1966, 78, par. 24), where the ICJ stated that the instruments establishing international organisations are international treaties whose purpose is the creation of new legal entities, endowed with a certain autonomy, to which the parties entrust the task of achieving common goals; in the same opinion, the ICJ, however, emphasized that international organisations do not possess, as opposed to states, general jurisdiction. In the same spirit see also: Reparation for injuries suffered in the service of the United Nations, I.C.J. Advisory Opinion of 11.4.1949, I.C.J. Reports 1949, p. 174 at p. 179. Interpretation of the Agreement of 25.3.1951 between the WHO and Egypt, I.C.J. Advisory Opinion of 20.12.1980, I.C.J. Reports 1980, p. 73, para 37, pp. 89-90. R. Collins & N. White (eds.) *International Organisations and the idea of autonomy. Institutional independence in the international legal order*, London & New York: Routledge, 2011, pp. 10ss. R.A. Wessel, S. Blockmans (eds.) *Between autonomy and dependence. The EU legal order under the influence of International Organisations*, The Hague: T.M.C. Asser Press, 2013, pp. 14ss.

³³ In particular, some authors complain that the scope of Article 64 appears to be too broad and, consequently, unable to capture the great differences between the various International Organisations. On the other hand, it is also true that an operation of "selective codification" of the particular norms of each individual international organisations would not have been possible, as admitted by the Commission itself (Project 2011, 168, par. 2) which therefore opted for an all-encompassing and apparently vague rule in its formulation. Furthermore, according to Ahlborn, the language used by the Commission is imprecise and not entirely correct, since it seems to overlap the concept of *lex specialis* with that of internal rules of the organization. The law governing relations between member states and organization, explains the author, is the internal law of the organization and not *lex specialis*. Consequently, the text of the Project should eliminate the part in which it refers to the "rules of the organization applicable to the relations between an international organisation and its members" as a *lex specialis*. The position of Ahlborn is, in our opinion, excessively rigid, but shared in substance. See in particular: C. Ahlborn, 'The Rules of International Organisations and the Law of International Responsibility', *ACIL Research Paper* 2011-2, pp. 28-32.

³⁴ J. D'Aspremont, 'A European law of international responsibility? The Articles on the responsibility of international organisations and the European Union', *ACIL Research Paper* 2013-22, pp. 7-8.

³⁵ J. M. Cortés & Martín, '*Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional*', Sevilla: Instituto Andaluz de Administración Pública, 2008. C. Gutierrez Espada, 'La responsabilidad internacional de las organizaciones internacionales a la luz del proyecto definitivo de artículos de la Comisión de Derecho Internacional', Granada: Comares 2012.

³⁶ Project 2011, *supra* note 9, pp. 168, par. 2.

³⁷ European Commission of Human Rights case: *M & Co. v. Germany* of 9 February 1990, case n. 13258/87. see also the Report of Panel OMC, European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff-Complaint by the United States, WT/DS174/R, 20 April 2005. In particular the European Commission of Human Rights came to the conclusion that: "(...) the transfer of powers to an international organisations is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent

prove the existence of a special rule on attribution “to the effect that, in the case of an EC act binding a Member State, State authorities would be considered as acting as organs of the Community”³⁸. The European Union has repeatedly highlighted its peculiarities and the need for the 2011 ILC Project to take it into account, sometimes expressing doubts about the possibility of bringing together rules in a single text concerning deeply different international organisations³⁹. In 2004, following the first work of the ILC on the subject of the responsibility of international organisations, the EC recognized that “while the EC is in many ways *sui generis*, it is clear that all international actors, albeit states or organizations, need to recognize their international responsibility in the event of any wrongful acts”⁴⁰. Furthermore, it was careful to state that “the European Community is an IO with special features as envisaged in the founding treaties”⁴¹ and emphasized the need “to address the special situation of the Community within the framework of the draft articles”⁴². In particular, the EC proposed three ways to adapt the issue of responsibility of international organisations to the characteristics of the European Union:

“(a) special rules of attribution, so that actions of member states’ organs can be attributed to the organization; (b) special rules for responsibility, so that responsibility can be charged to the organization, even if member states’ organs were the prime actors of a breach of an obligation borne by the organization; (c) consideration of the possibility that the European Community (...) should benefit from a special exception or of a kind of special savings clause for such an organization⁴³.”

A few months before the second reading of the Project of ILC, in the commentary on article 63⁴⁴, the EC re-emphasized its peculiar aspects and welcomed the introduction of this provision, stating that “to the extent that the draft articles, even taking account of the commentaries, at present do not adequately reflect the situation of regional (economic) integration organizations such as the European Union, it would seem particularly important for the draft to explicitly

protection (...) and the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance (...).”

³⁸ C. Pitschas, *Die volkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, Berlin: Duncker & Humblot 2001.

³⁹ ILC, Responsibility of International Organisations-Comments and observations received from International Organisations, 31 March 2008, A/CN.4/593, p. 4: “As in previous years, the European Commission expresses some concerns as to the feasibility of subsuming all international organisations under the terms of this one draft in the light of the highly diverse nature of international organisations, of which the European Community itself is an example”. See also: A/CN.4/637, p. 7: “A principal general comment which has been highlighted throughout previous comments is the need for the draft articles to allow sufficient room for the specificities of the European Union”.

⁴⁰ ILC, Responsibility of International Organisations-Comments and observations received from Governments and International Organisations, 25 June 2004, A/CN.4/545, p. 22, par. 6.

⁴¹ ILC, Responsibility of International Organisations-Comments and observations received from Governments and International Organisations, 12 May 2005, A/CN.4/556, p. 31. K. Daugirdas, ‘Reputation and the responsibility of International Organisations’, *European Journal of International Law* 2014-4, pp. 994ss.

⁴² J. M. Thouvenin, ‘Responsibility in the context of the European legal order’, in J. Crawford, A. Pellet & S. Olleson (eds.), *The law of international responsibility*, Oxford: Oxford University Press 2010, pp. 862ss.

⁴³ ILC, Responsibility of International Organisations-Comments and observations received from Governments and International Organisations, 12 May 2005, A/CN.4/556, p. 31.

⁴⁴ Responsibility of International Organisations. Comments and observations received from International Organisations, 14 February 2011, A/CN.4/637, pp. 37-38, par. 1.

allow for the hypothesis that not all of its provisions can be applied to regional (economic) integration organizations (*lex specialis*)⁴⁵.

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.⁴⁶ This idea of "self-contained regimes" has come to mean specific secondary norms, for example norms contained within the Vienna Convention on Diplomatic Relations⁴⁷.

The European Union contested, essentially, the premise on which the work of codification of the ILC was based, or that the acts implemented by the member states in regard of the guidelines provided by the organization to which they belonged could not in principle be attributed to the latter. The EC, for its part, said that when the member states of the Union implement a decision of the organization, they act almost as organs of it, since they have no margin of discretion. The insistence on this position expressed in written statements and interventions made in the discussion of the text of the Project convinced the ILC to include the numerous references to the practice on the assignment to the EU of a conduct put in place by the member states.

In the intentions of ILC, article 64 should cover all the situations delineated by the EC in which different rules regarding attribution⁴⁸ or content of the international responsibility of the European Union are required. The provision specifies that "special rules of international law may be contained in the rules of the organization applicable to the relationship between an IO and its members"⁴⁹. In this regard, the rules on the division of competences between the EU and the member states could be highlighted. However, these are mere "internal" rules, which in all likelihood cannot qualify as *lex specialis* under article 64 of Project⁵⁰.

Although the European Union possesses special characteristics that differentiate it from other international organisations in many respects, there is no doubt that the general regime on international responsibility for international organisations applies to it, albeit with certain "adaptations"⁵¹, which however do not substantially affect the content of the obligations.

⁴⁵ G. Gaja, The relations between the European Union and its Member States from the perspective of the ILC Articles on responsibility of International Organisations, *ACIL Research Paper* 2013-25, pp. 3.

⁴⁶ Wimbledon case, PCIJ, Series A, No.1 (1923), at pp. 23ss. C. Ryngaert, The European Court of Human Rights' approach to the responsibility of Member States in connection with acts of International Organisations, *International and Comparative Law Quarterly*, 2011, pp. 998ss.

⁴⁷ United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, at p.3.

⁴⁸ According to D'Aspremont, *supra* note 35, "article 64 allows (theoretically) the emergence of special rules of international responsibility in relation to REIOs (Regional Economic International Organisations) like the EU, especially when it comes to attribution of conduct".

⁴⁹ C. Ahlborn, 'The rules of International Organisations and the law of international responsibility and the law of international responsibility', *ACIL Research Paper* 2011-03, pp. 29ss. J. D'Aspremont, *supra* note 35. See also the opinion of some critics from some States in ILC, Eighth report on responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur, 14 March 2011, A/CN.4/640, pp. 36-37.

⁵⁰ C. Ahlborn, *supra* note 60.

⁵¹ N. Tsagourias, 'The responsibility of International Organisations for military missions', in M. Odello & R. Piotrowicz (eds.) *International military missions and international law*, The Hague: Martinus Nijhoff Publishers, 2011, pp. 246ss.

II. Interpretation of Article 340(2) of the TFEU

The European Union law on liability is rather poor and does not seem to concern international responsibility for international organisations. In regards to the sources of primary law, in particular the Treaties, the most relevant, if not the only, provision is undoubtedly article 340(2) TFEU, which provides: "in matters of responsibility non-contractual, the Union must reimburse, in accordance with the general principles common to the laws of the member states, damage caused by its institutions or agents in the performance of their duties"⁵².

The provision concerns the non-contractual liability of the European Union, namely that which does not concern contracts concluded between the Union and a third party. The provision is related to article 268 of the TFEU, which states that "the Court of Justice of the European Union (CJEU) has jurisdiction over disputes relating to compensation for damages referred to in article 340(2-3)"⁵³. Moreover, article 275 of the same Treaty⁵⁴ specifies that "the CJEU has no

⁵² G. Marhic, 'Le régime de responsabilité des opérations de paix de l'Union Européenne: quelles règles applicables?' *Revue Belge de Droit International* 2013-1, pp. 137-145, 140ss.

⁵³ S. Griller, *The Court of Justice and the common foreign and security policy*, in *CJEU, The Court of Justice and the construction of Europe*, T.M.C. Asser Press, Bruxelles, 2013, pp. 675ss.

⁵⁴ "(...) it must be held that a reading of the law in this sense would lead to the paradoxical conclusion that the Lisbon Treaty instead of strengthening weakened the Court's judicial review (...) It should be emphasized that only CFSP decisions which have restrictive measures are pursuant to Article 275(2), TFEU (...) The demarcation of the Union's material policies with respect to CFSP has undergone "redeployment" over time. The reconditioning of a certain action within one area that within another was based on a finalistic approach (...) By virtue of such a reconstruction, the adoption of measures based on several legal bases (so-called measures having a cross-pillar dimension) had to be precluded when the objectives falling within the Community competences were prevalent or equivalent: Article 47 prevented the adoption by the Union, on the basis of the EU Treaty, of a measure that could be validly adopted on the basis of EC Treaty, and the Union could not resort to a legal basis under CFSP to adopt provisions also falling within the scope of the powers conferred by the EC Treaty on the Community (...) So the protection of the person in Union law is fragmentary. If this is the general framework, a fortiori must occur if the jurisdiction of the Court to review only the restrictive measures in CFSP can put forward in the sense that-albeit the general limitations referred to above-the protection of human beings in EU is also equally guaranteed in relation to CFSP acts. If one adhered to such a literal interpretation, it would lead to a reduction in Court's jurisdiction over that which it exercised under the regulatory framework preceding the Treaty of Lisbon. Indeed, Article 275 TFEU legitimizes the challenge only of Community acts implementing CFSP measures which adopt restrictive measures against natural or legal persons and only on the part of the latter and not to all the applicants who, ordinarily, under the conditions set out in Article 263 TFEU, are entitled to challenge EU acts. Thus, these last acts would continue to be subject to the general power of scrutiny by the CJEU (...) if the implementing measures for CFSP acts were not directly based on CFSP provisions, they did not escape the control of the Court and the provision referred to in Article 275 TFEU would prove useless. It would then be appropriate for an interpretative reconstruction under which the acts of execution of CFSP as well as acts which are directly based on the provisions of the common foreign and security policy, are beyond the control of the Court with the exception of restrictive measures taken against natural or legal persons (...) This assumption should lead to the consequence that although the CJEU has no jurisdiction to rule on CFSP acts (with the exceptions mentioned above), it should instead be competent to know all the acts adopted on the basis of the provisions of the TFEU to implement CFSP acts in the event that they should find a conflict between the basic CFSP acts and implementing measures. If this were the case it would be to establish an indirect power of the CJEU for the interpretation of CFSP provisions. Indeed in order to assess the compatibility of a reprehensible measure with regard to CFSP provisions, it is essential that the Court should interpretively reconstruct the scope of those provisions (...) It follows that the reference parameter of the legality of restrictive measures must also be the acts adopted on the basis of CFSP provisions. If this interpretation were correct, the Court would in fact exercise a power of interpretation which, in

jurisdiction with regard to the provisions relating to the CFSP, nor with regard to the acts adopted on the basis of those provisions⁵⁵.

