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The Apportionment of International Responsibility between the European Union and its Member States under Mixed Agreements

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"Every difficulty slurred over will be a ghost to disturb your repose later on."

- Frédéric Chopin

Summary

With the assumption that the internal law of some international organizations require the development of special rules of international responsibility and that these rules can be accommodated with due regard to long-standing international legal principles, this thesis examines whether there exists a special legal regime for the apportionment of international responsibility between the European Union (EU) and its Member States under mixed agreements. The analysis occurs in the light of EU law, the jurisprudence of relevant judicial bodies and the work of the International Law Commission (ILC).

The thesis argues that the *sui generis* aspects of the EU, such as its constitutional order, its international legal personality, its extensive treaty-making powers, legislative powers, its executive federalist construct, the dual role that the organs of its Member States play and the continuous development of EU competencies, leads to the need for the development of special rules relating to the apportionment of international responsibility between the EU and its Member States under mixed agreements. It is subsequently argued that these special rules should be based on the normative control doctrine, i.e. the theory that the international responsibility for the conduct of an EU Member State is apportioned to the EU if the conduct is a consequence of a binding act of the EU. It is subsequently illustrated that international practice exists in support of this.

Further, the legal problems that could arise as a consequence of the normative control doctrine, such as legal uncertainty for third parties, the friction between normative control and the principle of *pacta tertiis* and *pacta sunt servanda* are ultimately found not to constitute insurmountable obstacles for applying the normative control doctrine when apportioning international

responsibility between the EU and its Member States under mixed agreements.

With these findings in mind, a critical examination of to the EU accession to the European Convention on Human Rights (ECHR) is conducted. It is there suggested that the accession agreement between the EU and the Council of Europe (CoE) should contain an explicit reference to the normative control doctrine paired with an obligation for the EU and its Member States to submit a declaration of competences as well as a subsidiary mechanism of joint responsibility that is triggered should the EU or its Member States fail to fulfill their obligations.

Sammanfattning

Denna uppsats utreder huruvida det går att identifiera en särskild rättsordning vad gäller fördelningen av internationellt ansvar mellan EU och dess medlemsstater under blandade avtal, det vill säga internationella avtal som undertecknats av EU och vissa eller alla dess medlemsstater på ena sidan, och en tredje stat eller internationell organisation på den andra. Utredningen görs med antagandet att vissa internationella organisationers interna regelverk kräver särskilda folkrättsliga regler i förhållande till deras internationella ansvar och att dessa särskilda regler kan tillgodoses med vederbörlig hänsyn till långvariga folkrättsliga principer. Rättsutredningen görs i ljuset av EU lagstiftning, FN:s folkrättskommissionens arbete samt rättspraxis hos relevanta rättsliga organ.

Uppsatsen presenterar slutsatsen att *sui generis*-aspekterna av EU:s konstitutionella ordning, såsom dess internationella juridiska personlighet, fördragsgivande befogenheter, lagstiftande befogenheter, EU domstolens överhöghet och den kontinuerliga utvecklingen av EU:s kompetens, kräver att särskilda regler för tilldelning av internationellt ansvar tillämpas på EU:s blandade avtal. Det hävdas vidare att dessa särskilda regler bör baseras på doktrinen om normativ kontroll, dvs. teorin om att det internationella ansvaret för agerandet av en EU-medlemsstat tilldelas EU om agerande är en följd av en bindande EU norm och att stöd för detta kan hittas både i Folkrättskommissionens arbete och i praxisen från både internationella och regionala rättsliga organ.

Slutligen slås det fast att de juridiska problem som kan uppstå som en följd av användandet av doktrinen om normativ kontroll, såsom försämrad rättssäkerhet i för tredje part samt friktionen mellan doktrinen om normativ och principerna om *pacta tertiis* och *pacta sunt servanda,* inte utgör ett oöverstigligt hinder för tillämpningen av doktrinen om normativ kontroll vid

fördelandet av ansvar mellan EU och dess medlemsstater under mixed agreements.

Med dessa fynd i åtanke genomförs en sedan en kritisk granskning av EU:s tillträde till den Europeiska konventionen om mänskliga rättigheter, där det föreslås att anslutningsavtalet mellan EU och Europarådet bör innehålla en uttrycklig hänvisning till doktrinen om normativ kontroll i kombination med en kompetensdeklaration samt en subsidiär mekanism för delat ansvar mellan EU och dess medlemsstater.

Abbreviations

ARSIWA	Articles on State Responsibility for an international wrongful act
CDDH	Steering Committee for Human Rights
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COREPER	Committee of Permanent Representatives
DARIO	Draft Articles on the International Responsibility of International Organizations
DG	Directorate-General
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EEC	European Economic Community
EU	European Union
FAC	Foreign Affairs Council
FRA	European Union Agency for Fundamental Rights
FREMP	European Council's Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons
GATT	General Agreement on Tariffs and Trade
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy
ICJ	International Law Commission
IO	International Organization
REIO	Regional Economic Integration Organization
SEA	Single European Act
SR	Special-Rapporteur

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
VCLT 1969	Vienna Convention on the Law of Treaties
VCLT 1986	Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations
WTO	World Trade Organization

1 Introduction

1.1 Background

International organizations have, unlike States, heterogeneous international legal personalities. They vary not only in their purpose but in their mandate, powers, status and are, as a consequence, carriers of varying rights and obligations.[1] The heterogeneity of international organizations raises the question of whether they should be treated in an equal fashion and be subject to the same universally applicable rules, in particular, whether a highly integrated international organization such as the EU[2], should be subject to the same rules of international responsibility as other international organizations.[3]

When the ILC adopted its Draft Articles on International Responsibility of International Organizations (DARIO) on its second reading in 2011, it was met with considerable criticism.[4] The criticism was primarily aimed at the methodical approach of the ILC and was based on two points of contention. Firstly, the decision of the ILC to base DARIO on its recently finished work on the international responsibility of States (ARSIWA) was criticized on the basis that it did not sufficiently highlight the fundamental differences between States and international organizations for the purpose of international law, namely that States, as subjects of international law, have a

[1] UNGA Sixth Committee (15th Meeting), "Sixth Committee Summary Record of the 15th Meeting" (28 October 2003) UN Doc A/C.6/58/SR.15, para. 8.

[2] The thesis may refer to times or developments that occurred with the "European Community" or "European Communities", however, unless explicit discussion of these terms is necessary for the analysis, the thesis will refer to the European Union throughout for the sake of uniformity.

[3] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (1st edn, Cambridge University Press 2016). p. 57f.

[4] ILC, "Report of the International Law Commission on the Work of its Sixty-sixth Session" (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 and Add.1, paras. 82–83 and 87–88.

homogenous legal personality. This is not the case with international organizations, whose mandate and powers can differ widely.[5]

Secondly, even if the ILC would manage to accommodate the differences between States and International Organizations in their Draft Articles, the diversity between different international organizations was not seen as conducive for the development of universally applicable rules. During the drafting of DARIO, the EU was one of the strongest proponents of the importance of recognizing and accommodating the fact that highly integrated organizations or Regional Economic Integration Organizations (REIOs) are, by their very nature, in need of special rules for the apportionment of international responsibility between them and their Member States.[6]

It has been a long-held maxim that the EU is a *sui generis* international organization. For one, the EU is more than merely a forum for its Member States to organize their mutual relations. It is also a more or less autonomous actor in its own right with an international legal personality that is separate from that of its Member States.[7] Crucially, the EU is governed by an internal constitutional arrangement which entails that EU law is, for the most part, not executed or implemented by the organs of the EU itself, but rather through the organs or authorities of its Member States.[8] The unique characteristics of the EU as an international organization and its increasing presence and assertiveness on the international stage[9] has made the question

[5] J Wouters and J Odermatt, "Are All International Organizations Created Equal?" (2012) 9 International Organizations Law Review 7-14.
[6] ILC, "Responsibility of international organizations - Comments and observations received from international organizations" (14 and 17 February 2011) UN Doc A/CN.4/637 and Add. 1, p. 168.
[7] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), Article 47; ILC, "Responsibility of international organizations – Comments and observations received from international organizations" (25 June 2004), UN DOC A/CN.4/545, p 21.
[8] K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (1st edn, Sweet and Maxwell 2005), p. 607.
[9] See for example President-elect of the European Commission Ursula von der Leyens, 'Speech In The European Parliament Plenary Session' (Strasbourg, 27 November 2019); K E Jørgensen and K V Laatikainen, *Routledge Handbook on the European Union and International Institutions* (1st edn, Routledge 2013). p.1.

of its international responsibility ever more critical, especially considering the often complex relationship between the EU, its Member States and non-EU Member States (third States).

The capacity of the EU to engage with third States on the international stage has undergone substantive transformations during the last decades. However, the treaty-making power of the EU is not the only aspect that has undergone dramatic development. Today, the EU has a High Representative for Foreign Affairs,[10] a position comparable to that of a foreign minister, and is enjoying worldwide representation through its over 140 delegations,[11] staffed by its diplomatic core, the European External Action Service.[12]

Due to the *sui generis* characteristics of the EU, the question of whether the EU falls under the generic definition of an international organization for the purposes of international law is fraught with controversy. This thesis analyzes a particular legal issue that exists as a result of the *sui generis* features of the EU, that of the apportionment of international responsibility between the EU and its Member States under so-called multilateral mixed agreements, i.e. international agreements signed by the EU and some, or all, of its Member States on one side, and a third State(s) or international organization(s) on the other.[13] The analysis takes place in the light of EU law, relevant case-law from regional and international judicial bodies as well as the work of the ILC on the responsibility of international organizations. The findings are then applied to the long-running, yet unfinished, EU accession to the European Convention on Human Rights (ECHR), the finalization of which will result in a multilateral mixed agreement.

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[10] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/04 (TFEU), Article 221.

[11] EEAS, "EU in the World" www.eeas.europa.eu/headquarters/headquarters-homepage/area/geo_en.

[12] Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service, OJ L 201/30.

[13] M Maresceau, "A Typology Of Mixed Bilateral Agreements", in C Hillion and P Koutrakos (ed), *Mixed Agreements Revisited: The EU and its Member States in the World* (1st edn, Hart Publishing 2010), p. 12.

The completion of EU accession to the ECHR will lead to the EU becoming a High Contracting Party to the ECHR, with all the obligations that stem from it. It will also mark the first time that the EU becomes a party to an international treaty, the enforcement of which is monitored by a regional court, the European Court of Human Rights (ECtHR) and it will thus usher in a new era for human rights protection in Europe.[14] However, since all EU Member States are, and will remain, parties to the ECHR, accession of the EU will lead to a multilateral mixed agreement in which both the EU and its Member States are bound to third parties. Against this background, an examination of the relevant international rules on the apportionment of responsibility for cases which involve the EU and one or all of its Member States under multilateral mixed agreements is highly pertinent.

1.2 Purpose and research questions

This thesis investigates whether the *sui generis* characteristics of the EU leads to the need for special rules on its international responsibility, and more specifically, a special legal regime for the apportionment of international responsibility between the EU and its Member States under multilateral mixed agreements and whether such as special regime can be said to exist under international law. These questions are relevant for several reasons. From an international law perspective the questions are highly pertinent as they touch on the more general issue of how international law should address the diverse body of international organizations. Secondly, it addresses the interplay between EU law and international law and how the former affects the latter. From the perspective of the EU, the research questions are

[14] See for instance: N O'Meara, "'A more Secure Europe of Rights?' The European Court of Human Rights, The Court of Justice of the European Union and EU Accession to the ECHR" (2010) 12 German Law Journal 1813-1832; T Locke, "Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order" (2011) 48 Common Market Law Review 1025-1054; A. Łazowski, R.A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR" (2016) 1 German Law Journal 179-212.

important due to the fact that the interactions that the EU has with third States are increasing. Therefore a clear answer to the question of what rules on international responsibility are applicable on a treaty relationship with the EU is crucial.

For these purposes, the thesis examines the following questions:

1. Do the *sui generis* features of the EU lead to the need for special rules of apportioning international responsibility between the EU and its Member States under mixed agreements?
2. Does a special legal regime of responsibility for the EU and its Member States exist under international law?
3. What issues stem from the potential existence of such a regime and, how can they be resolved?

1.3 Delimitations

This thesis addresses, more generally, whether a special legal regime for the apportionment of international responsibility should be applied to certain international organizations. For the scope of this thesis, this examination will be limited to the EU. It is conceivable that other international organizations, such as the UN, could benefit from the same potential legal regime, however, unlike the EU, the UN is an international organization with near-universal membership, meaning that it rarely interacts with non-Member States, and thus the question of international responsibility of the UN and its Member States is rarely invoked. With the EU, the opposite is the case, since the vast majority of States are not members of the EU.

The thesis is further limited in its analysis insofar that it focuses on mixed agreements, and does not go into any in-depth analysis of other treaty relationships that can, and do, occur. The reason for this is that mixed agreements raise unique questions relating to the apportionment of responsibility between the EU and its Member States vis-à-vis their treaty parties. Further, the thesis does not deal with questions relating to other

aspects of international responsibility such as circumstances precluding wrongfulness, reparations and countermeasures.

Moreover, the primary focus of the thesis is not on so-called primary norms, i.e. the rules in international law which establish substantive obligations, but instead on secondary norms, i.e. the rules in international law which establish when a breach of a primary norm has occurred and the legal consequences of such a breach.[15] The effect that the findings have on primary norms, such as human rights, are therefore not explored in depth.

Regarding the international jurisprudence, the author has opted to restrict the analysis to two judicial bodies, the WTO and the ECtHR. Other judicial bodies such as the International Tribunal for the Law of the Sea and quasi-judicial bodies such as the Aarhus Convention Compliance Committee have dealt with issues relevant to the research question, but for this thesis, their inclusion is not necessary, as the WTO and the ECtHR illustrate the two opposing view in a satisfying way.

Further, the EU accession to the ECHR, which is used as an example to apply the findings of the thesis, is only dealt with as it pertains to the research questions. Other aspects and issues of the accession process, such as voting rights or the election of judges to the ECtHR, are not dealt with.

The aim of this thesis is not to present an answer to the research question that is politically feasible, but rather legally so. Since the topic of responsibility of international organizations is in a nascent stage, answering the research questions necessarily entails a mix of *lex lata* and *de lege feranda*. This is in particular the case when dealing with the international responsibility of the EU, since the question is not by any means settled at the time of writing.

[15] A Cassese, *International Law* (2nd edn, Oxford University Press 2005), p. 244.

1.4 Theoretical Perspective

When answering the research questions this thesis resorts to applying the legal dogmatic method. The thesis explores the possible existences of special rules of international responsibility for the EU by analyzing the internal constitutional arrangements of the EU. For this purpose, the constituent treaties of the EU as well as the jurisprudence of the Court of Justice of the European Union (CJEU), are analyzed. An examination of selected international and regional jurisprudence, specifically that of the European Court of Human Rights as well as the World Trade Organization, will follow in order to ascertain whether there exists international practice in support of a special legal regime. The thesis then turns to the work of the ILC, such as the two Vienna Conventions on the Law of Treaties (1969 VCLT and 1986 VCLT), the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and its Draft Articles on the Responsibility of International Organizations (DARIO) and their *travaux préparatoires*. For a more stringent response to the research questions, scholarly literature will be used when analyzing all aspects of the thesis.

