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The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations

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The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations

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1. In the discussion of matters concerning shared responsibility in the papers reflecting the SHARES lectures series, various issues relating to the responsibility of international organizations have been raised. Understandably, the articles adopted by the International Law Commission (ILC) have been examined with a critical eye. Some views have even been harshly critical, as if this mode of expression could give strength to the arguments put forward.

Whatever their mode of expression, several critical views would deserve comments. However, I shall make some comments only with regard to a few questions which are relevant to the subject of today's meeting. My purpose is not to produce a defence of the articles, but to contribute to the further development of the analysis of those questions.

According to the title given to my presentation, I should cover both the case of the European Union (EU) being responsible in relation to the conduct of its Member States, and the reciprocal case of the responsibility of EU Member States for the conduct of the Union. However, for reasons of time I shall not attempt to discuss questions relating to the responsibility of Member States, even if they have some importance in practice, especially in the field of the Common Foreign and Security Policy. On the other hand, while the focus will be on the responsibility of the European Union in relation to the conduct of its Member States, some more general issues concerning international organizations will also have to be dealt with.

2. The responsibility of the European Union for an internationally wrongful act may naturally arise only in so far as the relations of the European Union with States or other subjects of international law are governed by international law. This mainly occurs in the relations of the European Union with non-member States or with other international organizations. Relations between the European Union and member States are to a large extent governed by European Union law, which is viewed as a separate system of law.

According to one of the "general principles" expressed in the ILC articles on the responsibility of international organizations (article 4), the two elements of an internationally wrongful act of an international organization are, first, that conduct consisting either in action or in omission is attributable to that organization and, second, that that conduct constitutes a breach of an international obligation. A similar principle governs the internationally wrongful act of States according to the ILC articles on the responsibility of States. Liability for harm may also arise without a breach of an obligation under international law, but an obligation of reparation would then need to rest on a specific rule.

3. If one takes the approach followed by the International Law Commission on the issue of attribution and applies it to the European Union, the Union would be internationally responsible when its organs or agents commit a breach of one of the obligations that the Union has under international law.

Depending on the content of the international obligation, a breach could consist in the failure to comply with a rule requiring the European Union to ensure that Member States do something or in the failure to prevent them from taking certain actions.
This type of obligation does not necessarily consider the conduct of Member States in a specific way. It may be an obligation of result, like arguably those under UNCLOS that were at stake in the *Swordfish* case between the European Community and Chile. The fact that the European Union does not achieve the required result of the conservation of swordfish stocks would be sufficient to cause a breach, whether the failure is caused by its organs or agents or by its Member States. The WTO agreements may provide further examples of obligations of result that may be breached by the Union because of the conduct of its Member States.

4. When the articles on responsibility of international organizations consider issues of attribution, they only envisage attribution of conduct to an international organization. However, they do not exclude the possibility that conduct may also be attributed to another subject of international law. In particular, as the International Law Commission stated in its commentary (doc. A/66/10, p. 83, para. 4), one cannot rule out the possibility that a conduct which is attributed to an international organization may also be attributed to a State. This would occur according to the articles on State responsibility. Thus, "a shared or divided attribution" is not excluded by the articles on responsibility of international organizations or, for that matter, by the articles on State responsibility.

5. The ILC articles on the responsibility of international organizations start from the premise that, as a rule, acts of member States are not attributable to the organization. The Commission of the European Union contested this assumption with regard to conduct of Member States when they implement legislation of the European Union, in so far as they do not have discretion concerning the manner of implementation. The Member States would then act quasi as organs of the European Union, to whom conduct of Member States should correctly be attributed. The same opinion was expounded in literature, although mainly by authors (Kuijper, Paasivirta and Hoffmeister) who were associated with the Legal Service of the EU Commission.

The insistence of the European Union on this view in written statements and in interventions during the discussions in the Sixth Committee of the General Assembly led the International Law Commission to make an extensive reference in its commentary on article 64 to the possible existence of a special rule of international law concerning attribution of the conduct of member States to the European Union (doc. A/66/10, pp. 168-170). This reference was due also to the fact that, while several international organizations insisted on the importance that special rules on responsibility have for them, they were not forthcoming in giving examples of those rules. When considering matters of attribution to the European Union, the International Law Commission thus referred to two decisions of WTO panels, which were favourable to the attribution of the conduct of Member States to the European Union, but also to some decisions of the European Court of Human Rights, notably in *Bosphorus* and *Kokkelvisserij*, where this Court observed, with regard to the same issue, that "[a] Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations". The latter reference was meant to include obligations under EU law. Also in view of the variety of opinions expressed in practice, the International Law Commission did not take a stand on the matter.

6. In my presentation I shall follow the approach taken by the European Court of Human Rights with regard to attribution to the Member State, and not to the Union, of acts of organs of Member States when implementing EU law. I am encouraged to do this by the position that the European Union has recently taken in the negotiations relating to the agreement for the accession of the European Union to the European Convention of Human Rights. As results from the report of the second negotiating meeting held in September 2012 (doc. 47+1(2012)R02), the representative of the European Union made a proposal explaining that its "purpose was to make explicit the

attribution rule whereby acts of member States are and remain only attributable to them even if they are acts of implementation of EU law".

