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Jean d'Aspremont
Amsterdam Center for International Law

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A European Law of International Responsibility?

The Articles on the Responsibility of International Organizations and the European Union

Jean d'Aspremont[*]

Practice has borne witness to recurring pleas by regional economic integration organizations (REIOs) – and especially by the European Union (EU), which is the organization most often referred to within the concept of REIOs – that the determination of their responsibility ought not to be entirely subjected to the general regime of responsibility for internationally wrongful acts. In the case of REIOs such as the EU, such pleas have mostly been voiced in relation to the question of attributions. It is well-known that in the first instance, the Special Rapporteur of the International Law Commission (ILC), in the course of the preparation of the Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (ARIO), shied away from accommodating such requests and expressly recognizing such specificities, and the specific rules associated with them previously, before changing its position and acknowledging that such a possibility falls within the ambit of *lex specialis* provisions.

The first section of this paper will briefly describe the plea made by the EU for recognition of special rules of responsibility for REIOs, with an emphasis on rules on attribution (Part 1). The paper will then critically evaluate this claim and the way it was addressed by the ILC in its work on the ARIO (Part 2). Arguing that the ARIO leaves enough room for the development of rules of international responsibility specific to REIOs, the paper will then evaluate the possible source for such special rules and gauge the value of EU law for the sake of the *lex specialis* principle (Part 3). The paper will finally turn to the draft agreement on the accession of the EU to

[*] Chair of Public International Law, University of Manchester and Associate Professor of International Law, Amsterdam Center for International Law, University of Amsterdam. Author SSRN page: http://ssrn.com/author=736816. Many thanks to Christian Ahlborn for her insightful comments on an earlier draft.

the European Convention on Human Rights (ECHR) and will reflect on the extent to which the mechanism set up on that occasion could be conducive to the emergence of special rules of international responsibility for the EU (Part 4).

1. The Plea for European Rules of International Responsibility

The claim by the European Commission that the European Community (EC), and subsequently the EU, cannot be considered as falling within the generic definition of international organizations was voiced as early as the commencement of the examination of the topic of responsibility of international organizations by the ILC.[1] Notably, the EU has repeatedly argued for the necessity of special rules of attribution of conduct for REIOs.[2] In particular, invoking some allegedly supportive practice of the World Trade Organization (WTO),[3] the EU has been advocating that the conduct of its Member States (MS) enforcing EU decisions in areas of exclusive competence – and similar situations – should be construed as conduct of the EU, for the MS must, in these situations, be considered *de facto* organs.[4] This contention was underpinned by the argument that the normative control exercised by the EU over the MS when the latter are solely implementing EU legislation should be considered, for the sake of

[1] See statement of the European Commission to the 6th Committee of the General Assembly on 27 October 2003, Doc. A/C.6/58/SR.14, 22 December 2004, paras. 13-14; see EU Presidency Statement on the ILC Report, 2004, New York, 5 November 2004, available at: www.europa-eu-un.org/articles/en/article_4020_en.htm, cited by Frank Hoffmeister, "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 *European Journal of International Law*, p. 728.

[2] See the comments by the European Commission, in UN Doc. A/CN.4/545 (2004), at 18, and UN Doc. A/CN.4/637 (2011), at 7.

[3] See Panel Report, European Communities ± Geographic Indications, WT/DS174/R, 15 March 2005, [7.98] and [7.725]; see also Panel Report, European Communities ± Selected Customs Matters, WT/DS315/R, 16 June 2006 and Appellate Body Report, WT/DS315/AB/R, 13 November 2006; Panel Report, European Communities ± Biotech, WT/DS 291/R, 29 September 2006, [7.101]. For some critical remarks on the use of this case-law, see F. Messineo, "Multiple Attribution of Conduct", in A. Nollkaemper and I. Plakokefalos (eds.), Principles of Shared Responsibility (forthcoming), SHARES Research Paper No. 2012-11, available at www.sharesproject.nl.

