

DIVISION OF INTERNATIONAL RESPONSIBILITY BETWEEN THE EU AND ITS MEMBER STATES IN THE AREA OF FOREIGN, SECURITY AND DEFENCE POLICY

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Introduction

Even though the Common Foreign and Security Policy of the European Union has been in place for almost twenty years, the division of competences between the Union and its Member States in this area remains unclear. Insight into this division has become more important in view of the increasing role of the EU as a global actor.¹ Due to its complex and *sui generis* nature, the question to which extent the EU would in general be covered by the rules on international legal responsibility has led to some debate. However, most contributions so far have focused exclusively on the European Community or, later, on the Union's competences on the basis of the *Treaty on the Functioning of the European Union* (TFEU).² The importance of having more clarity regarding the different roles an international organisation and its Member States play at the global level was recently underlined when the Court of Appeal in The Hague ruled that the Netherlands was responsible for some actions of Dutch military personnel who were part of the UN military mission during the Srebrenica crisis in 1995.³

The Treaty of Lisbon clarified the international legal status of the European Union by codifying its international legal personality (Art. 7 TFEU). At the same time it refrained from categorising the nature of the competence under both the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) under the headings in Title I: exclusive competences (Art. 3), shared competences (Art. 4), and competences to support, coordinate, or supplement the actions of the Member States (Arts. 5 and 6). Article 2, paragraph 4 of the TFEU merely states that competence exists:⁴ "The Union

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¹ See also M. Emerson *et al.*, *Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy*, Brussels: Centre for European Policy Studies (CEPS), 2011.

² See E. Paasivirta, P.J. Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organisations', *Netherlands Yearbook of International Law* 2005-36, 2007, pp. 169-226; S. Talmon, 'Responsibility of International Organizations: Does The European Community Require Special Treatment?', in M. Ragazzi (ed.), *International Responsibility Today*, Leiden/Boston: Martinus Nijhoff Publishers 2005, pp. 405-421; F. Hoffmeister, 'Litigating Against the European Union and its Member States', *European Journal of International Law*, 2010, pp. 723-747.

³ Cases *Mustafic* and *Nuhanovic*, *Gerechtshof Den Haag*, 5 July 2011.

⁴ Yet, compare the (I would argue, somewhat absurd) view that a CFSP competence as such is lacking as Member States merely use the Union to exercise their own competences. C. Hermann, 'Much Ado About Pluto? The Unity of the Legal order of the European Union

shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.” One may argue that the CFSP and CSDP are not categorised in the TFEU because these policy areas (in contrast to all other policy areas of the Union) do not find their basis in the TFEU, but in the *Treaty on European Union* (TEU). Yet, even the TEU does not define the type of competences involved, nor does it clarify the division of CFSP and CSDP-related competences between the Union and its Member States. While it may be tempting to argue that the Treaty most probably refers to a combination of *supportive, coordinating, supplementing*, or at best *shared* competences,⁵ the exclusion of mixed agreements calls for international agreements in the area of CFSP and CSDP to be *exclusively* concluded by the EU.⁶

The purpose of the present contribution is to investigate some questions emerging from the new and ambitious global role of the EU in combination with the unclear division of international responsibility between the EU and its Member States in the area of foreign, security and defence policy. In that sense this paper aims to contribute to the ongoing debate on the relationship between international law and EU law,⁷ albeit with a strict focus on the position of the CFSP and CSDP, which is arguably still rather a distinct one. Section 1 first of all presents the international legal framework regarding international responsibility of international organisations and, above all, their Member States. Here I also address the special nature of the EU. Section 2 re-assesses the division of competences within the post-Lisbon European Union in the areas of CFSP and CSDP. The main question here is who may act under the CFSP and CSDP. Finally I discuss some emerging questions, in particular regarding the connection between the existing competences in the area of foreign, security and defence policy and possible international responsibility.

I. EU External Action and International Responsibility

The assessment of the applicable rules will follow the Articles on the Responsibility of International Organizations, which were adopted by the UN International Law Commissions (ILC) at first reading in 2009.⁸ According to

Revisited’, in M. Cremona and B. de Witte, *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford: Hart Publishing 2008, pp. 20-51.