The thesis presents the theory that contemporary international law is ill-suited to accommodate the diverse body of international organizations, a diversity that springs from their widely varying mandates and powers that are without exception, a result of the original actions of their founding Member States. Therefore, the thesis presents solutions that bridge the gap between on the one hand the need for respecting long-standing international law principles such as *pacta tertiis,* the supremacy of international law over municipal law and *pacta sunt servanda* while at the same time promoting the need for international law to be flexible and, perhaps even more importantly, to reflect the political and constitutional realities of its legal subjects. This will, by necessity, require an exploration of the borderland between EU law and international law, and the effects that the former has on the latter.

The thesis thus hinges on two general assumptions. Firstly, that the mandate and powers of some international organizations, in particular the EU, results in them requiring special treatment under international law. Secondly, that international law needs to be perceptive to this reality, not only as to avoid an existential threat against the international organization in question but also as to ensure the legitimacy and efficiency of international law itself. With these assumptions in mind, the importance of finding an appropriate international legal framework for the apportionment of international responsibility between the EU and its Member States under mixed agreements cannot be overstated.

1.5 Outline

Chapter 2 explains the different aspects that make the EU *sui generis*. It explores both the internal and external powers of the EU and analyzes their effects on the international responsibility of the EU and its Member States. Further, the chapter introduces the concept mixed agreements, the normative control doctrine and executive federalism, which are central in understanding the arguments for why the EU requires special rules of international responsibility.

Chapter 3 begins by explaining the basic notion of international responsibility before turning to the practice of regional and international judicial bodies. Chapter 3 also provides an analysis of the work of the ILC on the topic, and specifically its position towards the normative control doctrine. The chapter concludes with a summary of the current status of the normative control doctrine in international law.

Chapter 4 provides a more in-depth exploration of the normative control doctrine based on the findings in Chapter 2 and 3. The chapter highlights the limits of the normative control doctrine as well as the legal problems that

may arise as a consequence of its use. The chapter is concluded with a presentation of solutions that can be applied in order to alleviate these problems.

Chapter 5 then applies the findings of the previous chapters on the EU accession to the European Convention on Human Rights (ECHR). The chapter begins by outlining the still on-going accession process and explores the legal problems that have thus far been encountered. It critically examines the Draft Accession Agreement and proposes an alternative model of accession based on the normative control doctrine.

Finally, Chapter 6 provides conclusions on the topic. The chapter begins with a summary of the findings from the previous chapters and concludes with highlighting the importance that the normative control doctrine becomes the basis for the apportionment of international responsibility between the EU and its Member States under multilateral mixed agreements.

2 The legal Identity of the EU

2.1 Introduction

In order to understand why the international responsibility of the EU is a question that is fraught with controversy, it is necessary to examine the internal function of the EU and how this affects its capacity to engage with third parties. In the following section, the thesis examines the aspects that make the EU *sui generis,* including the autonomy of EU law, its implementation and enforcement.

An examination of how this manifests itself externally is then presented, specifically relating to the international legal personality of the EU, its resulting treaty-making powers and the concept of mixed agreements.

2.2 The Autonomy of EU Law

The CJEU has held, on several occasions, that the preservation of the autonomy of EU law is a prerequisite for the EU being permitted to accede to an international agreement.[16] But what does autonomy mean? There is no explicit reference to autonomy in the Treaties. Instead, the principle is one that has been developed primarily by the CJEU. One has to first turn to the findings of the CJEU in the 1963 *van Gend & Loos case*. In the case, the CJEU found that the EU constituted a new legal order of international law for which the Member States had limited their sovereign rights in some

[16] See for example Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the Draft Accession Agreement with the EU and FEU Treaties* [2014] ECLI:EU:C:2014:2475,

fields.[17] A year later, in the *Costa v ENEL case*, the CJEU found that EU law, as an independent source of law, has primacy over domestic law, due to its special and original nature.[18]

Initially, the question of the autonomy of EU law was a question relevant vis-à-vis the domestic legal orders of the Member States. However, in time, with the growing engagement of the EU with external actors, the focus shifted from the need to preserve the autonomy of EU law from the domestic legal systems of Member States, towards protecting it from international law.[19] The relationship between EU law and international law is to a certain degree regulated in the Treaties, the central provision being Article 216 TFEU, which stipulates that the EU may conclude an agreement with third States or international organizations under certain circumstances and that such agreements are binding on the institutions of the EU and its Member States.[20] The CJEU has further elaborated on this question, holding that an international agreement has primacy over EU secondary law but not EU primary law.[21]

2.3 The implementation of EU law

In order to understand the relevance that the *sui generis* characteristics of the EU has on international responsibility, the compliance mechanism that the EU can employ against its Member States is vital to consider, [22] since it is rarely the EU itself, but the authorities and institutions of the Member States

[17] Case 26/63 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, para. 3.
[18] Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 595.
[19] J Odermatt, "When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law" EUI Working Papers, MWP 2016/17, p. 2.
[20] TFEU, Article 216.
[21] C-173/06 *Agrover Srl v Agenzia Dogane Circoscrizione Doganale di Genova* [2007] ECR I-8783, para. 17.
[22] E Paasivirta and P.J. Kuijper, "Does on size fit all?: The European Community and the Responsibility of International Organizations" (2005) 36 Netherlands Yearbook of International Law 169-226.

that implement EU law.[23] This constitutional arrangement is known as 'executive federalism'.[24] As has already been demonstrated, Article 216(2) TFEU established that international agreements entered by the EU are binding on the EU and its Member States.[25] This article must be read in the light of Article 4 TEU, which establishes the principle of sincere cooperation.[26] The principles of sincere cooperation is a central aspect of EU law[27] and require, *inter alia,* that Member States refrain from measures which would hinder the effectiveness of any course of action designed to advance the objectives of the EU.[28] The principle applies to all areas falling within the scope of the aims of the EU under Article 3 TEU,[29] in addition to situations falling under shared competence.[30] Further, Article 291(1) TFEU provides that Member States shall adopt all measures of national law necessary to implement legally binding EU acts.[31]

The notion of "implementing EU law" merits some reflection. Article 291(1) TFEU seems to limit the notion to the introduction of EU secondary legislation into the domestic legal order.[32] However, the entry into force of the Charter of Fundamental Rights of the European Union (CFR), which has been elevated to primary law through Article 6(1) TEU, has allowed the CJEU to elaborate on the notion of implementation of EU law when examining the wording of Article 51(1) CFR.[33] The CJEU has found that

[23] TEU, Article 4(3).
[24] K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (1st edn, Sweet and Maxwell 2005), p. 607.
[25] TFEU, Article 216 (2).
[26] TEU, Article 4(3).
[27] H Blanke and S Mangiameli, *The Treaty On European Union (TEU): A Commentary* (1st edn, Springer 2013), p. 231.
[28] Ibid, p. 234.
[29] Opinion 2/91 *Re: Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061 para. 10.
[30] Opinion 1/94 *Competence of the Community to conclude international agreements concerning the protection of intellectual property* [1994] ECR I-5267 para. 108.
[31] TFEU, Article 291(1).
[32] Ibid, Article 291(2); A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (1st edn, Cambridge University Press 2016). p. 45.
[33] A Ward, "Field of Application", in S Peers, T Hervery and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, (1st ed. Hart Publishing 2014), p. 1431.

"implementation of EU law" includes situations when the organs of Member States are acting as EU agents[34] when they are applying measures pursuant to EU law, and when the actions of Member States are perceived as originating from the EU.[35]

The distinction between EU Regulations and EU Directives warrants some discussion. EU Regulations, which are binding in their entirety and have direct applicability in the Member States,[36] obliges the Member States to implement and apply the substantive rules of the regulations. Should there be any dissatisfaction with the Member State's implementation of the Regulation, the Regulation can only be challenged based on EU primary law or EU general principles.[37] In order to preserve the uniformity of EU law, the CJEU has sole competence to declare EU secondary law to be incompatible with primary law through annulment[38] and national courts against whose decisions there exists no judicial remedy are obliged to refer questions relating to the validity of EU secondary law to the CJEU.[39] Thus, the organs and courts of the Member States act as agents of the EU in the sense that they implement EU Secondary law, whose compliance with EU primary law is determined solely by the CJEU.[40]

With regards to EU Directives, which are binding on the Member States only in so far as to the aims pursued,[41] the establishment of the organs and courts of the Member States as EU agents is more complicated. This is because the

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[34] E Hancox, "The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson" (2013) 50 Common Market Law Review. 1411-1431.
[35] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (1st edn, Cambridge University Press 2016). p. 45.
[36] TFEU Article 288(2).
[37] Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford* [2004] ECR I-11825, para. 28.
[38] Case 314/85 *Foto-Frost v Hauptzollant Lübeck-Ost* [1987] ECR 4199, para. 17.
[39] TFEU, Article 267(3).
[40] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726.
[41] TFEU, Article 288(3).

room for maneuver for the Member States is greater, as compared to Regulations.[42] In its jurisprudence, the CJEU seems to put less emphasis on the question of how much discretion the Member State has when implementing EU law and more on whether the act is ultimately governed by EU law. In the *Mox Plant* case, the UK had built a nuclear reactor on the coast of the Irish Sea. The Irish government subsequently brought a complaint against the UK at the Arbitral Tribunal created under United Nations Law of the Sea (UNCLOS). The CJEU found that complaint before the Arbitral Tribunal fell within a policy area covered by an EU Directive and that since the EU had exercised its competence in the area of environmental protection, the dispute between Ireland and the UK was not a matter of international law but a question of interpretation and application of EU law. This meant that the CJEU had exclusive jurisdiction over the matter.[43] Thus, the CJEU considers that all acts that are ultimately governed by EU law fall under its exclusive jurisdiction, regardless if the underlying legislation is a Regulation or a Directive. Thus, EU law is governing both the substance of the act and the available legal remedy for any resulting violation.[44]

Article 258 TFEU provides the European Commission with the possibility to bring infringement procedures before the CJEU against a Member State who is failing to fulfil an obligation under the Treaties,[45] such as implementing EU law.[46] This mechanism has been used successfully by the European Commission against a Member State who is failing to implement mixed agreements.[47]

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[42] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726.
[43] Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-04635, paras. 110-114.
[44] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726
[45] TFEU, Article 258 (2).
[46] TEU, Article 17.
[47] Case C-61/*94 Commission of the European Communities v Federal Republic of Germany* [1996] ECR I-03989.

Hence, the EU's constitutional arrangement results in a situation where the administrations and institutions of Member States are required to implement EU law, despite not being integrated into the EU administration.[48] This form of decentralized implementation of EU law by the Member States has, as was previously mentioned, been termed "executive federalism".[49] Executive federalism places upon the organs of the Member States a dual role, where, in one instance, they might be implementing an EU act and in another instance, a domestic act. For the purposes of EU law, the organs of the Member States are placed at the disposal of the EU and are at times acting as agents of the EU.[50] This dual role or, *dédoublement fonctionnel,* of the organs of the EU Member States constitutes one of the main issues with regards to the application of the rules of international responsibility vis-à-vis the EU since the apportionment of responsibility presupposes the identification of whether the act of an organ is an EU act or a domestic one.[51]

2.4 An ever closer union?

The notion that the EU should serve as a mechanism for an ever closer union between its Member States is an idea that harks back to the Treaty of Rome, where the first sentence of the preamble articulates the desire to lay the foundations for an ever closer union among the peoples of Europe.[52] The notion now finds its place in the TEU, both in the preamble and in Article 1.[53] The inclusion of this objective in one of the constituent treaties of the EU leaves the final form of the EU ambiguous.[54] Indeed, the fact that Article 1

[48] R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (1st edn, Oxford University Press, 2009) p. 57.
[49] K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (1st edn, Sweet and Maxwell 2005), p. 607.
[50]E Paasivirta and P.J. Kuijper, "Does on size fit all?: The European Community and the Responsibility of International Organizations" (2005) 36 Netherlands Yearbook of International Law 169-226.
[51] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 43.
[52] Treaty establishing the European Economic Community [1957], preamble.
[53] TEU, Preamble; Article 1.
[54] H Blanke and S Mangiameli, *The Treaty On European Union (TEU): A Commentary* (1st edn, Springer 2013), p. 47.

TEU characterizes the adoption of the TEU as simply a "…new stage in the process of creating an ever closer union.." indicates that the integration process is yet to be completed.[55] The conceptualizing of European integration as an ever-ongoing project is another factor that makes defining the precise limits of the power of the EU a difficult endeavor.

The idea of an ever closer union has created friction between the EU and some of its less integrationist Member States, who fear that the final product of European integration will be an entity akin to a federal state. An attempt to alleviate these concerns can be found in Article 48(2) TEU, wherein Governments of Member States may, at least theoretically, submit proposals to decrease the competences of the EU.[56]

2.5 The International legal personality of the EU

With the entry into force of the Lisbon Treaty, the legal personality of the EU was firmly established in its primary law.[57] Although the Treaties are not explicit on what type of legal personality the EU is endowed with, it is clear from Article 335 TFEU that it concerns an international legal personality.[58] The article thus endows the EU with the capacity to take on both obligations and rights under international law vis-à-vis third States.[59]

In terms of the capacity of the EU to conclude an international agreement with third States, Article 216 TFEU specifies that the EU can do so in four scenarios:

1. If the Treaties provide it;

[55] H Blanke and S Mangiameli, *The Treaty On European Union (TEU): A Commentary* (1st edn, Springer 2013), p. 59f.
[56] Ibid, p. 1347.
[57] TEU, Article 47.
[58] H Blanke and S Mangiameli, *The Treaty On European Union (TEU): A Commentary* (1st edn, Springer 2013), p. 1318.
[59] Ibid.

2. Where it is necessary in order to achieve one of the objectives referenced to in the treaties;
3. If it's provided for in a legally binding EU act;
4. Is likely to affect common rules or alter their scope.

