

CHAPTER THIRTY-FOUR

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS:
DOES THE EUROPEAN COMMUNITY REQUIRE
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1. INTRODUCTION

After the completion by the International Law Commission of its second reading of the draft articles on the responsibility of States for internationally wrongful acts, the General Assembly recommended that the Commission take up the subject of the responsibility of international organizations.¹ During its fifty-fourth session (2002), the Commission decided to include the 'responsibility of international organizations' in its current programme of work. At the same session, the Commission appointed Giorgio Gaja as Special Rapporteur and established a Working Group on the topic. During its fifty-fifth session (2003), the Commission considered the first report of the Special Rapporteur and provisionally adopted three draft articles concerning general principles relating to the responsibility of international organizations with commentaries thereto. At its latest session in 2004, the Commission, following largely the pattern of the articles on the responsibility of States, provisionally adopted four draft articles on attribution of conduct.²

In March 2003 and March 2004, in response to various requests by the International Law Commission and the General Assembly, the European

¹ 'Resolution of the United Nations General Assembly on the Responsibility of States for Internationally Wrongful Acts (adopted on 12 December 2001)' (A/RES/56/83).

² On the Commission's work on the question of the responsibility of international organizations, see the Commission's Reports on its 54th to 56th session ('Report of the International Law Commission on the Work of its Fifty-fourth Session', *Gen. Ass. Off. Recs., Fifty-seventh Session*, Supp. No. 10 (Doc.A/57/10); 'Report of the International Law Commission on the Work of its Fifty-fifth Session', *Gen. Ass. Off. Recs., Fifty-eighth Session*, Supp. No. 10 (Doc.A/58/10); 'Report of the International Law Commission on the Work of its Fifty-sixth Session', *Gen. Ass. Off. Recs., Fifty-ninth Session*, Supp. No. 10 (Doc.A/59/10)) and the two Reports produced thus far by the Special Rapporteur (Gaja, 'First Report on Responsibility of International Organizations' (Doc.A/CN.4/532, 26 March 2003); *Id.*, 'Second Report on Responsibility of International Organizations' (Doc.A/CN.4/541, 2 April 2004)).

Commission—together with selected other international organizations—submitted comments and observations on the question of the responsibility of international organizations.³ The European Commission also expressed its view on the topic in a statement to the Sixth Committee of the General Assembly on 27 October 2003.⁴

In its submissions, the European Commission pointed out that the European Community (EC)⁵ is ‘not the “classic” type of international organization, for several reasons’.⁶ Firstly, the EC is not only a forum for its member States to settle or organize their mutual relations, but it is also an actor in its own right on the international stage. Thus, the EC is a party to many international agreements with third parties and often concludes such agreements together with its member States, each in accordance with its own competence. Secondly, the EC constitutes a legal order of its own, with comprehensive legislative and treaty-making powers, deriving from the transfer of competence from the member States to the EC. Community law, including international obligations assumed by the EC, is directly applicable in the member States as part of their national law. In addition, the practical implementation of Community law is carried out by the authorities of the member States instead of the EC institutions themselves. There is no EC administration throughout the Community territory. In that sense, the EC goes well beyond the normal parameters of classical international organizations. The European Commission therefore emphasized that the International Law Commission’s draft articles should fully reflect the institutional and legal diversity of the structures existing in the international community.⁷ In this respect, it proposed that the International Law Commission should ‘take into account diverse situations and structures such as that of the European Community, which to some extent was *sui generis*’ when devising

³ The responses of the European Commission and international organizations are reproduced in a topic-by-topic manner in ‘Responsibility of international organizations: Comments and observations received from international organizations (25 June 2004)’ (Doc.A/CN.4/545).

⁴ Doc.A/C.6/58/SR.14, 22 December 2003, 4, paras. 13–14. Acting on the suggestion of the representative of Italy, speaking on behalf of the European Union, the Chairman invited a representative of the European Commission to address the Committee.

⁵ The statements of the European Commission only concerned the EC and not the European Union (EU), whose legal status at the time had still been under discussion. According to the Treaty Establishing a Constitution for Europe, signed in Rome on 29 October 2004 (electronically available at <<http://ue.eu.int/igcpdf/en/04/cg00/cg00087-re01.en04.pdf>>), the ‘EU established by this Treaty’ is the successor to the old EU and the EC (Article IV-438) and has legal personality (Article I-7). The structural problems outlined by the European Commission with regard to the EC will largely remain the same with regard to the EU under the new constitutional setup. As the Treaty will only enter into force if all 25 member States ratify it (which, in view of the referenda in various member States, seems doubtful at the moment) and, in any case, not before 1 November 2006 (Article IV-447), this essay is also concerned only with the EC.

⁶ Doc.A/C.6/58/SR.14, 22 December 2003, 4, para. 13.