[4] This has usually been uncontested from the standpoint of EU law; see E. Paasivirta and Pieter Jan Kuyper, "Does One Size Fit All? The European Community and the Responsibility of International Organizations" (2005) 36 *Netherlands Yearbook of International Law*, 169-226, p. 192.

international responsibility, as making the conduct of the MS conduct of the EU.[5]

The reasons for such a plea are well-known. There is a general tendency for the EU – like the United Nations – to "generously" claim responsibility for actions pertaining to its areas of competence in a way that may lead one to think that the EU construes responsibility with autonomous identity and independence on the international plane. In this specific case, the European Commission claimed that the EU/EC constituted a REIO[6] which could not be conflated with other international organizations and accordingly could not be submitted to the whole general regime being designed by the ILC. The specific features emphasized by the European Commission can be summarized as follows.[7] In contrast to other less integrated international organizations, the EU is said to rest on a full transfer of "sovereign powers"[8] in certain areas where states have

[5] S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment" in Maurizio Ragazzi (ed.) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill Publication, 2005), 405-421, esp. p. 414. The debate about normative control has mostly swirled around the situation of State organs put at the disposal of international organizations, as is envisaged in article 7 of the ARIO. This is the so-called "peacekeeping provision", for it mostly addresses questions of responsibility in the case of peacekeeping operations. In this respect, it is interesting to note that the UN has always claimed that wrongful conduct by peacekeepers ought to be dealt from the vantage point of article 6 (see UN Doc. A/CN.4/637/Add.1 (2011), at 15-17), whilst the Special Rapporteur claimed that this rule was a codification of UN practice.

[6] The notion of REIOs is, in substance closely associated with the conclusion of multilateral agreements that were meant to be open to the EU. The most famous examples include article 305(1)(f) of UNCLOS; the 1995 UN Fish Stocks Agreement; the 1994 WTO Agreement; the Energy Charter Treaty (1994) (which expressly uses the term REIO); article 13 of the 1985 Vienna Convention for the Protection of the Ozone Layer; article 22 of the 2000 UNFCC; article 34 of the 1992 Convention on Biological Diversity; article 36 of the 2000 Cartagena Protocol in Biosafety; and the 2000 UN Convention Against Corruption. For further insights on this notion, see E. Paasivirta and Pieter Jan Kuyper, "Does One Size Fit All? The European Community and the Responsibility of International Organizations" (2005) 36 *Netherlands Yearbook of International Law*, 169-226, pp. 205-212.

[7] On the specific features of the EU justifying such a claim, see E. Paasivirta and Pieter Jan Kuyper, "Does One Size Fit All? The European Community and the Responsibility of International Organizations" (2005) 36 *Netherlands Yearbook of International Law*, 169-226, esp. pp. 174-183; see also D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) *CMLR*, 17-69; R. Wessel, "Division of International Responsibility Between the EU and its Member States in the Area of Foreign, Security and Defence Policy" (2011) 3 *Amsterdam Law Forum*, 42-47. See also M. Cremona, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law", *EUI Working Papers*, Law No. 2006/22, 2-25 (including the particular questions raised by mixed agreements).

[8] D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP, 2005), 69 ff.

relinquished public power to the benefit of permanent structures at the supranational level, with a view to achieving certain common objectives.[9]

In the first instance, these contentions were largely ignored. In its 2004 Report, the ILC Special Rapporteur only envisaged the supplementary possibility of specific responsibility of the EU in the case of enforcement action by Member States, which could result in the EU's responsibility under the hypothesis of *attribution of responsibility*, but not from a situation of attribution of conduct. In particular, the EU could incur responsibility for an act still formally attributable to its MS by virtue of its binding decisions.[10] As such, no special rule of attribution of conduct was designed.

