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International Responsibility for EU Military Operations:

Who Guards the Guardian?

Iuliia Vengerovych

DEPARTMENT OF
EUROPEAN INTERDISCIPLINARY STUDIES

Natolin Best Master Thesis 04 / 2013

This work is dedicated to my mom for her love, endless support and encouragement.

I would also like to thank profesor Jean de Ruyt for his kindness and readiness to help; and the College of Europe for the opportunity to elaborate my research.

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Iuliia Vengerovych

Supervisor: Jean de Ruyt

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DEPARTMENT OF
EUROPEAN INTERDISCIPLINARY STUDIES

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Key words

European Union · United Nations · international responsibility
military crisis management · peacekeeping · military operations · missions

Iuliia Vengerovych

International Responsibility for EU Military Operations:

Who Guards the Guardian?

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Abstract

The present work is entitled *The International Responsibility for EU Military Operations: Who Guards the Guardian?* It constitutes an analysis of the contemporary international responsibility regime and its applicability to EU military operations.

In order to address the problem, the legal documents, the case law and the analysis of the academic literature were used as sources. Particularly, the Draft Articles on the Responsibility of International Organisations of the International Law Commission play a crucial role. Accordingly, the research was conducted predominantly on the basis of normative, analytical, comparative, legal and case study methods.

The Master's Thesis consists of three parts. The first part provides the general analysis of the responsibility of international organisations in contemporary international law and the place of the EU in international accountability regime. The second chapter looks at the legal framework and practice of the EU military operations. The third part is dedicated to the theoretical and practical aspects of the attribution of conduct in international law.

The thesis arrives at a number of conclusions. First, the idea of EU exclusive responsibility for EU military operations is very weak and unconvincing. Second, the invocation of joint responsibility is the most suitable scenario concerning the international responsibility for EU military operations. However, any international court does not exercise jurisdiction over the EU. Consequently, from practical point of view, only troop-contributing states could bear international responsibility for violations committed in EU military operations.

List of Accronyms and Abbreviations

ARTEMIS	EU Military Operation in the Democratic Republic of Congo
BiH	Bosnia and Herzegovina
C2	Control and Command
CFSP	Common Foreign and Security Policy
CONOPS	Concept of Operation
CSDP	Common Security and Defence Policy
DARIO	Draft of Articles on the Responsibility of International Organizations
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ESDP	European Security and Defence Policy
EU	European Union
ALTHEA	European Union Multinational Stabilization Force in BiH
EUMC	European Union Military Committee
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEMF	Interim Emergency Multinational Force
KFOR	Kosovo Force
MONUC	UN Mission in the DRC
OPALAN	Operation Plan
PSC	Political and Security Committee
SHAPE	NATO's Supreme Headquarters Allied Power Europe
SOFA	Status of Force Agreement
SOMA	Status of Mission Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	Organisation of United Nations

The Natolin Best Masters' Theses Series

Prof. Nanette Neuwahl
Director of studies
College of Europe (EIS programme, Natolin Campus)

The "Natolin Best Master's Thesis" series showcases the best Masters' Theses produced by the students of the Natolin campus of the College of Europe in any given year.

The College of Europe (CoE), founded in 1949 at the instigation and with the support of leading European figures, in particular, Salvador de Madariaga, Winston Churchill, Paul-Henri Spaak and Alcide de Gasperi, is the world's first university institute of postgraduate studies and training specialised in European affairs. The idea behind this particular institution was, to establish an institute where university graduates European countries could study and live together , and the objective was to enhance cross-border interaction and mutual understanding. The Natolin campus of the College of Europe in Natolin, Warsaw (Poland) was established in 1992 in response to the revolutions of 1989 and in anticipation of the 2004 and 2007 enlargements of the European Union. Ever since, the College of Europe operates as 'one College – two campuses'.

The European Interdisciplinary Studies (EIS) programme at the Natolin campus invites students to view the process of European integration beyond disciplinary boundaries. Students are awarded a 'Master of Arts in European Interdisciplinary Studies'. This programme takes into account the idea that European integration goes beyond the limits of one academic discipline and is designed to respond to the increasing need for experts who have a more comprehensive understanding of the European integration process and European affairs. The EIS programme is open to graduates in Economics, Law or Political Science, but also to graduates of History, Communication Studies, Languages, Philosophy, or Philology who are interested in pursuing a career in European institutions or European affairs in general. This academic programme and its professional dimension prepare graduates to enter the international, European and national public sectors as well as nongovernmental and private sectors. For some of them, it also serves as a stepping stone towards doctoral studies.