The problem which arises in relation to article 340(2), concerns its scope: in particular, whether the non-contractual liability regime it has set up relates to the international responsibility of the Union, under international public law, or is it only of an administrative, civil or even private international law liability? Some authors have highlighted this aspect⁵⁶, particularly the one linked to the difficulty of analysing the regime configured by the provision in terms of international responsibility under international "public" law⁵⁷. On the other hand, other scholars consider that the non-contractual responsibility of international organisations corresponds essentially to international responsibility, which is emphasized in the event of illicit and harmful exercise of their competences and, in this sense, article 340 would reflect this reality⁵⁸. The liability regime configured by the provision taking into consideration the fundamental elements that characterize the international responsibility of organizations, namely the existence of an offense, damage, and of a causal link between the damage and the illicitness⁵⁹, moreover the illegality of the conduct also of an omission nature, the effectiveness of the damage always referring to the general principles common to the rights of member states.

These assumptions of the non-contractual liability of the Union have been illustrated by the CJEU⁶⁰; they are always necessary, if the behaviour of the Institutions of the Union consists in the exercise of powers characterized by a wide margin of discretion and, in particular, in the adoption of normative acts involving choices of economic policy (for example, regulations in the framework of the common agricultural policy). In these cases, it is not enough to demonstrate the mere illegitimacy of the behaviour and the act from which the damage is derived, but it is

principle, should be precluded (...) It seems clear that whenever there are spaces that lend themselves to being attracted by the jurisdiction of the Court, this increasingly restricts the terrain of the unappealable. He did so under the previous regime and does so even more in the unified regulatory environment redesigned on the occasion of the last amendment of the Treaties. However, in the face of the deficiencies of the system with regard to the protection of the rights of the person in the field of CFSP, the Lisbon Treaty has brought partial solutions and the protection of the person continues to suffer from important limitations. D. Liakopoulos, 'Art. 275 TFUE', in P.E. Herzog, C. Campbell & G. Zagel, *Smit & Herzog on the law of the European Union*, New York: LexisNexis 2018.

⁵⁵ For details see. S. Griller, *The Court of Justice and the common foreign and security policy*, in CJEU, *The Court of Justice and the construction of Europe*.

⁵⁶ J. Salmon, 'Les accords Spaak-U Thant du 20 février 1965', *Annuaire Français de Droit International*, 1965-11, pp. 479ss.

⁵⁷ J. M. Thouvenin, *Responsibility in the context of the European legal order*, in J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility*, Oxford: Oxford University Press 2010, pp. 861ss.

⁵⁸ P. Dailler, M. Forteau & A. Pellet, *Droit international public*, Paris: LGDG 2009, pp. 680ss.

⁵⁹ V. F. Castillo De La Torre, 'Article 340 TFEU on contractual and non-contractual liability of the Union', in P.E. Herzog, C. Campbell & G. Zagel, *Smit & Herzog on the law of the European Union*, New York: LexisNexis, 2010, pp. 340-347. S. van Raepenbusch, 'La convergence entre les régimes de responsabilité extracontractuelle de l'Union Européenne et des États Membres', *ERA Forum*, 2012-4, pp. 672ss.

⁶⁰ CJEU, C-4/69, *Alfons Lütticke GmbH v. Commission of the European Communities*, 28 April 1971, ECLI:EU:C:1971:40, ECR 1971. par. 10-11. M. Riddervold & G. Rosén, *Trick and treat: How the Commission and the European Parliament exert influence in EU Foreign and Security Policies*, *Journal of European Integration* 2016-6, pp. 688ss. T. Giegerich, 'Wege zu einer vertieften Gemeinsamen Außen-und Sicherheits-politik: Reparatur von Defiziten als "kleine Lösung"', in S. Kadobach, *Die Europäische Union am Scheideweg: mehr oder weniger Europa?*, Baden-Baden: Nomos 2015, pp. 138ss.

also necessary, firstly, that the rule violated by the institutions is intended to confer rights to individuals and, moreover, whether it is a serious and manifest violation.

According to our opinion on the basis of article 340(2), the EU would be constructing, little by little, in accordance with the general principles common to the law of the various member states and through the jurisprudence of the CJEU, a system of responsibilities whose characteristics correspond to those of international law⁶¹. Instead, the situation is in some ways more complex and nuanced, since the practice does not seem to indicate with certainty that the EU's non-contractual liability under article 340 TFEU is the same as that of "public" international law, nor can it be fully configured as a responsibility of private derivation. Thus, the provision on non-contractual liability of the European Union, although very elastic and seemingly broad in scope, cannot reasonably refer to the international responsibility of the organization. Rather, it seems to involve a substantially "private" type of liability⁶² concerning only the liability, arising outside the contract practice, of the EU towards individuals within the Union system for damages caused by omissions or actions (culpable behaviour with certain and real damage) by bodies, institutions or agents in the exercise of their functions. Our position is also based on an objective analysis which leads us to observe, as we have already said, how the practice on the liability of the European Union for illicit acts at international level is very scarce or almost non-existent, a circumstance which certainly does not play in favour of an "internationalist" view of the regime set out in article 340(2) of the TFEU.

Other provisions that may be noted with regard to the responsibility of the EU are contained in specific decisions and joint actions issued by Council⁶³. For example the Council Joint Action 2008/851/CFSP⁶⁴ which established the start of Operation Atalanta states that "(...) the conditions

⁶¹ M. Forteau, 'Régime général de responsabilité ou *lex specialis*?', *Revue Belge de Droit International*, 2013-1, pp. 147-160.

⁶² In this spirit, the eventual responsibility of the EU will be determined, if the private contractors' conduct can be attributed to it. Article 340(2) TFEU stipulates the non-contractual liability for any damage caused by its institutions and servants, which include private contractors authorised by the Union to fulfil official duties. The contractual liability of the Community is governed by the law applicable to the contract in question. Regarding non-contractual liability, the Community must, in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or agents in the performance of their duties. The second subparagraph shall apply to the same conditions as damage caused by the European Central Bank or by its servants in the exercise of their functions. The personal liability of the agents vis-à-vis the Community is governed by the provisions establishing their status or the regime applicable to them (...). E. Krahnmann & C. Friesendorf, *The role of private security companies (PSCs) in CSDP missions and operation*, European Parliament Directorate-General for External Policies, *Policy Department*, 2011, pp. 6-7. See also: CJEU, C-9/56, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community* of 13 June 1958, ECLI:EU:C:1958:7, I-00133, par. 42-47 and case: C-138/79, *Murri Frères v. Commission of the European Communities* of 29 October 1980, ECLI:EU:C:1980:249, I-03333, par. 34ss. O. de Frouville, 'Attribution of conduct to the State: private individuals', in J. Crawford, *The Law of International Responsibility*, Oxford: Oxford University Press 2010.

⁶³ F. Naert, 'The international responsibility of the Union in the context of its CSDP operations', in M. Evans & P. Koutrakos, *supra* note 17.

⁶⁴ 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, OJ L 301, 12.11.2008, p. 33-37. L. Simón, *No mighty, no right: Europeans must rediscover military power*, in Real Instituto Elcano, *European Global Strategy Project*, EGS 2/2013, 19 March 2013. See also I.K. Düsterherf & A.I. Gerlach, 'The successes and failures of the interventions of the European Union, the African Union and neighbouring powers in Somalia', *Sicherheit und Frieden*, 2013-1, pp. 19ss. E. Leonard & G. Ramsay, *Globalizing Somalia: Multilateral international and*

of the presence of units belonging to Atalanta aboard merchant ships, in particular those chartered from World Food Program, including privileges, immunity⁶⁵ and other guarantees necessary for the good performance of the mission, are established with the flag state of these ships⁶⁶, while the Council Joint Action 2007/192/CFSP concerning the EUSEC mission in Congo provides that "(...) neither the European Union nor the SG/HR (Secretary-General/High Representative) can in any case be held responsible by the contributing Member States for acts or omissions of the Head of Mission in the use of the funds of these states"⁶⁷. Furthermore, with regard to the EULEX Operation in Kosovo, the European Union has set up a Human Rights Review Panel (HRRP) to accommodate complaints of potential human rights violations committed by the operation personnel in the carrying out its mandate⁶⁸.

A document that may be important with reference to some possible profiles of responsibility is represented by the "Generic Standards of Behaviour for ESDP Operations"⁶⁹, i.e. the guidelines drawn up by the Council in 2005 for the purpose "to ensure that all categories of personnel involved in ESDP (CSDP) operations (...) maintain the highest personal standards of behaviour"⁷⁰. Indeed, the document contains directives of a non-judicial nature, the violation of

transnational repercussions of conflict, New York: Bloomsbury, 2013. R. Schütze & T. Tridimas, *Oxford Principles of European Union Law*, Oxford: Oxford University Press, 2018. P. Koutrakos, *Judicial Review in EU's Common Foreign and Security Policy*, Cambridge: Cambridge University Press 2018.

⁶⁵ In its advisory opinion on Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, the same Court pointed out that, if damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity, "(...) the United Nations may be required to bear responsibility for the damage arising from such acts".

⁶⁶ 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, OJ L 301, 12.11.2008, p. 13. Council Decision 2014/827/CFSP of 21 November 2014 amending Joint Action 2008/851/CFSP 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, OJ L 335, 22.11.2014, p. 19-21.

⁶⁷ Council Joint Action 2007/192/CFSP of 27 March 2007 amending Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), OJ L 87, 28.3.2007, p. 22, art. 1 (1).

⁶⁸ Agreement between the European Union and the former Yugoslav Republic of Macedonia on the participation of the former Yugoslav Republic of Macedonia in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA), OJ 2008 L 188/10; Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), OJ 2009 L 202/84. T. Palm, "The changing character of EUFOR Althea: Power politics or learning?", *Cambridge Review of International Affairs*, 2017-1, pp. 68ss. N. I. M. Nováky, *European Union Military Operations: A Collective Action Perspective*, London & New York: Routledge, 2018.

⁶⁹ Doc. of Council 8373/3/05 REV 3, 18 May 2005.

⁷⁰ W. Benedek, M. C. Ketemann & M. Möstl, *Mainstreaming Human Security in Peace Operations and Crisis Management: Policies, Problems, Potential*, London & New York: Routledge, 2010. The whole process is known as the crisis management procedures and it will culminate with the Operation Plan (OPLAN), and where applicable, the Rules of Engagement (ROE). At the point of development, the OPLAN should clarify the applicable law to the operation, specifying whether international humanitarian law or human rights law is suitable for each context, but this is not always the case. The absence of this kind of exact provision may be reflected in references to applicable rules of international humanitarian law or human rights law, which does not clarify in which circumstances those rules are applicable. Consequently, the Operation Commander would have to determine this to some extent. See also in argument: C. Márquez Carrasco, "The Applicability of Human Rights Instruments to European

which seems to constitute, more than anything else, a responsibility of an individual, penal or disciplinary nature. In this regard, it provides that “(...) the standards of behaviour are complementary to the legal obligations of personnel. Personnel must apply the provisions of international law, including, when applicable, the law of armed conflict, and the laws of the contributing state. As a rule, personnel will also respect local law unless the execution of the mission requires otherwise” and adds, moreover, that “(...) not adhering to the required standards of behaviour is misconduct and may result in disciplinary measures. This is independent of possible criminal procedures”⁷¹.