Such a position was met with strong criticism in the literature. It was portrayed as a "second best" option,[11] and calls for the inclusion of a special provision for cases where MS are the *de facto* organs of the EU were

[9] The exclusive competences of the EU, where MS only have enforcing responsibilities, are customs, union, competition, monetary policy, commercial policy, or the conservation of marine biological resources. Matters slightly more complicated in areas of shared competence include the environment, transport, agriculture, fisheries, or consumer protection. See a description of these competences and the articulation between the experience of public power by the EU and that by the Member States in E. Paasivirta and Pieter Jan Kuyper, "Does One Size Fit All? The European Community and the Responsibility of International Organizations" (2005) 36 *Netherlands Yearbook of International Law*, 169-226, pp. 188-192.

[10] Article 17: Circumvention of international obligations through decisions and authorizations addressed to members

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

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

For a discussion of the application of this provision in the case of the EU see R. Wessel, "Division of International Responsibility Between the EU and its Member States in the Area of Foreign, Security and Defence Policy" (2011) 3 *Amsterdam Law Forum*, pp. 37-40.

[11] See e.g. the comments by Hoffmeister, "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 *European Journal of International Law*, p. 729; see also the criticisms of this "second best" option by E. Paasivirta and Pieter Jan Kuyper, "Does One Size Fit All? The European Community and the Responsibility of International Organizations" (2005) 36 *Netherlands Yearbook of International Law*, 169-226, pp. 217-218.

advocated.[12] Although the literature is replete with some semantic instability with respect to the distinction between *de facto* organs and agents,[13] others have claimed that a sister provision to article 5 of the Articles on State Responsibility (ASR)[14] should be included so as to cover situations where a MS acts as "agent" of the organization.[15] The argument was also made that normative control should be elevated into a criterion for the attribution of conduct of a MS to the organization.[16]

Interestingly – and irrespective of whether this should be read as a reaction to these criticisms – the ILC changed its position during its 2009 session by explicitly recognizing the possibility of a special rule of attribution that could fall within the ambit of the more general article 64 on the principle of *lex specialis*.[17] For the first time, reference was thus made to the possible existence of special rules in connection with "the attribution to the European Union Community of conduct of States members of the Community when they implement binding acts of the Community".[18] This approach is the one that eventually prevailed and it is now enshrined in the ARIO. Although falling short of an explicit acknowledgment of a rule of attribution of conduct, this solution does not bar the general rules of attribution from yielding to any specific rule pertaining to the relations between the EU and its MS. Although the lack of express acknowledgement that normative control exercised by the EU could generate attribution of

[12] E. Paasivirta and Pieter Jan Kuyper advocated the inclusion of the following provision: "Without prejudice to article 4, in the case of a REIO the conduct of its member states and their authorities shall be considered as an act of the REIO under international law to the extent that such conduct falls within the competencies of the REIO as determined by the rules of that REIO". See E. Paasivirta and Pieter Jan Kuyper "Does One Size Fit All? The European Community and the Responsibility of International Organizations" (2005) 36 *Netherlands Yearbook of International Law*, 169-226, p. 216.

[13] See the criticism by C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series), pp. 40-41.

[14] Article 5 of the ASR: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".

[15] S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment", in Maurizio Ragazzi (ed.) *International Responsibility today: Essays in Memory of Oscar Schachter* (Brill Publication, 2005), 405-421, esp. p. 412.

[16] See supra note 5.

[17] ILC Reports of its 61st session (2009), Commentary on Draft Article 63, A/64/10, at 173. See remarks by 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*, pp. 729-730.

[18] ILC Report, 61st session, UN Doc. A/64/10 (2009), at 176, para. 2.

conduct was criticized,[19] the solution eventually endorsed by the ILC was positively received.