From Article 216 TFEU, we can thus conclude that the EU may enter into an international agreement where it has constitutional express powers[60] which would cover a wide array of policy areas.[61] Moreover, Article 216 TFEU expands this capacity by establishing that conferment of internal power through other EU legislation results in the EU acquiring the same power externally, a principle known as the external flexibility clause.[62] Further, Article 216 seems to leave open the possibility that the EU also gain external powers, despite the absence of any internal legislation, if such powers are necessary to achieve one of the Treaty objectives. The precise limits of these powers are opaque and are yet to be defined by the CJEU.[63] The CJEU has, however, determined that the external powers of the EU can be established not only from the substantive articles of the Treaties but also from other provision of the Treaties in addition to measures adopted under the umbrella of those provisions by the institutions of the EU.[64]

Due to the layered formulation of Article 216 TFEU, it is thus possible to conclude that the external powers of the EU contain more than the

[60] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 17.
[61] For example: CFSP (Article 37 TEU); European Neighborhood Policy (Article 8(2) TEU); Common customs traffic (Article 32 (a) TFEU); Agriculture (Article 40(2) TFEU); Asylum (Article 78 (2) (g) TFEU); Monetary Policy (Article 138 TFEU); Public health (Article 168 (3) TFEU); Environment (Article 191 (4) TFEU); Common commercial Policy (Article 207 TFEU); Development cooperation (Article 209 (2) TFEU); Economical and financial cooperation with third countries (Article 212 (3) TFEU); Humanitarian aid (Article 214(4) TFEU); Relations with other international organizations (Article 220 TFEU); and Association agreements (Article 217 TFEU).
[62] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 20.
[63] Ibid, p. 22.
[64] Case 22/70 *Commission of the European Communities v Council of the European Communities (ERTA)* [1971] ECR 296, para. 15.

constitutional express powers found in the Treaties. Moreover, the external powers of the EU are subject to continuous development, which makes their precise limits hard to define with precision.[65]

The fact that the external powers of the EU expand affects the capacity of its Member States to act on the external plane. Article 3 TFEU confer exclusive external competence for the EU to enter into international agreements in areas such as common commercial policy, customs union and conservation of marine biology[66], with the resulting effect that Member States are prohibited from acting within those fields without prior authorization from the EU.[67]

In policy areas of shared competence[68], the situation is different. In these areas, both the EU and the Member States may legislate and adopts binding decisions. However, the Member States can only legislate to the extent that the EU has not already done so, a principle known as the principle of pre-emption.[69] The principle of pre-emption has significant consequences for the external powers of the EU Member States since the CJEU has found that once the EU has exercised its shared competence internally, it becomes the exclusive competence of the EU externally.[70] Further, the treaty-making power of the Member States is limited by the ERTA Principle, which states that a Member State cannot employ their treaty-making power to the extent that it affects internal EU law[71] in such a way that it undermines the uniform

[65] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 24.
[66] TFEU, Article 3.
[67] Ibid, Article 2(1).
[68] Ibid, Article 4.
[69] Ibid, Article 2(2).
[70] Opinion 2/91 *Re: Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061, para. 9.
[71] Case 22/70 *Commission of the European Communities v Council of the European Communities (ERTA)* [1971] ECR 263, para. 18.

and consistent application of EU law and the proper functioning of the system they establish.[72]

Further, the EU enjoys exclusive external competence in situations where the conclusion of an international agreement is necessary to achieve the objectives in the Treaties which cannot be attained by the adoption of autonomous rules and in which the internal competence of the EU can only be efficiently exercised at the same time as its external competence.[73] Lastly, the Member States are further limited in their capacity to act externally by the fact that whenever the EU has included in its internal legislation provisions relating to the treatment of nationals of third States or expressly empowered its institutions with powers to negotiate with third States, the EU acquires exclusive external competence in the areas covered by that legislation, a principle known as the WTO-doctrine.[74]

As has been shown, the EU exclusive external competence is extensive and not limited to those policy areas which fall within EU exclusive competence under the Treaties. The EU Member States are thus severely limited in their capability to act on the international stage, which raises questions about their ability to bear responsibility under international law.[75]

[72] Opinion 1/2003 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters* [2006] ECR I-1145, para. 133.
[73] Opinion 2/92 *Competence of the community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment* [1995] ECR I-1759, para. 4; Case 476/98 *Commission v Germany (Open Skies)* [2002] ECR I-9855, para 87.
[74]Opinion 1/94 *Competence of the Community to conclude international agreements concerning the protection of intellectual property* [1994] ECR I-5267, para. 95.
[75] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 29.

2.6 International agreements between the EU and third parties

With the international personality and the external competences of the EU now dealt with, the manner in which these competencies manifest themselves, namely in the form of international agreements, needs examining. An analysis of the international agreements of the EU is necessary, since it is well settled that for the international responsibility of a State or an international organization to arise, an international obligation must first be established.[76]

Today, there exist two basic types of international agreements to which the EU may become a party. The first are Union agreements, in which the EU alone enters into an international agreement with a third party. The second are mixed agreements, wherein both the EU and some or all of its Member States conclude an international agreement with one or more third parties.[77]

Concerning Union agreements, the question of whom the obligation rests with is clear. According to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT 1986), which codify the international customary law principle of *pacta tertiis*[78], only the EU and the third party, are bound by the international agreement.[79] Since this is the case, only the EU,

[76] See ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (November 2001), Supplement No. 10 UN Doc A/56/10 (ARSIWA), Article 2(b) and ILC, *Yearbook of the International Law Commission 2011*, vol. II, Part Two (DARIO), Article 4(b).
[77] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 29.
[78] O Corten and P Klein (eds) (2011) *The Vienna Conventions on the Law of Treaties: A commentary Oxford* (Oxford University Press 2011), p. 887.
[79] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, March 21, 1986, 25 ILM 543 (VCLT 1986) Article 26 and 34.

and not its Member States should, under normal circumstances, bear the responsibility for any violation of a Union agreement.[80]

It is, however, essential to remember that Article 216 (2) TFEU established that any international agreement concluded by the EU is also binding upon its Member States.[81] In the case-law of the CJEU, this has been further developed into the idea that international agreement concluded by the EU form an integral part of EU law.[82] The consequence of this is that as soon as the EU becomes bound by international law, its Member States become bound by the same obligation, but through EU law. This is important as it allows the EU to use its enforcement mechanisms, such as infringement procedures, to ensure that its Member States act in compliance with any international agreement it has concluded[83] which means that the EU can employ its enforcement mechanism to ensure that Member States implement and respect the international agreements entered into by the EU. The enforcement powers of the EU in this area are thus broader than most federal States.[84]

2.6.1 Mixed agreements

The other category of international agreements which the EU has at its disposal are mixed agreements. Mixed agreements are relevant in areas where the EU enjoys shared competence with the Member States and are by definition signed by the EU and some, or all, of its Member States on one side, and a third State or international organization on the other.[85] They can

[80] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 32.
[81] TFEU, Article 216(2).
[82] Case 181-73 *R & V Haegeman v Belgian State* [1974], ECR 449, para. 5.
[83] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 33.
[84] P Kuijper and E Paasivirta, "EU International responsibility and its Attribution: From the Inside Looking Out", in M. Evans and P Koutrakos (eds) *The International Responsibility of the EU: European and International Perspectives* (1st edn, Hart Publishing 2013), p. 39.
[85] M Maresceau, "A Typology Of Mixed Bilateral Agreements", in C Hillion an P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (1st edn, Hart Publishing 2010), p. 12.

deal with a wide array of areas, such as trade,[86] development cooperation,[87] maritime law[88], environmental protection[89] or human rights[90] and will be the method used for EU accession to the ECHR. From the perspective of international responsibility, a mixed agreement is an inherently more complex instrument as compared to a Union agreement since the former involves the division of competence and the subsequent apportionment of responsibility between the EU and its Member States for the obligations contained in the mixed agreement.[91] A distinction must, however, be made between bilateral mixed agreements and multilateral mixed agreements, the latter being the envisioned agreement for EU accession to the ECHR. The need for a distinction between the two is because the CJEU has found that bilateral mixed agreements, unlike multilateral ones, place the obligations stemming from the agreement jointly upon the EU and the Member States.[92]

The internal relationship between the EU and its Member States under mixed agreements has undergone a substantial shift during last decades. Initially, the relationship was envisioned as being a horizontal one, where the EU Member States entering into a mixed agreement were obliged to fulfill their obligations under the agreement both in relation to the Non-Member State and the EU.[93] In its later case-law, the CJEU has taken the position that an obligation of an EU Member-State to fulfill a commitment contained in a

[86] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
[87] Partnership agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part [2000] OJ L 317/3.
[88] Convention on the Law of the Sea (United Nations [UN]) 1833 UNTS 3, UKTS 81 (1999), UN Doc A/Conf.62/122, UN Reg No I-31363 (UNCLOS).
[89] Paris Agreement (Dec. 13, 2015), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (Jan. 29, 2016)
[90] Convention on the Rights of Persons with Disabilities (United Nations [UN]) 2515 UNTS 3, UN Doc A/RES/61/106, Annex, GAOR 61st Session Supp 49, 65.
[91] P J Kuijper and E Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations" (2004) 1 International Organizations Law Review 111-138.
[92] Case C-316/91 *European Parliament v. Council of the European Union* [1994] ECR I-625, paras. 29, 33.
[93]Case 104/81 *Hauptzollant Mainz v Kupferberg* [1982] ECR 3641, para. 11.

mixed agreement exists in relation to the EU itself, in addition to the third party[94] and that therefore, EU Member States have an obligation to comply with mixed agreements not only under international treaty law but also under EU law, even in areas of shared competence, with the CJEU being the final arbiter on the legal effects of mixed agreements.[95] This 'Europeanization' of international agreements have been deemed by some scholars to result in that mixed agreements endows the EU with the same level of normative control over the EU Member States as other parts of EU law do.[96]

2.6.1 Conclusion

The external powers of the EU are broader then a reading of the Treaties might first suggest. They encompass not only the areas of exclusive competence but also shared competence. Further, the principle of the external flexibility clause, the ERTA principle and the WTO doctrine vastly expand the area in which the EU enjoys exclusive external competence.

Additionally, we have seen that both Union agreements and mixed agreements transform the obligations of Member States from international law to EU law, which enables the EU to employ its compliance mechanism to ensure that its Member States implement the agreements.

2.7 The normative control doctrine

In order to reconcile the law of international responsibility with the executive federalism of the EU and the *dédoublement fonctionnel* of the organs of its Member States, the normative control doctrine has been suggested as a

[94] Case C-293/03 *Commission of the European Communities v French Republic)* [2004] ECR I-09325, para. 26.
[95] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 37f.
[96] A Nollkaemper, "The Role of National Courts in Inducing Compliance with International and European Law – A Comparison" in M Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012), p. 194.

possible solution. The normative control doctrine, which is intimately tied to the *sui generis* features of the EU,[97] holds that special rules for apportionment of responsibility are implied by the fact that the EU Member States have transferred decision-making authority in specific areas to the EU. Consequently, the EU Member States are obliged to carry out binding decisions adopted by the EU according to the EU's internal rules. Thus, the EU exercises normative control over the Member States whom themselves are just acting as agents of the EU when implementing EU law.[98]

Accordingly, the conduct of an EU Member State must be attributed to the EU, when the EU Member State is implementing binding EU decisions, since the EU, as the adopter of the binding decision is the source of the alleged violation and is thus responsible.[99] According to Hoffmeister, international responsibility can be apportioned to the EU when it has been established that EU law governs not only the substance of the conduct of the organ of a Member State but also the available legal remedies for it.[100] In other words, when an organ of a Member State implements EU law, the responsibility should rest with the EU provided that the EU alone holds the judicial competence to remedy the alleged violation.

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[97] C Contartese, "Competence-Based Approach, Normative Control and the International Responsibility of the EU and its Member States – What Does Recent Practice Add to the Debate?" (2019) 16 International Organizations Law Review 339-377.
[98] ILC, "Responsibility of international organizations - Comments and observations received from international organizations" (14 and 17 February 2011) UN Doc A/CN.4/637 and Add. 1, p. 167.
[99] C Contartese, "Competence-Based Approach, Normative Control and the International Responsibility of the EU and its Member States – What Does Recent Practice Add to the Debate?" (2019) 16 International Organizations Law Review 339-377.
[100] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726.

3 Responsibility of international organizations

3.1 General observations on international responsibility

Before an in-depth analysis of the international responsibility of international organizations is presented, the more general aspects of international responsibility merit some reflection.

Responsibility is a central aspect of international law. Not only is it intimately tied to sovereignty, but it is also the most visible evidence of the effectiveness that international law has on the relationship between States and other entities.[101] Some scholars argue that the law of responsibility is a prerequisite for the very existence of international law since no law can exist in the absence of rights and obligations.[102] The law of international responsibility constitutes, according to the ILC, secondary norms, as opposed to the substantive obligations of States known as primary norms. Secondary norms determine, among other things, the consequences of a State acting in violation of a primary norm that places obligations upon it.[103]

In order for the international responsibility of a state to be triggered, it has to have committed an internationally wrongful act (IWA).[104] An IWA is constituted by an act or omission of a State that is attributable to that State under international law and is constituting a breach of an international

[101] A Pellet, "The Definition of Responsibility in International Law', in J. Crawford, A. Pellet and S. Olleson (eds.) *The Law of International Responsibility* (1st edn, Oxford University Press, 2010), p. 3.
[102] ILC, *Yearbook of the International Law Commission 1971, Vol II (1*), p. 205.
[103] J Klabbers, *International Law* (2nd edn, Cambridge University Press 2017), p. 138f.
[104] ARSIWA, Article 1.

obligation of that State.[105] The act or omission constituting an IWA is attributed to the State, *inter alia,* when committed by its organs,[106] by persons or entities empowered to exercise elements of governmental authority[107], or by an organ placed at the disposal of the State by another state if the organ is exercising elements of governmental authority of the State at whose disposal it is placed.[108] The same applies when the conduct is committed *ultra vires.*[109]

The law responsibility of international organizations is, for several reasons, different from that of State responsibility. Firstly, States and international organizations differ significantly as subjects under international law. Unlike States, international organizations are not homogenous.[110] they are instead endowed with vastly different mandates, powers, and functions. The International Court of Justice confirmed this idea when it established that international organizations, unlike States, do not possess general competence and that they instead are governed by the principle of speciality. The principles of speciality entail that international organizations are given a mandate by the Member States, the limit of which is defined by common interests whose promotion the Member States have entrusted with the international organization.[111] Arguably, the heterogeneity of international organizations makes it difficult to develop general rules of responsibility applying to all international organizations equally.[112]

[105] ARSIWA, Article 2.
[106] Ibid, Article 4.
[107] Ibid, Article 5.
[108] Ibid, Article 6.
[109] Ibid, Article 7.
[110] UNGA Sixth Committee (15th Meeting), "Sixth Committee Summary Record of the 15th Meeting" (28 October 2003) UN Doc A/C.6/58/SR.15, para. 8.
[111] ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) 1996, ICJ Reports 1996, 66, at 78–9, para. 25.
[112] M. Möldner, "Responsibility of International Organizations – Introducing the ILC's DARIO" (2012) 16 Max Plank Yearbook of United Nations Law 281-328.

3.2 The jurisprudence of international and regional judicial bodies

The apportionment of responsibility between the EU and its Member States has been dealt with by several international and regional judicial bodies. Due to the growing presence of the EU on the international stage, the question has become increasingly pertinent.

This section will explore relevant international and regional case-law in order to ascertain whether there exists any practice in support of the notion that the EU and its Member States enjoy special rules governing the apportionment of their responsibility under international law.