The ESDP became operational in 2003 when the General Affairs and the External Relations Council stated “the EU now has operational capability across the full range of the Petersberg tasks”⁷². The entry into force of the Treaty of Nice gave the legal basis for the EU’s involvement in military operations by virtue of article 17 that declared, “the common foreign and security policy shall include all questions relating to the security of the Union. The questions referred to shall include humanitarian and rescue tasks and task of combat forces in crisis management, including peace-making”⁷³.

However, the boundary between these different types of responsibility within the CSDP is uncertain and labile and it cannot be ruled out that a violation of these provisions may also give rise to international responsibility on the part of the organization or one of its member states, especially where consider the possibility that such offenses have been committed in the performance of official functions⁷⁴. The guidelines also provide that “personnel should report any alleged violations by personnel of human rights and international humanitarian or criminal law” and specify that the rules set out “are not intended to replace, restrict or extend national regulations”⁷⁵.

Union’s CSDP Operations: Framing the Challenges’, *Cuadernos Europeos de Deusto* 2015-53, pp. 60ss.

⁷¹ An example of misconduct of EU mission personnel is in the case of sexual abuse and exploitation. In this regard we read that: “(...) sexual exploitation and sexual abuse violate universally recognized international legal norms and standards. They constitute acts of serious misconduct and are therefore grounds for disciplinary measures”.

⁷² Declaration on EU military capabilities, 19-20. V. 2003. 9379/03 (Press 138) p. 2.

⁷³ Art. 17 contained the so-called “Petersberg Tasks”. The Petersberg Tasks were set out in the Petersberg Declaration adopted at the Ministerial Council of the Western European Union in June 1992; Petersberg Declaration of the Western European Union Council of Ministers, paragraph II.4, June 19, 1992. See also: P. Ponzano, ‘Méthode intergouvernementale une méthode communautaire: Une question sans intérêt, in *Notre Europe*’, *Les Brefs* 2011-23.

⁷⁴ This will depend on what scope to attribute to the notion of “functions”, as also foreseen by article 6 of the 2011 Project. It is obvious, in fact, that crimes such as sexual exploitation, corruption or trafficking in human beings-provided for within the Generic Standards of 2005-cannot be included among the functions assigned by the European Union to the staff, but an extensive interpretation of the concept, in the sense of intending such illicit actions, but nevertheless conducted within the assigned functions (for example, in the event that a contingent with the task of overseeing an area exercises at the same time some form of corruption on the local population) it could trigger the responsibility of the organ/agent and, therefore, of the European Union.

⁷⁵ M. H. A. Larivé, *Debating European Security and Defence Policy Understanding the Complexity*, London & New York: Routledge 2016, pp. 197ss.

III. The Role of Effective Control

The concept of effective control is not only used in the military but has a broader and more general scope. It is connected to the degree of control over conduct, which must necessarily be assessed on a case-by-case basis. What does this concept refer to in practical terms? Effective control is essentially equivalent to operational control, which in turn corresponds to the power to direct field operations and which is usually transferred by states to international organizations conducting the operation. As a result, an illicit conduct is generally attributed to international organizations since it is usually the latter that exercises operational control. Only the operative level of command can generate an effective control, while other forms of command and control are judged irrelevant. For the same reason we can argue that a conduct must be attributed to the entity that formally holds the operative command, with the consequence that this hypothesis can be refuted if it is the state to exercise this type of command. Effective control does not imply only operational control, but must be interpreted, more generally, as the factor that has led to the implementation of a conduct⁷⁶. There must be a sort of cause-effect link between the control exercised and the resulting action. In military operations, in particular, the conduct must be attributed to the entity that exercises a form of "causally linked" military control over the conduct of the offending party. This approach broadens the scope of effective control, attributing illicit conduct to the entity that, in the absence of operational control, also exercises other types of control, such as the organic command or strategic control, provided that there is a link between this control and occurrence of the unlawful action. This theory seems to be acceptable, as it has the merit of reflecting the real complexity of military operations conducted under the auspices of an international organization, where violations of international obligations often derive from the fulfilment of actions that do not fall within the concept of operational control, such as for example, an individual unlawful conduct.

The notion of effective control, which has a legal nature, must be distinguished from that of command and control, which instead has a technical meaning, although the two concepts are not mutually exclusive. Article 7 of the Project, in particular, seems to indicate that, in order to evaluate the effectiveness of the criterion under examination, it is necessary to carry out an analysis of each individual action, using the concept of "control" in a manner similar to how it is used in article 8 of the Project of 2001⁷⁷. However, article 7 only requires that there be a factual

⁷⁶ N. Perova, 'Disentangling "effective control" test for the purpose of attribution of the conduct of UN peacekeepers to the state and the UN', *Nordic Journal of International Law* 2017-1, pp. 32ss. We take particularly in consideration as to the precise standard of this overall control-test, the International Criminal Tribunal for the Former Yugoslavia in case: ICTY in Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, par. 185-229, considered as follows: "(...) the control required by international law may be deemed to exist when a state (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto state organs regardless of any specific instruction by the controlling state concerning the commission of each of those acts (...)".

⁷⁷ According to our opinion, the international organisations will be responsible for the *ultra vires* acts of its organs/agents under DARIO art. 8 only if they act in the official capacity. Therefore there must be a "close link" between the *ultra vires* conduct and their official functions. It does not matter whether an *ultra vires* act is valid or not under the international organisation's rules - the international organization may still entail responsibility because, if the attribution of conduct were denied on this ground, it would deprive third parties of all redress, unless the conduct could be attributed to a state. The DARIO Commentary also provides that art. 8 covers situations when the conduct of its organ/agent exceeds the competence of the International Organisations, because "it will also exceed the authority of the

link between the given organ and the international organization that uses it, not attaching any importance to the existence of an institutional or organic link. The European Court of Human Rights (ECtHR) has repeatedly referred in its judgments to the test of effective control⁷⁸ - however, developing this concept in an innovative way.

The general check was used for the first time by the ECtHR in the decision on the admissibility of cases *Behrami v. France* and *Saramati v. France, Germany and Norway* of 2 May 2007⁷⁹. The decision, in fact, seems to preclude every possible alternative on the front of imputability, attributing to the UN exclusively the activities carried out by the military contingents and, moreover, it affirms in a rather dubious way the absolute prevalence of the peacekeeping regime under the Security Council, with the result of denying access to the control system guaranteed by the European Convention of Human Rights (ECHR) to victims of ECHR violations committed during missions of peace led by the United Nations⁸⁰. The UN also did not fail to criticize the work of the ECtHR, asserting that, based exclusively on the delegation of powers carried out by the Security Council in favour of the Kosovo Force (KFOR) as a result of which the former had "ultimate control and authority"⁸¹ on the second, the judges of Strasbourg "disregarded the test of "effective command and control" which for over six decades has guided the United Nations and member states in matters of attribution. Another case in which the Court of Strasbourg used the ultimate control criterion as the basis for the attribution of conduct is *Al-Jedda v. United Kingdom*.⁸² The facts relating to Al-Jedda present numerous similarities with respect to the Saramati case, since it concerned alleged wrongdoing committed in the context of a mission authorized by the United Nations. In the ruling given in the Nada case⁸³, the Court of Strasbourg seems to have further restricted the scope of the ultimate control test as a criterion for allocation. Although the facts did not fit into the context of a multinational peace operation, the ECtHR expressly rejected the argument put forward by France, according to which the measures taken by member states to implement Security Council resolutions under Chapter VII of the UN Charter must always be attributed to the United Nations. In particular, the judges have ruled out that the ultimate control test applies to actions taken by

organ/agent who performed it". In this spirit an organ/agent must act within the overall functions of organisation but may exceed the International Organisation's competence for the *ultra vires* acts to be attributed to the International Organisations. The question lies in the distinction between both terms. International Organisations' functions reflect its responsibility to fulfil the assigned task and may sometimes in constituent instruments of International Organisations be referred as "tasks", "purposes", "objects" or "aims". Probably, one potential approach to the definition of *ultra vires* acts can include acts beyond the ascribed powers and competences but within the attributed functions.

⁷⁸ ECtHR, *Behrami and Behrami v. Francia* and *Saramati v. Francia, Germany and Norway* of 2 May 2007; *Kasumaj v. Greece* of 5 July 2007; *Gaji v. Germany* of 28 August 2007; *Beri et al. v. Herzegovina Bosnia* of 16 October 2007; *Al-Jedda v. United Kingdom* of 7 July 2011.

⁷⁹ A. Sari, 'Jurisdiction and International Peace Support Operations. The Behrami and Sarmanti cases', *Human Rights Law Review*, 2008-1, pp. 154ss. B. Knoll, 'Rights without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo', *Zeitschrift für ausländisches öffentliches Recht*, 2008-68, pp. 432ss. K. Mujezinovi & C. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', *European Journal of International Law*, 2008-3, pp. 512ss.

⁸⁰ D. Liakopoulos, 'L'ingerenza umanitaria nel diritto internazionale e comunitario', *Cedam*, 2007.

⁸¹ K. Zwolski, 'The European Union and international security: Developing a comprehensive approach', in C. Kaunert, S. Léonard, *European Security, Terrorism and Intelligence*, London: Palgrave Macmillan 2013.

⁸² ECtHR, *Al-Jedda v. United Kingdom* of 7 July 2011.

⁸³ ECtHR, *Nada v. Switzerland* of 12 September 2012. L. van Den Herik, *Research Handbook on United Nations Sanctions and International Law*, Cheltenham: Edward Elgar Publishers 2017, pp. 423ss.

member states to implement, at national level, a Resolution of the Security Council which imposes restrictive measures against individuals⁸⁴.

The test of the "effective control" is used as a reference criterion for attributing the conduct to an international organisation in the context of peace operations. Although the verification of the presence of this type of control is more complex than what can be said for the test of "general control", it has the merit of more equitably assigning an illegal conduct where there are more legal entities involved, since this type of control is exercised by the person who has actually given the precise order of, or issued the authorization to, commit certain actions and who has, at the same time, the power to prevent them. On the other hand, in the face of increasing application, especially with regard to disputes concerning the attribution of crimes committed in the course of military operations conducted by international organisations, the "effective control" test as configured in the Project of ILC does not yet seem corroborated, in all likelihood, by a sufficient *opinio iuris* to be considered to correspond to a norm of customary international law.⁸⁵ On the other hand, a sufficient *diuturnitas* seems to be lacking, to the extent that the provision is applied in different ways, which do not yet allow to configure a constant and uniform repetition of this "behaviour" over time. Even the European Union, in the work of the ILC, has expressed doubts about the effectiveness of article 7 and its customary nature, stating that "this remains a controversial area of international law"⁸⁶. The most problematic aspect, however, concerns the uncertainty that still exists regarding its actual scope and, in particular, the elements that must be taken into consideration to assess its presence.

One of the most interesting aspects of the criterion as formulated in article 7 of the Project of 2011 concerns its "unambiguous" scope, under two different aspects. Firstly, in spite of many of them favourable to a "double use" of the test, it has the purpose of attributing a conduct exclusively to international organizations, since it cannot be used "directly"⁸⁷ to attribute the conduct to the state (or to states) of sending or another international organization⁸⁸. Consequently, it can be assumed that, where illicit conduct at international level does not meet the award criteria established by the provision, it will automatically have to be attributed to the

⁸⁴ G. I. Hernandez, 'Beyond the control paradigm? International Responsibility and the European Union', *The Cambridge Yearbook of European Legal Studies*, 2012-2013-15, pp. 644ss.

⁸⁵ G. I. Hernandez, *supra* note 85.

⁸⁶ ILC, Responsibility of International Organisations-Comments and observations received from International Organisations, A/CN.4/637, 14 February 2011, Draft article 6, European Commission p. 22, par. 2.

⁸⁷ F. L. Bordin, 'Reflections of Customary International Law. The Authority of Codification Conventions and ILC Draft Articles in International Law', *International & Comparative Law Quarterly* 2014-3 pp. 537ss.