⁷ The differences between the EC and other classic international organizations are set out *ibid.*, 4, para. 13, and Doc.A/CN.4/545, 25 June 2004, 5 and 18–19.

its draft articles.⁸ This essay will examine whether the EC requires any special treatment by the International Law Commission when it further considers the topic of responsibility of international organizations.

2. GENERAL PRINCIPLES CONCERNING RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

At its fifty-fifth session in 2003, the International Law Commission adopted the general principles concerning responsibility of international organizations. Draft article 3, which is modelled on articles 1 and 2 of the articles on the responsibility of States for internationally wrongful acts,⁹ provides:

- (1) Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
- (2) There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
 - (a) Is attributable to the international organization under international law; and
 - (b) Constitutes a breach of an international obligation of that international organization.¹⁰

As in the case of States, two requirements must be satisfied for an internationally wrongful act of an international organization to occur: (1) the conduct in question must be attributable to the international organization and (2) the conduct must violate an international obligation of the organization. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. The European Commission pointed out that, in practice, the EC's international responsibility has arisen only in the context of international obligations *ex contractu* with third parties rather than in a non-treaty context. It therefore limited its observations to the breach of bilateral and multilateral agreements to which the EC, either alone or together with its member States, is a party. The European Commission's observations on the questions of attribution of conduct to the EC and whether an obligation of which a breach is alleged is an obligation of the EC will be discussed in turn.

⁸ Doc.A/C.6/58/SR.14, 22 December 2003, 4, para. 14. A Working Group established by the International Law Commission in 2002 had already acknowledged that 'it may be necessary to devise specific rules for different categories of international organizations' (Doc.A/57/10, 230, para. 470).

⁹ For the text of the articles and the commentary thereto, see Doc.A/56/10, 29–365.

¹⁰ Doc.A/58/10, 45. For the commentary on the article, see *ibid.*, 45–9.

3. ATTRIBUTION OF CONDUCT TO THE EUROPEAN COMMUNITY

The implementation of international obligations resulting from agreements entered into by the EC, even in areas of exclusive Community competence,¹¹ is almost exclusively carried out by the authorities of the member States, not EC institutions. This poses questions whether and when the conduct of these national authorities is to be attributed to the EC. Matters are, at least in part, further complicated in the fields of shared competence between the EC and the member States.¹² International agreements in these areas frequently result in so-called 'mixed agreements', to which both the EC and some or all of the member States are parties.¹³ In that case, the international obligations adopted both by the EC and its member States are carried out by one and the same (national) authorities. As far as mixed agreements of a bilateral nature are concerned, they do not pose any particular problem as the EC and the member States are regarded as one legal person in the framework of the treaty relationship. This is already shown by the language of such agreements, which provide that they are concluded 'of the one part' by the EC and its member States and their respective treaty partner(s) 'of the other part'.¹⁴ Their conduct need not be attributed to each other but is attributed instead to the legal person consisting of the EC and its member States.¹⁵ Problems may however arise in the case of multilateral mixed agreements, to which the EC and its member States are parties individually.

The European Commission suggested that the question of attribution of conduct to an international organization should generally be decided on the basis of the 'rules of the organization' and, in the particular case of the EC, on the basis of its internal rules on the division of competence between the EC and the member States. Actions of the authorities of the member States in areas of Community competence are thus to be attributed to the EC.¹⁶ As the jurisprudence of the European Court of Justice plays an important role in the delimitation

¹¹ E.g. customs union, competition, monetary policy, commercial policy, or the conservation of marine biological resources.

¹² E.g. the environment, transport, agriculture and fisheries, or consumer protection.

¹³ On mixed agreements, generally, see Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001); Bourgeois, Dewost and Gaiffe (eds.), *La Communauté européenne et les accords mixtes: quelles perspectives?* (1997); Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (1987); Dolmans, *Problems of Mixed Agreements: Division of Powers Within the EEC and the Rights of Third States* (1985); O'Keefe and Schermers (eds.), *Mixed Agreements* (1983).

¹⁴ See, e.g., the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the EC and its member States, of the other part, signed in Cotonou, Benin, on 23 February 2000: OJ L 317, 15 December 2000, 3.

¹⁵ The question of dual attribution of conduct does not arise in the framework of bilateral mixed agreements as there is only one legal person on each side to which conduct can be attributed. This fact has not been appreciated by the Special Rapporteur in his Second Report: Doc.A/CN.4/541, 4-5, para. 8.

¹⁶ Doc.A/CN.4/545, 13-14 and 19-20.

itation of competence between the EC and its member States, the European Commission emphasized that the 'established practice of the organization', one of the elements of the definition of 'rules of the organization', should be understood broadly as encompassing the case law of the courts of an organization.¹⁷ The problem with the European Commission's approach is that competence is not determinative of the question of attribution of conduct as may be seen by the attribution of *ultra vires* conduct.¹⁸ Attribution of conduct on the basis of a division of competence also provides no criteria for the attribution of conduct in areas of exclusive Community competence. As Community obligations are not only implemented by the authorities of the member States but also, for example, by private organizations in the member States,¹⁹ it is necessary to establish general criteria for determining whether a particular conduct of an official, person or entity is attributable to the EC.