3.2.1 WTO

The question of international responsibility and its apportionment between the EU and its Member States became relevant early in the days of the WTO. In the *EC – Lan* case, which concerned a complaint aimed at against an EU regulation which obliged EU Member State to increase the tariffs on certain computer equipment. The United States challenged the increase in tariffs, aiming their complaint against both the EU and two of its Member States.[113] The EU countered with the argument that the EU is a WTO Member that has taken upon itself the exclusive responsibility for the implementation of tariffs on the goods in question.[114] The US argued that the internal arrangements of the EU were not relevant and that they should, in any case, not lead to fewer right and obligations for other WTO Members.[115] This argument was contested by the EU who argued that the transfer of sovereignty between the EU and its Member State is relevant externally and

[113] WTO, *European Communities – Customs Classification of Certain Computer Equipment - Report of the Panel* (22 June 1998) WT/DS62/R.
[114] Ibid, para. 4.10.
[115] Ibid, para 4.14.

that WTO Members State had implicitly recognized this transfer of sovereignty by virtue of the EU being a founding Member of the WTO. Additionally, the EU asserted that it was ready to accept the international obligations that sprung from this transfer of sovereignty but that it would not accept an attack on the EU constitutional arrangement, an attack which it considered to be implicit in the US complaint.[116] However, the findings of the WTO Dispute Settlement Body (DSB) in this case did not express a definitive opinion on the issue[117]

The position of the DSB on the issue became much more explicit in *Geographical Indications* case, which dealt with a complaint by the United States concerning EU regulation related to the protection of geographical indications and designation of origins on agricultural products and foodstuffs.[118] The case is of great interest insofar that it contains a recognition by the DSB that the EU has a *sui generis* constitutional order in which Member States act as de facto organs of the EU, for which the EU is responsible under international law.[119] The DSB later confirmed this position in the *Biotech* case, which concerned an alleged general EU moratorium on the approvals of biotech products from the United States, Canada and Argentina.[120]

Another case of considerable importance is that of *Customs Matters*. The case, concerns a complaint from the United States relating to the EU's administration of its customs regime and is seminal for several reasons, not

[116] WTO, *European Communities – Customs Classification of Certain Computer Equipment - Report of the Panel* (22 June 1998) WT/DS62/R, para. 4.15.
[117] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 162.
[118] WTO, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff – Complaints by the United States - Report of the Panel* (20 April 2005) WT/DS293/R, para. 2.1.
[119] WTO, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff – Complaints by the United States - Report of the Panel* (20 April 2005) WT/DS293/R, para. 7.725.
[120] WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products - Report of the Panel* (29 September 2006) WT/DS291/R, para. 7.101.

least because the complaint was targeted only against the EU and not the Member States with the motivation that the EU was the source of the relevant legislation and therefore responsible for the customs administration in the Member States.[121] Furthermore, the DSB endorsed the term "executive federalism" in its report.[122]

The evident trend of the WTO to increasingly recognize the normative control of the EU has however been somewhat interrupted in its latest case law. In *Airbus,* which concerns a US claim against the EU and some of its Member States relating to the granting of state aid, the EU argued that since state aid is subject to control by the European Commission, any international responsibility for state aid granted in violation of WTO law should fall on the EU.[123] The WTO Panel disagreed with this claim, finding instead that both the EU and the Member States in question were separately responsible for their violation of the WTO rules on state aid.[124] The reason why the WTO Panel chooses a different approach is not explicit in its decision. However, it has been suggested that the normative control doctrine could not be applied in this situation firstly because Member States of the EU use their national budgets for the granting of state aid and secondly because there was no need for the Member States to seek EU authorization for the granting of state aid in this particular case.[125] The lack of normative control over the Member States was thus apparent.

3.2.1.1 Conclusion

The WTO jurisprudence relating to the responsibility of the EU is the body of case-law which is perhaps most in line with the EU's position on the

[121] WTO, *European Communities – Selected Customs Matters - Report of the Panel* (11 December 2006) WT/DS315/R, para. 2.1.
[122] Ibid, para. 2.13.
[123] WTO, *European Communities – Measures Affecting Trade in Large Civil Aircraft: First Written Submission by the European Communities* (5 April 2007) WT/DS316, p. 43.
[124] WTO, *European Communities – Measures Affecting Trade in Large Civil Aircraft – Report of the Panel* (30 June 2010) WT/DS316/R, para. 8.5
[125] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 192.

matter. Not only has the WTO panel used the normative control doctrine to establish responsibility in cases where the EU and its Member States are involved, but it has also established some limitations to that normative control.

It seems as though one can conclude from the WTO case-law that the normative control doctrine applies whenever acts of EU Member States have been adopted in order to implement EU norms and that this suffices to establish the exclusive responsibility of the EU.[126]

3.2.2 ECtHR

As has been shown, the WTO Dispute Settlement Body has moved from cautiously pondering the idea of the *sui generis* aspects of the EU, towards explicitly recognizing that the organs of EU Member States are, when implementing EU law, in effect acting as agents of the EU. This development has not been mirrored in the jurisprudence of the ECtHR who has, at least at first sight, moved in the opposite direction.

The predecessor to the ECtHR, the European Commission on Human Rights, ruled as early as 1958 that a State remains responsible for the breach of a treaty obligation, even if it has subsequently entered into a new treaty which hinders it from fulfilling the obligations steming from from the former treaty.[127] As has been previously illustrated, the EU is not a High Contracting Party to the ECtHR and therefore, the complaints that have been brought against the EU have thus far been declared inadmissible *ratione personae*.[128] The ECtHR has, however, dealt with cases were the alleged responsibility of

[126] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 193.
[127] *X v Germany* App. No. 235/56 (Commission Decision, 10 June 1958)
[128] *Conféderation Française Démocratique du Travail v the European Communities* App. No. 8030/77 (Commission Decision 10 July 1978), para. 7.

one or several EU Member States for the implementation of EU decisions has been invoked.

In the case of *Etienne Tête v France*, which concerned a complaint from a politician regarding French legislation relating to elections to the European Parliament, the ECtHR found that the transfer of competence from a High Contracting Party to the EU could not lead to the exclusion of matters otherwise covered by the ECHR.[129]

The case of *M & Co. v Germany* represents another important ruling when examining the ECtHR view on the matter of the responsibility of Member States when implementing EU law. The case concerned a German company which lodged a complaint aimed at a fine enforced by the German authorities, imposed by the European Commission and upheld by the CJEU.[130] The ECtHR found that since the object and purpose of the ECHR is to provide practical and effective safeguards, the transfer of powers from a State to an international organization does not exclude a State's responsibility under the ECHR with regards to the exercise of the transferred powers. Further, the ECtHR found that a transfer of power is not incompatible with the ECHR, provided that there is equivalent protection of fundamental rights within the international organization to which the powers are transferred.[131]

The case of *Matthews v UK*, which dealt with a complaint by an individual living in Gibraltar concerning the fact that an EU decision, which had been integrated into UK legislation, prevented Gibraltarians from voting in elections to the European Parliament. The UK contested the complaint, claiming that the underlying legislation which had led to the complaint was EU primary law, which had been adopted within the EU framework and

[129] *Etienne Tête v. France* App. No. 11123/84 (Commission Decision 9 December 1987), p. 67.
[130] *M & Co v the Federal Republic of Germany* App. No. 13258/87 Commission Decision 9 January 1990), p. 3.
[131] Ibid, p. 7.

could not be unilaterally amended by a Member State. Therefore, the UK lacked the necessary power of effective control over the legislation complained of.[132] The ECtHR acknowledged that the EU existed outside of its jurisdiction and that the ECHR does not exclude the transfer of powers to an international organization as long as the rights contained in the ECHR are secured.[133] Further, the ECtHR noted that the alleged violation of the ECHR flowed from EU legislation, including primary law. However, since the UK freely entered both the EEC Treaty and the Maastricht Treaty, it was responsible *ratione personae* under the ECHR for the consequences sprung from those pieces of EU legislation.[134] The ECtHR thus established the responsibility of the UK based on the fact that the UK had voluntarily entered the Maastricht Treaty.[135]

The manner in which the ECtHR establishes the responsibility of the UK is interesting to juxtapose with the findings of a highly influential private body such as the Institut de Droit International who, in their 1995 Resolution, found that no liability of a State arises merely by virtue of "having participated in the establishment of an international organization to serve the State's own purposes".[136]

The ECtHR's reasoning in the *Bosporus case*, which is a seminal case in defining the EU's relationship with the ECHR, differs from that of *Matthews*. The case concerned a complaint aimed at the impounding of a Yugoslav airplane by the Irish authorities within the framework of EU regulations imposing sanctions against Yugoslavia.[137] Before the case reached

[132] *Matthews v. the United Kingdom* (1999) 28 EHRR 361, para. 26.
[133] Ibid, para. 32.
[134] Ibid, para. 33.
[135] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726
[136] Institut de droit international, "The Legal Consequences for Member States of the Non-fulfilment by International Organization of their Obligations toward Third Parties", (1996) 66 Annuaire, ii, 444-453.
[137] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (2006) 42 EHRR 1.

the ECtHR, the CJEU had already deemed the EU regulation to be compatible with the Treaties. An examination of the ECtHR's reasoning in *Matthews* would lead one to assume that the ECtHR would be able to again derive responsibility for Ireland, on account of it having freely entered into the constituent Treaties of the EU. However, the ECtHR choose instead to focus on the fact that it was the Irish authorities who *de facto* adopted the act of impounding the airplane. Thus, the act of impoundment fell within the jurisdiction of the ECtHR.[138]

Ultimately, the ECtHR did not find that Ireland had violated the ECHR. It arrived at this conclusion by applying what is now known as the "Bosphorus presumption" or the "principle of equivalent protection" wherein it is assumed that an action taken by a State in compliance with its legal obligation vis-à-vis an international organization is not in violation of the ECHR as long as the international organization in question is considered to protect fundamental rights in a manner that is at least equivalent to that which is provided by the ECHR. This presumption can only be rebutted if it is considered in any particular case, that the protection of the rights contained in the ECHR is manifestly deficient.[139] The ECtHR subsequently found that the EU offers equivalent protection and the principle of equivalent protection was thus applicable[140], leading the ECtHR to find that Ireland had not acted in violation of the ECHR.[141]

3.2.2.1 Conclusion

It seems evident when examining the case-law of the ECtHR on the issue that there is considerable hesitance to apportion responsibility on an international organization instead of its Member States. At first sight, this could be understood as a rejection of the normative control doctrine, but other

[138] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (2006) 42 EHRR 1, para. 137.
[139] Ibid, para. 155f.
[140] Ibid, para. 165.
[141] Ibid, para. 167.

reasons can potentially be identified. Several scholars argue that the findings of the ECtHR in its case-law which deals with situations where Member States implement EU law is motivated by its desire to provide real and effective human rights protection and that applying the normative control doctrine would lead to the EU being apportioned responsibility. Since the EU is not, as of yet, a High Contracting Party to the ECHR, it exists outside of the jurisdiction of the ECtHR *ratione personae*, which would be an unsatisfactory result due to the large gap in human rights protection on the European continent that would this would lead to. Thus, the ECtHR is obliged to find ways to apportion responsibility to the Member States of the EU since they are High Contracting Parties and therefore within the jurisdiction of the ECtHR.[142]

Other scholars claim that the case-law of the ECtHR should be read as an implicit acknowledgement of the normative control doctrine. Tzanakopoulos argues that the Bosphorus principle is an expression of the ECtHR accepting the idea that the EU is exercising normative control over its Member States and that this has consequences for the apportionment of international responsibility. By creating the Bosphorus principle, the ECtHR in effect recognizes that both the reviewing of conduct by an international organization that is not a party to the ECHR, and the reviewing of the conduct of a State taken as a result of a legal obligation imposed by the international organization, is outside the scope of its jurisdiction because of the normative control that the international organization has over the conduct of the State.[143]

[142] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726; P Kuijper and E Paasivirta, "EU International responsibility and its Attribution: From the Inside Looking Out", in M Evans and P Koutrakos (eds), *The International Responsibility of the EU: European and International Perspectives* (1st edn, Hart Publishing 2013), p. 67.
[143] A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (1st edn, Oxford University Press 2011), p. 42f.

3.3 Work of the International Law Commission

The question of the responsibility of international organizations was for a long time neglected. During its fifty-third session, in 2001, the ILC adopted its draft articles on Responsibility of States for internationally wrong full acts (ARSIWA).[144] The adoption marked the end of a gargantuan project that had occupied the agenda of the ILC for almost half a century.[145] However, despite the comprehensive way that the ARSIWA deals with the issue of state responsibility, one crucial aspect was left out, that of the responsibility of States or international organizations for the conduct of an international organization.[146]

Thus, with the successes of ARSIWA fresh in mind, and with the ever-growing powers of international organizations and institutions, the ILC decided to begin its work on the responsibility of international organizations in 2002.[147] Due to the fact that ARSIWA, to a large degree, could be used as a basis[148] the ILC moved relatively swiftly and at its sixty-third session in 2011 the ILC adopted 67 draft articles with commentaries on the responsibility of international organizations (DARIO).[149] The decision to base DARIO on ARSIWA has been subject to criticism, since the sovereign powers of international organizations unlike States, are subject to limitations to various extents and are therefore not homogenous. The limitations placed on international organizations makes them dependent on their Member States

[144] ILC, "Report of the International Law Commission on the work of its fifty-third session" (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, p. 26.
[145] M. Möldner, "Responsibility of International Organizations – Introducing the ILC's DARIO" (2012) 16 Max Plank Yearbook of United Nations Law 281-328.
[146] ARSIWA, Article 57.
[147] ILC, *Yearbook of the International Law Commission 2002 Volume II Part II*, para. 461.
[148] M. Möldner, "Responsibility of International Organizations – Introducing the ILC's DARIO" (2012) 16 Max Plank Yearbook of United Nations Law 281-328.
[149] ILC, "Report of the International Law Commission on the Work of its Sixty-sixth Session" (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 and Add.1, paras. 82–83 and 87–88.

when realizing their mandate, which complicates the question of responsibility immensely.[150]

It is essential to keep in mind that the ILC is not a legislative body endowed with the powers to enact binding international norms. Instead, the ILC was established by the United Nations General Assembly (UNGA) in order to shoulder the UNGA mandate of initiating studies and making recommendations for the purpose of promoting the progressive development of international law and its codification.[151] Thus, the legal effect of the work of the ILC is contingent upon its reception by the international community.[152]

3.3.1 Draft Articles on Responsibility of International Organizations

3.3.1.1 Legal status of the Draft Articles on Responsibility of International Organizations

Before turning to the substantive provisions of DARIO, some words on the legal status of the text in international law is merited. It is clear that DARIO is an expression of the progressive development of international law rather than a codification of settled customary international law, a fact that is partly due to limited international practice.[153]

The notion that at least some of the provisions of DARIO constitute progressive development was confirmed by the ILC, who commented that

[150] C Tomuschat, "Attribution of International Responsibility: Direction and Control", in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (1st ed. Hart Publishing 2013), p. 9f.
[151] Charter of the United Nations, Article 13(1).
[152] ILC, *Yearbook of the International Law Commission 2011, Volume II, Part II,* p. 47.
[153] C Contartese, 'Competence-Based Approach, Normative Control and the International Responsibility of the EU and its Member States – What Does Recent Practice Add to the Debate?' Intl OrgL Rev 16 (2019), 339-377.

the authority of the more progressive articles in DARIO hinged upon their reception by the subjects of international law.[154]

3.3.1.2 Scope and Definitions

The scope of DARIO encompasses both the international responsibility of an international organization for an IWA and the international responsibility of State for an IWA in connection with the conduct of an international organization.[155] An international organization is defined as an organization which possess an international legal personality, established by an instrument governed by international law and whose membership is composed by States or other entities.[156] The "rules of the organization" is defined, non-exhaustively[157], as the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.[158]

An "organ" of an international organization refers, according to DARIO, to any person or entity which has that status in accordance with the rules of the organization[159] and an "agent" of an international organization is in turn defined as an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus the actor through whom the organization acts.[160]

In Article 4, which essentially mirrors the corresponding article in ARSIWA[161], it is stipulated that exists an IWA of an international organization when an act or omission is a) attributable to that organization

[154] ILC, *Yearbook of the International Law Commission 2011, Volume II, Part II,* p. 47.
[155] DARIO, Article 1.
[156] Ibid, Article 2(a).
[157]ILC, *Yearbook of the International Law Commission 2011, Volume II, Part II,* p. 49.
[158] DARIO, Article 2(b).
[159] Ibid, Article 2(c).
[160] Ibid, Article 2(d).
[161] ARSIWA, Article 2.

under international law and b) constitutes a breach of an international obligation of that organization.[162]

3.3.1.3 Attribution of conduct

The articles which regulate the attribution of conduct stipulate that the conduct of an organ or agent of an international organization shall be considered an act of the international organization.[163] Further, the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization is considered to be an act of the latter organization if the organization exercise effective control over that conduct.[164] The requirement of effective control should, according to the commentary, here be understood as "operational control" rather than "ultimate control"[165] and the article is primarily aimed at codifying the responsibility of international organizations for military operations.[166]

The fact that Article 7 of DARIO is aimed mainly at military operations was criticized by several EU Member States who argued that the requirement for "effective control" was not an appropriate benchmark for attributing conduct in cases of other types of cooperation between States and international organizations.[167]

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[162] DARIO, Article 4.
[163] DARIO, Article 6(1).
[164] Ibid, Article 7.
[165] ILC, *Yearbook of the International Law Commission 2011, Volume II, Part II,* p. 57f.
[166] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726 and; Yearbook of the International Law Commission 2011, Volume II, Part II, A/CN.4/SER.A/2011/Add.1 (Part 2), p. 57f.
[167] UNGA Sixth Committee (22nd meeting), "Summary records of the 22nd meeting of the Sixth Committee" (5 November 1998) UN Doc A C.6/59/SR.22, para. 62.