⁸⁸ In this regard, the language used by the ILC in the commentary on art. 7 is not always clear. In fact, it states that: "(...) the criterion for the attribution of conduct to the contribution to the fact that the system is based on and that 'when an organization or agent is placed at the disposal of an International Organisations, the decisive question. See Project 2011, p. 87, par. 4 and p. 89, par. 8. These statements would seem to pave the way for a "two-way" use of the "effective control" criterion, but in our opinion the correct interpretation is based on the text of the article, which speaks unambiguously of attribution to the organization, as well as object and purpose of the Project (under article 31(1) of the Vienna Convention on the Law of Treaties) and of Chapter II in particular, which is precisely to regulate the question of the attribution of a 'organization. For a position favourable to the "bi-univocal" interpretation of the "effective control" criterion see in argument, T. Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', *International and Comparative Law Quarterly*, 2012-3, pp. 714ss. A. Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link', *International Organisations Law Review* 2012-1, pp. 77-85.

state (or states) or to the international organization which made the organ available, which then, in turn, committed the violation. The doubt that may arise with regard to the scenario just configured is whether it is sufficient to hold responsible the state (or the international organization) that made the "loan" only on the basis of a "default attribution rule" or if, on the contrary, is necessary to demonstrate the presence of other elements. The Project of ILC does not provide any guidance on this, but in all likelihood, the responsibility of the state will have to be ascertained under the relevant Project of 2001. Secondly – unlike the Court of Appeal in the Nuhanovi⁸⁹ - case – the "effective control" outlined in article 7, in our opinion, can be exercised by a single legal entity at the same time and in relation to the same conduct. In practical terms, this means that the provision does not allow to configure the hypothesis of a dual, or multiple, attribution of conduct.

IV. Comparative Remarks from the Praxis of UN and NATO into the Sector of Foreign Defence

Regarding the practice of UN, the organization has the will to respond internationally for any violation committed during the peace-keeping missions⁹⁰ through the implementation of an adequate reparation to the injured parties⁹¹. In this regard, the decades of experience gained in the field of peacekeeping and international security⁹², as well as the primacy in it, is a fundamental aspect, which has led the UN for some decades to develop the awareness that violations of international obligations can be frequent in this type of interventions, so as to act accordingly, thus adopting standards of conduct, issuing statements, concluding agreements that provide for appropriate procedures for the resolution of disputes, etc.

The practice is inclined to attribute responsibility for offenses exclusively to the UN, appearing to be depositing for a widening of the scope of the responsibility of the participating states to military operations, a tendency which we believe to be welcomed. The reason should not be sought only based on legal considerations. It is important to highlight, in fact, the greater number of primary rules of international law applicable to states, rather than to international organisations, as well as the easier judicial assessment of state responsibility, when compared to the difficulty of judging matters concerning the responsibility of an organization, often frustrated by the application of the rules on immunity benefiting these institutions.

⁸⁹ Supreme Court, *The Netherlands v. Hasan Nuhanovi*, 12/03324, ECLI/NL/HR/2013/BZ9225, 6 September 2013, par. 3.11.2 e 3.5.2. *Nuhanovi v. The Netherlands* case number 265618/HA ZA 06, 1672, *Mustafi v. Netherlands*, appeal judgment, LJN BR5386, Judgment of 5 July 2011; *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Nuhanovi*, 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 16th 2014.

⁹⁰ A. Novosseloff, 'United Nations-European Union. Cooperation in the Field of Peacekeeping. Challenges and Prospects', *Global Governance Institute Analysis Paper* 2012.

⁹¹ "It has always been the policy of the UN, acting through the Secretary-General, to compensate individuals who have suffered damages for which the organization was legally liable". UN Doc. S/6589, p. 41.

⁹² P. Barette, 'Croyances et coopération: analyse du réseau des acteurs de la Politique de sécurité et de défense commune de l'UE', *Swiss Political Science Review* 2014-1, pp. 118ss. H. Biehl, B. Giegrich & A. Jonas, *Strategic Cultures in Europe. Security and Defence Policies Across the Continent*, Wiesbaden: Springer 2013.

With reference to the practice of the North Atlantic Treaty Organization (NATO)⁹³, the issue of international responsibility has not yet developed widely. Appeals for violations of international law have been brought against the individual states participating in the mission and not the organization as a legal entity; moreover, the international courts called to resolve the issue have never been able to rule on the merits and possibly recognize a state responsibility.

In particular, the next and later operation deployed with recourse to NATO assets and capabilities was operation ALTHEA in Bosnia and Herzegovina in 2004⁹⁴. In this operation, as in CONCORDIA, the Joint Action established recourse to NATO's assets and capabilities, and NATO placed the Deputy Supreme Allied Commander Europe (DSA-CEUR) and the SHAPE at the disposal of the EU. The collaboration of NATO in these two operations was also based on the "Concerted Approach for the Western Balkans", which outlined "core areas of cooperation and emphasizes the common vision and determination both organizations share to bring stability to the region"⁹⁵.

If we look at the UN and NATO⁹⁶ responsibility practice arising from the conduct of crisis management missions, it shows that the violations established and decided by the courts derive almost exclusively from the violation of international humanitarian law rules⁹⁷ and on human rights. This should not be surprising, when considering the centrality of the aspects related to the use of force and the protection of human rights in carrying out peace operations⁹⁸. However,

⁹³ H. Krieger, 'Common European Defence: Competition or Compatibility with NATO?', in M. Trybus & N.D. White, *European security law*, Oxford: Oxford University Press 2007, pp. 174-197. T. Stein, *Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?*, in C. Tomuschat, *Kosovo and the International Community. A Legal Assessment*, The Hague: Martinus Nijhoff, 2002, pp. 182ss. F. Terpan 'EU-NATO relations: Consistency as a strategic consideration and a legal requirement', in M. Trybus, N.D. White, *European Security Law*, Oxford: Oxford University Press 2007, pp. 270-294.

⁹⁴ A. Juncos, *EU Foreign and Security Policy in Bosnia: The Politics of Coherence and Effectiveness*, Manchester: Manchester University Press 2013. B. Pohl, *EU Foreign Policy and Crisis Management Operations: Power, Purpose and Domestic Politics*, London: Routledge 2014. M. E. Smith, 'Developing A Comprehensive Approach to International Security: Institutional Learning and the CSDP', in J. Richardson, *Constructing a Policy-making State? Policy Dynamics in the EU*, Oxford: Oxford University Press, 2012, pp. 254ss. S. Blockmans & M. Spembauer, 'Legal Obstacles to Comprehensive European Union External Security Action', *European Foreign Affairs Review*, 2013-4, pp. 9ss. F. Cameron, *An Introduction to European Foreign Policy*, London: Routledge 2012.

⁹⁵ P. Petrov, 'Early institutionalisation of the ESDP governance arrangements: Insights from the operations Concordia and Artemis', in S. Vanhoonacker, D. Hylke & M. Heidi (eds). *Understanding the role of bureaucracy in the European Security and Defence Policy*, *European Integration Online Papers*, 2010-1. K. Engberg, *The European Union and Military Operations: A Comparative Analysis*, London & New York: Routledge, 2013, pp. 53ss. U. Rabi, 'International Intervention in Local Conflicts. Crisis Management and Conflict Resolution in the Cold War', London & New York: I.B. Tauris Publishers 2010. M. Reichard, *The European Union-NATO Relationship: A Legal and Political Perspective*, London & New York: Routledge, 2016, pp. 247ss.

⁹⁶ In this spirit see also the Ruggie's Framework of 2011, UN Doc. A/HRC/17/31, March 21, 2011 contains a number of principles that help to flesh out the components of a corporate human rights due diligence process, which-should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

⁹⁷ M. Zwanenburg, 'The Duty to Respect International Humanitarian Law During European Union-Led Operations', in A. Sari & R.A. Wessel, 'Human rights in EU Crisis management Operations. A Duty to Respect and to Protect?', The Hague: T.M.C. Asser Institut 2012.

⁹⁸ F. Lachenmann & K. Wolfilum, *The Law of Armed Conflict and the Use of Force*. The Max Planck Encyclopaedia of public international law, Oxford: Oxford University Press 2017.

one of the obstacles that do not allow a full assessment of the international responsibility of these two organizations is the uncertainty about the scope and content of international humanitarian law and human rights applicable in such situations. The same problem emerged with reference to the operations of EU CSDP⁹⁹. A clarification of the applicable law in such situations therefore appears opportune and necessary, also in light of the considerable development of the practice in the field of peace-keeping and crisis management¹⁰⁰.

Should an EU military operation be involved in an armed conflict as combatants, what are the foundations for the application of international humanitarian law? It has been established, even by the EU, that the rules of the Vienna Convention on the Law of Treaties are customary international law¹⁰¹ and, therefore, they must be applied by all subjects of international law¹⁰², which refers to the EU. This applicability is supported by TEU and EU case law which states “that European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation (...)”¹⁰³. One of the problems arising from this assertion is the question of which rules are applicable to a conflict in which the EU is involved. The Salamanca Declaration and the Framework Action adopted on 7-10 June 2004 as well as the European Union Guidelines on Promoting Compliance with International Humanitarian Law¹⁰⁴ might well be considered unilateral acts. However, the absence of one of the requirements for the existence of a unilateral act such as the intent to generate legal effect, when combined with the vague content of the documents as well as the purpose of the second document to “promote compliance with international humanitarian law” among non-member states, have hampered the classification of these documents as unilateral acts. Council joint actions might be also considered a source of unilateral acts. In relation to EU military operations, in some of the Council joint actions

⁹⁹ In addition, the Strategic Framework highlights some areas of action related to CSDP. See Council of the European Union, Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12 (2012).

¹⁰⁰ D. Liakopoulos, ‘Kritik an Friedenserhaltenden/Peacekeeping Operationen und die Entwicklung des Konzepts der Souveränität im Völkerrecht’, *International and European Union Legal Matters* 2011.

¹⁰¹ J. Pejic, ‘The Protective Scope of Common Article 3: More than Meets the Eye’, *International Review of the Red Cross*, 2011-93, pp. 5-7.

¹⁰² The ICJ in its advisory opinion on the Interpretation of the Agreement of 25 March 1951 between The WHO and Egypt ruled that “International Organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”. Interpretation of the Agreement of 25 March 1951 between The WHO and Egypt, I.C.J. Reports (1980), at. 37. In relation to the applicability of the international humanitarian law to UN, Zwanenburg stated that article 1 (I), article 3 and article 103 of the UN Charter “together make clear that UN Security Council can derogate from customary law”, when acting under the chapter VII of the UN Charter. M. Zwanenburg, *Toward a more mature ESDP: Responsibility for violations of international Humanitarian Law by EU crisis management operations*, in S. Blockmans (ed.), *The European Union and crisis management. Policy and legal aspects*, The Hague: T.M.C. Asser Institute 2008, pp. 395ss.

¹⁰³ J. Cardona Llorens, J. Pueyo Losa & J.L. Rodriguez-Villasante Prieto (eds.) *Estudios de Derecho Internacional y de Derecho Europeo en Homenaje al Profesor Manuel Pérez González*, Valencia: Blanchia, 2012, pp. 168ss.

¹⁰⁴ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJ C 303, 15.12.2009, p. 12-17. In argument see also: A. BRESLIN, *Ensuring respect The European Union's guidelines on promoting compliance with international humanitarian law*, in *Israel Law Review*, 43 (2), 2010, pp. 382ss. T. PFANNER, *Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims*, in *International Law Red Cross*, 91. 209, pp. 280ss-. D. PATTERSON, A. SÖDERSTEN, *European Union law and international law*, ed. Wiley Blackwell, New York, 2016.

pertaining to operation EUNAVFOR¹⁰⁵, the EU refers to different UN Security Council Resolutions as a basis for its operation. In these resolutions, the Security Council allows the states to enter and use the territorial waters of Somalia to fight against piracy in a manner consistent with relevant International Law, which in the case of an armed conflict would be international humanitarian law. This limitation has also been included in the "whereas" sections of one of the Council joint action. According to this conclusion, it is possible to affirm that the EU is bound by international humanitarian law.

ILC has also made this a criterion in the Project of 2011, and this will also be the model to be followed to address the issue of attribution of responsibility in the context of EU crisis management missions. Finally, the practice of UN and, to a lesser extent, NATO has shown that there are different types of international responsibility (direct, shared, secondary), depending on the degree of involvement of the various actors in the commission of the offense and the relationship between these. However, the state of international law regarding situations in which a liability that is not of an exclusive nature emerges is not yet well established at the present time, in order to determine exactly which of the above hypotheses can be configured in the concrete case¹⁰⁶.