2. A Need for an Express Acknowledgement of a European Law of International Responsibility?

The argument could cogently be made that the debate that unfolded in the years 2004–2011 on the need to recognize specific modes of attribution of conduct for the relation between REIOs and their MS could have been avoided simply by recognizing that the situation where states act as a *de facto* organ of the organization is covered by the general principle governing attribution of conduct. Indeed, it can be argued that, even without the addition of a sister provision to article 5 of the ASR, conduct of MS when enforcing EU legislation in areas such as customs, union, competition, monetary policy, commercial policy, or the conservation of marine biological resources could fall under the general rule of article 6 of the ARIO.[20] In that sense, the argument could be made that when merely implementing and enforcing EU policies, MS disappear behind the corporate veil[21] of the organization[22] and constitute organs of that organization, thereby making the design of a specific rule of attribution unnecessary. This idea – that MS can be an organ of an international organization under article 6 when implementing EU law – had been expressly rejected by Special Rapporteur Gaja,[23] invoking the cases of *Bosphorus*[24] and *Kadi*,[25] as well as a possible contradiction with the ASR.[26]

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[19] F. Hoffmeister, "Litigating against 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*, 723-747, at p. 746 ("[T]he 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"). He calls for an explicit acknowledgment rather than the implicit one in article 64 (pp. 746-747).

[20] The argument has been compellingly made by C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series), pp. 38-39.

[21] On that notion, see Catherine Brölmann, *The International Institutional Veil in Public International Law – International Organisations and the Law of Treaties* (Oxford: Hart Publishing, Ltd, 2007).

[22] C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series), pp. 38-39.

[23] 7th Report, UN Doc. A/CN.4/610 (2009), at 12-13 (para. 33).

[24] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Judgment (Grand Chamber) of 30 June 2005, application no. 45036/98, para. 153.

[25] *Kadi, Al Barakaat International Foundation v. Council and Commission*, Judgment (Grand Chamber) of 3 September 2008, joined cases C-402/05 P and C-415/05 P, para. 313.

He subsequently invoked the *Kokkelvisserij* case.[27] Certainly this reading of these controversial decisions, as well as their respective authority, could be contested. Other decisions also offer support for the exact opposite understanding.[28] Likewise, it is not certain whether the characterization of MS as organs of the EU in this case would necessarily entail a discrepancy with the ASR.[29]

Although simpler and more satisfactory conceptual routes than tackling the specificities of REIOs could have been followed, as was discussed above,[30] it is true that article 64 leaves space for developing rules tailored to REIOs. This is why it does not seem worth bickering over the deficiencies of that approach. Whilst it is not certain that the motives invoked by the Special Rapporteur for rejecting the possibility of MS acting as *de facto* organs of the organizations are entirely convincing, there seems to be no need to (re-) engage with the normative and conceptual choices which have been made in the course of the work of the ILC, especially when it comes to rules pertaining to attribution. We can take for granted that the ARIO will not be amended and that possible subsequent steps in the codification process will not bring about any change with respect to the abovementioned question of EU specificity.[31] Even the EU seems to have capitulated and accepted that its specificities are sufficiently accommodated by the avenue opened by article 64. The foregoing certainly does not mean that article 64 is a panacea. Its wording is highly problematic, especially when it comes to the

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[26] For some critical remarks on the case-law invoked by the Special Rapporteur, see F. Messineo, "Multiple Attribution of Conduct", in A. Nollkaemper and I. Plakokefalos (eds.), Principles of Shared Responsibility (forthcoming), SHARES Research Paper No. 2012-11, available at www.sharesproject.nl.

[27] ECtHR, *Kokkelvisserij v. Netherlands*, Application No. 13645/05. On the invocation of that case, see 8th Report, A/CN.4/640, p. 37.

[28] See WTO Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaints by the United States, WT/DS293/R, adopted 20 April 2005, para. 7.725: it accepted that "the European Communities explanation of what amount to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States act as de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general").

[29] For a criticism of the motivation of the Special Rapporteur, see C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series), pp. 39-40.

[30] Cf supra 2.