Accordingly, the current Draft Revised Agreement on the Accession of the European Union to the European Convention (doc. 47+1(2013)008) includes in Article 1(4) the following statement: "For the purposes of the Convention, of the Protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure of omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty of the European Union (…) and under the Treaty on the Functioning of the European Union (…)."

7. Having taken this option, I shall now turn to consider breaches of an obligation under international law that binds both the European Union and its Member States. In relation to an obligation of conduct, should the wrongful act be attributable to a Member State and not to the European Union, the Union could not be held responsible for having committed a breach of that obligation.

My analysis will focus on the responsibility that in such a situation the European Union could nevertheless incur because of its contribution to the internationally wrongful act of one of its Member States.

8. The simplest, and probably most frequent, scenario of a possible responsibility of the European Union is that the Union is bound not only by the obligation breached by the Member State but also by an ancillary obligation to prevent the relevant wrongful act of member States or at least not to contribute to it. Failure by the European Union to comply with that ancillary obligation would give rise to the Union's responsibility. The Union would then incur responsibility for the breach of this distinct, though connected, obligation. The responsibility of the European Union would be normally additional to the responsibility incurred by the Member State.

With regard to the relations between States under the Genocide Convention, the judgment of the International Court of Justice in *Bosnia v. Serbia* offers a theoretical example of such an ancillary obligation of prevention. This obligation is linked, according to the Court, to the State's "capacity to influence effectively the action of persons likely to commit, or already committing, genocide" (*ICJ Reports 2007*, p. 221, para. 430). Similarly, should the European Union have that capacity in

relation to the conduct of a Member State, be under an obligation to prevent breaches by its Member States and fail to prevent the member State's act, the Union would incur responsibility for its own breach of a separate obligation.

The type of responsibility that an international organization may incur is not specifically envisaged in the text of the International Law Commission. The reason for this omission is that the responsibility of the international organization would then result from the application of the general rules. Under those rules, when the organization breaches one of its obligations, including its ancillary obligation of prevention, through the conduct of its organs and agents, it would be responsible for that breach.

9. The ILC articles on the responsibility of international organizations also envisage alternative scenarios that may lead to the responsibility of an international organization in connection with the breach of an international obligation by a State, in practice frequently a member State.. According to articles 14 and 15, an international organization incurs responsibility when it supports a State in committing an internationally wrongful act, either through providing aid or assistance, or by the exercise of direction and control. These concepts, which find their origin in the articles on State responsibility, are not precisely defined. One question raised in the commentary of article 15 on the responsibility of international organizations is whether direction and control include a binding decision addressed by an international organization to a member State (doc. A/66/10, p. 106, paras. 4-5). Even if direction and control were regarded as factual, rather than normative, criteria, a binding decision by the European Union would seem to meet the required standard.

10. For the responsibility of an international organization to arise, two conditions are set out in both provisions on aid or assistance and on direction and control for the commission of an internationally wrongful act. First, the breached international obligation should exist also for the international organization; second, the latter should have "knowledge of the circumstances of the act". As an example from practice, the commentary of article 14 quotes a document written by the Legal Counsel of the United Nations, expressing the view that support by MONUC to FARDC units would be unlawful if MONUC had "reason to believe that the FARDC units involved are violating" international humanitarian law (doc. A/66/10, pp. 104-105).

At the insistence of certain States, the condition of knowledge was strengthened in the commentary of article 14, by aligning it to the parallel text of the commentary on State responsibility, which

requires that "the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct" (*Yearbook of the International law Commission*, 2001, Vol. II, Part Two, p. 66). In *Bosnia v. Serbia*, the Court found that this standard had not been reached according to the facts of the case, because Serbia did not have "full awareness that the aid supplied would be used to commit genocide" (*ICJ Reports 2007*, p. 219, para. 423). Read in this light, the scope of articles 14 and 15 on the responsibility of international organizations, like that of the parallel text on State responsibility, appears to be limited.

11. In both cases of aid or assistance and of direction and control, the responsibility of the European Union would depend on its contribution to the breach of an obligation by one of its Member States. Articles 14 and 15 do not envisage the responsibility of an international organization for the internationally wrongful act committed by the State. According to the commentary of article 16 on State responsibility, "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act" (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 66). We have here an additional responsibility that relates to the contribution given by the organization to the breach..