The European Single Market, governance and external relations are focal points of academic activity. Recognised for its academic excellence in European studies, the Natolin campus of the College of Europe has endeavoured to enhance its research activities, as well as to encourage those of its students who are predisposed to do so,

to contemplate a career in academia. The European Parliament *Bronislaw Geremek* European Civilisation Chair and the *European Neighbourhood* Policy Chair in particular, encourage research on European History and Civilisation, respectively, the Eastern and Southern Neighbourhood.

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Prof. Nanette Neuwahl
Directeur d'étude
Collège d'Europe (Programme EIS, campus Natolin)

La série « Meilleure thèse de Master du campus de Natolin" met en valeur les meilleures thèses de master rédigées par les étudiants du campus de Natolin du Collège d'Europe pour une année donnée.

Le Collège d'Europe (CoE), fondé en 1949 à l'instigation et avec le soutien de figures européennes de proue telles que Salvador de Madariaga, Winston Churchill, Paul-Henri Spaak et Alcide de Gasperi, est le premier institut universitaire d'études supérieures du monde spécialisé dans les affaires européennes. L'idée à l'origine de cette institution était de créer un institut dans lequel des diplômés universitaires issus de différents pays européens pourraient étudier et vivre ensemble afin de promouvoir la communication transfrontalière et la compréhension mutuelle. Le campus de Natolin du Collège d'Europe à Natolin, Varsovie (Pologne) a été fondé en 1992 à la suite des révolutions de 1989 et pour anticiper les différents élargissements de l'Union européenne prévus pour 2004 et 2007. Depuis lors, le Collège d'Europe fonctionne désormais selon la formule « un collège – deux campus ».

Le programme d'études européennes interdisciplinaires (EIS) du campus de Natolin invite les étudiants à analyser le processus de l'intégration européenne au-delà des frontières disciplinaires. Les étudiants obtiennent un "Master en études européennes interdisciplinaires ». Ce programme tient compte de l'idée que l'intégration européenne dépasse les limites d'une seule discipline académique et est conçu pour répondre aux besoins croissants d'experts qui conservent une compréhension globale du processus de l'intégration européenne et des affaires européennes. Le programme EIS est ouvert non seulement aux étudiant en économie, en droit ou en science politique, mais également aux diplômés en histoire, en communication, en langues, en philosophie ou en philologie désireux de poursuivre une carrière dans les institutions européennes ou les affaires européennes, en général. Ce programme académique et sa dimension professionnelle préparent les étudiants à intégrer les secteurs publics nationaux, européens et internationaux ainsi que les secteurs non-gouvernementaux et privés. Pour certains d'entre eux, ce programme constitue également une étape vers des études doctorales.

Le marché unique européen, la gouvernance et les relations extérieures sont des points majeurs de l'activité d'enseignement. Reconnu pour l'excellence de ses programmes en études européennes, le campus de Natolin du Collège d'Europe s'est engagé à améliorer ses activités de recherche, ainsi qu'à encourager ses étudiants les mieux prédisposés dans une carrière d'enseignement. La chaire de civilisation européenne du parlement européen *Bronislaw Geremek* et la chaire de politique de voisinage européen en particulier, encouragent la recherche sur l'histoire et la civilisation européenne, respectivement, et sur le voisinage avec l'Europe de l'est et du sud.

Le programme EIS se termine par la rédaction d'une importante thèse de Master. Au Collège d'Europe, chaque étudiant doit, pour obtenir son diplôme, produire une thèse dans le cadre de l'un des cours qu'il a suivi au cours de son année d'enseignement. La recherché doit être originale et liée aux politiques et aux affaires européennes, sur un sujet choisi par l'étudiant, ou sur proposition du professeur chargé de la thèse. Souvent, l'étudiant choisit un sujet qui est important pour le déroulement ultérieur de sa carrière. Les thèses de master sont écrites en français et ou en anglais, les deux langues officielles du Collège d'Europe, bien souvent une langue différente de la langue maternelle de l'étudiant.