According to our findings we disagree with the position that international humanitarian law applies only to the operations authorised by the UN Security Council and led by other states, while not applying to the operations under UN command and control. This is not possible simply because international humanitarian law starts to apply in the situations where there is an armed conflict or an occupation of the territory in fact and does not depend on any justification to use force lawfully or unlawfully coming from *jus ad bellum*. Accordingly, as soon as a state or IO becomes a party to the armed conflict, they are bound by international humanitarian law. In this spirit the peacekeepers participating in hostilities will become combatants. They cannot be considered civilians anymore because their states are in conflict with other parties and they are members of the armed forces. To argue otherwise would lead to unfortunate results, as if they were not considered combatants and still participated in the armed conflict, they would become unlawful combatants with very arguable status under international humanitarian law. When they do not participate in hostilities, their states are not parties to the conflict, and they are not considered armed forces and will be civilians of a neutral state. Their participation (representing an international actor) may convert that conflict in an international one if they participate in hostilities against state armed forces or against an armed group in the state without a government and that group may pretend to act on behalf of the government. This position argues for a gradual approach to the application of the law of occupation under Vienna Conventions on the law of Treaties¹⁰⁷. If protected persons fall in the hands of peacekeepers and the application of any provision of Vienna Conventions on the Law of Treaties is triggered, they

¹⁰⁵ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122, 19.5.2015, p. 31-35. H. Merket, *The European Union and the Security-Development Nexus Bridging the Legal Divide*, Leiden & Boston: Brill, 2016, pp. 130ss. A. J. Bellamy, Libya and the responsibility to protect: The exception and the norm, *Ethics & International Affairs*, 2011-3, pp. 263ss. S. Chesterman, Leading from behind: The responsibility to protect, the Obama doctrine, and humanitarian intervention after Libya, *Ethics & International Affairs*, 2011-3, pp. 282ss.

¹⁰⁶ M.P. Moele, *The international responsibility of international organisations. Cooperation in peacekeeping operations*, Cambridge: Cambridge University Press 2017, pp. 168ss.

¹⁰⁷ E. Benvenisti, *The Law of Global Governance*, The Hague: Brill, 2014, pp. 99, "as an international person, an International Organisation is subject to general international law. Therefore, International Organisations are subject to customary international law and general principles of law".

must comply with it irrespective of the heading under which the provision is placed in Vienna Convention on the Law of Treaties¹⁰⁸. The whole system of Vienna Conventions on the Law of Treaties may also apply to the peacekeepers, even if they do not participate in the conflict if they exercise the sole authority in the country. In all cases, whether international humanitarian law applies or not, the troop contributing countries and UN remain bound by international humanitarian law obligations (the UN remains bound by customary international humanitarian law)¹⁰⁹. Consequently, I am of the opinion that international human rights law does not cease to apply during the application of international humanitarian law: they apply concurrently. In any case of their conflict, it can be solved by interpretation of the one in the light of another. If the peacekeepers commit human rights violations and their conduct is attributable to their respective troop contributing countries will be responsible for that conduct, even though it was committed beyond the territorial borders and territorial control is not needed. The argument is made that the notion of jurisdiction, provided in human rights treaties, is not a condition additional to the attribution of the conduct to states but, in substance, represents the same limitation to state responsibility for the conduct performed abroad. The human rights bodies use the jurisdictional requirement to find the responsibility of the state in the same way as the attribution of the conduct is used to find the responsibility of that state.

Therefore, the UN or troop contributing countries can be responsible for the human rights violations committed by peacekeepers during peace keeping operations if the conduct constituting human rights violations is attributed to either of them. Regarding individual criminal responsibility of peacekeepers, the thesis argues that the SOFAs which the UN signs with the host states provide blanket exception from the host state jurisdiction for peacekeepers and may lead to the impunity of peacekeepers for the acts committed during peace operations. The host states signing such agreements may violate their obligations under the Vienna Convention on the Law of Treaties¹¹⁰. Under those Conventions, the host states are obliged to establish their jurisdiction over war crimes or crime of torture, if a perpetrator of those acts is present in their territory. They are also under obligation to take him into custody and prosecute or extradite. No such possibility is envisaged under the UN SOFAs and when a peacekeeper commits an international crime, the host state will be in violation of its obligations.

It can be concluded that the responsibility of the UN, troop contributing countries, and peacekeepers depends on the factual circumstances of the commission of international law violations during PSOs. The troop contributing countries hiding behind the veil of the UN and its immunities cannot avoid international responsibility for those crimes that they were able to prevent. The fact that the troop contributing countries possess more powers than the UN (including disciplinary, prosecutorial and training powers) to prevent violations of international law contributes to their responsibility for those crimes. The UN should not bear the responsibility on its own. The UN should change its position with regarding the SOFAs that it signs with the host states, as by this act it may compel the host states to violate their obligations under international law. Although the UN tries to adopt certain measures and policies directed to prevent unlawful conduct of peacekeepers, it does not change its policy in shielding troop contributing countries and their peacekeepers from any international responsibility and by that contributing to the sense of impunity among them. What should be done is to recognise that

¹⁰⁸ For details see O. Corten, P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford: Oxford University Press 2011.

¹⁰⁹ K. Daugirdas, 'How and Why International Law Binds International Law', *Harvard Journal of International Law* 2016-2.

¹¹⁰ See also J. Obermatt, 'The Development of Customary International Law by International Organisations', *International & Comparative Law Quarterly* 2017-2, pp. 494ss.

the international responsibility for violations of international law committed during peace operations is shared between the UN, troop contributing countries and peacekeepers and neither of them will avoid responsibility by reason of simple collaboration with the UN and authorisation by the UN Security Council.

V. CSDP Missions in the European Union

The hypothesis that the contingents taking part in a military operation of CSDP¹¹¹ can be qualified as *de jure* bodies of the European Union is to be excluded, since there is no indication to that effect that can be found in deeds, declarations and other soft law instruments issued from the EU, or even less, in provisions contained in the Treaties. For similar reasons, even the possibility of configuring such groups as "subsidiary" organs of the organization is groundless. Finally, the hypothesis consisting in considering military contingents *de facto* organs shows evident difficulties in many ways. Although military contingents transfer part of their command and control structure to the European Union, the EU does not exercise full command over them. On the other hand, it can be said that only bodies under its "direct" and "exclusive" operational and organizational control are bodies of the European Union, and this criterion can be extended, in general, to all international organisations. In other words, the concept applies only to those subjects on whom the organization has the "exclusive" authority to impose operational decisions or regarding the appointment of their duties within the mission. This is not the case of personnel participating in CSDP¹¹² missions.

In our opinion, the quotas that take part in the military operations of CSDP cannot therefore qualify as bodies of the European Union under article 6 of Project 2011. The application of this provision is, therefore, excluded with reference to the allocation of unlawful conduct during CSDP operations. The absence of specific provisions that set the state quotas as organs of the

¹¹¹ A. Sari & R.A. Wessel, 'International responsibility for EU military operations: Finding the EU's place in the global accountability regime', in B. Van Vooren, S. Blockmans & J. Wouters, *The EU's role in global governance: The legal dimension*, Oxford: Oxford University Press 2013, pp. 128ss. M. Zwanenburg, *Accountability of Peace Support Operations*, Leiden & Boston: Martinus Nijhoff Publishers 2005. A. Billon-Galland, M. Quencez, *Can France and Germany Make PESCO Work as a Process Toward EU Defence?* Washington, DC: German Marshall Fund of the United States, 2017. S. Biscop, 'All or nothing? The EU global strategy and defence policy after Brexit', *Contemporary Security Policy* 2016-3, pp. 432ss.

¹¹² To date, the EU and CSDP has successfully launched 34 operations and missions: seven military operations (Concordia, Althea, Artemis, EUFOR DR Congo, EUFOR Chad/RCA, Atalanta, EUFOR RCA), twelve assistance/supporting missions (EUSEC DR Congo, EU support to AMIS Darfur, EUSR BST Georgia, EUPAT FYROM, EUPT Kosovo, EUSSR Guinea-Bissau, EUNAVCO, EUCAP Sahel Niger, EUCAP NESTOR Horn of Africa, EUAVSEC South Sudan) including the two most recent (EUCAP Sahel Mali and EUAM Ukraine), six police operations (EUPM, Proxima, EUPOL Kinshasa, EUPOL COPPS, EUPOL DRC, EUPOL Afghanistan), three rule of law missions (EUJUST THEMIS, EUJUST LEX, EULEX Kosovo), three border missions (EUBAM Rafah, EUBAM Ukraine/Moldova, EUBAM Libya), and two monitoring missions (AMM and EUMM Georgia). See for details: A.E. Juncos, *European Union foreign and security policy in Bosnia. The politics of coherence and effectiveness*, Manchester: Manchester University Press, 2015, pp. 145ss. M.E. Smith, *Europe's Common Security and Defence Policy: Capacity-Building, Experimental Learning and Institutional Change*, Cambridge: Cambridge University Press 2017. B. Möler, *European Security. The Roles of Regional Organisations*, London & New York: Routledge 2016. C. Major, *Towards an EU Peacebuilding Strategy: The Effects of the Lisbon Treaty on the Comprehensive Approach of the EU in the Area of Civilian Crisis Management*, *European Foreign Affairs Review* 2014-18, pp. 46ss.

organization when they act as part of CSDP operations can be explained by the awareness of the risks related to the commission of violations of international law and, consequently, perhaps also by the will to ensure that, first and foremost, states have to respond internationally to any illegal conduct. On the other hand, it is appropriate to emphasize the large, and in some ways unexplained, asymmetry between the Project of 2001 and the one of 2011 regarding the regulation of the issue concerning the attribution of conduct. This is a "deficient" regulatory framework, in which the (few) provisions concerning the attribution of conduct of the Project of 2011 do not seem sufficient to regulate the various situations that may occur with reference to the increasingly complex practice of international organisations.

VI. European Union Responsibility Related to Acts of Member States

Under certain circumstances, the responsibility of an IO may arise in connection with the conduct of a state or another IO, pursuant to articles 15¹¹³ and 17 of the Project 2011¹¹⁴. Article 15 provides that where an organization directs and controls a state (or another international organization) in the commission of an international offense, it will be responsible for that act, if it does so "with knowledge of the circumstances of the internationally wrongful act" and if the act "would be internationally wrongful if committed by that organization"¹¹⁵.

This case may take on a certain importance during the CSDP operations. One of the discriminating factors for the attribution of conduct and responsibility is to assess the type of control exercised over a member state. Also, with reference to the hypothesis of "related liability", it is fundamental to understand what kind of relationship exists between the European Union and the member states participants in the missions. In this case, the position of the member states is emphasized, not that of their organs made available to the organization. This aspect must be appropriately considered and may change the conclusions that can be reached. In essence, it can be said that in the course of a military operation conducted under the aegis of the European Union, the latter directs and controls a member state in the commission of an unlawful act in accordance with article 15 of the Project of 2001. In our opinion, the hypothesis is hardly feasible in practice, but should not be excluded a priori. The only form of control exercisable by an IO on the member states is achieved through the enactment of binding acts. In this sense, there is no doubt that within the CSDP the Member states are obliged to comply with the measures decided and adopted by the European Union, in particular the Council. In fact, the transactions are initiated through the issue of joint actions, which, pursuant to article 25(bi) of the TEU, are among the decisions taken by the European Union to conduct the CFSP. The decisions are binding acts issued by the Union, obligatory in all their elements, which may have general scope or, if they designate the recipients, individual scope.

¹¹³ See, O. Keefe, C.J. Tams, A. Tzanakopoulos, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, Oxford: Oxford University Press 2013, pp. 241ss.

¹¹⁴ See in argument: C. Alborn, The rules of International Organisations and the law of international responsibility, *International Organisations Law Review*, 2011-8, pp. 398ss. P. Jacob, Les définitions des notions d'organe' et d'agent' retenues par la ILC sont-elles opérationnelles?, *Revue Belge de Droit International*, 2013, pp. 18ss. Y. Kerbat, Sanctions et contre-mesures: risques de confusion dans les articles de la ILC sur la responsabilité des organisations internationales, *Revue Belge de Droit International* 2013, pp. 105ss. M. Möldner, Responsibility of International Organisations-Introducing the ILC's DARIO, *Max Planck Yearbook of United Nations Law* 2012-16, pp. 282ss.

¹¹⁵ A. Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge: Cambridge University Press 2016.