The commentary of article 48 on the responsibility of international organizations refers to a judgment of the European Court of Justice in a case *Parliament v. Council* relating to a mixed cooperation agreement which did not provide for an apportionment of responsibility. The Court of Justice then found that "the Community and its Member States as partners of the ACP States are jointly liable" (doc. A/66/10, p. 144, para. 1). The commentary further describes as "joint" the responsibility of an international organization when it contributes to the commission of an internationally wrongful act. It appears to refer, also in the latter context, to a single internationally wrongful act, which presupposes the breach of the same obligation. This description is possibly misleading, because the contribution of the European Union to an internationally wrongful act of a State would not be a breach of the same obligation. That breach is clearly different from the breach, by both the European Union and its Member States, of an obligation under a mixed agreement when the obligations under that agreement are not divided.

When a Member State breaches one of its obligations while the European Union only contributes to the Member State's unlawful conduct, it stands to reason that the European Union would incur responsibility only to the extent that its contribution actually affects the commission by the Member State of its wrongful act. This remark concerns the existence of responsibility, but also the amount

of reparation. As is explained by the ILC in its commentary of article 47 on State responsibility (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 125, para. 8), when "several States by separate internationally wrongful conduct have contributed to causing the same damage", "the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligation".

12. According to the Draft Revised Agreement on the Accession of the European Union to the European Convention, the fact that the European Union contributes to a breach of the Convention by a Member State should normally lead to the European Union becoming a co-respondent, alongside the respondent State whose organ or agent committed the breach. Article 3 (7) envisages that the European Union and the State "shall be jointly responsible for that violation, unless the [European Court of Human Rights], on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible". This text seems to imply that, as a rule, the Member State and the European Union fully share responsibility. More than being the result of a coherent construction, this approach seems to pursue the purpose to ensure that the European Court of Human Rights abstains from identifying the precise extent of the contribution that the European Union gives to the commission of a breach of the Convention. The reason stated for this in the explanatory report is that there would be "the risk that the Court would assess the distribution of competences between the EU and its Member States" (doc. 47+1(2013)008, p. 26, para. 62). However, the question for the Court would be not the competence of Member States, but the extent of their discretion.

13. Should a primary rule already prohibit the contribution by the European Union to an internationally wrongful act of a member State, we would be in the scenario of the ancillary obligation which was previously considered. The provisions on aid or assistance and on direction and control may be understood as expressing a rule extending, under relatively strict conditions, the obligation of a State or an international organization, and thus of the European Union, not to give support to a State committing an internationally wrongful act.

The general commentary on the ILC articles on the responsibility of international organizations refer to the distinction between primary and secondary rules and state that "[n]othing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations" (doc. A/66/10, p. 69, para. 3). This statement was designed to allay the fear expressed by certain international organizations that the articles could be used for

considering international organizations as bound by various rules of general international law. It did not imply that all the rules expressed in the proposed articles were necessarily regarded as having the nature of secondary rules. However, taken at its wording, the statement quoted above could convey the impression that any rule that is not a secondary rule would be out of place in the articles. To avoid this impression, the statement should have been qualified.

The fact remains that the distinction between primary and secondary rules is not clear-cut. I have noted that this point was extensively elaborated by Nollkaemper and Jacobs in an article that will be published in the *Michigan Journal of International Law.*

Can we be sure, for instance, that the rules on attribution of conduct are only secondary rules? Are they not an aspect of the definition of the obligation under the primary rule? When an obligation is imposed on a State not to commit a certain act, does it not imply that neither its organs nor individuals under its direction and control should do so?

It may be left here as an open question whether the rules on aid or assistance or on direction or control have the nature of primary or secondary rules. Nothing specific is stated either in the relevant ILC articles or in the related commentaries about the nature of these rules as primary or secondary. At any event, when discussing international responsibility, the International Law Commission could not have ignored the issues of aid or assistance or direction and control.

14. Leaving coercion aside because of its limited relevance, I shall now briefly consider the question addressed in article 17 on responsibility of international organizations. This provision concerns the responsibility that an international organization may incur when adopting a decision binding a member State "to commit an act that would be internationally wrongful if committed by the former organization". It also covers, with stricter conditions for responsibility, an act of an organization authorizing member States to commit a similar act. Authorizations may be influential, but cannot be equated with binding decisions.

Article 17 partly overlaps with the article concerning direction and control. It acquires significance when the latter article does not apply because the member State is not bound by an international obligation not to commit the relevant act. This occurs with regard to many agreements that are concluded by the European Union in areas where the Union has exclusive competence and thus is the only entity which becomes bound towards third States.

An obligation for the European Union not to take advantage of the separate legal personality of its Member States by requesting them to commit an act that would be prohibited to the Union may be in many cases implied in the primary obligation for the Union not to commit a certain act. I may refer again to the examples from WTO and the WTO agreements which I mentioned earlier on. In that case, the European Union would incur responsibility for the breach of its obligation according to the general rules.

When a specific primary obligation to the same effect does not exist, the rule expressed in article 17 extends, also under rather strict conditions, a similar obligation. Here again we are in the presence of what appears to be a primary rule. Should this obligation be breached by the European Union, one would again be in the presence of responsibility for an act attributable to the Union which would be internationally wrongful.

The extent of the obligation of reparation for the European Union in case of breach would depend on the moral and material injury caused by the breach.