3.3.1.4 Responsibility of an international organization in connection with the act of a state or another international organization

Article 14 of DARIO holds that an international organization which aids or assists a State in the commission of an IWA by that State is internationally responsible for doing so provided that the international organization had knowledge of the circumstances of the IWA and that the act would be an IWA if committed by the international organization.[168] Article 15 stipulates that an international organization which directs and controls a State in the commission an IWA is internationally responsible for that act if; the international organization does so with knowledge of the circumstances of the IWA, and the act would be internationally wrongful if committed by that organization.[169] The ILC commentary specifies here that the adoption of a binding decision of an international organization could constitute a form a direction and control of an internationally wrongful act, and that the Member State, provided that it is not given any discretion to carry out the decision, is not committing an internationally wrongful act.[170]

From Article 17, which is entitled "Circumvention of international obligations through decisions and authorizations addressed to Members", one learns that an international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding on Member State. The same applies when the international organization is authorizing Member States to commit an act that would be internationally wrongful if committed by the international organization itself, regardless of whether the act in question is internationally wrongful for the Member States themselves.[171] It is further essential to note that the articles

[168] DARIO, Article 14.
[169] DARIO, Article 15.
[170] ILC, *Yearbook of the International Law Commission 2011, Volume II, Part II,* p. 67.
[171] DARIO, Article 17.

are without prejudice to the international responsibility of the State which commits the act in question.[172]

3.3.1.5 The lex specialis provision

The *lex specialis* provision of DARIO, which is found in Article 64, stipulates that:

> "…the Draft Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its Members."[173]

The inclusion of the *lex specialis* provision was not subject to much controversy *per se* since the notion and effect of *lex specialis* in international law is well known. Moreover, a similar provision had previously been included in ARSIWA.[174] The reference to the "rules of the organization" as a potential vessel for *lex specialis* was, however, subject to criticism, with some delegations in the UNGA highlighting the risk that the provision could be used by Member States to escape responsibility by invoking the internal rules of the international organization,[175] while others welcomed the perceived flexibility that the article provides.[176]

[172] Ibid, Article 19.
[173] DARIO, Article 64.
[174] ARSIWA, Article 55.
[175] UNGA Sixth Committee (17th Meeting) "Summary Record of the 17th Meeting Of the Sixth Committee" (8 February 2010) UN Doc A/C.6/64/SR.17, para. 14.
[176] Ibid, para. 21.

3.4 DARIO the EU

3.4.1 The initial pleas of the EU

From the beginning, the EU took an active part in the discussions on the work of the ILC.[177] As early as 2003, the European Commission argued before the Sixth Committee of the UNGA that the EU could not be considered to fall within the conventional definition of an international organization. The reasons for this were, according to the European Commission, several. Firstly, the EU is not merely a forum for its Member States to organize their bilateral or multilateral relationship, but also an actor on the international stage in its own right, acceding to treaties and intervening in international legal disputes. Secondly, the EU is governed by its own legal order and empowered with extensive legislative and treaty-making power which means that the EU goes beyond that of other international organizations.[178]

This argument was further developed a year later when representatives of the EU argued that the notion of attribution of conduct needed to be distinguished from the notion of apportioning responsibility. The reason for this, it was argued, was that the implementation of EU law is done almost exclusively by the Member States. Therefore, the conduct should be attributed to them. The EU should, however, be apportioned the responsibility since it is the legislator.[179] This argument was illustrated with an example concerning a specific EU policy area, namely that of tariffs. The

[177] J D'Aspremont, "A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the EU", in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 76.
[178] UNGA Sixth Committee (56th Session), "Report of the International Law Commission on the work of its fifty-fifth session - European Commission Comment" (22 December 2003) UN Doc A/C.6/58/SR.14, para. 13-14.
[179] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726

example used to illustrate the argument was that of a Member State of the EU implementing a tariff policy that is alleged to violate a provision of an agreement that has been concluded by the EU and its Member States. In such a scenario, one would first have to address the question of apportionment of the obligation and the responsibility. Since trade policy falls under the exclusive competence of the EU, the responsibility would, by necessity, be apportioned to the EU. After this has been determined, it is not possible to attribute the conduct to the Member State, since it has already been decided that it does not carry the obligation that allegedly has been breached.[180] For these reasons, it was further put forward that the EU, as a REIO, would potentially require special rules with regards to international responsibility.[181]

The EU further argued that the internal rules of an organization are crucial for the attribution of conduct since those rules are instrumental in defining the power and scope of the organs and agents of the international organization. Moreover, the rules of the organization are of paramount importance when determining whether the obligation which has allegedly been breached is an obligation of the international organization since the internal rules are solely determinant in defining the tasks and powers of the organization vis-à-vis its Member States.[182]

This reasoning has, however, been subject to criticism, as it was perceived to contravene conventional international law. It is well established that the question of whether an obligation exists vis-a-vis a third party should be answered with reference to the law of Treaties.[183] The 1986 Vienna Convention on the Law of Treaties between States and International

[180] ILC, "Responsibility of International Organizations, Comments and Observations Received from International Organizations" (25 June 2004) UN Doc A/CN.4/545, p. 13.
[181] Ibid, p. 18.
[182] ILC, "Responsibility of International Organizations, Comments and Observations Received from International Organizations" (25 June 2004) UN Doc A/CN.4/545, para. 13.
[183] S Talmon, 'Responsibility of international organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005), 415.

Organizations or between International Organizations explicitly state that an international organization may not invoke the rules of the organization as justification for the non-performance of a treaty.[184]

3.4.2 The response of the ILC

Initially, the pleas of the EU were largely ignored by the Special Rapporteur (SR) of the ILC, who stated that it seemed preferable not to assume that a special rule has come to existence that stipulates that when implementing a binding act of the EU, State authorities would act as organs of the EU.[185] The position of the SR was met with criticism from scholars who continued to argue for the need for a special provision which explicitly recognized that the conduct of the Member States of the EU should be considered as the conduct of the EU to the extent that such conduct falls within the competencies of the EU as determined by its internal rules.[186] Alternatively, it was proposed by some scholars that the DARIO should be redrafted so as to permit for the attribution of conduct based on the 'normative criterion', i.e. the normative control doctrine.[187]

In addition, the view of the SR that international practice did not lend itself to the idea of special rules of apportionment of responsibility was criticized by some scholars, since the SR seemed to give greater importance to the jurisprudence of the ECtHR as opposed to that of the WTO which, as has

[184] VCLT 1986, Article 27(2).
[185] ILC, "Report of the fifty-seventh session" (2 May-3 June and 11 July-5 August 2005) UN Doc A/60/10, p. 96.
[186] See for example F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726.
[187] S Talmon, 'Responsibility of international organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005), 415.

been shown, is more favorable to the idea of special rules of responsibility for the EU and its Member States.[188]

3.4.3 The *lex specialis* compromise

In 2009, the SR suddenly altered his position on the matter with the inclusion of Draft Article 63 (now Draft Article 64) on *lex specialis*, which acknowledges that rules of the international organization, may replace or supplement, more general rules of DARIO. While the Draft Article is not an explicit recognition of the normative control doctrine presented by the EU and some scholars it is clear from the commentary that the unique features of the EU were highly relevant when drafting the article.[189] The term "rules of the organization" and the perceived ambiguity of the precise meaning of the term have been fraught with controversy. According to some scholars, the fact that the ILC chose the term "rules of the organization", could lead to the consequence that Member States can avoid the general rules of international responsibility vis-à-vis third parties by virtue of internal rules, outside of the scope of international law.[190]

In any case, the inclusion of the *lex specialis* provision in DARIO has been interpreted by some scholars as opening up for the possibility for the application of the normative control doctrine when apportioning responsibility between the EU and its Member States.[191]

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[188] F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726.
[189] ILC, "Report of the International Law Commission Sixty-first sessions" (4 May-5 June and 6 July-7 August 2009) UN Doc A/64/10, p. 173.
[190] C Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', ACIL Research Paper No 2011-13 (SHARES Series), p. 57.
[191] See for example F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726; A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 105.

4 Does the EU require special treatment?

The aim of this thesis is to determine whether the *sui generis* features of the EU require it to be subject to special rules of international responsibility, whether such a special regime exists under international law and if any problems arising from these special rules can be resolved.

It has been established that the normative control doctrine is not only appropriate, but necessary when dealing with apportionment of international responsibility between the EU and its Member States under mixed agreements. It has been shown that the EU has extensive treaty-making powers on the external plane in policy areas falling both under its exclusive competence and its shared competence and that the capacity of the Member States to act on the external plane have been correspondingly limited. It has further been established that international agreements, including mixed agreements, are binding upon the Member States both as a matter of international law and a matter of EU law, which enables the EU to enforce the implementation of its international agreements as though they were EU law, through infringement procedures before the CJEU. Additionally, the CJEU has exclusive jurisdiction to deal with the legal issues that spring from the treaty-making powers of the EU. The constitutional arrangement thus creates a situation wherein the EU has exclusive competence to enter into international agreements in a wide array of areas, which then become EU law.

Due to executive federalism, EU law is, in most cases, not implemented by the organs of the EU but instead by the organs of the Member States who then act as organs of the EU who remains is the only actor capable of enforcing the international agreements. The EU is thus the only actor capable of entering into the international agreement as well as enforcing it and should, according to the normative control doctrine, be the bearer of the international responsibility.

The findings in the above chapters show that the use of the normative control doctrine for apportioning international responsibility between the EU and its Member States under mixed agreements is a necessity from the perspective of EU law. The use of the normative control doctrine for apportioning responsibility between the EU and its Member States under mixed agreements is, as has been shown, well established in the jurisprudence of the WTO which has accepted the idea that the organs of the EU Member States are acting as agents of the EU when implementing EU law. With regards to the more ambivalent jurisprudence of the ECtHR, it is held that its use of the Bosphorus principle when dealing with the responsibility of the EU is not only a pragmatic choice since the ECtHR at present does not have jurisdiction over EU responsibility for reasons *ratione personae*. It is also a tacit acknowledgement of the normative control that the EU exercises over its Member States. Thus, both the WTO and the ECtHR have recognized the normative control doctrine, the former explicitly and the latter by way of implication.

Further, the normative control doctrine has been recognized, albeit not explicitly, by the ILC through the adoption of Article 64 DARIO, which seemingly leaves the door open for the normative control doctrine to prevail as *lex specialis* over the conventional rules of international responsibility.

4.1 Problems with normative control

As has been shown, the degree control exercised of the organs of the Member States when they implement EU law is determinative when apportioning responsibility between the EU and its Member States. With regards to Union agreements, where only the EU itself, and not its Member States are parties, the apportioning of responsibility is a straightforward exercise. With mixed agreements, the endeavor to apportion responsibility becomes much more involved as it entails answering the question of whether the organs of a

Member State were committing an EU act or a domestic one, with only the former resulting in the responsibility being apportioned to the EU. Therefore, any mixed agreement carries with it a certain degree of legal uncertainty for third parties as to whether the responsibility for an alleged violation of a mixed agreement lies with the EU or its Member States.[192] In other words, a mixed agreement demand *per se* that third parties understand the internal division of competence between the EU and its Member States.[193]

Criticism has been levelled against the idea that the internal rules of the international organization dictate the rights of third parties[194] and that the international organization could be used as a tool for Member States to avoid responsibility.[195] However, an examination of EU law leads to a different conclusion. Not only are mixed agreements rarely a legal necessity from the point of view of EU law, but they are also often a product of political considerations within the EU, in the sense that EU Member States insist on being included as treaty partners because of sensitivities of losing their external display of sovereignty vis-à-vis the outside world, a phenomenon known as 'false mixity'.[196]

Finally, it could be argued that a special legal regime for the apportionment of international responsibility between the EU and its Member States under mixed agreements would contribute to the further 'fragmentation' of

[192] E Paasivirta and P J Kuijper, "Does on size fit all?: The European Community and the Responsibility of International Organizations" (2005) 36 Netherlands Yearbook of International Law 169-226.
[193] M. Björklund, "Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?" (2001) 70 Nordic Journal of International Law 373-402.
[194] I Brownlie, "The Responsibility of States for the Acts of Organizations" in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005), p. 359.
[195]S Yee, "The Responsibility of State Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership", in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005), p. 440.
[196] P Kuijper and E Paasivirta, "EU International responsibility and its Attribution: From the Inside Looking Out", in M. Evans and P Koutrakos (eds), *The International Responsibility of the EU: European and International Perspectives* (1st edn, Hart Publishing 2013), p. 45.

international law, i.e. the rise of different international legal regimes that are seemingly self-contained.[197] However, the avoidance of a putative fragmentation of international law should not come at the cost of ignoring the practical realities of the subjects of international law. The normative control doctrine is a necessity born out of the EU's constitutional arrangement and must be accepted in international law since the opposite would pose an existential threat to the basic structure of the EU.[198]

4.2 Possible solutions

4.2.1 Joint responsibility?

Some scholars, such as Christian Tomuschat, have found the burden that is placed on the shoulders of third parties to a mixed agreement to be unacceptable. It has been argued that mixed agreements should be interpreted within the strict confines of the text itself and that it, therefore, cannot fall on the third party to go beyond the content of the mixed agreement in order to investigate the internal division of powers in the EU. Accordingly, the absence of a formally published division of powers would typically result in joint responsibility for the entire implementation of the mixed agreement.[199] The basis for this argument can be found in Article 27 and Article 46 of the 1986 VCLT where it is stated that internal rules may not be invoked to justify non-performance of a treaty obligation and that internal limitations of competence may not be invoked as a ground for invalidating the initial consent to be bound to the treaty.[200]

[197] ILC, Report of the Study Group of the International Law Commission, A/CN.4/L.682, para. 483.
[198] P Kuijper and E Paasivirta, "EU International responsibility and its Attribution: From the Inside Looking Out", in M. Evans and P Koutrakos (eds), *The International Responsibility of the EU: European and International Perspectives* (1st edn, Hart Publishing 2013), p. 69.
[199] C Tomuschat, "Liability For Mixed Agreements", in D O'Keeffe and H G Schermers (eds), Mixed *Agreements* (1st edn, Kluwer 1983), p. 130.
[200] VCLT 1986, Article 27 and 46.