⁵ M. Cremona, ‘Defining Competence in EU External Relations’, in A. Dashwood & M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008, pp. 34-69, p. 65: “[...] the CFSP appears to be a type of *sui generis* competence that shares characteristics of both shared and complementary competences”.

⁶ R.A. Wessel, ‘The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities’, in A. Dashwood & M. 2008, *supra* note 5, pp. 156-157.

⁷ See in general on this issue: E. Cannizzaro, P. Palchetti & R.A. Wessel (eds.), *International Law as Law of the European Union*, Boston/Leiden: Martinus Nijhoff Publishers 2011 (forthcoming).

⁸ 2009 Draft Articles on the Responsibility of International Organizations, *Report of the International Law Commission*, Sixty-first session, General Assembly Official Records,

Article 1, the Draft Articles apply to the international responsibility of international organisations for acts that are wrongful under international law as well as to the international responsibility of States for the internationally wrongful acts of international organisations.

I.1 The Attribution of Conduct to the EU and its Member States

The basic principle is that the European Union is responsible for its own internationally wrongful acts. Draft Article 3 states: "Every internationally wrongful act of an international organization entails the international responsibility of the international organization". Article 4 lists the conditions for an internationally wrongful act by an international organisation to entail the international responsibility of that organisation: "There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributable to the international organization under international law; and (b) Constitutes a breach of an international obligation of that international organization". The next question is: which acts can be attributed to the Union? According to Draft Article 5 (1) "[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization." This somewhat obvious rule indicates that the European Union as such can only act through one of its organs. In view of the rules on internal responsibility, there are good reasons to interpret the term 'organs' as 'institutions, bodies, offices and agencies and their servants'.⁹ In the area of CFSP/CSDP this would thus cover not only the Council, but also the High Representative of the Union for Foreign and Security Policy, the Political and Security Committee, the EU External Action Service (EEAS) and agencies, such as the European Defence Agency or the EU Institute for Security Studies. It would also include the missions of the Commission abroad (which are now being transformed to EEAS representations) and civilian and military missions once these can be regarded as extensions of Union bodies. At the same time, however, such a definition raises the question of whether Member States could be seen as acting as agents of the Union.

This brings us to the core of the attribution question. Draft Article 6 makes it clear that "[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct." The question, however, is whether the term 'placed at the disposal of' an international organisation might at all apply to the relationship between the EU and its Member States. Only then will the question of whether the EU exercises effective control over the conduct of its Member States in terms of CFSP and

Supplement No. 10, UN Doc. A/64/10, 2009. A final adoption is planned for 2011, but is not yet available at the time of writing of this article.

⁹ Hoffmeister 2010, *supra* note 2, p. 740, refers to Arts. 340(2) and 263 TFEU as well as to Art. 51(1) of the EU Charter of Fundamental Rights.

CSDP become relevant. This issue has been addressed in relation to the European Community, and there seems to be a consensus that the idea of 'effective control' is not relevant when authorities of Member States merely carry out Community law.¹⁰ While it could perhaps be argued that there once was a difference between Community law and CFSP law, at least post-Lisbon it has become difficult to maintain that the constitutional relationship between the Union and its Member States differs by policy area.¹¹ This brings us back to the rule in Draft Article 5, on the basis of which Member States would be seen as organs of the EU whenever they take part in the implementation of CFSP and CSDP-related decisions. Thus far, however, the special relationship between the EU and its Member States is not reflected in the Draft Articles. Nevertheless, as the above-mentioned Srebrenica judgment revealed, the 'effective control' argument may be decisive in establishing the division of responsibility between the EU and its Member States in very concrete situations in the framework of EU military missions.