Despite the problems of attribution outlined by the European Commission, the Special Rapporteur saw 'no need to devise special rules on attribution in order to assert the organization's responsibility in this type of case [where the authorities of the member States act as implementing authorities in areas of Community competence]'.²⁰ Instead, the Rapporteur suggested that

[the] responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization. It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible. However, attribution of conduct need not be implied.²¹

This statement seems difficult to reconcile with the International Law Commission's view that 'the attribution of conduct to an international organization is one of the two *essential elements* for an internationally wrongful act [of the organization] to occur'.²² The requirement of attribution of conduct is necessitated by the fact that international organizations, like States, are legal persons which

¹⁷ Ibid., 15. The European Commission therefore recommended making this point clear either in the text of the draft articles by referring to 'established practice of the organization, including the case law by its courts' or by explaining this point in the commentary to the draft definition. The International Law Commission did not act on this recommendation, see Doc.A/59/10, 103, para. 7 and 108, para. 11. It may however be argued that the definition of 'rules of the organization' is wide enough to encompass the case law of the courts of an organization.

¹⁸ See Article 7 of the Commission's articles on State responsibility and Article 6 of the Commission's draft on responsibility of international organizations, provisionally adopted so far (Doc.A/59/10, 100, para. 71).

¹⁹ E.g. measures taken by private producers' organizations in the member States, acting within the Community's agricultural intervention system, have been regarded as 'governmental measures' taken by the EC. See the European Commission's observations in Doc.A/CN.4/545, 20.

²⁰ Doc.A/CN.4/541, 6, para. 11.

²¹ Ibid., 6, para. 11 (footnote omitted).

²² Doc.A/58/10, 46, para. 4 (emphasis added).

cannot act of themselves. As the Permanent Court of International Justice held: 'States can act only by and through their agents and representatives'.²³ The same is true for international organizations. The determination of an internationally wrongful *act of the EC* thus, by necessity, will always involve the question of attribution.

The Rapporteur is correct in pointing out that international organizations may incur responsibility not just for their own acts but also in connection with internationally wrongful acts of States or of other organizations.²⁴ Any responsibility of the EC on this basis, however, would require, first of all, an internationally wrongful act on the part of the member States. Such an act will usually be lacking because, as the case of pure Community agreements²⁵ shows, the conduct of the national authorities, although attributable to the member States on the basis of Article 4 of the International Law Commission's articles on State responsibility, will not violate any obligations of the member States because they are not parties to these treaties. In the framework of international treaty law, the principle *pacta sunt servanda* not only carries the idea that treaties are binding, but also that they are binding (and thus create obligations) only for those who are formally the parties to the treaty (the concept of privity).²⁶ In addition, the requirements for the responsibility of an international organization for the wrongful acts of others will not usually be met. The EC neither aids and assists nor directs and controls, let alone coerces, the member States when they are implementing Community agreements.²⁷ Thus, if the EC is to be responsible at all, it can only be so for its own internationally wrongful acts, that is to say for conduct attributable to it which is in breach of its international obligations.

The Rapporteur presents Annex IX to the United Nations Convention on the Law of the Sea as an example of 'an approach which is focused on attribution of responsibility rather than on attribution of conduct'.²⁸ According to Article 5, international organizations and their member States are required to

²³ *German Settlers in Poland, Advisory Opinion, 1923, PCIJ, Series B, No. 6, 22.*

²⁴ Cf. Articles 16–19 of the Commission's articles on State responsibility. Following the pattern of the articles on responsibility of States for internationally wrongful acts, the Special Rapporteur intends to address in his third report, *inter alia*, the 'responsibility of an international organization in connection with the wrongful act of a State or another organization.' See Doc.A/59/10, 9, para. 25 and Doc.A/CN.4/541, 5, para. 9.

²⁵ That is to say agreements in the fields of exclusive Community competence to which only the EC, and not the member States, is a party.

²⁶ Cf. also Articles 34 and 35 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, Doc.A/CONF.129/15. (The text of the Convention is available at 25 *ILM* (1986), 543.) The Convention is not yet in force and the EC has neither signed nor ratified it, although 15 member States have ratified it.

²⁷ In his Second Report, the Rapporteur states himself that the organs of the member States, when implementing a Community agreement, 'are not placed under the organization's control' (Doc.A/CN.4/541, 5, para. 10).