There are, however, sound arguments for why *prima facie* joint responsibility for the EU and its Member States under multilateral mixed agreements is a legally inappropriate solution. For one, the concept of joint responsibility for the purpose of international law is unprecise and ambiguous in its meaning, and most scholars seem to leave open the possibility for exceptions to joint responsibility, in order to avoid the unsatisfactory result that a third party can freely choose whom to address their claim, irrespective if the chosen target is in any position to fulfil the provision of the agreement that is cause for the dispute.[201] Tomuschat does, for instance, state that the joint responsibility of the EU and its Member States under mixed agreements is conditioned upon the absence of formal publication of the division of competences. The shape in which this formal publication could potentially be restricted to the declaration itself but could perhaps also involve judgments from the CJEU.[202]

One could also make the argument that it would be in contravention of good faith for a third party to indiscriminately invoke the responsibility of the EU or one of its Member States, irrespective of their competences and powers in relation to the provision of the mixed agreement that is alleged to have been violated. Joint responsibility would also, in effect, allow third parties to altogether bypass the international legal personality of the EU, depriving it of its place on the international scene.[203]

Returning to Article 46 of 1986 VCLT, it is stipulated that a state or an international organization may not invoke that its consent to be bound to an international agreement is invalid since it occurred in violation of its internal rules regulating its competence unless that violation is manifest and concerned a rule of fundamental importance.[204] Whether a violation is manifest is determined by whether it was objectively evident to any state or

[201] M. Björklund, "Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?" (2001) 70 Nordic Journal of International Law 373-402.
[202] Ibid.
[203] Ibid.
[204] VCLT 1969, Art 46 (1)(2).

International organization conducting itself in the matter in accordance with the normal practice of States and international organizations and in good faith.[205] From this exception to Article 46 VCLT 1986 we can conclude that strict joint responsibility for the EU and its Member States under mixed agreements is not legally sound since joint liability would ignore all limitations of competences within the EU, the existence of which, at least in its most basic form, must be considered manifest for third parties.[206]

Indeed, there is support amongst a considerable number of scholars for the idea that the existence of a rule on responsibility in the constituent treaty of an international organization could be opposable towards third parties, provided that the third party had been made aware of such a rule.[207] Moreover, SR Gaja stated, during the debate on his first report on the responsibility of international organizations, that unlike the topic concerning State responsibility, it was not possible to simply declare that the constituent instrument of an international organization had no effect on international law, since it was not by any means clear that the constituent instrument, or treaty, of an international organization, was not part of international law as opposed to internal law, for the purpose of the 1969 Vienna Convention on the Law of Treaties.[208]

If we accept the argument that joint responsibility for mixed agreements is a legally unsound solution, and that the constituent treaty of an organization constitutes international law, then the division of competence between the EU and the Member States contained within the treaties would be of relevance for third States. In order to arrive at that conclusion, however, the principle of *pacta tertiis nec nocent nec prosunt,* i.e. the idea that treaties cannot

[205] VCLT 1986, Article 46(3).
[206] M. Björklund, "Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?" (2001) 70 Nordic Journal of International Law 373-402.
[207] Institut de Droit International, "The Legal Consequences of the Non-Fulfillment by International Organizations of Their Obligations toward Third Parties", 66 Yearbook of the Institute of International Law, Part 1 (1995), p. 333, 337, 353, 365 and 362.
[208] ILC, *Yearbook of the International Law Commission 2003, vol.1,* p. 14.

create rights nor obligations for third parties without consent[209], needs to be accounted for. A convincing argument for how the *pacta tertiis* principle can be nullified is that since a third party who enters into a mixed agreement with the EU and its Member States expects that the international agreement entered into by the EU also binds its Member States. Since that expectation is based on the content of the constituent treaties of the EU, the third party also implicitly consents to the division of competences contained in that same constituent treaty of the EU.[210]

Thus, it can be concluded that joint responsibility is not a *fait accompli* under multilateral mixed agreements, and that the constituent treaties of the EU can, and do, affect the division of competence of the EU and its Member States and thus the division of responsibility on the external plane. It has also been established that there is a burden placed upon a third party to be informed on the division of competence between the EU and its Member States contained in the Treaties.

4.2.2 A Declaration of Competence?

It is evident that mixed agreements lead to legal uncertainty for third parties not only because of the inherent complexity of the internal division of competence between the EU and its Member States[211] but also, as has been demonstrated, because joint responsibility is not by any means a *fait accompli*. To alleviate the burden that therefore is placed on third parties that might otherwise act as a deterrent on third parties from entering mixed agreements, the EU has developed and employed an instrument for its treaty-making practice; that of declarations of competence. The purpose of these declarations is to inform third parties to multilateral mixed agreements who

[209] A Fellmeth and M Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009), p. 212. See also VCLT 1986, Article 34.
[210] M. Björklund, "Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?" (2001) 70 Nordic Journal of International Law 373-402.
[211] P J Kuijper, *Of 'mixity' and 'double-hatting': EU external relations explained* (Amsterdam University Press 2008), p. 12.

is responsible for a breach of the agreement *a priori*, the EU or its Member State(s).[212]

The requirement for the attachment of a declaration of competence to a multilateral mixed agreement has become an increasingly frequent reoccurrence, and they encompass a wide array of policy areas such as the environment[213], human rights[214], nuclear safety[215]and human trafficking[216] and are considered by the CJEU as being a "useful reference base".[217]

Although declarations of competence might at first glance seem as though they are ameliorating some of the legal uncertainties inherent in mixed agreements, they are fraught with legal issues. Firstly, the complexity of the division of competence between the EU and its Member States is challenging to address in a comprehensive manner, not least because different competencies can cover the same policy area in a treaty. Secondly, the division of competence between the EU and its Member States is, by its very nature, dynamic and subject to change, through the notion of implied power and the doctrine of pre-emption, which makes it an impossible task to provide a definitive declaration of competence at any one point in time.[218] This problem has been at least partly remedied by the inclusion of a duty to notify treaty partners when any substantive changes occur.[219]

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[212]A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 110.
[213] Declaration by the Union of 19 October 2016 made in accordance with Article 20(3) of the Paris Agreement. (2016). OJ L 282, 18.
[214] Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Rights of Persons with Disabilities. (2010). OJ L 23, 55.
[215] Declaration by the European Atomic Energy Community according to the provisions of Article 30(4)(iii) of the Nuclear Safety Convention. (1999). OJ L 318, 30.
[216] Declaration concerning the competence of the European Community with regard to matters governed by the Protocol Against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention Against Transnational Organized Crime. (2006). OJ L 262, 33.
[217] Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-04635, para. 109.
A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 117f.
[219] See for example Article 44(1) UN Convention on the Rights of Persons with Disabilities.

An additional problem with declarations of competence relates to their actual legal relevance. The vague formulation of declarations of competence combined with the continuous development of the division of competence within the EU results in that they often are of little use as a tool to determine responsibility.[220]Indeed, international practice relating to declarations of competence of the EU is sparse, and the declarations often go without mention when the EU or its Member States are engaged in an international dispute where a declaration of competence could be pertinent.[221]

Further, the use of declarations of competence in front of the CJEU has been lackluster. In *Mox Plant,* the CJEU considered the declaration of competence made by the EU when acceding to UNCLOS be a 'useful reference base' but did not ultimately consider itself bound by it.[222] The *LZ*[223] case, which concerned a preliminary reference on the direct effect of Article 9(3) of the Aarhus Convention, the CJEU had ample opportunity to use the declaration of competence that had been submitted which stated that the implementation of Article 9(3) Aarhus Convention lay outside EU law and thus the responsibility of the Member States.[224] The CJEU came to the opposite conclusion, finding that Article 9(3) Aarhus Convention fell under EU law, based on the principle of pre-emption.[225]

Therefore, the inherent complexity of the internal division of competence within the EU, the fact that this division is subject to continuous change, the

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[220] T Locke, *The European Court of Justice and International Courts* (1st edn, Oxford University Press 2015), p. 123f.
[221] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 159.
[222] Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-04635, para. 109.
[223] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republic (LZ)* [2011] ECR I-01255.
[224] Declaration by the European Community in Accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (2005). OJ L 124/3.
[225] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republic (LZ)* [2011] ECR I-01255, para. 36.

vagueness, and ambivalent legal value of the declarations of competences, leads to the conclusion that declarations of competence do not provide a satisfactory solution to the legal uncertainty of third parties relating to the apportionment of responsibility between the EU and its Member States.

4.2.3 A Declaration of Competence paired with a Subsidiary Mechanism of responsibility

Requiring the EU to submit a declaration that deals with the division of competence article-by article[226], would be inappropriate for a cross-cutting treaty, such as the ECHR. It would also constitute a gargantuan, if not impossible task, for even the most seasoned EU lawyer since the precise delimitation of competence between the EU and its Member States is both controversial and subject to continuous development.

Instead, inspiration for a solution can be sought in the first multilateral mixed agreement that required the EU to submit a declaration of competence, namely UNCLOS. Not only did UNCLOS require that the EU, or any other acceding international organization, submit a declaration of competence[227] but also imposed upon the EU and its Member States an obligation to notify the depository of the treaty of any changes to their internal division of competence.[228] Moreover, all other treaty parties have the right to request information regarding the division of competence relating to any question arising from the treaty.[229] Crucially, UNCLOS also introduces a subsidiary mechanism which is triggered if the EU or its Member State fails to provide the requested information or if the information that they do submit is contradictory, namely that both the EU and its Member States are held

[226] P Olson, "Mixity from the Outside" in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (1st edn, Hart Publishing 2010), p. 336.
[227] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Annex IX, Article 5(1).
[228] Ibid, Article 5(4).
[229] Ibid, Article 5(5).

jointly responsible.[230] The subsidiary mechanism is however somewhat ambiguous to what obligation the EU and its Member States is to be held jointly responsible, the failure to provide the requested information or the obligation to which the request to provide information was related.[231]
Nonetheless, it is here suggested that UNCLOS should serve as inspiration for future multilateral mixed agreements, as it provides the EU and its Member States with the incentive to be as specific as possible when submitting the declaration as well as keeping it updated in order to reflect the continuous evolution of EU law.[232] An UNCLOS inspired model should, if not eliminate, at the very least ameliorate the legal uncertainty for third parties that exist as a result of the normative control doctrine.

4.3 The outer limits of normative control

The normative control of the EU over its Member States is far-reaching. However, its outer limits have not yet been defined. It has been established that the normative control that the EU exercises of its Member States extends as far as the jurisdiction of the CJEU. We know, therefore, that conduct of Member States not governed by EU law fall outside the ambit of normative control and that in those situations, conventional rules of responsibility would therefore apply, as exemplified by the *Airbus* case.

It is here necessary to note one crucial caveat to the normative control doctrine. Since the apportionment of responsibility based on normative control supposes that the conduct of the organ of the EU Member States is related to the implementation of EU law and that the EU must have sole judicial control, the normative control doctrine is limited by the jurisdiction

[230] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Annex IX, Article 6(2).
[231] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 139.
[232] Ibid, p. 128f.

of the CJEU. Article 24(1) TEU and Article 275 TFEU proscribes that the CJEU does not have jurisdiction on matters related to the Common Foreign and Security Policy (CFSP) of the EU, except to review the legality of decisions relating to restrictive measures, i.e. sanctions, against natural or legal persons.[233] We can, therefore, conclude that the normative control doctrine is limited to non-CFSP related matters and that the Member States remain responsible for CFSP acts, with the notable exception of restrictive measures.[234] However, it is important to note two things; the CJEU has taken a somewhat restrictive approach towards what acts are encompassed by CFSP, and also that Member States could in the future, through amending of the Treaties, grant the CJEU the necessary jurisdiction and thus placing the CFSP under the umbrella of the normative control doctrine.[235]

[233] TEU Article 24(1) and TFEU Article 275.
[234] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 233.
[235] Ibid, p. 234

5 Normative control and EU accession to the ECHR

5.1 Introduction

The penultimate chapter of this thesis serves to apply our findings to a concrete scenario where the question of the international responsibility has, and will continue to be, of importance, namely that of EU accession to the ECHR. The chapter will begin by explaining the rationale behind the EU accession and then turn to a description of the accession process.

An analysis of the Draft Accession Agreement in light of the normative control doctrine will be presented, and the chapter will conclude by presenting an alternative solution, in the light of both the concerns raised in Opinion 2/13 of the CJEU and the normative control doctrine.

5.1.1 General Introduction

The idea of EU accession to the ECHR is not by any means novel. Indeed, in a memorandum from 1979, the European Commission expressed the opinion that EU accession to the ECHR would be the most effective way to respond to the need for reinforcing the protection of human rights in the EU.[236]

According to its supporters, EU accession would lead, *inter alia,* to a more stringent protection for human rights and provide for a coherent, continent-wide system of human rights and that the need for the EU to accede to the

[236] Memorandum of the Commission of 4 April 1979, Bulletin of the European Communities, supp COM(79) 210 final, p. 1.

ECHR has grown in pace with the ever-growing competence of the EU in fields such as Justice and Home Affairs and External Action.[237]

5.1.2 The arguments in favour of accession

The enhancement of the coherence of the legal protection of human rights on the European continent is one of the main arguments in favour of accession presented by its supporters. The claim here is that EU accession to the ECHR is crucial to preserve the pan-European tradition to protect individual human rights, a tradition that has been a cornerstone of democratic States in post-war Europe.[238]

Furthermore, accession would fill a legal gap in European human rights law. If the EU is not a party to the ECHR, the acts of EU institutions or agents are beyond reproach before the ECtHR. Should an individual bring a complaint to the ECtHR against the EU, it would by necessity be declared inadmissible *ratione personae*. In other words, there exists at present no mechanism for external scrutiny of acts by EU institutions and agents in areas that previously have fallen under the competence of its Member States.[239] A third reason presented by supporters of accession is the idea that the EU being bound by the ECHR would prevent further divergence between the jurisprudence of the ECtHR and the CJEU. A divergence that some scholars claim has accelerated since the entry into force of the Charter of Fundamental Rights of the European Union (CFR).[240]

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[237] M Kolb, *The European Union And The Council Of Europe* (1st end, Palgrave Macmillan 2013), p. 3.
[238] See for example J Callewaert, "To accede or not to accede: European protection of fundamental rights at the crossroad" (2014) 4 Journal européen des droits de l'homme 496-513.
[239] Ibid.
[240] See M Kuijer, "The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession" (2018) The International Journal of Human Rights 1-13; and J Callewaert, "To accede or not to accede: European protection of fundamental rights at the crossroad" (2014) 4 Journal européen des droits de l'homme 496-513.