Of possible relevance to the situation regarding the CFSP and CSDP is Draft Article 8. This Article allows for conduct to be considered acts of an international organisation "if and to the extent that the [organisation] acknowledges and adopts the conduct in question as its own". This article applies only in cases where "Conduct [...] is not attributable to an international organization under the preceding draft articles" and could therefore be seen as an addendum to the general rules of attribution. The situation is somehow mirrored in Article 61, which states that a Member State of an international organisation is responsible for an internationally wrongful act of that organisation if: "(a) It has accepted responsibility for that act; or (b) It has led the injured party to rely on its responsibility." The subsidiary nature of this responsibility provided in paragraph 2 allows for a shared responsibility between the organisation and its Member States.¹²

The relationship between the Union and its Member States is at the core of this issue and is most prominently dealt with in Draft Article 16.¹³ What happens if the Union adopts a CFSP or CSDP decision that would force (or authorise) the

¹⁰ See Paasivirta & Kuijper 2007, *supra* note 1.; as well as P.J. Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) states: Attributed or Direct Responsibility or Both?', *International Organizations Law Review*, 2010, pp. 9-33.

¹¹ More extensively: R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', *European Constitutional Law Review*, 2009- 1, pp. 117-142. But see for instance Kuijper 2010, *supra* note 10, p. 21), who argues that "the divide on this point runs right across the EU, separating its traditionally supra-national EC part from the intergovernmental CFSP-side". In his view "the foreign policy powers of Member States are unaffected by the fact that certain aspects of foreign and defence policy are run on a common basis" (p. 20, footnote 36)

¹² *Ibid*, p. 19

¹³ N.M. Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations', *International Organizations Law Review*, 2010, pp. 35-48; as well as J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', *International Organizations Law Review*, 2007, pp. 91-119.

Member States to commit an internationally wrongful act? Article 16 provides for a number of situations:

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.
2. An international organization incurs international responsibility if:
(a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and
(b) That State or international organization commits the act in question because of that authorization or recommendation.
3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

Hence, international responsibility of the European Union *itself* could occur both in the case of binding decisions and whenever Member States act under an authorisation or recommendation.

At the same time, a Member State may be responsible when it hides behind an international organisation. Article 60 establishes:

1. A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

As Kuijper rightfully argues: “[t]his article sets out a series of events that virtually no State could bring about all on its own, since it would need at least several other States as ‘partners in crime’ in order to incite the organisation from the inside to commit an act contrary to the Member States’ international obligations to which the organisation would not be bound.”¹⁴ Nevertheless,

¹⁴ Kuijper, 2010, *supra* note 10, p. 28. See more extensively on Art. 60: E. Paasivirta, ‘Responsibility of a Member States of an International Organization: Where Will it End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations’, *International Organizations Law Review*, 2010, pp. 49-61.

also in the relationship between the EU and its Member States with respect to CFSP/CSDP, these types of 'abuse' are not to be ignored completely. Particularly in this area the debate on the Union's separate international legal status has finally led to an acceptance of the legal personality of the European Union, including all its policy areas. It is in fact the existence of this international legal personality alongside the legal personalities of the Member States that potentially allow both to pass the buck.

A number of other, general situations may be relevant in establishing the division of responsibilities between the EU and its Member States in the area of foreign, security and defence policy. These situations do not concern the specific relationship between the organisation and its Member States, but relate more generally to relationships between international organisations and states. Nevertheless, we briefly address them here since 'Member States' are not excluded in the definition of a 'State'.¹⁵

First of all, Article 13 of the Draft Articles states that "[a]n international organization which *aids or assists* a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that organization."¹⁶ The inverse is provided by Art. 57, which under the same conditions establishes the international responsibility of "[a] State which aids or assists an international organization in the commission of an internationally wrongful act [...]". Given the close cooperation between the Union and its Member States in the formulation and implementation of CFSP and CSDP these provisions may well be relevant.

A similar situation concerns the responsibility of an international organisation that *directs and controls* a state (or another international organisation) in the commission of an internationally wrongful act.¹⁷ This is dealt with in Article 14 of the Draft Articles. Article 58 provides the inverse: "[a] State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State." A situation in which Member States direct or control the EU in the execution of CFSP/CSDP may be difficult to find, but it has been suggested that excessive control over the decision-making process of

¹⁵ In fact, 'States' are not defined at all and are not referred to in Draft Article 2, which defines 'International organization', 'Rules of the organization', and 'Agents'.

¹⁶ Emphasis added.