[31] On the epistemological consequences thereof, see J. d'Aspremont, "The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility" (2012) 9 IOLR, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163427.

understanding of the rules of the organization.[32] However, article 64 allows (theoretically) the emergence of special rules of international responsibility in relation to REIOs like the EU, especially when it comes to attribution of conduct.

3. The Sources of a European Law of International Responsibility

As was explained above, the conceptual approach for accommodating possible special rules of international responsibility was the object of variations in the course of the ILC's work on the responsibility of international organizations. It was eventually decided to address this question through a general *lex specialis* clause. For the sake of the argument made here, once the possibility of a European law of international responsibility is established, the question of where such special European rules would come from arises. In other words, acknowledging the possibility of a special law raises the question of its sources.

Such a question can be easily addressed when special rules of responsibility – and in particular, special rules of attribution – are the object of express provisions in the regime concerned.[33] However, it is submitted here that the EU regime does not contain express provisions that put in place special rules of international responsibility of the EU and/or the MS. According to this position, there are no express rules of international responsibility found under EU law which constitute a *lex specialis* for the sake of the international responsibility of the EU and/or the MS.

In order to make this point, it must be understood as a preliminary matter that the rules of the organization pertaining to its relation with its member states are of an internal nature and therefore cannot constitute special rules for the sake of article 64. Indeed, these rules, albeit dealing with questions

[32] C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series).

[33] Traditional examples of a regime providing for a special rule of attribution are found in article 3 of the 4th Hague Convention and article 91 of the 1st Additional Protocol to the Geneva Convention, whereby every State party is responsible for the violations committed by the members of its armed forces, irrespective of the capacity in which they acted when the wrongful act was committed. On this special rule, see J. d'Aspremont and J. de Hemptinne, *Droit international humanitaire* (Paris, Pedone, 2012), chapter 13.

of responsibility, constitute the internal law of the organization. As has been convincingly argued elsewhere, such an internal law of the organization cannot in itself constitute *lex specialis*.[34] Indeed, rules of an internal nature cannot affect the functioning of the general regime of responsibility. This point was made very clear by the ILC in its commentary to the Vienna Convention on the Representation of States in Their Relations with International Organizations.[35] On that occasion Roberto Ago also emphasized that particular rules cannot prevail over a general rule unless the two rules have the same status.[36] The international conventional character of the framework within which such arrangements are enshrined does not alter that conclusion. As pointed out by the ILC in its commentary to the ASR, "international law does not permit a State to escape its international responsibility by a mere process of international subdivision".[37] There is no reason why a different conclusion would hold for a REIO, which can accordingly not be seen as being in a position to generate specific rules of responsibility applicable to relations between it or its member states and third states.

In the case of the relations of the EU with its MS, the foregoing means that the internal rules of the EU about the distribution of competences cannot qualify as *lex specialis*. Said differently, the rules of the EU about the distribution of competences cannot be considered to have the same status as the rules of attribution of the general regime of international responsibility and can accordingly not be considered "special". These rules of allocation of competence between the EU and its MS cannot be considered special rules of attribution for the sake of international responsibility. They boil down to purely internal arrangements between the EU and its MS and are merely rules of an internal nature.[38]

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[34] Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03 (SHARES Series)*, p. 29; see also J. d'Aspremont and C. Ahlborn, "The International Law Commission Embarks on the Second Reading of Draft Articles on the Responsibility of International Organizations", at http://www.ejiltalk.org/the-international-law-commission-embarks-on-the-second-reading-of-draft-articles-on-the-responsibility-of-international-organizations/#more-3326.

[35] ILC Commentary to the draft articles on the Representation of States, ILC Yearbook 1971, vol. II (Part One), at 287-288.

[36] ILC Yearbook, 1968, vol. I, Summary records of the 20th session, 27 May – 2 August 1968, p. 31 (para. 24).

[37] ILC Yearbook, 2001, vol. II, Part Two, p. 39, para. 7.

[38] C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series), p. 38.