Un comité scientifique sélectionne les meilleures thèses de master parmi les 100 dossiers produits sur le campus de Natolin chaque année. En les publiant, nous sommes fiers de disséminer dans toute la communauté enseignante européenne quelques-unes des recherches les plus intéressantes menées par nos étudiants.

Preface of the Master Thesis Supervisor

Jean De Ruyt
Part-time Professor
College of Europe, Natolin Campus, Warsaw

The complexity of the relationship between the EU as an organization and its member states is probably one of the reasons for the recent lack of enthusiasm for military action under the EU flag . More clarity on the sharing of responsibilities and on the accountability of the EU as such is therefore welcome. Ms Vengerovitch's thesis exposes the various elements of the problem and brings a useful contribution to this very important discussion .

Military intervention in today's world is often intended at restoring peace rather than provoking war. But the use of hard power , for whatever purpose and whatever the precautions taken by the intervening force , can cause harm to innocent people and violate human rights internationally recognized.

Those responsible have to be accountable but in operations conducted by several nations under the flag of an international organization , does international law clearly define who is responsible ? An answer to this question has been elaborated , after long discussions , by the International Law Commission , the so called "Draft Articles on the responsibility of international organizations" (DARIO) , which were endorsed by the General Assembly in 2011.

But do the DARIO apply to operations under EU security and defence policy? Very methodically, Ms Vengerovych tries to give an answer to this difficult question. The EU indeed , as she mentions , is a "very special legal animal" . Even if the Lisbon Treaty gave it an explicit legal personality , the sharing of responsibilities between the EU itself and the countries participating in a CSDP operation is different from the relationship between participants in UN PKOs and the UN . She tests her reasoning by applying it

to two very different EU operations : Artemis , the French led EU operation in Ituri in 2003 , and the still continuing Althea operation in Bosnia Herzegovina.

Well documented and clearly presented, Ms Vengerovitch's thesis and its nuanced conclusions will , I'm sure , be useful to those who are planning new EU peacekeeping operations or will have to decide if they want to send troops under the EU flag.

Introduction

> *On 11 March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air: it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured… The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence"*[1].
>
> *Behrami v. France*,
> European Court of Human Rights

Leading international organisations (the UN, the EU, and the Council of Europe etc.) act as the prime promoters of democracy and human rights on global, subregional and regional levels. They use various tools for this purpose, including the so-called soft and hard powers[2]. However, they may also violate international law, namely human rights law, while exercising their competences. This question is relevant especially when an international organisation acts through hard power instruments. The aforementioned abstract of the *Behrami* case demonstrates what can happen during military actions conducted by international organisation[3]. At the same time we should take into account

1 *Behrami v. France*, European Court of Human Rights, Grand Chamber Decision as to the Admissibility of Application No. 71412/01, p. 4.

2 The hard power usually includes military intervention, introduction of troops, military assistance programs etc.; semihard power is about diplomacy, foreign economic assistance, economic or political sanctions; soft power consists of indirect forms of influence, as cultural exchanges, commercial contacts, humanitarian assistance, civil society network. (Frederic S. Pearson and Marie Olson Lounsbery, 'Soft Power and the Question of Democratization', in: Dursun Peksen (ed.), *Liberal Interventionism and Democracy Promotion*, Lanham, Md.: Lexington Books, 2012, p. 61.)

3 The practice shows that fundamental rights violations are plausible during peacekeeping operations. For instance, UN peacekeeping troops might unlawfully destroy or confiscate civilian property during the operations. The most known claims of this type concerned damage derived from activities carried out by the UN forces in the Congo (1960 – 1963), after having been unsuccessfully sued before Belgian courts, eventually the UN accepted the responsibility for injures inflicted on nationals of five states and paid

that international organisations are not subject to the national law possessing the immunity from suits before national courts[4]. All this clearly shows us how the legal responsibility of international organisations under international law is so important nowadays.