¹⁷ See more extensively A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', *International Organizations Law Review*, 2010, pp. 63-77.

an organisation could lead to (joint) international responsibility.¹⁸ Obviously, this would be difficult to reconcile with the idea of Member States as 'seat holders' in an organ of an international organisation. In this view the decision-making procedure as such is irrelevant as in the end it is the organisation that makes the decision.¹⁹ Situations in which Member States are directed or controlled by the Union form the foundation of the Common Foreign Security and Defence policy. It can therefore not be excluded that states may commit international wrongful acts on the basis of binding CFSP/CSDP decisions.

Finally, the Draft Articles foresee situations in which either the organisation or the state is subject to *coercion* by the other. The applicable rules can be found in Draft Articles 15 and 59. In view of the theoretical nature of these provisions with regard to the relationship between the EU and its Member States, I leave this possibility out of the present discussion.

1.2 The Division of Responsibility between the EU and its Member States

In view of the fact that the Draft Articles distinguish between the different legal personalities of the international organisation and its Member States, it is important to return to our analysis of the division of competences between the Union and its Member States in the area of foreign, security and defence policy. To whom can external conduct be attributed? A distinction should be made between international agreements concluded by the EU, decisions made by the EU and (military) actions or operations in the framework of the CSDP.

International agreements with respect to the CSDP are (exclusively) concluded by the Union. This assigns primary responsibility to the EU (cf. Draft Article 3), particularly because the agreements do not refer to the division of responsibility between the Union and its Member States. Indeed, provisions on dispute settlement in those international agreements refer to the Union exclusively.²⁰ At the same time, Member States may have implementing obligations under Union Law, which could imply subsidiary responsibility when Member States accept responsibility or when they led the injured party to rely on their specific responsibility (Draft Article 61). Such a situation may, for instance, occur when Member States act in CSDP operations on the basis of international agreements between the EU and a host country. After all, while all commitments are entered into by the Union, in the end the Member States, either individually or jointly, are the ones that engage in the actual operations.

When Member States undertake activities on the basis of *internal* EU obligations, the situation is much the same as when Member States act on the

¹⁸ d'Aspremont 2007, *supra* note 13, p.92: "[...] member states exerting an excessive control over the decision-making process of the organization must be held, together with the organization, responsible for violations of international law committed by the organization"

¹⁹ R.A. Wessel, 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review*, 2000, p. 516.

²⁰ P. Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy', in Cannizzaro, Palchetti & Wessel, 2011, *supra* note 7.

basis of EU decisions. As we have seen, CFSP and CSDP decisions are not only binding for the Institutions, but also for the Member States. Again the EU itself seems to incur primary responsibility in the event that the implementation of a decision results in an internationally wrongful act by either the Union institutions or the Member States. The situation is similar in cases where no formal decision is made, but where Member States are merely authorised or recommended to engage in certain conduct (Draft Article 16). Both courses of action are taken quite frequently in the area of CFSP and CSDP but, unlike other EU policies, CFSP and CSDP decisions and guidelines hardly ever require actual implementation by the Member States. The instruments merely aim at defining common policies, which – once established – are meant to restrict the freedom of Member States, rather than call upon them to engage in certain external action.

This may be different in the case of CSDP civilian and military operations. Decisions taken in this area do compel Member States, or at least authorise them, to take certain action. The attribution of conduct in such cases, however, is quite complex. According to the agreements, a CSDP mission enjoys the status of a diplomatic mission under the 1961 Vienna Convention on Diplomatic Relations.²¹ Nevertheless, responsibility questions may emerge, for instance in relation to human rights or international humanitarian law, or indeed in civil proceedings (cf. the above-mentioned Srebrenica cases).²²