5.1.3 The arguments against accession

Detractors of EU accession to the ECHR present two primary arguments. The first one is that accession would be a redundant exercise insofar that the EU already has a binding document that protects human rights, the CFR.[241] The other argument against accession is the perceived fear that the EU becoming a High Contracting Party to the ECHR, will lead to additional obligations for the Member States of the EU, since the Bosphorus presumption in all likelihood will be rendered mute.[242]

Further skepticism towards accession has come to fruition as a result of Opinion 2/13 where the CJEU found the Draft Accession Agreement on the Accession of the EU to the ECHR to be incompatible with the Treaties on numerous grounds.[243] The opinion, which was met with surprise and criticism by numerous scholars who have characterized it as obstructionism[244], has been accused of placing demands on the final form of the EU accession that would if fulfilled, lead to a worse situation for human rights protection in Europe.[245]

[241] J Callewaert, "To accede or not to accede: European protection of fundamental rights at the crossroad" (2014) 4 Journal européen des droits de l'homme 496-513.
[242] Ibid.
[243] See Chapter 5.3.2.
[244] A Lazowski and R A Wessel, "When Caveats Turn Into Locks: Opinion 2/13 on Accession of the European Union to the ECHR" (2015) 1 German Law Journal 179-212.
[245] S Peers "The EU's Accession to the ECHR: The Dream Becomes a Nightmare" (2015) 16 German Law Journal 213-222.

5.2 Prelude to the negotiations between the CoE and the EU

5.2.1 The EU

5.2.1.1 Early Human Rights Protection in the European Union

Not the Treaty of Paris[246], which established the European Coal and Steel Community, nor the Treaty of Rome[247] which established the European Economic Community, contain any reference to human rights. This lack of reference to human rights is symptomatic to the early days of the EU, as the focus was firmly on the promotion of economic convergence, sustainable growth and high levels of employment,[248] rather than on questions relating to human rights.[249] The lack of any reference to human rights is also reflected in the early case-law of the CJEU,[250] where it refused to review the application of human rights, due to their absence in the Treaties.[251]

With increased economic cooperation, the growing relevancy of human rights standards and the pressure that they might be put under in the continued economic integration became apparent for both national courts and the CJEU.[252] This realization manifested itself in the case of *Internationale Handelsgesellschaft* where the Court established that '..respect for fundamental

[246] Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951.
[247] Treaty establishing the European Economic Community, Rome, 25 March 1957.
[248] Ibid, Article 2.
[249] M Kuijer, "The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession" (2018) The International Journal of Human Rights 1-13.
[250] See for example Case 36/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft mbH v High Authority of the European Coal and Steel Community* [1960] ECR 423, p. 438.
[251] M Kuijer, "Fundamental Rights Protection In The Legal Order Of The European Union", in A Lazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016), p. 221.
[252] Ibid.

rights forms an integral part of the general principles of law protected by the Court of Justice..".[253]

However, since the Treaty did not contain a catalogue of human rights that the CJEU could draw upon, it had to seek guidance in other places. In the case of *Nold II,* the CJEU found that international human rights treaties to which the Member States have collaborated or are signatories to can serve as guidelines that should be followed within the framework of EU law.[254] Finally, in the case of *Hoechst,* the CJEU singled out the ECHR as an instrument of "particular relevance" for the determination of fundamental rights as general principles of EU law.[255]

5.2.1.2 Human Rights finds its way into the Treaties

5.2.1.2.1 Single European Act

As previously mentioned, the Treaty of Rome did not include any reference to human or fundamental rights. It was instead a document focused on the creation of a common market.[256] This objective was partly achieved, but due to difficulties with legislative harmonization amongst Member States and the requirement of unanimity for decision making, the process was deemed to be inefficient by Member States.[257] The need for a significant revision of the Treaty of Rome paved the way for the Single European Act of 1986 (SEA).[258] The SEA brought a wide array of essential modifications to the foundational treaties, in particular relating to questions concerning the internal market and the internal decisions process mechanism of the EU.[259]

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[253] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*[1970] ECR I 00503, para. 3f.
[254]Case 4/73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 00491, para. 13.
[255] Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 02859, para. 13.
[256] Treaty of Rome, Article 2.
[257] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29) June 1985) COM(85) 310, June 1985.
[258] The Single European Act [1986] OJ L 169/2.
[259] A Moravcsik, "Negotiating The Single European Act: National Interests And Conventional Statecraft In The European Community" (1991) 45 International Organization 19-56

For this thesis, the SEA is significant insofar that it is the first EU Treaty that contains an explicit reference to human rights stating in its preamble, that the Member States are determined to promote democracy based on the fundamental rights recognized in, *inter alia*, the ECHR.[260]

5.2.1.2.2 Maastricht Treaty

The entry into force of the Maastricht Treaty[261] was the next milestone for the protection of human rights in the EU.

This seminal text, one of the two constitutional texts of the EU, created the European Union. The Maastricht Treaty sets down, in its Article F(2), that "the Union shall respect fundamental rights, as guaranteed by the [ECHR]….", giving the ECHR a considerably more prominent position in EU law and consolidates the case-law of the CJEU on this matter.[262]

5.2.1.2.3 The opinion of the CJEU on whether accession to the ECHR would be compatible with the Treaties

In 1990, the European Commission again proposed in a communication that the EU should accede to the ECHR.[263] The Council believed that no formal decision on the opening of negotiations could be taken until the CJEU had considered whether EU accession would be compatible with the Treaty and thus requested an opinion on this matter from the CJEU in 1994.[264] The CJEU found in Opinion 2/94 that the EU is bound to act within the explicit and implicit set out in the Treaty.[265]

Even though the CJEU acknowledged the integral role that fundamental rights play in forming the general principles of law that the CJEU is tasked

[260] The Single European Act [1986] OJ L 169/2, Preamble.
[261] Treaty on European Union [1992] OJ C 191/1.
[262] Ibid, Article F(2).
[263] Communication of the Council of 19 November 1990, Bull. EC 10-1990, p. 76.
[264] Opinion 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759, para. 2
[265] Ibid, para.13.

to ensure, it did not find that accession would fall within the competence of the EU, as set out in the Treaty and could only be permissible after an amendment of the Treaty.[266]

5.2.1.2.4 Further Reforms

Despite the findings of the CJEU in Opinion 2/94, the ambition to accede to the ECHR was not extinguished.[267] In 2000, the question of EU accession to the ECHR was included on the agenda of the European Council Meeting.[268] It was during the Council meeting in Laeken that the 'Convention on the Future of Europe' was announced which would, among other things, produce a draft for a Constitution for Europe.[269] The Convention on the Future of Europe, which counted 102 Members, finalized a Draft Treaty establishing a Constitution for Europe in 2003 which was then delivered for review to an Intergovernmental Conference which completed its work in 2004.[270]

The Draft Treaty establishing a Constitution for Europe which was finalized by the Intergovernmental Conference, and subsequently adopted by the European Council, contained, in its Article I-9(2), a legal obligation for the EU to accede to the ECHR.[271] However, several Member States were required by their national constitutions to hold referendums on the Draft Constitution, with the referendums in France and Netherlands yielding a negative result which caused several other Member States to put their respective ratification processes of the Constitution on hold.[272] With the

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[266] Opinion 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759, para. 35.
[267] M Kuijer, "Fundamental Rights Protection In The Legal Order Of The European Union", in A Lazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016), p. 239.
[268] Presidency Conclusions of the Laeken European Council, EU Bull, No 12, Annex 1 (2001).
[269] Ibid.
[270] NW Barber, M Cahill and R Ekins (eds), The *Rise and Fall of the European Constitution* (1st edn, Hart Publishing 2019), p. 3.
[271] Treaty establishing a Constitution for Europe, OJ C 310/13 16.12.2004, Article I-9 (2).
[272] P Craig, *The Lisbon Treaty: Law, Politics, And Treaty Reform* (1st edn, Oxford University Press 2013), p. 20.

ratification process of the Constitution blocked, the European Council opted for a period of reflection, taking stock on why the Constitution had failed.[273]

5.2.1.3 The Treaty of Lisbon

Ultimately, it would be the entry into force of the Treaty of Lisbon[274] that would legally enshrine the EU's ambition to accede to the ECHR. The two failed referendums in France and the Netherlands prompted the heads of state and government of the EU Member States to conclude that successful EU-wide ratification of the Draft Constitution was impossible. Nevertheless, there existed amongst political leaders a consensus for the pressing need to strengthen and consolidate the EU.[275] The European Council thus mandated a new Intergovernmental Committee to amend the existing Treaties at the cost of abandoning the constitutional aspirations.[276] The result of the work of the Intergovernmental Committee was subsequently signed in Lisbon in December 2007 and would be known to posterity as the Treaty of Lisbon.[277]

The Treaty of Lisbon is a seminal document for many reasons. For one, it expressly states that the Charter of Fundamental Rights has the same legal value as the Treaties.[278] More relevant for this section is the insertion of Article 6(2). The article states that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties"[279] and thus creates not only a possibility but a legal obligation

[273] NW Barber, M Cahill and R Ekins (eds), The *Rise and Fall of the European Constitution* (1st edn, Hart Publishing 2019), p. 4.
[274] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/0.
[275] J Piris, *The Lisbon Treaty: A Legal And Political Analysis* (Cambridge University Press 2010), p. 25f.
[276] Presidency Conclusions, Brussels, 21 and 22 June 2007, doc. 111777/1/07 REV 1, 15–3.
[277] J Piris, *The Lisbon Treaty: A Legal And Political Analysis* (Cambridge University Press 2010), p. 46.
[278] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/0, Article 6(1).
[279] Ibid, Article 6(2).

for the EU to accede to the ECHR.[280] In parallel to the adoption of Article 6(2), a new Protocol No.8 was annexed to the Lisbon Treaty, laying out the conditions that need to be fulfilled and respected in the accession process.[281] These conditions demand that the specific characteristics of the EU and EU law are preserved and that there must be a mechanism that ensures that proceedings by non-Member States and individual applications are correctly addressed to Member States or the EU as appropriate. Moreover, the accession shall not affect the situation of Member States in relation to the ECHR and, finally, that actions between Member States and the EU must be excluded from the scope of the accession agreement, so as to respect the monopoly conferred on the CJEU in such matters, per Article 344 TFEU.[282] Furthermore, a Declaration no. 2 was attached to the annex of the Treaty of Lisbon wherein it was proclaimed that EU accession to the ECHR should be arranged in such a way as to preserve the specific features of Union law and that the regular dialogue between the CJEU and the ECtHR should be reinforced when the accession is completed.[283]

5.2.2 Council of Europe

The matter of EU accession to the ECHR is not a one-sided exercise. In order to lay the legal foundation that would permit accession of the EU, reforms would have to be undertaken on the side of the CoE as well.[284] The original text of the ECHR, before the amendments, stipulated that accession

[280] H Blanke and S Mangiameli, *The Treaty On European Union (TEU): A Commentary* (1st edn, Springer 2013), p. 310f.
[281] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms OJ C 326, 26.10.2012, p. 273–273.
[282] Ibid, Article 1ff.
[283] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/0 - Declaration on Article 6(2) of the Treaty on European Union.
[284] M Kuijer, "Fundamental Rights Protection In The Legal Order Of The European Union", in A Lazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016), p. 240.

to the ECHR was only open to Members of the CoE.[285] The Statute of the CoE specifies that Membership is only open to 'Any European country...'[286], with the result that international organizations or other non-state entities, like the EU, were precluded from becoming High Contracting Parties to the ECHR.

Even though negotiations on accessions had not commenced, the legal developments within the EU, in particular after Maastricht, were clear and the CoE Member States decided that the laying of the necessary legal foundation for future EU accession should begin.[287] This process took place within a comprehensive reform of the European Court of Human rights, in the face of an ever-increasing backlog of cases.[288] The result of the reform, which began in in 2000, was Protocol No. 14 to the ECHR,[289] which entered into force in 2010. Protocol No. 14 introduced several innovations, one of which was the insertion of a new paragraph 2 under Article 59 of the ECHR stating that "The European Union may accede to this Convention".[290] However, as highlighted in the explanatory report to Protocol No. 14, further amendments of the ECHR would be necessary before EU accession could be completed, but this would have to wait until negotiations had begun and a Draft Accession Agreement was concluded.[291]

[285]Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ET 5, Art 66(1).
[286] Council of Europe, Statute of the Council of Europe, 5.v.1949, ETS 1, Article 4.
[287] M Kuijer, "Fundamental Rights Protection In The Legal Order Of The European Union", in A Lazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016), p. 240.
[288] United Kingdom, Parliament, Joint Committee on Human Rights (2004) *Protocol No. 14 to the European Convention on Human Rights, First Report of Session 2004-05.* (HL Paper 8 (HC 106)). London. The Stationery Office.
[289] Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, 13.v.2004, ETS 194.
[290] Ibid, Article 17.
[291] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13.v.2004, ETS 194, Para. 101-102.

With the entry into force of the Treaty of Lisbon, and the creation of a legal obligation for the EU to accede to the ECHR, and Protocol No. 14 to the ECHR, allowing for such an accession, the scene was set for negotiations to start.

5.3 The Draft Accession Agreement

5.3.1 The Negotiations

In June 2010, shortly after the entry into force of the Treaty of Lisbon, the Council of the European Union authorized the European Commission to initiate negotiations with the CoE, with the close cooperation of the European Council's Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP).[292] The CoE, on its side, gave a mandate to the Steering Committee for Human Rights (CDDH), an intergovernmental committee of experts, to produce, in cooperation with the representatives of the EU, a legal draft that would establish the modalities of EU accession.[293]

Initially, the negotiations were conducted in an informal, smaller format with seven experts from EU Member States and seven from the on-EU Member States who produced a first draft Accession agreement which was presented to the larger CDDH in late 2011.[294] However, several EU Member States took issue with certain aspects of the draft, which, due to the internal principle of unanimity (for the EU), posed a problem. The negotiations were suspended while the EU Member States, under the aegis of FREMP, found a way forward out of the impasse. In 2012, the EU Member States arrived at

[292] A Drzemczewski, "The Negotiation Process", in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 19.
[293]Council of Europe, Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH (Adopted by the Committee of Ministers on 26 May 2010 at the 1085th meeting of the Ministers' Deputies).
[294] A Drzemczewski, 'The Negotiation Process', in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 20.

a workable compromise, and the negotiations within the CoE resumed, this time with experts from all 47 CoE Member States represented on one side, and the European Commission on the other.[295]

In the summer of 2013, the CDDH submitted the final report of the negotiations to the decision-making body of the CoE, the Committee of Ministers (CM), containing, among other things, the Draft revised accession agreement (hereinafter 'the Draft Accession Agreement'), a Draft declaration by the EU to be made at the time of signature of the accession agreement, and a Draft explanatory report of the Draft Accession Agreement.[296]

5.3.2 The Draft Accession Agreement and the Co-respondent mechanism

A comprehensive, in-depth examination of the Draft Accession Agreement in its entirety is outside the scope of this thesis. Instead, what follows will be an explanation of certain aspects of the Draft Accession Agreement that are 1) pertinent to answer our research question or 2) necessary to understand the reasoning of the CJEU in its opinion of the Draft Accession Agreement.

Article 3 of the Draft Accession Agreement contains a piece of legal innovation, the Co-respondent mechanism. Article 3(1) of the Draft Accession Agreement would amend Article 36 of the ECHR so that it includes a new paragraph which allows the EU or a Member State, after a decision by the ECtHR, to become co-respondent, with the status of party, to the proceedings in certain cases.[297]

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[295] A Drzemczewski, 'The Negotiation Process', in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 21.
[296]Council of Europe, Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and The European Commission on the Accession of the European Union to the European Convention on Human Rights, 10 June 2013, 47+1(2013)008rev2. (Draft Accession Agreement)
[297] Ibid, Article 3(1).