Over the course of the last century, the peacekeeping operations have been developed from an instrument of preventing conflict between international actors into a multidimensional tool, which covers facilitating political processes, protection of civilians, disarmament, demobilization and reintegration of former combatants, support for the elections, protection and promotion of human rights and the rule of law[5]. However, peacekeeping military missions inevitably imply a risk of loss, damage and human rights violations, which in turn can raise issue of international responsibility. The decision in the *Behrami* case has significant consequences in the context of human rights violations conducted by peacekeeping military personnel. It brought up the urgent question as to whom the illegal conduct should be attributed in the result of violations of international human rights law and international humanitarian law. Unfortunately, reports of human rights abuses have increased, for instance, sexual exploitation and abuse by a significant number of UN peacekeeping personnel in the Democratic Republic of Congo (hereinafter - DRC) in 2004 shows this tendency[6].

Very often military operations take place in the territories of different states. Furthermore, the circumstances on the ground sometimes lead to the deeper involvement in a conflict and to the tendency for peacekeeping military actions to go beyond their original mandate, and may provoke the so-called "*mission creep*"[7]. It is likely that in the future such operational activities on behalf of international organisations will be held more often and responsibility issues may emerge again and again. On the other hand, the rules of international responsibility with regard to international organisations pertain to

considerable sums in compensation. (Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, Boston: M. Nijhoff, 1995, p. 6).

4 August Reinisch, 'Securing the Accountability of International Organizations', in: Global Governance, Vol. 7, No. 2, 2001, p. 133; An international organization's responsibility has different aspects and may be invoked under different systems of law. However, in this work I take the perspective of responsibility under international law. The principal aims of the law of international responsibility are deterrence and provision of remedies to the injured party. For more details see M. Hirsch, *op.cit*., p. 8.

5 United Nations Peacekeeping. Available at: http://www.un.org/en/peacekeeping/operations/peace.shtml, (consulted on 06.05.2013).

6 United Nations General Assembly, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and abuses in United Nations Peacekeeping Operations*, Doc A/59/710, United Nations, 24 March 2005, p. 41.

7 Norrie MacQueen, *The United Nations, Peace and the Cold War*, New York: Pearson Longman, 2011, p. 58.

the public international law, which to date have not been codified by the way of treaty. In 2011 the International Law Commission (hereinafter - ILC) presented the Draft Articles on the Responsibility of International Organisations (hereinafter - DARIO) as the basis for future codification. Since no clear-cut legal basis exists, there are numerous unresolved legal issues.

The international responsibility for military operations has attracted much attention for the first time with respect to peacekeeping operations carried out by the UN in 60s (during and after the Korean War (1950 – 1953) and the UN operation in the Congo (1960 – 1963)[8]. During the operation conducted in the Congo (1960 – 1963), UN peacekeeping forces unlawfully destroyed and confiscated civilian property, at that time the UN accepted the responsibility for injuries inflicted on nationals of five states and paid compensation[9].

The European Union (hereinafter - EU) as a global actor[10], extensively acts in the field of global governance through various instruments, including military operations. It could lead to the situation where the EU and other international organisations might violate fundamental human rights and where the urgent question of **quis custodiet ipsos custode?** or **who guards the guardian?** would come about. Being "*an important contributor to a better world*"[11], the EU has established its own crisis management mechanism after the conflict in Kosovo (1998-1999), and has shifted towards an active international role in maintenance of international peace and security. Consequently, the security and defense now represent one of the most dynamic areas of EU activity. Even though, yet all EU military operations have been modest in terms of numbers and in terms of scope, they have demonstrated the EU's ability to apply the security policy instruments and have given the EU more confidence, which may lead to more ambitious interventions in the future[12]. Thus, the main purpose of this work is to investigate some

8 M. Hirsch, *op.cit*., p. 6.

9 A. Reinisch, *op.cit*., p. 132. ; M. Hirsch, *op.cit*., p. 6.

10 The EU is the second largest military actor in the world after the USA and a leading security actor in Europe. See Julia Schmidt, 'The High Representative, the President and the Commission – Competing Players in the EU's External Relations: The Case of Crisis Management', in: Paul James Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague: T.M.C. Asser Press, 2012, p. 162; Han Dorussen, Emil J. Kirchner and James Sperling, 'Sharing the Burden of Collective Security in the European Union', In: International Organization, Vol. 63, No. 4, 2009, pp. 789 – 810.

11 Council of the European Union, *A Secure Europe in a Better World*, European Security Strategy, Brussels, 12 December, 2003, p. 1.

12 Fraser Cameron, *An Introduction to European Foreign Policy*, New York: Routledge, 2012, p. 109.

questions that emanate from the new and ambitious role of the EU in global security governance[13].