In the absence of any explicit rules on the division of responsibilities and given the fact that international agreements are ‘exclusively’ concluded by the EU and the fact that CFSP/CSDP decisions and operations are primarily to be seen as being conducted by the Union, the presumption could be that in all cases the EU itself incurs international responsibility. Could this presumption be rebutted? The Draft Articles point to possible Member States’ responsibility in some situations that are relevant to the relationship between the Union and its Member States in the area of foreign, security and defence policy. First of all Member States may have implementing obligations, which could lead to a subsidiary responsibility when the Member States accept responsibility or when they have led the injured party to rely on their responsibility (Draft Article 61). Secondly, a Member State may be responsible when it hides behind an international organisation for its own international wrongful acts (Draft Article 60). Finally, Member State responsibility may emerge when a Member State *aids or assists* an international organisation in the commission of an internationally wrongful act (Draft Article 57); when a Member State *directs and controls* the EU in the commission of an internationally wrongful act; or when it coerces the Union to commit such an act (Draft Article 59). As we have seen, both *aid and assistance* and *direction and control* are not to be excluded, although it is difficult to come up with examples of the latter given the fact that the adoption of Decisions and the conclusion of international agreements is

²¹ *Ibid.*

²² F. Naert, ‘The Application of International Humanitarian Law and Human Rights Law in CSDP Operations’, in Cannizzaro, Palchetti & Wessel, 2011, *supra* note 7.

subject to formal decision-making procedures. Moreover, these provisions have been drafted with the relationship between states and international organisations in mind and do not account for the special relationship between *member* states and an international organisation, let alone the very special relationship between the European Union and its Member States.

II. Who Acts under the CFSP and CSDP?

II.1 The Nature of the European Union

The legal nature of the European Union remains important in terms of its possible international responsibility. The Lisbon Treaty not only integrated the European Community into the European Union, but the current Treaty on European Union also explicitly provides that “[the] Union shall have legal personality” (Art. 7), thus putting an end to the academic discussion on the legal status of the Union.²³ There is still some uneasiness on the part of some Member States, as reflected in Declaration No. 24, attached to the Lisbon Final Act: “The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.” Like many Declarations, this one states the obvious. After all, the principle of attributed (or conferred) powers forms a basic one in international institutional law and is even explicitly referred to in the new TEU, this time with no exception for the Common Foreign and Security Policy (CFSP): “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States” (Art. 5).²⁴ Similar careful considerations can be found in Declarations no. 13 and 14, which underline that the changes “do not affect the *responsibilities* of the Member States, as they currently exist [...]”²⁵ and do not “prejudice the specific character of the security and defence policy of the Member States”.

Since the Lisbon Treaty came into force, we are left with one international legal entity: the European Union. It is difficult not to regard this entity as an international organisation and thus subject to the Draft Articles on International Responsibility. The convergence of the ‘bits and pieces’ that were originally said to make up the Union’s structure²⁶ has created a new institutional and normative situation. Indeed, the past years revealed that the

²³ See on this discussion the many references in R.A. Wessel, ‘The International Legal Status of the European Union’, *European Foreign Affairs Review*, 1997, p. 109; as well as ‘Revisiting the International Legal Status of the EU’, *European Foreign Affairs Review*, 2000, p. 507.

²⁴ On the basis of Article 5 TEU the principles of proportionality and subsidiarity also apply to all Union policy areas, although the Protocol on the Application of the Principles of Subsidiarity and Proportionality seems to focus on ‘legislative acts’ only and these acts cannot be used for CFSP matters.

²⁵ Emphasis added.

²⁶ D. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’, *CMLR*, 1993, pp. 17-69.

nature of the Union is best understood when accounting for the complex relation between the different policy areas and between the Union and its Member States.²⁷ This complex nature has not prevented the Union from becoming an international ‘independent actor’.²⁸

Indeed, by now it has become widely accepted that the European Union as such may bear international responsibility for an international wrongful act.²⁹ The EU seems to fit the definition of an international organisation used in the 2009 Draft Articles on the Responsibility of International Organizations: “For the purposes of the present draft articles, the term ‘international organization’ refers to an organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to States, other entities”. Obviously, the wrongful act must be attributable to the European Union under international law.³⁰ It has been observed that the ILC Draft Articles make no mention of the notion of ‘regional economic integration organization’ (REIO).³¹ This notion was invented to permit an organisation like the European Community to participate in multilateral treaties and conventions as a contracting party alongside states.³² In the absence of special rules for the EU, we follow the general rules on responsibility of international organisations in our assessment of the responsibility of the EU and its Member States in the area of foreign, security and defence policy.