²⁸ *Ibid.*, 6–7, para. 12.

declare their respective competence with regard to matters covered by the Convention. Article 6 then states: 'Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention'.²⁹ The International Law Commission is more guarded in its assessment of these provisions. In the draft report on the work of its fifty-sixth session, it says with regard to Article 6: 'Attribution of conduct to the responsible party is not necessarily implied'.³⁰ But, one may add, attribution is also not expressly excluded. States and international organizations are free to agree on special conditions for the existence of an internationally wrongful act which will take precedence over the general principle set out in draft Article 3.³¹ It is, however, questionable whether this was intended in Articles 5 and 6 of Annex IX to the Convention on the Law of the Sea. Article 6 seems to deal with *allocation* of responsibility rather than with *attribution* of responsibility.³² Within a party's allocated area of responsibility, it is argued that the existence of an internationally wrongful act must still be established if the 'responsible' party is to incur responsibility under international law. This may be shown by the following example: according to Article 5, competence for the repression of piracy clearly lies with the member States and not with the EC.³³ This alone does not establish whether a certain member State is responsible to a foreign flag State for the unjustified boarding of one of its ships wrongly suspected to be engaged in piracy. This question will depend in the first instance on whether the boarding of the vessel can be attributed to the member State. This, in turn, will depend on the factual circumstances of the case. If the boarding was carried out by one of the member State's warships the action will obviously be attributable to it under Article 4 of the Commission's articles on State responsibility; the same, however, is not true if the boarding was carried out by an (unsuccessful) insurrectional movement in the member State.³⁴ Similar questions may arise with regard to matters for which the EC has responsibility. For example, it will make a difference whether the authorities of a member State or a private producers' organization act in an area of exclusive Community competence such as the conservation and management of sea fishing resources. Article 6 thus can only be a

²⁹ United Nations Convention on the Law of the Sea, 10 December 1982: 1833 *UNTS* 396, at 580.

³⁰ Doc.A/59/10, 101, para. 3.

³¹ See Article 55 of the Commission's articles on State responsibility. It can be assumed that a similar article will be adopted for the responsibility of international organizations.

³² An allocation of responsibility that is based on a division of obligations under the treaty which, in turn, is based on declarations of competence by the organization and its member States; see below the section on the breach of an international obligation by the EC.

³³ Cf. the EC's 'Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement', 1 April 1998, electronically available at <<http://www.un.org/Depts/los>>.

³⁴ Cf. Article 10 of the Commission's articles on State responsibility.

starting point or a fork in the road on the way to establishing the international responsibility of the EC or its member States. It does not absolve States or international organizations wanting to invoke the responsibility of the EC from the need to show that the conduct in question is attributable to it.

The fact that often no reference to attribution of conduct to the EC is made in practice does not necessarily mean that such attribution is not required.³⁵ It could equally be that States have implicitly accepted the legal position advanced by the European Commission that conduct of the authorities of the member States is, under certain circumstances, to be attributed to the EC.³⁶ In order for conduct to be attributed to the EC the authorities of the member States need not be (quasi) Community organs (which they are clearly not).³⁷ The International Law Commission itself has shown another way. The draft articles on responsibility of international organizations, provisionally adopted by the Commission at its fifty-sixth session in 2004, provide in Article 4:

- (1) The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.
- (2) For the purposes of paragraph 1, the term ‘agent’ includes officials and other persons or entities through whom the organization acts.
- (3) Rules of the organization shall apply to the determination of the functions of its organs and agents.
- (4) For the purpose of the present draft article, ‘rules of the organization’ means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.³⁸

This general rule on attribution of conduct to an international organization seems wide enough to cover the relationship between the EC and the authorities of its member States. The latter may be regarded as agents of the EC. The word ‘agent’ is understood by the International Law Commission in the

³⁵ But see the opposite conclusion of the Special Rapporteur: Doc.A/CN.4/541, 7, para. 12.

³⁶ See the statement of the Director-General of the Legal Service of the European Commission: ‘[given] the “vertical” structure of the EC system as it concerns the authorities of the Member States (customs administration) acting as implementing authorities of EC law in a field of exclusive Community competence [the] EC took the view that the actions of these authorities should be attributed to the EC . . .’ (Quoted in Doc.A/CN.4/541, 6, para. 11). See also Groux and Manin, *The European Communities in the International Order* (1985), 144.

³⁷ See *M. & Co. v. Germany*, European Commission of Human Rights, decision of 9 February 1990 on application no. 13258/87, 64 *Decisions and Reports* 138, at 144. The Special Rapporteur seems to rest his case heavily on the argument that the authorities of the member States are not organs of the EC. See Doc.A/CN.4/541, 7, para. 13 and especially note 18.