Article 3(2) of the Draft Accession Agreement further specifies that when an application is lodged before the ECtHR against one or more of EU Member States, the EU can become a co-respondent to the proceedings if the proceedings concern an allegation that EU law is in violation with the ECHR, in particular, if the only way to avoid the violation of the ECHR is to disregard EU Law.[298] The same right is given to the EU Member States when an application is lodged before the ECtHR against the EU.[299] The Co-respondent mechanism is, however, voluntary.[300] It is further crucial to note that the respondent and the Co-respondent usually are held jointly responsible for any violation that is found by the ECtHR.[301]

The rationale behind the inclusion of the Co-respondent mechanism is many-fold. In the Explanatory Report to the Draft Accession Agreement (hereinafter the "Explanatory report"), it is explained that the mechanism is necessary to accommodate the *sui generis* aspects of a non-State entity with an autonomous legal order, such as the EU. The Co-respondent mechanism was thus introduced in order to clarify the division of responsibilities between the EU and its Member States for violations by allowing the EU and the Member States to jointly participate in proceedings brought against them and thus bridge the accountability gap that could otherwise occur.[302]

The co-respondent mechanism has, however, been subject to criticism. Firstly, the wording of Article 3 of the Draft Accession Agreement is of a character that indicates that the mechanism is voluntary.[303] The interpretation of the articles as being voluntary is univocally supported by the annexed explanatory report which explicitly states that a High Contracting Party may

[298] Draft Accession Agreement, Article 3(2).
[299] Ibid, Article 3(3).
[300] Ibid, Article 3(5).
[301] Ibid, Article 3(7).
[302] A D Casteleiro, "United We Stand: The Co-respondent Mechanism", in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 110f.
[303] Draft Accession Agreement, Article 3(1).

not be compelled against its will to become a co-respondent.[304] Scholars have criticized the voluntary aspect for failing to bridge the accountability gap, as it would leave the *ex-ante* assumption of responsibilities up to the EU Member States themselves.[305]

5.4 Opinion of the CJEU regarding the Draft Accession Agreement

Following the completion of the Draft Accession Agreement, the European Commission again turned to the CJEU for an opinion, this time asking whether the Draft Accession Agreement was compatible with the EU Treaties.[306]

In its opinion, the CJEU acknowledges that an international agreement providing for the creation of a judicial body responsible for the interpretation of its provisions with the capacity to announce binding decisions on the EU and its institutions is not incompatible with the Treaties *per se*. This is, however, contingent upon that the 'essential character' of the EU is not affected which in the context of EU accession would mean that the powers vested to the ECtHR under the Draft Accession Agreement must not have a binding effect on the EU and its institutions in the exercise of their internal powers to a particular interpretation of the rules of EU law.[307] In other words, the autonomy of EU law must be preserved.

[304] Explanatory Report to the Draft Accession Agreement, para. 53.
[305] A D Casteleiro, "United We Stand: The Co-respondent Mechanism", in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 116.
[306] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the Draft Accession Agreement with the EU and FEU Treaties* [2014] ECLI:EU:C:2014:2475, para.1.
[307] Ibid, para. 182–84.

For this thesis, two grounds of incompatibility with the Treaties that the CJEU singled out in its opinion are of particular importance. Firstly, when examining the Co-respondent mechanism in Article 3 of the Draft Accession Agreement, the CJEU took issue with the fact that it would be for the ECtHR to decide whether the requirements for the activation of the Co-respondent mechanism had been reached when receiving a request from the EU or a Member State to intervene as a Co-respondent, as this would be equivalent to the ECtHR reviewing EU law.[308] Moreover, the mechanism would give the ECtHR the power to allocate responsibility to one, or all Co-respondent, which, would encroach on the exclusive jurisdiction of the CJEU to distribute responsibility amongst the EU and its Member States.[309]

Another point of objection for the CJEU was that of the EU's Common Foreign and Security Policy (CFSP). Under the Draft Accession Agreement, it was explicitly mentioned that obligations stemming from the ECHR would, after accession, be applicable on the CFSP, in effect giving the ECtHR sweeping jurisdiction over acts or omission related to the CFSP.[310] However, according to the Treaties, the same jurisdiction is not afforded to the CJEU.[311] The CJEU considered that this arrangement would be incompatible with the Treaties as it in effect would give the ECtHR, an external organ, exclusive jurisdiction to rule on the legality of acts under the CFSP.[312] The CJEU ultimately found that several provisions of the Draft Accession Agreement would adversely affect the specific characteristics and

[308] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the Draft Accession Agreement with the EU and FEU Treaties* [2014] ECLI:EU:C:2014:2475, para. 220f.
[309] Ibid, para 234.
[310] Draft Accession Agreement, para. 23.
[311] Article 24(1)(2) TEU and Article 275 TFEU.
[312] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the Draft Accession Agreement with the EU and FEU Treaties* [2014] ECLI:EU:C:2014:2475, para. 255f.

autonomy of EU law, thus rendering the Draft Accession Agreement incompatible with the Treaties.[313]

5.5 Subsequent developments

In the wake of the negative Opinion 2/13 of the CJEU, the Committee of Permanent Representatives (COREPER), which is made up of the head or deputy head of missions from the EU Member States in Brussels,[314] decided that a period of stocktaking and reflection was necessary before resuming negotiations with the CoE.[315] The European Commission also asserted its continued commitment to complete accession by including it both in its 2016 and 2017 Work Programme, stating that the European Commission will pursue work towards accession while taking full account of Opinion 2/13.[316]

The European Commission has subsequently provided the Council of the European Union with technical contributions addressing the points of contention in the CJEU Opinion 2/13,[317] and on 31 October 2019, the President and the First Vice-President of the European Commission sent a letter to the Secretary General of CoE, stating that the EU was ready to resume negotiations. The Committee of Ministers of the CoE approved the resumption of negotiations in January 2020, and the first meeting was held on 22 June 2020.[318]

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[313] Ibid, para. 258.
[314] Article 240 TFEU.
[315] European Union, Council of the European Union, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of Play, 27 November 2017, 14936/17, para. 5.
[316] European Commission (2015) *Commission Work Programme 2016,* p. 10 and European Commission (2016) *Commission Work Programme 2017,* p. 12.
[317] European Union: Council of the European Union, *Outcome of the Council Meeting Justice and Home Affairs,* 7-8 October 2019, 12837/19, p. 11.
[318]Council of Europe "Accession of the European Union to the European Convention on Human Rights <www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.

5.6 The way forward

Opinion 2/13 of the CJEU could serve as an excellent opportunity to re-work the Draft Accession Agreement in a manner that both accommodates the constitutional requirements of the EU as well as the concerns of the legal uncertainty of third parties. From the perspective of third parties, the co-respondent mechanism could potentially be an appropriate way to deal with the legal uncertainties sprung from the normative control doctrine. However, as has been shown, it is, in its current form, incompatible with EU law.

Should the EU accession to the ECHR, in whatever shape the final agreement takes, be successful, the normative control doctrine and the resulting special rules of responsibility need to be included. The inclusion of normative control in the EU accession is crucial not only because, as has been shown, international law and EU law demands it, but also because the jurisprudence of the ECtHR on the topic of the international responsibility of the EU will not be sustainable once the EU has become a High Contracting Party to the ECHR. The Bosphorus presumption, i.e. the presumption that any measure adopted by an EU Member States in fulfilment of its obligations under EU law is compatible with the ECHR unless rebutted by a manifest deficiency, will no longer be needed nor usable once the accession process is complete.[319]

The reasons for this are several. Firstly, the rationale behind the Bosphorus presumption was to deal with the fact that the EU is not a High Contracting Party to the ECHR and thus outside the jurisdiction of the ECtHR for reasons *ratione personae*. After accession, this will no longer be an issue. Secondly, should the Bosphorus presumption be allowed to survive, it would

[319] O De Shutter, "Bosphorus *Post-Accession*: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention", in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 177.

put the EU in an unjustifiably privileged position vis-à-vis the other High Contracting Parties.[320] Thus, the ECtHR will no longer be able to circumvent the question of the international responsibility of the EU by applying the Bosphorus presumption.

The Co-respondent mechanism contained in the Draft Accession Agreement attempted to accommodate the *sui generis* characteristics of the EU, in particular the executive federalist structure upon which it is based,[321] by allowing the EU to become a full party to a proceeding directed against a Member States where an alleged violation calls into question the compatibility of EU law with the ECHR.[322] The Co-respondent Mechanism does provide some benefits for applicants complaining about a violation of the ECHR as it would not require them to correctly discern who between the EU and its Member State should shoulder the responsibility for the alleged violation.[323] However, as has been shown, there are several problems with the Co-respondent mechanism.

Firstly, it is an entirely voluntary procedure,[324] meaning that the EU could avoid any responsibility if the application lodged is not explicitly directed at it but at one or more of its Member States. Secondly, if a violation is found to have an occurred, the co-respondents are held jointly responsible,[325] which is, as has been demonstrated, an unsatisfactory solution to the question of international responsibility. Lastly, as the CJEU expressed in Opinion 2/13, the Co-respondent Mechanism in its current form risks interfering with the division of powers between the EU and its Member States as it entails that the ECtHR reviews EU law relating to the division of powers when deciding

[320] Ibid.
[321] Draft Accession Agreement, para. 38.
[322] Ibid, para. 48.
[323] E Cannizaro, "Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR" in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 309.
[324] Draft Accession Agreement, para. 53.
[325] Ibid, para. 62.

whether the conditions for the triggering of the Co-respondent mechanism have been fulfilled.[326]

It is here proposed that the negotiators should find a solution by explicitly acknowledging the normative control doctrine, perhaps by amending the Draft Accession Agreement through the inclusion of an article which states that the conduct of the organs of a Member State as a result of a binding EU decision, is considered to be an act of the EU itself, who is therefore responsible.[327]

An obligation for the EU and its Member States to submit a declaration of competence inspired by Annex IX UNCLOS, i.e. a declaration of competence combined with a subsidiary mechanism of joint responsibility that is triggered should they fail to provide the treaty parties with the declaration of competence as well as any further information that they request, should be established. Here, it would be essential to avoid the ambiguity of the subsidiary mechanism contained in UNCLOS by clarifying that the EU and its Member States will be held jointly responsible for the alleged substantive violation that is found, and not solely for their obligation to provide accurate information regarding their internal division of competence.

Additionally, since the division of competence between the EU and its Member States is subject to continuous development, the declaration of

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[326] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the Draft Accession Agreement with the EU and FEU Treaties* [2014] ECLI:EU:C:2014:2475, para. 224f.

[327] See for instance Hoffmeister's suggestion for an article on normative control: "The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred." in F Hoffmeister, "Litigating against the European Union and Its Member States – Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723-726.

competence must be updated continuously.[328] Additionally, the EU and its Member States must, during the accession negotiations, make it clear to their treaty parties that their compliance with the ECHR is ensured regardless of their internal division of competence.[329]

Lastly, it is essential to avoid placing an undue burden on the individuals complaining before the ECtHR. Even with a detailed and updated declaration of competence available, it could potentially be difficult for the applicant to correctly identify who has committed the alleged violation of the ECHR.[330] This burden could be ameliorated by allowing applications to be lodged against either the EU or the relevant Member State(s) or both without declaring it inadmissible if the entity against which the application is lodged is the incorrect one according to the normative control doctrine. Further, if an application is submitted before the ECtHR which concerns a putative link between the conduct of an organ of an EU Member State and a binding EU norm, the EU would be obliged to give a categorical response as to the division of responsibility for the alleged violation, perhaps through the prior involvement of the CJEU, with both the EU and its Member States being found jointly responsible otherwise. This system would ensure that the constitutional arrangement of the EU is respected, that third parties are spared most of the legal uncertainty inherent in multilateral mixed agreements, and that individual applicants are not given an undue burden. Importantly, it also ensures that the responsibility gap that might otherwise occur is eliminated, since either the EU, its Member State(s), or both will be held jointly responsible for any potential violation of the ECHR.

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[328] A D Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016), p. 128.
[329] Ibid.
[330] E Cannizaro, "Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR" in V Kosta, N Skoutaris and V Tzevelekos (eds), The *EU Accession to the ECHR* (1st edn, Hart Publishing 2014), p. 308.

6 Concluding remarks

The continuous proliferation of international organizations and their increasing assertiveness on the international stage has created a new environment to which international law needs to adapt. Contemporary international law, wherein it is assumed that the subjects of international law are homogenous and enjoy full sovereignty, has proven a poor fit for REIOs such as the EU. The reason for this is that the EU, on the one hand, is a conventional international organization made up by it Member States and endowed with a limited mandate, but on the other hand has been vested with extensive powers over its Member States, at times more so the then some federal States.

It has been established that the *sui generis* features of the EU, such as its executive federalist construct of the relationship between the EU and its Member States, and the dual role that the organs of the Member States have, demand that special rules are applied when apportioning international responsibility between the EU and its Member States under multilateral mixed agreements.

It has further been shown that the normative control doctrine should be determinative when apportioning responsibility between the EU and its Member States under multilateral mixed agreements and that the EU should bear the exclusive responsibility for the conduct of the organs of its Member States that occur due to a binding EU decision. The normative control of the EU over its Member States has a broad reach and is subject to continuous development, even though the precise outer limit is yet to be defined. What has been shown is that the normative control of the EU stretches as far as the jurisdiction of the CJEU. In other words, normative control encompasses all matters relating to EU law, with the notable exception of the CFSP.

The application of the normative control doctrine for the apportionment of international responsibility between the EU and its Member States under multilateral mixed agreements is supported by international practice. International and regional judicial bodies, and in particular the WTO has accepted the normative control doctrine as determinative when apportioning responsibility between the EU and its Member States. At the same time, the ECtHR has been more hesitant, although such hesitance seems to be motivated by pragmatic reasons rather than legal considerations. Moreover, it has been argued that some of the ECtHR practice in actuality constitutes an implicit endorsement of the normative control doctrine. Further, the ILC, despite its initial resistant to the idea, and the absence a wholesale acceptance of the normative control doctrine in DARIO, has opened a door for the application of the normative control doctrine through the adoption of the *lex specialis* provision in article 64, which was included explicitly with the EU in mind.

The putative problems of the normative control doctrine, such as its seeming incompatibility with the principle of *pacta tertiis* and the primacy of international law over municipal law can, as has been illustrated, indeed be overcome. Further, the legal uncertainty that the normative control doctrine places on third parties under mixed agreements can be ameliorated. With the proper use of declarations of competence, combined with an obligation upon the EU and its Member States to continuously update their declarations paired with a mechanism of subsidiary responsibility which is triggered if the EU and its Member States fail to provide a clear answer on the division of responsibility, the problems can be overcome.

The question of apportionment of international responsibility between the EU and its Member States under multilateral mixed agreements will emerge more frequently after the completion of the EU accession to the ECHR, the result of which will be a multilateral mixed agreement. It has been illustrated

how and why the normative control doctrine should occupy a central place in any future accession agreement between the EU and the CoE.

The use of the normative control doctrine to apportion responsibility between the EU and its Member States under multilateral mixed agreements might, and probably will, meet with continued resistance from actors. It is, however, essential to remember that the *sui generis* characteristics of the EU are here to stay. Depriving the EU of its identity by insisting on submitting it and its Member States to the conventional rules of international responsibility will not only deprive it of its place on the international stage and thus frustrate the development of inter-State cooperation on a global scale. It will also move international law further away from the political reality that it is supposed to reflect.

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