One of the major problems, however, lies in the fact that the management and control in question must be exercised directly on the concrete EC of the unlawful act, or must be functional and closely related to it. Moreover, this control must refer to a real "domination" on the commission of the deed, while the management must also be factual. The first requirement seems to imply that the member state cannot have any alternative available except to commit the act¹¹⁶. For example, it could be assumed that a member state is bound by a provision contained in a decision to subject individuals captured in the course of a military operation to arbitrary arrest and detention, in violation of its obligation under international law of a customary nature. Regarding the second requirement, it seems at first sight easier to consider it satisfied in relation to the subject in question. The term "directs", in fact, refers to an "actual direction of an operative kind"¹¹⁷ which can be said to exist with regard to CSDP missions. Nonetheless, the control we are referring to is implemented towards state bodies and not towards member states tout court. The latter provide civilian and military capabilities for carrying out the various missions which, in concrete terms, consist precisely of qualified personnel. It is therefore a sort of "three-way relationship": firstly, there is the European Union, which leads the CSDP and has its full "ownership"; secondly, there are the member states, which provide their necessary resources for the organization, preparation and actual conduct of the missions; finally, in a position, so to speak, "intermediate", there are the state bodies made available to the Union, which act as a filter between the two main actors and which, in practice, carry out the activities envisaged by each individual operation. If from a purely practical point of view this situation may appear well defined, the legal uncertainties it poses are not, as we have so far been able to appreciate, of little importance. In particular, since the "control" requirement on states does not seem to be fulfilled, we believe that the European Union cannot be held responsible for an international offense committed within the framework of a CSDP mission under article 15 of Project¹¹⁸. On the other hand, the relationship between the member state participating in a mission and the European Union does not seem to be sufficiently regulated and, even less, the triple relationship that is created between a member state and its own military contingent, on the one hand, and this last and European Union, on the other.

On the other hand, as regards the circumvention hypothesis (article 17 of the Project), it may be the most suitable for the purpose of configuring the possible international responsibility of the European Union in the context of the CSDP¹¹⁹. In fact, in this area of foreign policy, the Union does not have the basic elements to implement proper regulatory control towards the member states – the jurisdiction of the CJEU over the provisions concerning the CFSP – the member states being excluded would continue to incur liability for issues related to this sector, while the EU could incur international liability, not on the basis of a rule on attribution, but exclusively under article 17¹²⁰. This position, although present undeniable connotations of logic, does not seem to be shared in the light of what we say below.

¹¹⁶ S. Yee, 'Member responsibility and the ILC Articles on the Responsibility of International Organisations: Some observations', in M. Ragazzi *supra* note 6.

¹¹⁷ ILC, Project 2011, p. 106, par. 4.

¹¹⁸ In argument see: K. Berner, *Subsequent agreements and subsequent practice in domestic courts*, Berlin: Springer 2017, pp. 76ss. P. Behrens, *supra* note 7.

¹¹⁹ M. Cortés Martín, 'The European exceptionalism in international law? The European Union and the system of international responsibility', in M. Ragazzi, *supra* note 6.

¹²⁰ R.A. Wessel & L. Den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?', in M. Evans & P. Koutrakos, *supra* note 17.

If we apply the provision in question to the operations of CSDP¹²¹, we can see, in fact, how the member states conduct their actions on the basis of binding decisions issued by the Council. However, two requirements need to be met to hold the European Union accountable under article 17(1): First of all, it must be shown that, in issuing a decision with regard to the member states, it had the precise intention of circumventing its own international obligation. Furthermore, the decision must not leave any room for manoeuvre in the hands of the member state, which must be forced to commit an international offense by implementing that decision. Finally, there is no responsibility of the IO if the authorization is no longer valid and no longer applicable to the circumstances of the case due to changes that have occurred since its adoption¹²². The conditions of applications provided for in article 17 are so restrictive that they jeopardize the usefulness of the whole provision. As regards to the first aspect, it is clearly difficult to demonstrate that the European Union wants to circumvent an international obligation which will be free to adopt the measures it deems most appropriate in this regard. On the other hand, in general and theory, the fact remains that these are official organs and therefore always subject to the supreme command of their sending state.

The hypothesis of the circumference, in fact, implies the presence of the specific element of malice, or the will to cause a certain act, as clarified also by the ILC. This is obviously an element of a subjective nature whose presence cannot be deduced from mere factual criteria. In relation to the second aspect, it is difficult to establish to what extent the states enjoy a certain degree of discretion when they have to implement the measures imposed by the European Union in the context of the CSDP, partly because of the secrecy of certain documents such as those concerning, for example, the rules of engagement. In the *Rheinland-Pfalz* case¹²³, for example, the judges considered that the unlawful conduct was attributable exclusively to Germany, stating that it had a significant influence on the transfer of these subjects.

Since the state organs operating in the context of a CSDP operation are still subject to the general control of their sending state, they enjoy a certain degree of discretion in implementing EU measures. Furthermore, an observation is opportune. Article 17 of the Project assumes that the action taken by the member state following the decision issued by the organization is illegal for the latter, regardless of whether it is also for the circumvented member state (or IO). With regard to the international responsibility deriving from the CSDP operations, we can say that almost all of the international standards in this area constitute obligations both for the European Union and for the member states¹²⁴. It follows that, whenever article 17 is applied to cases of international crimes committed during a CSDP mission, both the European Union and the

¹²¹ An international organisation incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member states or international organisations to commit an act that would be internationally wrongful if committed by the former organization.

¹²² J. D'Aspremont, *The Law of International Responsibility and Multi-Layered Institutional Veils: The Case of Authorized Regional Peace-Enforcement Operations*, *SHARES Research Paper* 2013-24

¹²³ CJEU, 44/79, *Liselotte Hauer contro Land Rheinland-Pfalz*, 13 December 1979, ECLI:EU:C:1979:290, I-03727, par. 15.

¹²⁴ The only cases where the EU appears to have its own "specific" international obligations are those related to compliance with international agreements concluded with third states participating in the missions or resolutions issued by the Security Council which constitute the legal basis of certain CSDP operations (such as, for example, the 1846 issue of 2008 which calls into question International Organisations in order to combat piracy in accordance with international law). Other resolutions, on the other hand, seem to impose obligations only on states. For example, again with reference to the ATALANTA Operation, the Res. 1816 (2008) authorizes states to enter the territorial waters of Somalia to combat piracy in accordance with international law (Article 7, letter a). In this case, there are doubts about the applicability of the provisions with regard to the European Union.

member state will be responsible internationally. Article 17 may seem at first indicated to regulate the issues concerning the assignment of international responsibility in the context of CSDP missions; nevertheless, to a deeper analysis, the fundamental requisites that constitute its application base seem to be missing.

VII. Multiple Attribution and Responsibility

The hypothesis that an international crime committed during a CSDP operation can be attributed both to the European Union and to the individual sending states, to varying degrees depending on the case. An attribution of this type within the scope of CSDP operations can, in our opinion, occur when the "effective control" exercised by the European Union on the offending conduct¹²⁵ is not sufficiently clear, and there is exclusive control by the sending state. At the regulatory level, the Political and Security Committee (PSC) (article 38 TEU)¹²⁶ is responsible for the political control and strategic direction of military operations, under the authority of the High Representative for the Common Foreign and Security Policy from the Council. On the other hand, from a factual point of view, the contingents obey the directives of the Commander of the EU Force, but are subjected to the "full command and authority" of their sending state, which, as previously mentioned, retains powers disciplinary and jurisdictional measures on these and can also decide on a number of aspects, such as participation in a particular operation, the withdrawal of troops from the same, the number of men to be made available to the Union, etc. In this scenario, the dual (or multiple) attribution and responsibility hypothesis can be a valid solution for regulating this issue¹²⁷. The difficulty of this approach is, however, to distribute equally the "weight" of responsibility between the sending state and the European Union: in concrete terms, it will be necessary to assess the damage caused to the victims of the illicit act (where it is quantifiable) and to what extent each party will have to

¹²⁵ B. Kondoch, *The Responsibility of Peacekeepers, Their Sending States, and International Organisations*, in T.D. Gill, D. Fleck, *The Handbook of the International Law of Military Operations*, Oxford: Oxford University Press 2010, pp. 524ss.

¹²⁶ Political and Security Committee Decision (CFSP) 2017/682 of 29 March 2017 on the appointment of the EU Force Commander for the European Union military operation in Bosnia and Herzegovina and repealing Decision (CFSP) 2016/332 (BiH/25/2017), OJ L 98, 11.4.2017, p. 20-21.

¹²⁷ An interesting application of the dual responsibility theory, in close connection with the concepts of control and command, is provided by the International Law Association (ILA) in relation to the respect of international humanitarian law in the context of peace-keeping missions and of peace-enforcement. In particular, the Final Report entitled *Accountability of International Organisations* provides that: "(...) troop contributing countries remain responsible for violations of the applicable International Humanitarian Law (IHL), but International Organisations bear a coordinate responsibility with troop-contributing with the applicable principles of (IHL) in peacekeeping or other operations under the control or authority of the International Organisations". In its commentary, the Report states that "the obligation to abide by (IHL) rests wholly on the state when the armed forces remain under its command and control, while the International Organisations has granted the authorization, has the special responsibility to ensure respect for (IHL) by the state. If you are not responsible for the same rules, you will be responsible for ensuring compliance with the International Organisations. In the case of a national control system, choose the targets, both the state and the International Organisation share responsibility for a violation of (IHL). In other words, primary responsibility by way of effective control is always accompanied by independent, secondary obligations (...)". For the ILA, in essence, although as a consequence of the application of the "effective control" criterion one can attribute the conduct to only one of the parties in question, the other also shares a portion of responsibility, deriving from the violation of international obligations secondary. The theory contains valid aspects, but in our opinion it is scarcely supported by praxis. See, ILA, *Accountability of International Organisations*, Berlin Conference, Final Report, 2004, pp. 24.

respond internationally. Passed to the dual or joint responsibility situation, it is also foreseen by the 2011 Project in article 48¹²⁸. The limitation of this provision is that it deals only with the "consequence" of the commission of the unlawful act, providing that, where an IO and one or more states or international organisations are responsible for the same offense, "the responsibility of the state or organization may be invoked in relation to that act"¹²⁹.

Dual responsibility will necessarily have to be based also on an attribution of dual conduct. The ILC has admitted this possibility, stating however that it may not frequently occur in practice. The only example reported by the ILC in which there can be a double attribution of conduct is that in which two international organisations establish a joint body that works for both; this situation obviously cannot be emphasized with reference to the CSDP. A dual attribution can occur when the conduct is put in place by an individual or entity to which more than one attribution rule applies, or in cases where it acts on behalf of more than one entity at the same time. A multiple attribution of conduct in the practice of EU missions could arise, for example, in cases where the quota "given" to the organization is subject both to the directives originating from its sending state and to those issued, at the various levels, by the institutions and bodies of the Union. In this case, the decisive element lies in the "double membership" of the body in question, which acts both on behalf of its sending state and on behalf of the European Union. A problematic aspect, however, consists in establishing the criteria based on which to evaluate this "double belonging"¹³⁰: must we use formal or organic criteria? Or to factual criteria, as for the application of the "effective control" test? In the latter case, what kind of control should be exercised on such individuals so that there can be attribution of conduct? In other words, what is the "minimum threshold" of control required?

Another question we consider open concerns, moreover, the overlap of the dual attribution hypothesis with other cases configured by the 2011 Project, such as that of the conduct of organs or agents of the IO (article 6). In fact, in the case where a body acts on behalf of more than one legal entity at the same time, for example, as a *de facto* body of one and another *de iure* organ of the other, it is possible to speak of a dual attribution of conduct, which provides for an exclusive attribution to international organizations. In our opinion, the Project of 2011 is not, at present, able to answer these questions as it is strongly oriented towards the unequivocal attribution of conduct. A way forward could be to use the hypothesis of dual attribution as a sort of "default attribution rule" in all those cases in which it is not possible to find the presence of the attribution elements outlined in articles 6 and 7 of 2011 Project. If the conduct is not carried out by an organ or agent, in law or in fact, of an international organization, or is subject to the effective control of the latter, it must presumably be attributed to the sending state. In this scenario, the dual attribution could find space, especially in the residual cases of article 7, in which it is ascertained that the organization has not exercised an "effective control" on the specific conduct, but has in any case, in some way, influenced the occurrence of this unlawful event¹³¹. However, it is inevitable to observe how every effort to configure multiple attribution in cases of CSDP operations and, more generally, for military operations conducted under the aegis of international organisations, clashes, on the one hand, with the lack of clear normative references and, on the other, with a jurisprudence still extremely timid and, in our opinion, not

¹²⁸ T. Komori, J. Wellens, *Public interest rules of international law: Towards effective implementation*, London & New York: Routledge 2016, pp. 203ss.