³⁸ Doc.A/59/10, 103, para. 7.

most liberal sense as any 'person through whom [the organization] acts'.³⁹ This term thus covers not only officials but also any natural or legal person (including the organs of member States of an international organization) that performs functions as determined by the rules of the organization. Under the rules of the EC the practical implementation of Community law, including international obligations adopted by the EC, is entrusted to the member States and their authorities.⁴⁰ The reference in paragraph 1 of draft Article 4 to the fact that the agent acts 'in the performance of functions of that . . . agent' makes it clear that conduct is attributable to the EC only when and to the extent that the authorities of the member States implement Community law or exercise some other element of the authority of the EC entrusted to them by the rules of the Community.

The conduct that would be attributed to the EC as conduct of its agents, however, could equally be attributed to the member States as conduct of their organs on the basis of Article 4 of the International Law Commission's articles on State responsibility.⁴¹ As has been pointed out by the Commission, attribution of conduct to an international organization does not imply that the same conduct cannot be attributed to a State.⁴² Situations of dual attribution also arise in the case of organs placed at the disposal of an international organization by a State.⁴³ In that case the problem of dual attribution has been solved by draft Article 5 which provides that 'the conduct of an organ of a State . . . that is placed at the disposal of [an] international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'.⁴⁴ No such provision exists yet for the conduct of a State organ acting as an agent of an international organization. This is probably due to the fact that the Special Rapporteur does not see the need for any special rules on attribution to accommodate the special relationship between the EC and its member States. However, as has been shown above, there will generally be no responsibility of the EC without attribution of conduct. It is therefore argued that, if the authorities of member States qualify as agents of the organization, a similar provision to draft Article 5

³⁹ *Ibid.*, 106, para. 5. The wide meaning of the term 'agent' is also to cover situations corresponding to the ones in Articles 5 and 8 of the Commission's articles on State responsibility (*ibid.*, 108–109, paras. 12–13).

⁴⁰ Cf., e.g., Declaration (No. 19) on the implementation of Community law annexed to the Final Act of the Treaty on European Union, done at Maastricht on 7 February 1992: OJ C 191, 29 July 1992, 95.

⁴¹ The Working Group established by the Commission in 2002 stated in its report: 'in certain cases attribution could conceivably be made both to an organization and to its member States'. (Doc.A/57/10, 232, para. 476).

⁴² Cf. Doc.A/59/10, 101, para. 4.

⁴³ Cf. *ibid.*, 110, para. 1 and 111, para. 4.

⁴⁴ *Ibid.*, 109. A similar provision exists in Article 6 of the Commission's articles on State responsibility for the conduct of organs placed at the disposal of a State by another State; see Doc.A/56/10, 95.

should be included in the International Law Commission's draft articles in order to avoid dual attribution of conduct. Such a provision, which may be added as paragraph 5 to draft Article 4 above, could read as follows:

The conduct of an organ of a State that performs the functions of an agent of an international organization under the rules of the organization shall be considered an act of that organization under international law if the organ is acting in the performance of those functions.

The situation where an organ of a State performs the functions of an agent of an international organization under the rules of the organization seems to be limited in practice to the particular structure of 'supranational' organizations such as the EC; a point that may be emphasized in the commentary to the provision. In contrast to the case of conduct of organs placed at the disposal of an international organization, the criterion for attribution of conduct either to the State or to the international organization cannot be effective control over the particular conduct of the agent, as the organization will not usually possess such control. It is therefore suggested that attribution of conduct be based on the normative criterion of performance of functions under the rules of the organization.⁴⁵ In the relationship between the EC and the authorities of the member States, this means, *inter alia*, the implementation of the international agreements entered into by the EC.

4. BREACH OF AN INTERNATIONAL OBLIGATION OF THE EUROPEAN COMMUNITY

The second requirement for the responsibility of an international organization is that the conduct attributable to it breaches one of its international obligations. International agreements in fields of shared competence between the member States and the EC frequently result in mixed agreements, to which both the EC and the member States are contracting parties. This raises the question as to their respective obligations under such agreements vis-à-vis third parties. Again, it is necessary to distinguish between bilateral and multilateral mixed agreements.⁴⁶ In the case of the former, no problem arises as the obligations are placed jointly upon the EC and the member States which, in the framework of the treaty relationship, are regarded as one legal person. This has been confirmed by European Court of Justice which held with regard to the Fourth ACP-EEC Convention:⁴⁷

⁴⁵ This would also be a criterion general enough to cover the case of private organizations implementing Community law.

⁴⁶ This distinction is not always appreciated by the Special Rapporteur, see Doc.A/CN.4/541, 4-5, para. 8.

⁴⁷ Fourth Convention between the European Economic Community and its Member States, of the one part, and the ACP [African, Caribbean, and Pacific] States, of the other part, signed at Lomé on 15 December 1989: OJ L 229, 17 August 1991, 3.

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The Convention was concluded . . . by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken . . . It follows from the above that, in accordance with the essentially bilateral character of the cooperation, the obligation . . . falls on the Community and on its Member States, considered together.⁴⁸

In the case of multilateral mixed agreements, however, where the EC and the member States are parties in their own right, the question of the division of obligations arises.