In fact, the question of international responsibility of the European Union for military operations is of great practical and academic significance. From the practical point of view, it will help to find out who is responsible under public international law for any wrongful conduct of EU military crisis management missions, namely for the violations of human rights law and international humanitarian law. Taking into account specific legal status of the EU, the solving of this research problem will make an input into the development of the law of international responsibility. This research therefore aims to contribute to the debate concerning the EU's place in the international responsibility regime. The Master's Thesis attempts to provide answers for the following research questions:

1. To what extent could the Draft Articles on the Responsibility of International Organisations be applicable to the EU?

2. Who will be responsible for possible breaches of human rights law and international humanitarian law caused during the EU military operations by peacekeeping personnel?

Each of these queries brings up more specific questions that will be addressed throughout the Master's Thesis. Accordingly, this research examines the following two hypotheses. **Hypothesis I:** in the context of first research question, it should be indicated that the application of the DARIO to the EU is very narrow due to the EU specific legal nature and unclear division of competences between the EU and its Member States in the area of foreign, security and defence policy. **Hypothesis II:** the wrongful conduct committed during the EU peacekeeping operation will lead to the international responsibility of the EU only in the case when each military operation will have clear definition of it institutional place within the EU, otherwise it will invoke joint responsibility with one or more troop-contributing states. Hence, every particular case of EU military operation should be analysed separately.

Subsequently, the Master's Thesis is organized in three parts. The first part is dedicated to the explanation of EU legal nature under the Lisbon Treaty and to the general analysis of responsibility of international organisations in current international law. Further, the

13 Global security governance is the processes of international comprehensive collaboration among states, international intergovernmental and non-governmental organisations to enhance stability and security during and after armed conflict. See Roy H. Ginsberg and Susan E. Penksa, *The European Union in Global Security: The Politics of Impact*, New York: Palgrave Macmillan, 2012, p. xvii.

second chapter examines the legal framework and practice of the EU military operations. It firstly looks at the division of competences between the EU and its Member States in the area of foreign and security policy and tries to solve the "competence problem" in this respect. This section also considers the relationship between the concept of competence and the concept of international responsibility. Then, it defines the legal framework of EU military operations. The third part is wholly devoted to the attribution of conduct, both in theory and from practical point of view. In this part two case studies are scrutinized. This is then followed by conclusions.

The theoretical considerations and two case studies will help to answer the main research questions. However, this contribution relies mostly on qualitative analysis. Hence, the research was made on the basis of normative, analytical, systemic, comparative, legal and prospective methods, as well as the case study approach. The methodology was employed as follows. First, the thesis presents a normative approach by examining the legal regime of the responsibility of international organisations and the EU's place in it. Second, the systemic and legal approaches became useful for the analysis of the legal framework of EU military operations. Finally, a case study method and a comparative approach are used to identify the specificities of two different EU military operations (ARTEMIS and ALTHEA) in order to test how the attribution of conduct works in practice. Throughout my work, treaties and decisions of international organisations (namely, the UN and the EU) are the starting point of the analysis (primary resources). Also I equally take into account actual practice and benefit from the development of theoretical propositions in the doctrine of public international law (secondary resources). The Draft Articles on the International Responsibility of International Organisations developed by the International Law Commission play a crucial role within my research.

Chapter I. The Responsibility of International Organisations and the EU

1.1. The Responsibility of International Organisations under International Law

The problem of international responsibility for military operations is a complex and multidimensional one. To solve it, we should firstly scrutinize the public international law in order to find out the legal basis for further analysis. In fact, the law of international responsibility is an essential part of public international law and, at the same time, the proof of its effectiveness. In this sense, the international responsibility has to be regarded as an important mechanism for strengthening the rule of law in international relations. However, it is viewed to be "secondary" law, as it does not determine substantial rights and obligations binding international organisations, but its principal aim is to protect "primary" rights and obligations[14].