Interestingly, such a contention conflicts with the current wording of article 64, which provides that "(s)uch 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". Unless this provision is counter-intuitively construed as a merely illustrative list, this affirmation is highly problematic – as was spotted by scholars[39] as well as a few states[40] – as it allows internal rules to be elevated into the international rules of international responsibility. This is a clear denial of the specific and internal nature of the rules of international organizations. It boils down to allowing any internal arrangement between an international organization and its member states – if it provides different solutions – to exclude the general rules. In other words, recognizing a *lex specialis* status – and thus an excluding effect – of the internal rules of the organization allows general law to be excluded on the basis of internal, or quasi-domestic, arrangements.

This is certainly not the place to ignite a new debate about the nature of the rules of international organizations and, more specifically, whether internal rules of international organizations can be recognized as *lex specialis*. However, this debate is very central when it comes to the sources of the special regime of attribution vindicated by the EU. Indeed, if they are not found in the rules of an internal character of international organizations, they must be sought elsewhere. Indeed, claiming that the rules of a purely internal character cannot constitute *lex specialis* for the sake of the international responsibility of the EU and its MS certainly does not mean that there cannot be such rules. Rather, it is argued here that these derogations from the general regime found in the ASR and the ARIO are not the object of express provisions of EU law and must instead be sought in *practices* pertaining to the establishment of *international* responsibility of the EU and/or its MS *in relation with other states or entities* – and not responsibility of a purely internal character. Because they are not expressly

[39] C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *ACIL Research Paper No 2011-03* (SHARES Series), p. 29; see also J. d'Aspremont and C. Ahlborn, "The International Law Commission Embarks on the Second Reading of Draft Articles on the Responsibility of International Organizations", at http://www.ejiltalk.org/the-international-law-commission-embarks-on-the-second-reading-of-draft-articles-on-the-responsibility-of-international-organizations/#more-3326; see also J. d'Aspremont, "The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility" (2012) 9 IOLR, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163427.

[40] See the 8th report of the Special Rapporteur, A/CN.4/640, pp. 36-37.

formulated in rules of an internal character, rules of responsibility of a special character are, instead, to be found in the practices of law-applying bodies external to the EU. The best examples of these are international judicial proceedings where either the MS or the EU have been accused of a breach of international law and where the (co-) responsibility of the other has been invoked or established. Such judicial practice can be highly indicative of the special rules of responsibility pertaining to the EU and its MS in their international relations with one another. The WTO and the European Court of Human Rights (ECtHR), for instance, constitute platforms where special rules of international responsibility of the EU and/or its MS in relation to other states or entities can manifest themselves or be given insight.[41]

The following section will focus on one of these two fora: namely, the ECtHR. In doing so, it will take particular account of the impact of the new mechanism put in place on the occasion of the accession of the EU to the European Convention of Human Rights (ECHR) for the possible coalescing of special rules of international responsibility, especially in terms of attribution.

4. The EU-ECHR Mechanism as a Special European Regime of International Responsibility?

Cases where the (co-) responsibility of the EU has been invoked are well-known. *M. v. Germany*, *Matthews*, *Senator Lines*, and *Bosphorus* have all been extensively discussed in the literature in relation to the international responsibility of the EU, although the ECtHR was unable to establish it in any of these cases. It is interesting to note that these cases – and the discussions around them – have, to some extent, been instrumental in the notion of accession of the EU to the ECHR, which has now come close to reality. Indeed, real negotiations about the modalities of the accession of the EU to the ECHR started in July 2010 and ended in June 2011 with the presentation of a draft agreement that was subsequently endorsed by the Council of Europe's Steering Committee on Human Rights.[42] The

[41] For the case of the WTO, see e.g. P. Eeckhout, "The EU and its Members States in the WTO – Issues of Responsibility", in L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (New York, OUP, 2006), pp. 449-464.