¹²⁹ A. Nollkaemper, 'The Duality of Shared Responsibility', *Contemporary Politics* 2018-4.

¹³⁰ O. Quirilo, The international responsibility of the European Union. A basic interpretive pattern, *Hungarian Yearbook of International and European Law* 2013-63.

¹³¹ B. Boutin, 'Attribution of Conduct in International Military Operations. A Causal Analysis of Effective Law', *Melbourne Journal of International Law* 2017-18, pp. 158ss.

always convincing. In essence, the multiple attribution of conduct, although desirable, remains today a purely theoretical hypothesis.

Regardless of the difficulties in applying the criterion, the attribution to both the EU and to the member states of the same international illicit fact is certainly an aspect to be taken into consideration in order to provide an effective remedy for victims of such violations of international law. Since the primary objective of the international liability regime is the possibility for the injured party to invoke this responsibility and, above all, to assert it in legal terms.¹³² In the case in which the victim may have recourse against both the European Union and one or more member states, the probability of obtaining such redress will obviously increase. The dual attribution of an illicit conduct would therefore prevent the states from hiding behind the "shield" constituted by the organization (the so-called organizational veil)¹³³, also creating an obligation on them to provide an adequate repair and, moreover, it can provide an incentive for the European Union and to the member states participating in the missions to not commit violations of international law during the operations.

It is clear that it is not possible to establish a general rule which would always allow to attribute any international wrongdoing to the European Union. This may be true, in a broad sense, for all those military operations established, managed or authorized by an international organization. This lead, once again, to highlighting that the concrete attribution of a particular conduct detrimental to the subjects involved depends on the analysis of the circumstances proper to the specific case.

The bodies that participate in the CSDP operations-even more markedly than we can say with regard to the peace-keeping missions of UN-cannot, in our opinion, be defined as *de facto* departments of the European Union, nor much less *de jure* organs, constituting state organs made available to the organization. They cannot even be framed as agents of the European Union, being first of all agents of their own state. Therefore, linking the hypothesis of international responsibility of the European Union in this sector with the dictate of article 6 of the Project of 2011 would, in our opinion, be a stretch.

It is certainly correct to say that it is the personnel, both civil and military, who ensure the CSDP is "made available" to the European Union by the member states and, to a lesser extent, by third parties. In particular, these are state bodies that act on behalf of the organization, but under the "general command" of their sending state. The attribution rule that seems best suited to the situation in question is therefore that contained in article 7 of the Project. The difficulty, quite obvious, is to establish whether or not the Union exercises an "effective control" over the conduct of these national bodies and, to this end, determine under what circumstances such control exists. We have seen, that the chain of command can be a useful tool for this purpose, especially if we move on the basis of the practice of UN. It clarifies what the functions of each single structure participating in the operations are but has the defect of not being able to determine, when an international obligation is actually violated, if the EU were actually exercising such type of control¹³⁴. As the operation Atalanta demonstrates the "effective control"

¹³² The repair (envisaged by article 31 of the 2011 Project), in all its forms (articles 34-37), is one of the consequences that is produced as a result of international responsibility, together, usually, with the obligation to end of the unlawful act article 30, letter a) and not to repeat it (Article 30, letter b).

¹³³ J. D'Aspremont, *supra* note 123.

¹³⁴ G. Fernández Arribas, 'International responsibility of the European Union for the activities of its military operations. The issue of effective control', *Spanish Yearbook of International Law* 2013-2014-18, pp. 58ss.

on a specific conduct – understood as the specific order to perform a given act and therefore the ability to concretely influence the occurrence (or the non-occurrence) of that event – it can also be exercised by a different body than the one to which this control was originally assigned. Consequently, in order to hold the European Union accountable internationally, it will be necessary to take into account the specific act, contrary to a requirement of international law, and to ascertain who has given the precise order to accomplish it and, as established from the Hague Court of Appeal in the Nuhanovi case, it had the power to prevent it.

As far as military operations are concerned, the EU holds the command and control of the operation through a chain of command that originates from the Council and ends with the Operation Commander, who exercises command and strategic control at the narrowest level, under the authority of the European Union Military Committee (EUMC) and the Conference of the Parties (COPS). This transfer of authority from national governments to the EU can be interpreted as an exercise of effective control by the Union¹³⁵, especially when one considers that in UN case it is recognized its international responsibility, a similar mechanism took place, as it was the Force Commander to exercise command and control in the field on behalf of UN. In the case of the ONUC¹³⁶, mission, the chain of command originated from the Secretary General under the authority of the Security Council and from General Assembly passed through the officer in charge and reached up to the Commander of the Force. On the other hand, the concepts of general "command" and "control" are not sufficient to establish who exercises the "effective control" on a given conduct pursuant to article 7 of the 2011 Project. For this purpose, it is necessary to evaluate what is the authority that exercises control when the violation takes place, or the authority from which the order is issued which, in turn, causes the occurrence of the unlawful conduct. This can only be done by carefully assessing, on a case-by-case basis, all the details of the offending case.

Since this operation can be very complex with reference to the still poor practice of the European Union, one possibility could be that of setting up a "dual attribution" of an illegal conduct, either to the European Union, to the individual or to the most sending states that concretely commit the violation of an international obligation, evidently in proportion to the type of offense committed. This operation would also give rise to a dual international responsibility and, therefore, to the possibility for the injured party to take legal action against both parties. Although it is undeniable the difficulty of distributing the weight of each (part of) responsibility equally and the lack of adequate normative references, this approach appears at the moment, in our opinion, the way most responsive to the real modalities of CSDP operations. In order to simplify the distribution of responsibilities under the scenario just outlined, a viable route could be to consider, in cases of violations of international obligations committed during a CSDP mission, two distinct international offenses (of parallel attribution and responsibility).

The outlined approach clashes with the one adopted by the German courts in the case of Rheinland-Pfalz, in which the first and second instance judges have identified Germany as the only entity responsible for the violations of human rights committed against Somali pirates. In our opinion, the case could be an excellent opportunity to consolidate a line of jurisprudential

¹³⁵ S.Ø. Johansen, Accountability mechanisms for human rights violations by CSDP missions: Available and sufficient, *International & Comparative Law Quarterly*, 2017-1, pp. 184ss.

¹³⁶ O. Spijkers, The evolution of United Nations peacekeeping in the Congo: From ONUC, to MONUC, to MONUSCO and its force intervention brigade, *Journal of International Peacekeeping*, 2015-1, pp. 90ss. M.W. Doyle & N. Sambanis, *Making war and building peace: United nations peace operations*, Princeton, New Jersey: Princeton University Press, 2011.

prone to the recognition of a dual attribution and responsibility; to this end, the judges should have given less weight to the criterion of the final operational control, in the wake of the criticized cases *Behrami and Saramati*¹³⁷, and to admit that Germany had (a part of the) responsibility, since it had concretely implemented the illegal transfer, but that the European Union should also respond to a certain extent internationally, since it was the legal entity that had authorized it¹³⁸.

We believe that national and international jurisprudence should move more decisively towards a "shared" responsibility in relation to military operations conducted under the aegis of international organisations and, more specifically, those of CSDP, gradually moving away from the road of exclusive responsibility, so dear to classical international law, but perhaps inadequate in the current international scenario. A final consideration is opportune: if on the one hand the works of the ILC have allowed, albeit in a not yet definitive way, to codify the legal regime regarding the international responsibility of the organizations, on the other hand pronounced on the attribution of the committed offenses in the course of operations carried out by the United Nations, as well as the German one on the issue of pirate transfer in the context of Operation Atalanta, it seems to move more and more towards the recognition of a state responsibility rather than the ego. This situation in addition to constituting a paradox, represents a dangerous tendency that could prejudice the development of international law in matters of responsibility.

Our suggestion is to conduct an attribution of conduct analysis in each of these cases applying principle of effective control understood in its traditional meaning, i.e., the Nicaragua formula¹³⁹ and not the doctrine of ultimate control as developed in the jurisprudence of the ECtHR. As to the tension between the interests of the injurer organization and the injured party, international law fails to provide a satisfactory solution. The system fails at the procedural level of enforcement of responsibility. The international law provides for instruments safeguarding the autonomy of international organisations. The natural course of action would be that they could be held responsible for their acts violating international law. However, the deficiencies of the enforcement mechanisms of international law often render this impossible. Immunity of international organisations, lack of standing before international courts and tribunals, and absence of arbitration arrangements allowing for settlement of disputes involving international organisations create a situation in which a victim of a violation of international law is deprived of remedies under international law and as consequence in EU law, too. This also has its consequence in the application of substantial law on responsibility, as the injured parties will be likely to argue that the actions of the organizations are to be attributed to the member states, hoping to obtain a remedy in the more effective mechanisms of enforcement of state responsibility. Thus, the degree of control that the state must have over an entity, formally not having a "state organ" status, is the same as the state has over its *de jure* organs, namely complete dependence. The only difference between a *de jure* and *de facto* state organ is the recognition of the former in the state's internal law, which per se does not affect the state responsibility under international law.

¹³⁷ L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford: Oxford University Press, 2011, pp. 159ss.

¹³⁸ M. Dixon, M. Mccorquodale & S. Williams, *Cases and materials on international law*, Oxford: Oxford University Press, 2011.

¹³⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgement, ICJ Reports, 27 June 1986 ("Nicaragua case").

At the national level, restricting of the immunity of international organisations should be recommended. In our view, the limitations should be based not on the restrictive doctrine of immunity of state implying the *acta iure imperii* and *acta iure gestionis* division inappropriately to international organisations. The restrictions should go back to the very justification of their immunity under international law. The “functional necessity” analysis would constitute a useful tool for proving whether the acts in question in fact fall within the scope of activities requiring jurisdictional immunity.

VIII. Concluding Remarks

CSDP has great potential, especially following the changes introduced by the Lisbon Treaty and the new configuration of article 43 TEU. The European Union can conduct a very wide range of operations outside its borders, many of which involve military intervention, and is, at least on paper, a “new” actor for international security. The provision concerning the progressive definition of a “common European defence” further emphasizes the role and type of functions that the organization intends to take on the international scene, no longer limited only to the economic and trade sectors. On the other hand, the great potential of CSDP has, to date, remained largely unexpressed. The missions conducted were, except for sporadic cases, of reduced scale and involved a small number of units in the field. The “common defence”¹⁴⁰ has not yet been achieved¹⁴¹. CSDP is currently in a sort of “limbo” between a real security policy and a mere civil action. The reasons for a modest development and the “lack of enthusiasm” towards CSDP we believe are primarily due to its markedly intergovernmental character and its *sui generis* nature. Regarding the first aspect, it is clear that the member states are the real “protagonists” of the CSDP¹⁴² and those who can influence their development and progressive definition. The CSDP still appears, in fact, as the set of decisions taken at the level of individual national governments, rather than a real “common policy”. On the other hand, the relationship between the European Union and member states and third parties in this sector still appears to be obscure and, in some respects, controversial. In particular, it is not clear what kind of competence the organization has and what the member states’ room for manoeuvre is. The military missions (EUNAVFOR Somalia and EUNAVFOR MED on all)¹⁴³ seem to have, in some way, marked the passage of the CSDP to a more advanced phase and a more incisive type of military intervention, but this development must in our opinion necessarily also be accompanied a general change in the intergovernmental nature of this sector, which must become more supranational. To this end, a viable hypothesis could be that of modifying the norm foreseen by article 42 (4) TEU¹⁴⁴, replacing the unanimity rule currently in force for the adoption of decisions by the Council in this area, with that of the qualified majority. Furthermore, in our opinion, it is appropriate to clarify what kind of competence the European

¹⁴⁰ M.K. Cross (2013) ‘The Military Dimension of European Security: An Epistemic Community Approach’, *Millennium*, 2013-10, pp., 47ss. H. Dijkstra, *Policy-making in EU Security and Defence: an institutional perspective*, Basingstoke: Palgrave Macmillan 2013.

¹⁴¹ J. Black, A. Hall, K. Cox, M. Keep & E. Silversen, *Defence and Security after Brexit: Understanding the Possible Implications of the UK’s decision to Leave the EU*, Santa Monica: RAND Corporation, 2017. P.J. Cardwell, ‘Values in the European Union’s foreign policy: An analysis and assessment of CFSP declarations’, *European Foreign Affairs Review* 2016-4, pp. 602ss.