Nevertheless, the increased activity of international organisations has not been accompanied by a simultaneous progress of the law of international responsibility. Due to lack of practice, the rules regarding the responsibility of international organisations have not been clearly outlined and constitute a non-codified part of international law. It means that the scope, limits and application of international responsibility have not been outlined. However, there were several attempts to fill this gap so far[15]. The most successful endeavour has been made by the International Law Commission (ILC)[16]. It has worked extensively in the field of international responsibility of international

14 M. Hirsch, *op.cit*., p. XIV.

15 See Institut de Droit International, 'The Legal Consequences for Member States of the Non-Fulfilment by International Organisations of Their Obligations towards Third Parties' (1996); International Law Association, 'Accountability of International Organisations: Final Report', Report of the Seventy-First Conference, London, International Law Association, 2004.

16 The International Law Commission (ILC) is a body of experts subordinate to the UN General Assembly, created in 1947 for the purpose of codifying and developing international law.

organisations almost ten years since 2002. With this aim in mind, in 2002 the Working Group was set up under the guidance of Professor Giorgio Gaja appointed as a Special Rapporteur in this respect[17]. Gaja has presented seven reports on this matter. In his work, he has taken as a beginning point the Draft Articles on State Responsibility[18] and has formulated rules with regard to international organisations analogically to the principles of state responsibility. Actually, in this way, the ILC has broadened the doctrine of international responsibility. Consequently, the DARIO was adopted in 2011 and endorsed by the UN General Assembly. Nowadays it constitutes the latest stage in a development of the law of international responsibility.

However, while it is not clear whether the DARIO represents valid international law, it can provide useful guidance as an authoritative statement of the ILC. On the other hand, the ILC's project has been criticized on various grounds, such as its over-reliance on state responsibility regime (talking about international responsibility the ILC does not recognize the difference between states and international organisations) and the limited availability of pertinent practice with respect to the differences between various international organisations[19]. The ILC confirmed that several of the present Draft Articles are based on limited practice and argued that the corresponding provisions are "*more in the nature of progressive development*" comparing to the articles on state responsibility, which could represent codification on this matter, and their legal authority will depend upon their acceptance by international actors[20]. On the other hand, why should it be the legal basis of international responsibility regime? There are several reasons in fact. First of all, the ILC is the UN body worked upon the codification and progressive development of international law. Moreover, several international courts have already expressly referred to this set of rules[21]. And finally, the analysis of the

17 United Nations, International Law Commission, Report of the ILC, 54th Session, 2002, A/57/10, 228, paras 465–488.

18 The ILC has primarily finished its work on the Draft Article on Responsibility of States for Internationally Wrongful Acts in 2001.

19 Cedric Ryngaet, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations', in: *International and Comparative Law Quarterly*, Vol. 60, No. 3, October 2011, p. 999; Kristen E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations;, in: *The Yale Journal of International Law Online*, Vol. 37, 2011, p. 8.; *Legal Responsibility of International Organisations in International Law, Summary of the International Law Discussion Group*, Chatham House,10 February 2011, p. 4 – 5. Available at: http://www.chathamhouse.org/publications/papers/view/109605 (consulted on 24.03.2013).

20 Draft Articles with Commentaries, p. 3.

21 Niels M. Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-Term Review', in:

international responsibility for EU military operations brings us naturally to this Draft, as any other appropriate legal alternative exists. Moshe Hirsch came to the conclusions that the principle according to which international organisations bear international responsibility for their acts is nowadays part of customary international law applicable *mutatis mutandis* to all intergovernmental organisations (he took into consideration the practice, decisions of international institutions and the *opinio juris*)[22]. This means that the DARIO mainly reflects the customary international law.

Concerning the EU, the European Commission has actively participated in the elaboration of the DARIO between 2003 and 2011. Taking a great interest in this issue, it has recognised that it might have particular relevance to EU actions[23]. The further analysis regarding the application of the DARIO to the EU, particularly in the case of EU military operations, will be provided below.

Jan Klabbers and Asa Wallendahl (eds.), *Research Handbook on the Law of International Organizations*, Edward Elgar, Northampton, 2011, p.335; Cedric Ryngaet, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations', in: *International and Comparative Law Quarterly*, Vol. 60, No. 3, October 2011, pp. 998–999.

22 M. Hirsch, *op.cit.*, p. 9 – 10.

23 United Nations, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, Fifty – Sixth Session, 25 June 2004, A/CN.4/545, p. 5.