II.2 The Nature of the External Competence

Although “the nature of the Union’s external competence is an important factor in the allocation of international responsibility”,³³ this nature is not so easy to establish when it comes to foreign, security and defence policy. As indicated above, neither the CFSP nor the CSDP are mentioned in the categorisation of competences in Article 3 of the TFEU. There are indeed good reasons to argue in favour of a ‘shared competence’ concerning external action in this area. A shared competence allows both the Union and its Member States to make the necessary decisions, but Member States’ competences may be exercised only to the extent that the Union has not exercised its own (Art. 2,

²⁷ R.A. Wessel 2009, *supra* note 11. Compare for a political science perspective also S. Stetter, *EU Foreign and Interior Policies: Cross-Pillar Politics and the Social Construction of Sovereignty*, Oxon: Taylor & Francis, 2007.

²⁸ The term is used by Paasivirta and Kuijper (2007, *supra* note 2, p.181) to differentiate the European Community from more ‘classical’ international organizations, which are, in their view, predominantly meant to be a *forum* for their members.

²⁹ Hoffmeister 2010, *supra* note 2, p. 724.

³⁰ “Every internationally wrongful act of an international organization entails the international responsibility of the international organization”. Art. 3 of the ILC Draft Articles.

³¹ The 2004 Energy Charter Treaty (Art. 3) defines a REIO as “an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.”

³² Paasivirta and Kuijper 2007, *supra* note 2, p 205.

³³ Hoffmeister 2010, *supra* note 2, p. at 743.

par. 2 TFEU). It could be argued that this applies to the CFSP. Although there are good reasons to presume that pre-emption does not apply to the CFSP,³⁴ it is equally difficult to maintain that established CFSP decisions and international agreements do not restrict Member States' freedom to act externally. As argued elsewhere, possible restraints on Member States' freedom to conclude international agreements in CFSP fields can stem from both CFSP treaties and CFSP-related secondary measures. The extent to which those CFSP norms have a restraining effect is also determined by the potential role that the judiciary has to play in ensuring that those norms are enforced, as well as by the interpretation of the specific CFSP principle of loyal cooperation.³⁵

In that sense, the effect of CFSP norms on Member States' powers can be considered in the light of the Court's pronouncements on the effects of Community powers in the fields of development cooperation or humanitarian aid. This case law suggests that since the Community competence in these fields is not exclusive, the Member States are entitled to enter into commitments themselves vis-à-vis non-Member States, either individually or collectively, with or without Council involvement, or even jointly with the Community.³⁶ Does this mean that the 'exclusivity' issue has no role to play at all in relation to CFSP? Article 3, paragraph 2 of the TFEU reads:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

Indeed, CFSP rules do not find their basis in a 'legislative act'. That being said, reading this provision in conjunction with the loyalty principle enshrined in Article 28, paragraph 4 of the TEU, it seems too early to completely rule out exclusivity in the field of CFSP, particularly in view of the fact that the Court would have jurisdiction regarding this Article. After all, the Union's external activities in the form of the conclusion of international agreements are booming and Member States' actions increasingly risk affecting common rules or altering their scope. While the creation of CFSP norms depends on the political will of the Member States, once these norms have been established their very purpose is to restrict the freedom Member States traditionally enjoy in their external relations. Allowing Member States to affect or even act contrary to – common norms established by international EU agreements would amount to rendering most of the CFSP and CSDP provisions in the EU Treaty nugatory.

³⁴ See Cremona & de Witte 2008, *supra* note 4, p. 65.

³⁵ C. Hillion and R.A. Wessel, 'Restraining External Competences of EU Member States under CFSP', in Cremona & De Witte 2008, *supra* note 4, pp. 79-121

³⁶ Joined Cases C-181/91 and C-248/91 *European Parliament v Council of the European Communities and Commission of the European Communities* [1993] ECR I-3685 (Bangladesh case); Case C-316/91 *European Parliament v Council of the European Union* [1994] ECR I-625 (EDF case).