The European Commission suggested that the question of apportionment of obligations⁴⁹ as between the international organization and its member States should be decided on the basis of the internal rules of the organization on the division of competence between the organization and its member States. Its observations read, in part, as follows:

They [the 'rules of the organization'] are, however, equally important for . . . the question whether the obligation of which a breach is alleged is an obligation of the international organization in question. This is the question . . . of the apportionment of the obligation as between the organization and its members. This apportionment is entirely determined by the rules of the organization, since these rules define the tasks and powers of the organization which possesses its own international legal personality, vis-à-vis those of the member States.⁵⁰

This view, however, is not fully in conformity with current international law. The questions whether an international obligation is incumbent upon an international organization and whether such obligation has been breached are inextricably linked and both are to be decided on the basis of international law and not on the basis of the rules of the organization in question. Article 1, paragraph 1, of the draft articles speaks of the 'international responsibility of an international organization for an act that is wrongful under international law'. Article 3 of the International Law Commission's articles on State responsibility expressly provides that 'the characterization of an act of a State as internationally wrongful is governed by international law'. No such provision was deemed necessary by the Commission in the present draft articles as this was seen as a rather obvious statement, 'since it is clearly implied in the principle that an internationally wrongful act consists in the breach of an obligation under international law'.⁵¹

⁴⁸ Case C-316/91, *Parliament v. Council*, Judgment of 2 March 1994, [1994] ECR I-625, paras. 29, 33.

⁴⁹ The European Commission uses 'apportionment of obligations' and 'apportionment of responsibilities' interchangeably.

⁵⁰ Doc.A/CN.4/545, 13. See also, *ibid.*, 14 and 19.

⁵¹ Doc.A/58/10, 48, para. 9.

The question whether an obligation under an international agreement is incumbent upon an international organization is to be determined by reference to the law of treaties. The internal rules of the organization regarding competence to conclude treaties are of no relevance in establishing the existence or extent of the obligations of an organization under a treaty vis-à-vis third parties. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations makes this clear when it distinguishes between the *capacity* of international organizations to conclude treaties under international law and their *competence* to do so under the rules of the organization.⁵² In article 27, paragraph 2, the Convention also provides that ‘an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty’.⁵³ The principle that the organization cannot plead its own rules as an excuse corresponds with the interests of the parties to a treaty of not having to enquire into the internal rules of an international organization to determine its obligations under the treaty. Otherwise, treaty obligations would change alongside changes in the rules of the international organization. In this connection, it should also be recalled that mixed agreements are sometimes concluded for the very reason that the EC and its member States agree to disagree on the exact delimitation of their competences and, in order to leave the question open, all become parties to the treaty. In such a situation, or in the case of a dispute between the EC and its member States as to their respective competencies, how should third parties determine the extent of their obligations? If the EC becomes a party to a treaty it is bound by all the obligations under the treaty irrespective of whether or not it has competence for a certain matter under its internal rules. This is confirmed by several treaties which expressly provide that any ‘organization that becomes a Party to this Convention without any of its member States being a Party shall be bound by *all* the obligations under the Convention’.⁵⁴ The same is true if both the EC and its member States become parties to a treaty. In the latter case, the obligations under the treaty are incumbent upon all of them.⁵⁵ The result that the obligations are binding upon the EC and the member States, and that they are jointly and

⁵² Preamble, paras. 11 and 12. On the distinction between capacity and competence in the EC’s external relations, see also Kingston, ‘External Relations of the European Community—External Capacity Versus Internal Competence’, 44 *ICLQ* (1995), 659–69.

⁵³ See also the largely identical Article 27 of the Vienna Convention on the Law of Treaties, 23 May 1969: 1155 *UNTS* 331. On Article 27 as transcribing a general principle, see Case C-224/01, *Köbler v. Österreich*, [2003] ECR I-10239, para. 88 (opinion of Advocate-General Léger of 8 April 2003).

⁵⁴ See, e.g., Article 22 (2) of the United Nations Framework Convention on Climate Change, 9 May 1992: 1771 *UNTS* 107.

⁵⁵ See Article 26 of the 1986 Vienna Convention. Cf. also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, ICJ Reports 1980, 73, at 89–90, para. 37: ‘International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them . . . under international agreements to which they are parties’.

severally responsible,⁵⁶ seems appropriate as the other parties to the treaty potentially face twenty-six parties which may exercise rights and claim violations of obligations under the treaty. The reason for this is that the other parties cannot rely on the rules of the organization regarding competence to conclude treaties in their treaty relations with the EC or its member States as, for them, these are *res inter alios acta*.⁵⁷