1.2. The Legal Nature of the European Union

In order to make some judgements in the framework of this research, it is necessary to discover the legal nature of the EU. It is widely recognised that international legal personality or subjectivity is a precondition for an international organisation to be subject of international law[24]. The international legal personality of an international organisation is the ability to directly possess rights and obligations under international law and includes the capacity to bear the responsibility for internationally wrongful acts[25]. In his book F. Naert also adds the capability to "*exercise proper powers on the international plane and/or enter into international legal relations*"[26]. From the other side, Ramses A. Wessel pointed out that the concept of legal personality in international law "*does not find its primary value in the explanation of what international organisations may do on the international scene, but rather in the possibility of demarcating them from their Member States*"[27]. A legal person is then conceived as an entity capable of acting both vis-à-vis its own Member States and vis-à-vis other international legal persons, like third states[28].

As we can see, there is still no proper legal definition of international legal personality. It is more a doctrinal notion. However, the traditional starting point in discussing the international legal personality of international organisation is the advisory opinion of the International Court of Justice (ICJ) on *Reparation for Injuries Suffered in the Service of the United Nations of 1949*, where the Court has partially defined the mentioned concept. According to the ICJ, a subject of international law is capable of possessing international rights and duties and of maintaining its rights by putting forward international claims[29].

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24 M. Hirsch, op.cit., p. 10; Finally, the ILC also confirmed that the legal personality is a precondition of the international responsibility of international organization. See at: United Nations, International Law Commission, Draft Articles on The Responsibility of International Organizations, with Commentaries, International Law Commission, United Nations, 2011, p 9.

25 "Ainsi, toute action ou omission d'une organisation incompatible avec les regles de la coutume générale ou les dispositions d'un traité auquel elle est partie constitue un fait illicite international qui lui sera imputable". See at: Pierre-Marie Dupuy, *Droit International Public*, Paris : Dalloz, 2002, p.182.

26 Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp; Oxford: Intersentia; Portland, 2010, p. 319.

27 Ramses A. Wessel, 'Revisiting the International Legal Status of the EU', in: European Foreign Affairs Review, 2000, p. 510.

28 *Ibid*., p. 509 – 510.

29 *Reparation For Injuries Suffered In The Service of The United Nations*, Advisory Opinion, [1949], I.C.J. Rep. At 179.

The ICJ came to this conclusion in respect of the United Nations, but it is now widely accepted that it applies also to other international organisations[30].

Generally, it has been defined that an international organisation is endowed with international legal personality either explicitly or implicitly[31]. Under public international law, it has the powers expressly conferred on by the constituent instruments and those which are essential to the achievements of its objectives (the so-called "*implied powers*")[32]. Following this statement, we can argue that explicit international legal personality is established by a respect constitutional treaty (for instance, the UN Charter). If there is no constitutional attribution then we may refer to implicit international legal responsibility (in this case, we take into account the practice of particular international organisation, namely the conclusion of international treaties, which is a decisive indicator of the international legal personality)[33].

In fact, the second situation could be applicable to the European Community between 1993 and 2009[34]. Before the Lisbon Treaty, the EU had the implicit legal personality and the pillar structure of its legal order[35]. With the Lisbon Treaty in force on 1 December 2009, the European Union replaced the European Community and finally, a new single EU legal personality has appeared. Article 47TEU stipulates this clearly now. Such express conferral of legal personality has considerable implications for the EU's capacity to act on the international level as an independent subject of international law. Consequently, this provision has established a new normative situation when there are no doubts regarding the legal nature of the EU. Eventually, it has brought to an end the debate on EU legal status held since the Maastricht Treaty[36]. Paul Craig and Grainne de

30 H. Schermers and N. Blokker, *International Institutional Law*, Leiden, Martinus Nijhoff Publishers, 2003, p. 34.

31 Tarcisio Gazzini, 'Personality of International Organizations', in: Jan Klabbers and Asa Wallendahl (eds.), *Research Handbook on the Law of International Organizations*, Edward Elgar, Northampton, 2011, p. 38.; Frederik Naert, International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights, Antwerp; Oxford: Intersentia; Portland, 2010, p. 288.

32 M. Hirsch, *op.cit*., p. 14.

33 F. Naert, *op.cit*, p. 303.

34 Philippe de Schoutheetea and Sami Andoura, 'The Legal Personality of the European Union', in: *Studia Diplomatica*, Vol. LX, No. 1, 2007, p. 9. Available on: http://aei.pitt.edu/9083/1/Legal.Personality.EU-PDS-SA.pdf (consulted on 19.03.2013).