In relation to possible international responsibilities, the emerging question is whether a hierarchy of competences can be established: to what extent are Member States bound by agreements concluded by the Union, and do these agreements restrict their individual freedom in external relations? In this respect, there appears to be no reason not to apply the so-called *Haegeman* doctrine to EU agreements and to regard them as forming ‘an integral part of Union law’.³⁷ The question remains, however, whether the Member States are automatically bound by the agreements as a matter of EU law, and indeed whether perhaps a ‘direct effect’ of the agreements could even be construed. This would make the position of the Member States towards the agreements rather different from that of members of other international organisations.

II.3 Who is Bound by EU External Action?

Indeed, in addition to the question of the nature of the competence, the question of who is bound by international agreements (and perhaps decisions) in the area of CFSP and CSDP seems important to assess the division of possible international responsibility.

In the area of CFSP and CSDP, international agreements are concluded by the Union. The Union has made full use of its competence in this area.³⁸ By using the pre-Lisbon Article 24 TEU competences (in conjunction with Article 38 TEU in the case of agreements concerning police and judicial cooperation in criminal matters), the European Union has entered the international stage as a legal actor with obligations and responsibilities. This turned the provision into the general legal basis for the Union’s treaties whenever agreements could not be based on the Community Treaty. These days, the competence to conclude international agreements can be found in one single legal basis for the entire Union: Article 216 of the TFEU, which provides: “The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope.” The fact that this competence stretches beyond the TFEU itself and includes the domain of CFSP is underlined by Article 37 of the TEU, which provides that “the

³⁷ As provided by the ECJ in relation to international agreements concluded by the European Community: Cases C–181/73 *Haegeman* [1974] ECR 449 and C–104/81 *Kupferberg* [1982] ECR 3641. See in the same line D. Thym, ‘Die völkerrechtlichen Verträge der Europäischen Union’ (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, at 900.

³⁸ A. Sari, ‘The Conclusion of International Agreements by the European Union in the Context of the ESDP’, *International and Comparative Law Quarterly*, 2008, pp. 53-86; P. Koutrakos 2011, *supra* note 20 and R.A. Wessel 2008, *supra* note 6, p. 152. Indeed, these ‘agreements’ can be considered treaties in the sense of Art. 2(1)(a) of the 1969 and 1986 Vienna Conventions on the Law of Treaties as they fulfil all generally accepted criteria. See, in general, A. Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press 2007); and J. Klabbbers, *The Concept of Treaty in International Law* The Hague: Kluwer Law International 1996. Most agreements can be found in the international agreements database of the Commission (<http://ec.europa.eu/world/agreements/>).

Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter” (named ‘Specific provisions on the Common Foreign and Security Policy’).³⁹

All international agreements are, in the end, concluded by the Council.⁴⁰ In contrast to other Union areas, no mixed agreements are concluded in the area of CFSP and CSDP. In fact, neither the decision-making process nor the conclusion of the agreement reveals a separate role for the Member States. Apart from the references to the EU in both the texts and the preambles of the agreements and the fact that adoption and ratification are done “on behalf of the Union”, this is also confirmed by the central role of the Union’s institutions and organs, and the final publication in the L-series of the Official Journal (decisions on *inter se* agreements of the Member States are published in the C-series). Indeed, “fairly strange operations would be needed to demonstrate that a treaty concluded under such circumstances has instead created legal bonds between the third party concerned and each one of the Member States of the European Union”.⁴¹

Nevertheless and in line with our observations in the previous section – *internally* both the Union and its Member States seem to be bound by the agreements. This is underlined by Article 216, paragraph 2, which simply states: “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.” *Prima facie*, this does not change anything for third parties: only obligations for the EU arise from these international agreements and Member States’ obligations subsequently follow on the basis of Union law. At the same time, the question emerges whether this provision would play a role in the special position of “the rules of the organization” in the law on the responsibility of international organizations.⁴²

³⁹ This Chapter (2) also includes Section 2: Provisions on the Common Security and Defence Policy.