The situation may be different where a specific declaration of competence has been made by the EC and/or its member States. In modern treaty practice, where both a 'regional economic integration organization' (the generic term for an international organization such as the EC)⁵⁸ and its member States can be parties to an international agreement, the treaties more and more frequently provide that the international organization and, in the case of some treaties, also the member States shall, at the time of signature, ratification, acceptance, approval or accession, declare the extent of their competence with respect to the matters governed by the treaty. They shall also promptly inform the depositary of the treaty, who shall in turn inform the parties, of any substantial modification in the extent of their competence.⁵⁹ Such provisions seem to permit an international organization and its member States to limit their consent to be bound by the treaty to matters in respect of which they have competence. Thus, the United Nations Convention on the Law of the Sea, which in Articles 2 and 5 of its Annex IX requires both the international organization and its member States to make such declarations specifying the matters governed by the Convention in respect of which they have competence, expressly provides that 'an international organization shall be a Party to this

This position was also taken by the European Commission in its submissions in Case C-13/00, *Commission v. Ireland*, [2002] ECR I-2943, para. 29 (Advocate General's opinion).

⁵⁶ Advocate-General Tesauro (in Case C-53/96, *Hermès International v. FHT Marketing Choice*, [1998] ECR I-3603, para. 14) and Advocate-General Jacobs (in Case C-316/91, *Parliament v. Council*, [1994] ECR I-625, para. 69) seem to suggest 'joint responsibility'.

⁵⁷ Cf. Article 36 (1) of the 1986 Vienna Convention. It cannot be assumed that the member States of the EC intended to create rights for third States when concluding the treaties establishing the EC.

⁵⁸ 'Regional economic integration organization' has been defined as an 'organisation that is composed of several sovereign states, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters', see, e.g., Article 1 of the WHO Framework Convention on Tobacco Control, 21 May 2003: 42 *ILM* (2003), 518.

⁵⁹ Cf., e.g., Article 35(3), WHO Framework Convention on Tobacco Control; Article 67(4), United Nations Convention against Corruption (42 *ILM* (2003), 518); Article 25(3), Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Doc. UNEP/FAO/PIC/CONF/2); Article 35(3), Convention on the Law of the Non-navigational Uses of International Watercourses (Doc.A/51/869, 11 April 1997); Article 34(3), United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1954 *UNTS* 3); Article 22(3), United Nations Framework Convention on Climate Change (1771 *UNTS* 107); Article 34(3), Convention on Biological Diversity (1760 *UNTS* 79); Article 27(2), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Doc.E/CONF.82/15, Corr. 1 and Corr. 2).

Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in article 5 of this Annex'.⁶⁰ It also requires the organization 'to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its member States'.⁶¹ Other conventions which also prescribe such declarations of competence expressly state that any regional economic integration organization which becomes a party to the treaty without any of its member States being a party shall be bound by 'all the obligations' under the treaty.⁶² From this, one may draw the reverse conclusion that, if both the organization and its member States become parties to the convention, each shall be bound only by *its respective obligations* under the convention.⁶³ As pointed out above, the consent of an international organization to be bound by a treaty covers all obligations under the treaty (the principle of integrity of the treaty). There are, however, two exceptions: reservations and the possibility of consenting to be bound by part of a treaty. The latter is effective only if the treaty so permits or if the other parties to the treaty so agree.⁶⁴ Even without any specific provision relating to the extent of rights and obligations as in Annex IX to the United Nations Convention on the Law of the Sea, the requirement for a declaration of competence could be interpreted as permitting an international organization and its member States to limit their consent to be bound by the treaty to matters in respect of which they have competence.⁶⁵ The European Commission is thus correct insofar as there is a correlation between the division of competence between an international organization and its member States and the apportionment of their obligations under a treaty. However, it is not the division of competence as laid down in the rules of the organization that is decisive but the division of competence *as declared to the other parties to the treaty*.⁶⁶ This distinction is relevant if there is a discrepancy between the rules of the organization and the declaration of competence. Such a discrepancy may easily arise if a modification of

⁶⁰ Article 4(2), Annex IX, to the Convention on the Law of the Sea.

⁶¹ Article 4(1), Annex IX, to the Convention on the Law of the Sea.

⁶² See the treaties referred to in footnote 59, above. (Emphasis added.)

⁶³ If the international organization and one or more of its member States are parties, the treaties provide that they 'shall decide on their respective responsibilities for the performance of their obligations under the Convention'. (Emphasis added.)

⁶⁴ See Article 17(1) of the 1986 Vienna Convention.

⁶⁵ At least the initial declarations, at the time of signature, ratification, acceptance, approval or accession, could also be qualified as a reservation expressly authorized by the treaty, cf. Article 20(1) of the 1986 Vienna Convention.