¹⁴² F. Naert, *International Law Aspects of The EU’s Security and Defence Policy with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp, Oxford: Intersentia, 2010.

¹⁴³ J. Howorth, *Security and Defence Policy in the European Union*, Basingstoke: Palgrave Macmillan, 2014.

¹⁴⁴ D. Thym, ‘The Intergovernmental Constitution of the EU’s Foreign Security & Defence Executive’, *European Constitutional Law Review*, 2011-3, pp. 453ss.

Union possesses, possibly by introducing a new type that better fits the specifics of this sector. To conclude on this point, it seems to us that, at the present time, the CSDP is still in a phase of development and adjustment and does not enjoy a sufficient level of credibility, first of all by the member states of the European Union. For the realization of a complete CSDP to become just a matter of time, it is necessary to move more decisively towards a real common supranational policy.

Secondly, despite the problems and uncertainties that characterize the CSDP, the legal implications of its implementation are significant and complex. In order to analyse the question of the international responsibility of the European Union in the conduct of the CSDP, we first discussed the objective element of the international crime. In this regard, the explicit conferment of legal personality to the organization confirms its international subjectivity; as a consequence, the European Union is subject to the rules deriving from international law, which are imposed during the conduct of operations in non-member states. These obligations can be derived, first of all, from some provisions contained in the Treaties, such as those that provide for the respect of human rights and the principles contained in the United Nations Charter; however, these provisions are formulated in a generic manner and appear to represent "standards of behaviour" rather than actual legal obligations. As far as the obligations of a conventional nature are concerned, these are also contained in the decisions issued by the Council for the launching of a mission, but also in this case they are indications expressed in vague terms¹⁴⁵. Other obligations derive from the agreements on the status of forces concluded by the European Union with the states hosting the various missions (SOFA) and status of mission agreements (SOMAs)¹⁴⁶, as well as the agreements on the participation of non-member states to the operations and resolutions of the Security Council authorizing the initiation of these and the use of force. A large part of the binding obligations of the organization in conducting the CSDP derives from general international law, in particular the customary law and the general principles of law¹⁴⁷. In this regard, the most relevant sectors are the law concerning the use of force, human rights and, finally, international humanitarian law¹⁴⁸. The role of unwritten international law in the field of CSDP is extremely important, since the European Union, like all international organisations, cannot adhere to the main international conventions on issues such as human rights or international humanitarian law.

In addition, in this case, the problem of vagueness of the content of these obligations is presented. In this spirit we note the 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)¹⁴⁹. The unilateral acts of the EU can also be a source of obligation as they are in international humanitarian law. By way of an example, Council Joint Action 2088/749/CFSP, Council Joint Action 2008/851/CFSP and Council Decision

¹⁴⁵ A change, which may hopefully signal an inversion of the trend, is represented in this sense by the Council Decision (CFSP) 2015/778 on the military operation EUNAVFOR Med, which enumerates the various international conventions and protocols that apply there. Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122, 19.5.2015, recital 6.

¹⁴⁶ N. Zipperle, *European Union international agreements: An analysis of direct effect and judicial review pre and post-Lisbon*, Berlin: Springer 2017, pp. 69ss.

¹⁴⁷ N. Hachez & J. Wouters, 'Promoting the Rule Of Law: A Benchmarks Approach', *KU Leuven Working paper* 2013-105.

¹⁴⁸ M. Zwanenburg, *supra* note 98.

¹⁴⁹ OJ 2008 L 252/389.

2008/918/CFSP¹⁵⁰ contain references to respect for the relevant International Law and the UN Security Council Resolutions 1816 (2008) in which there are express demands for the respect of human rights. The EU is bound by international human rights rules of *jus cogens*, and it must respect them in the deployment of EU military operations, in which special circumstances and conflict require particular attention to be paid to these kinds of norms, and also according to ICJ case law, which in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory stated that “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights”¹⁵¹. *In speciem*, Zwanenburg makes reference to the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004¹⁵² in which the CIJ “suggest that at least certain norms of international humanitarian law may have a peremptory character”, but it does not establish which of them should be classed as such. The norms that can be considered to be peremptory are the basic rules of humanitarian Law, derived from the Vienna Conventions on the Law of Treaties, and can be identified by taking into account the prohibition of derogatory agreements¹⁵³.

As we can see in the same spirit in the case *Kasumaj v. Greece* of 5 July 2007¹⁵⁴ and *Gaji v. Germany* of 28 August 2008¹⁵⁵ the ECtHR reiterated its view on the attribution of the action of national contingents allocated to KFOR to the United Nations. In *Beri and others v. Bosnia and Herzegovina* of 16 October 2007¹⁵⁶ the ECtHR 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 Nations¹⁵⁷. international organizations' responsibility concerning human rights protection initiated from the Inter American Court of Human Rights (IACtHR) structured its decision around the rules of state responsibility. It

¹⁵⁰ 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. OJ 2008 L 301/33. 59 Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), OJ 2008 L 330/19. C. Fahron-Hussey, *Military crisis management operations by NATO and the European Union. The decision making process*, Berlin: Springer 2018.

¹⁵¹ G. Dahloff, *International Court of Justice. Digest of judgments and Advisory Opinions, Canon and Case Law 1946-2012*, The Hague: Martinus Nijhoff Publishers 2012, pp. 1657ss. S. Villalpando, ‘On the International Court of Justice and the determination of rules of law’, *Leiden Journal of International Law*, 2013, pp. 248ss.

¹⁵² ICJ, Advisory opinion, 2004, ICJ, 136. G. Dahloff, *supra* note 152.

¹⁵³ M. Zwanenburg, *supra* note 83.

¹⁵⁴ K. Mujezinović Larsen, *The human rights treaty obligations of peacekeeping*, Cambridge: Cambridge University Press 2012.

¹⁵⁵ S. Wills, *Protecting civilians: The obligations of peacekeeping*, Oxford: Oxford University Press 2009. C. Ryngaert, I.F. Dekker & R.A. Wessel, *Judicial missions on the law of International Organisations*, Oxford: Oxford University Press, 2016, pp. 325ss.

¹⁵⁶ C. Stahn, J.S. Easterday & I. Iverson, *Jus post bellum*, Oxford: Oxford University Press 2014, pp. 121ss. C. Foley, *UN Peacekeeping Operations and the Protection of Civilians Saving Succeeding Generations*, Cambridge: Cambridge University Press 2017. C. Cinkin & M. Kaldor, *International law and new wars*, Cambridge: Cambridge University Press 2017, pp. 367ss. C. Tomuschat, *Human rights. Between idealism and realism*, Oxford: Oxford University Press 2014.

¹⁵⁷ A. Kihara Hunt, ‘Holding UNPOL to account: Individual criminal accountability of United Nations police personnel’, Leiden & Boston: Brill/Martinus Nijhoff Publishers 2017. M. Evans, *International law*, Oxford: Oxford University Press 2014.

found that whenever a "state organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention (...)". In so doing, the IACtHR established that international responsibility may arise from an action of any authority, official, agent or person who is a member of the state machinery. The IACtHR noted it is a "tenet of international law that the state is responsible for the acts and omissions of its agents acting in their official capacity, even when those agents act outside the scope of their authority (...)"¹⁵⁸. The linkage between acts by agents of the state with the state apparatus expands avenues available to human rights courts to prosecute wrongful acts by states. The judgment in *Velásquez* of 29 July 1988 places a "duty to guarantee" on states, requiring them to take active steps towards monitoring, regulating and policing their agents, ensuring that a violation of international rights will not go unpunished, and upholding the right to life by all of their citizens¹⁵⁹.

In this regard, we believe that the establishment of a more precise regulatory framework regarding international law applicable under the CSDP and a clearer indication of the division of competences between the European Union and member states and third parties participating in the missions is necessary, whereas the latter have different international obligations and only partly coincide with those binding the European Union.

Equally important to CSDP framework is the incorrect definition of the relationship between European Union and states participating in the missions. The main normative reference in this case is article 7 of Project of ILC on the responsibility of international organisations, since the quotas that carry out CSDP operations are state bodies made available to the European Union. The first problem that has emerged is the determination of the exact scope of the "effective control" criterion contained in this provision. We believe that it does not correspond to a simple operational and general command and control over the troops-which are normally carried out by the European Union, whose institutions are at the top of the chain of command-but are exercised by the entity that issued the order to carry out the conduct that caused the occurrence of the unlawful event and which had the power to prevent the completion of such action. This necessarily requires an analysis of the specific circumstances of the case, while it cannot be determined *ex ante*, that is before the start of an operation and only on the basis of its command structure, which entity has exercised this "effective control" on the unlawful conduct.

Another problem posed by article 7 is whether it admits a double attribution of conduct, a solution that we consider acceptable with reference to the missions of the European Union and, more generally, to operations conducted under the auspices of an IO which provide for participation of state bodies. In this regard, article 7, as well as the other provisions of the Project concerning the attribution of conduct, does not rule the case of a dual attribution,

¹⁵⁸ E.K. Boon, 'The law of responsibility: A response to fragmentation', *Global Business & Development Law Journal* 2012-25, pp. 398.

¹⁵⁹ See in argument: *Velásquez Rodríguez* Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); *Anzaldo Castro v. Peru*, Inter-Am.Ct.H.R. (ser. C) No. 202, paras. 37-38 (Sept. 22, 2009) and *Kawas-Fernández*, Inter-Am.Ct.H.R. (ser.C) No. 196. From ECtHR: *Bevacqua v. Bulgaria* of 9 December 2008; *Opuz v. Turkey* of 9 June 2009. See also: U.N. Human Rights Commission, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, IN 8, 13, 16, U.N. Doc. CCPR/C/2 1/Rev. 1/Add. 13 (May 26, 2004); *Hajrizi Dzemajil v. Yugoslavia*, Case No. 161/1999, U.N. Human Rights Comm., In 8, 10, U.N. Doc. CAT/C/29/D/161/2000 (2002); *Jegatheeswara Sarma v. Sri Lanka*, case No. 950/2000, U.N. Human Rights Comm., 1 8.5 U.N. Doc. CCPR/C/78/D/950/2000 (2003). For details in argument see: E.K. Boon, *supra* note 159.

configuring itself as a "one-off" rule, whose purpose is solely to attribute a conduct to the IO. Although the UN Secretariat confirms the existence of practice of applicability of "effective control" test to the allocation of responsibility for the conduct of PSOs, it disagrees with the ILC Drafting Committee on the content of this control. It stated that in the UN practice the "effective command and control" test is applied "horizontally" to distinguish between the UN-commanded and controlled operations and UN-authorized operations under national command, whereas the ILC suggested the application of "effective control" test "vertically" to condition the responsibility on the possession of factual control by either of the entities. Therefore although both Articles (of Draft articles of State Responsibility (ASR) and Draft Articles on Responsibility of International Organisations (DARIO)) seem to be similar from the first view, they appear to be qualitatively different in their essence. While ASR understands "placed at the disposal of" requirement as an existence of "exclusive direction and control" of receiving entity, DARIO excludes from its cover "fully seconded" organs, and by contrast includes those on which the control is joint or shared by entities (which are in turn excluded by ASR article 6)¹⁶⁰.

The jurisprudence, for its part, has tried and tries to move towards a dual attribution of conduct in the context of illicit conduct during UN-led peace missions, but this attempt was based on an incorrect reading of the Project of ILC. In this regard, we believe that the attribution of the same conduct to more than one legal entity is one of the most important developments that the right of international responsibility can do in the future, especially in light of the ever-increasing complexity of practice and uncertainty application of the "effective control" criterion. However, this development cannot really be said as long as there is not a suitable legal framework, which foreshadows which are the extremes for configuring this dual attribution, on what kind of criteria to evaluate its presence, etc. Once this case has been better defined, international law can move from the traditional concept of exclusive responsibility to that, so to speak "evolved", of shared responsibility or, according to the phrase introduced by some scholars.

This development will contribute to strengthening the rule of law and will provide more chances for an adequate reparation to the victims of an international offense. At the time of writing, both the criterion of the "effective control" provided for in article 7 of Project¹⁶¹, and, to a greater extent, the hypothesis of a dual attribution of conduct, still seem far from a clear and uniform definition (and application) in law.

¹⁶⁰ R. Kolb, *The International Law on State Responsibility. An Introduction*, Cheltenham: Edward Elgar Publishers 2017.

¹⁶¹ *Ibid.*