⁴⁰ The debate on whether these agreements are concluded by the Council on behalf of the Union or on behalf of the Member States seems not only to be superseded by practice but also accepted by most experts of EU external relations law. R. Gosalbo Bono ‘Some Reflections on the CFSP Legal Order’, *CMLRev*, 2006, pp. 354–56; D. Thym, ‘Die völkerrechtlichen Verträge der Europäischen Union’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, pp. 863; C. Tomuschat, ‘The International Responsibility of the European Union’ in E. Cannizzaro (ed.), *The European Union As an Actor in International Relations*, The Hague: Kluwer Law International, 2000, p. 181; Wessel 2008, *supra* note 6, pp. 145–80; and R.A. Wessel and G. Fernandez Arribas, ‘EU Agreements with Third Countries: Constitutional Reservations by Member States’ in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects*, The Hague: TMC Asser Press, 2008, pp. 291–308.

⁴¹ Tomuschat 2000, *supra* note 41, p.181–2. Also see P. Eeckhout, *External Relations of the European Union*, Oxford: Oxford University Press 2004, p. 159; P. Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing, 2006, pp. 406–9 and Gosalbo Bono 2006 *supra* note 41, pp. 354–356.

⁴² See extensively on these rules: C. Ahlborn, ‘The Rules of International s and the Law of International Responsibility’, unpublished paper; to be published in *International Organizations Law Review*, 2011.

EU external action, however, not only takes shape in international agreements. International responsibility may be triggered on the basis of a number of other actions and situations, including the external effects of CFSP decisions, CSDP actions and missions and the participation of the EU in international organisations.⁴³

Conclusion

A first glance at the division of international responsibility between the EU and its Member States hints at the EU itself as the actor that would be primarily responsible for any international wrongful acts in the area of foreign, security and defence policy. What kind of internationally wrongful act could this be? Obviously, not living up to international agreements with third states or other international organisations could result in such international responsibility. Also acts by any agent of the Union (the Institutions, but also the High Representative, Special Envoys and CSDP missions) in violation of international obligations would be attributable to the Union. Given the upgraded role for the EU as a global actor more rules have become applicable to its actions.

The question is to what extent the EU is a 'special organisation' (or perhaps a REIO) in the area of CFSP/CSDP. Could one maintain that the 'symbiotic relationship'⁴⁴ that exist between the EU Community and its Member States in the former Community policy areas does *not* extend to the foreign, security and defence policy? As we have seen there are good reasons not to make the constitutional relationship between the Union and its Member States dependent on a particular policy area. Indeed, the 'rules of the organisation' (defined in Draft Article 2 as "in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization") may differ, but the rules in the TEU provide no indications that international responsibility for CFSP/CSDP-related actions or decisions primarily belongs to the Member States.

Nevertheless, we see an emerging research agenda. The complex nature of the cooperation between the EU and its Member States in external situations is not only related to the unclear division of competences, but also to the actual use of these competences in concrete situations. This allegedly makes the assessment of international responsibility in the framework of, for instance, EU military missions even more difficult than for UN missions. The 'constitutional' relationship between the Union and its Member States clearly differs from that in other international organisations. Even after almost twenty years of CFSP, we have not been able to fully grasp the complexity of the relationship between

⁴³ See on the latter K.E. Jørgensen & R.A. Wessel, 'The Position of the European Union in (other) International Organizations: Confronting Legal and Political Approaches', in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar Publishers 2011, pp. 261-286.

⁴⁴ Paasivirta & Kuijper 2007, *supra* note 1, p. 178.

actors in this area. This is problematic as the increasing external activity of the Union demands a more specific definition.

Secondly, assuming we manage to define and divide the competences, how will these relate to attributions? Is merely having competence sufficient grounds for the attribution of acts to either the Union or its Member States? Given the complex nature of the Union, could acts be attributed to either the Union or its Member States in the absence of a clear competence on either side? If we establish that CFSP/CSDP agreements and decisions are binding on the Member States *internally*, how does this affect *external* international responsibility?

A third set of questions relates to the development of the European External Action Service, the emerging diplomatic service in third countries and the changing status of the EU in some international organisations. The applicability of 'state rules' in this area to the EU has hardly been touched upon in academic writings.

These are just some first thoughts that come to mind when considering the (planned) increasing activities of the Union at the global level. Given the particularities of CFSP/CSDP these issues deserve special attention in the study of the international responsibility of international organisations.