⁶⁶ Cf. Article 4(2), Annex IX, to the Convention on the Law of the Sea, which provides that 'an international organization shall be a Party to this Convention to the extent that it has competence *in accordance with the declarations, communications of information or notifications*' (emphasis added). The fact that the EC and its member States have recourse to the formula of a mixed agreement without a specific declaration of competence therefore cannot be sufficient to limit the obligations of the EC to matters within its competence, *contra* Advocate-General Mischo in Case C-13/00, *Commission v. Ireland*, [2002] ECR I-2943, para. 30.

the rules on the division of competence is not promptly notified to the depositary of the treaty. In contrast to the rules of the organization, the other parties to the treaty may rely on the declaration of competence in their treaty relations with the international organization and its member States. The declaration creates an estoppel which prevents the organization and its member States from exercising any rights or claiming the violation of any obligations with regard to matters in respect of which they have declared competence to lie with the other party.

The problem with a division of obligations on the basis of a declaration of competence is that these declarations are often formulated in such general and nebulous terms that it may be difficult for the other treaty parties to determine whether a certain obligation is incumbent upon the organization or upon its member States.⁶⁷ Only the Convention on the Law of the Sea contains detailed procedural provisions how to deal with obscure or incomplete declarations of competence.⁶⁸ It is suggested that in cases of uncertainty as to the division of obligations the rule in article 46, paragraph 2, of the 1986 Vienna Convention should be applied by analogy. According to this provision, 'an international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest'. What applies to invalidating consent should equally apply to restricting consent. In case it is not manifest from the declaration of competence whether an obligation falls within the area of competence of the organization or within that of its member States, it will be incumbent upon both of them. This result coincides with the interests of the other parties to a treaty, which should not be unduly burdened with enquiring under whose area of competence a specific matter falls.

Following the pattern of the International Law Commission's articles on State responsibility, it is expected that the Commission will deal with the topic of 'breach of an international obligation' at its fifty-seventh session in 2005,⁶⁹ and/or at its future sessions. In order to clarify the law on breach of an international obligation in areas of shared competence between an international organization and its member States it is recommended that the Commission include an article on the question taking account of the treaty practice in that area. Such an article could be phrased along the following lines:

⁶⁷ See, e.g., the Declaration made by the EC pursuant to Article 35(3) of the WHO Framework Convention on Tobacco Control: OJ L 196, 2 August 2003, 7.

⁶⁸ Cf. Article 5(3) and (5), and Article 6, Annex IX, to the Convention on the Law of the Sea.

⁶⁹ Cf. Chapter III of Part I of the Commission's articles on State responsibility.

- (1) An act of a member State of an international organization to which its member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters, does not constitute a breach of an international obligation of the State if it is manifest at the time the act occurs that competence for the obligation lies with the organization.
- (2) An act of an international organization to which its member States have transferred competence over a range of matters, including the authority to make decisions binding on its member States in respect of those matters, does not constitute a breach of an international obligation of the organization if it is manifest at the time the act occurs that competence for the obligation lies with the member States.
- (3) A division of competence between an international organization and its member States is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

The provision is phrased in terms general enough to cover both contractual and non-contractual obligations, although, in practice, its main—if not only—area of application for the present time will be treaties concluded by the EC and its member States. While declarations of competence will help to make the division of competence manifest to the other treaty parties they are not the only way to do so. The provision also applies to treaties which do not expressly require a declaration of competence by the EC and/or its member States. If the other parties to the treaty are or ought to have been aware of the division of competence the EC and its member States will be able to invoke this division against them as a ground for limiting their obligations under the treaty in accordance with the principle of good faith. In both cases, however, the burden of proof will lie with the EC and its member States. Given the complexity of the EC's internal law on the division of competence between the EC and its member States, in most cases the division is most unlikely to be manifest as such. It is thus in the interest of the EC and the member States to provide detailed declarations of competence and to update them regularly.

5. CONCLUSION

The practice of the EC and its member States to conclude multilateral mixed agreements raises some difficult questions for the International Law Commission's work on the responsibility of international organizations. It has been shown that the questions whether certain conduct is to be attributed to the EC or to its member States and to which of the two a certain obligation belongs can

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be accommodated within the present system of the draft articles. The notion of 'agent' in draft Article 4 is broad enough to encompass the situation of the authorities of the member States implementing Community law, but a provision precluding dual attribution is required. The modern treaty practice on the division of obligations between the EC and the member States can be codified in an additional draft article in the chapter on breach of an international obligation. No concept of 'attribution of responsibility', that is to say responsibility without the attribution of conduct,⁷⁰ is called for in the case of the EC. The responsibility of international organizations is, after all, not a question of attributing responsibility but a question of establishing responsibility. This should be done in the same way with regard to all international organizations in accordance with the general principles set out in draft Article 3. The EC does not require any special treatment but merely the adjustment of some of the general rules to its particular structure and supranational nature.

⁷⁰ See, however, the Special Rapporteur's Second Report: Doc.A/CN.4/541, 6-7, paras. 11-12 and the Commission's report on the work of its fifty-sixth session: Doc.A/59/10, 101, para. 3.