[42] For a useful stocktaking, see T. Lock, "End of an epic? The draft agreement on the EU's accession to the ECHR", Yearbook of European Law 2012 (forthcoming).

agreement sets out the changes to the ECHR system of human rights protection. The draft agreement is still subject to amendment. However, it is interesting to formulate some preliminary observations on the extent to which the mechanism puts in place, or highlights – and which the anticipated ensuing case-law has the potential to generate – special rules and practices for the sake of the international responsibility of the EU and its MS, especially in terms of attribution. Could the practice that will emanate from such accession be conducive to the development of special rules of international responsibility for the EU?

Before investigating such a question, an important caveat must be formulated. The relevance of such special rules should certainly not be exaggerated, for their applicability would be limited to the contractual relation established under the ECHR. It is important to realize that contentious questions arising within such a contractual relationship are very unlikely to be raised before (or to fall within the jurisdiction of) courts other than the ECtHR. In that sense – very similar to the case of the special rules of responsibility pertaining to the contractual relations established in the WTO framework – the relevance and applicability of such potentially special rules would remain confined to their forum of origin. That being said, the limited practical impact of such rules does not, from a conceptual point of view, strip the question of the impact of the accession on the emergence of special rules of responsibility of its importance. This is why this chapter ends with a few conceptual remarks on the consequences of the accession for the autonomisation of the regime of responsibility under the ECHR.

Certainly, the accession of the EU will generate a new practice of engagement of responsibility with respect to a new form of contractual relation, i.e. that between the EU and the ECHR. Within the framework of that contractual relation, it cannot be excluded that new rules of responsibility – and in particular, new rules of attribution – will emerge. For instance, it cannot be excluded that for the sake of the obligations enshrined in the ECHR, the normative control exercised by the EU over Member States will be elevated into a criterion for attribution of conduct. The mechanism of co-respondent, which has now been included in the draft agreement, may even constitute a procedural framework within which such a *lex specialis* could potentially be perceived (or designed by the Court).

Whilst it cannot be excluded that the (litigation) practice pertaining to the new contractual relation between the EU and the ECHR will pave the way for special rules of responsibility for the sake of that specific contractual relation, the accession of the EU to the ECHR may impact more negatively on the possibility of new special rules of responsibility when it comes to questions of responsibility of the EU and of its MS beyond the ECHR regime. Indeed, it is argued here that accession will transform the way the ECtHR may potentially approach the nature of EU law – and thus of EU mechanisms of responsibility – in general, and hinder the emergence of special rules of responsibility that are not specific to the ECHR. In that sense, by formally subjecting the whole EU regime to the ECHR and the Court, the accession agreement will limit the space that has existed for the possible development (or discovery) of a special non-ECHR specific rule of responsibility. Such a contention can be explained as follows. By making the EU formally bound by the ECHR and justiciable before the Court, the accession agreement will change the nature of EU law and practices. EU law and practices before the accession, as they are now, have been of a nature completely external to the ECHR. Being external to the ECHR, they could have become the breeding ground of special rules or practices pertaining to the general international responsibility of the EU, the unearthing of which the Court of Strasbourg could have contributed to, even if only incidentally. On the other hand, as a result of the accession, EU law and practices will become internal to the ECHR too, and the Court will approach EU law and practices in their internal dimension: that is, as internal rules of an organization party to the Convention. After the accession, EU law and practices will thus no longer constitute (or generate) mere external practices which could be turned into special rules of *international* responsibility opposable to non-member States or entities. They will be applied as internal law of the EU. In that sense, the ECtHR will be bound to approach EU law and practices as rules of the organization of an internal nature and which, as was explained above, will be unable to qualify as *lex specialis* for the sake of international responsibility. The impact of that change of vantage point is accordingly fundamental when it comes to the possibility of the ECtHR uncovering special rules of responsibility which are not ECHR-specific. Rather than offering a platform for the further development of special rules of responsibility, the accession will restrict the contribution of the ECHR system to a European law of international responsibility.