35 It was emphasised by numerous authors. For example, see: Narine Ghazaryan, 'Pre and Post-Lisbon Institutional Trends in the EU's Neighbourhood', in: Paul James Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, the Hague : T.M.C. Asser Press, 2012, p. 200.

36 See Franklin Dehousee et Sami Andoura, 'La personalité juridique de l'Union européenne: le debat qui n'existe pas', in: Christian Franck et Genevieve Duchenne (dir.), *L'Action extérieure de l'Union européenne*

Burca indicated that pursuant to international law, on the one hand, the EU has the right to conclude treaties, the right to be a party to international agreements, the right to be represented and to submit claims, on the other hand, it is a subject to legal obligations and responsibility under international law[37]. The Working Group on Legal Personality established by the Convention on the Future of Europe nonetheless concluded that the EU has become a subject of international law, alongside the Member States but without jeopardising their own status as subjects of public international law[38]. This means that the EU possesses an objective legal personality separately from that of its Member States and may bear the international responsibility solely.

The EU is very often considered as an international organisation *sui generis* (a special one) due to the high degree of "*constitutional*" development and supranational components, which make it look like a federation of states[39]. That's why sometimes scholars make a reference to the supranational nature of the EU[40]. For instance, Mr. Jonas Beraud, the Head of Unit at the Directorate-General for External Policies within the European Parliament, argued that the EU is a "*special legal animal*" under international law, so any traditional approaches used with regard to the UN or the USA, the most important security providers in the world, are inappropriate[41]. This position was confirmed in a series of comments regarding the ILC's work[42]. The representative of the European Commission, Mr. Ruijper, at the UN Sixth Committee put the emphasis on the "*regional economic integration organisation*" concept. He argued that this term was deeply rooted in modern treaty practice and fully reflects the phenomenon of the European integration[43]. As some authors admitted, this notion mirrors the fact that such

: Rôle global, dimensions matérielles, aspects juridiques, valeurs : Actes de la XIe ChaireAGC - Glaverbel d'études européennes, Louvain-la-Neuve : Academia-Bruylant, 2008, pp. 229-253.

37 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, New York: Oxford University Press, 2011, p. 307.

38 CONV 305/02, Final Report of Working Group III on Legal Personality, Brussels, 1 October 2002, p. 6.

39 Joxerramon Bengoetxea, 'The EU as (More Than) an International Organization', in: Jan Klabbers and Asa Wallendahl (eds.), *Research Handbook on the Law of International Organizations*, Edward Elgar, Northampton, 2011, p. 449.; This was also confirmed by Mr Eric Chaboureau, Legal Adviser in the Legal Division of the European External Action Service, Brussels, in his interview for this research on 15 March 2013.

40 A. Reinisch, *op.cit*., p. 131.

41 Jonas Condomines Beraud, Head of Unit, Directorate-General for External Policies, European Parliament, "*Sidelined or at the Center? What's the Role of the EP in the Crisis*", European Parliament, Brussels, 5th of March, 2013.

42 United Nations, Sixth Committee, Summary record of the 14th meeting, 22 December 2003, UN Doc. A/C.6/58/SR.14, para 13.

43 *Ibid*.; See also some arguments in favor of this concept in: Pieter Jan Kuijper and Esa Paasivirta, 'EU

integration organisation acts through close links with its Member States in implementing international obligations[44]. Moreover, during the work of the ILC on the DARIO, the European Community admitted that the EC/EU differed from the classical international organisation due to these considerations:

1. the EC/EU is not only a forum for its Member States, but it is an actor itself on the international arena;

2. the EC/EU constitutes a unique legal order, establishing a single market, with its own legislation, which is a part of the national law of the Member States[45] .

It was also confirmed that, "*while the EC is in many ways sui generis, it is clear that all international actors, be they States or organisations, need to recognize their international responsibility in the event of any wrongful acts*"[46].

In fact, a close link exists between legal personality and responsibility of international organisation under public international law. In general, the scope of the international personality depends on the functions and competences, defined usually by a constitutional instrument, of a particular international organisation. Like states, international organisations are unitary actors or, in other terms, international legal persons. In spite of their unitary nature, international organisations are made up of member states, and this fact poses the problem of the division of responsibility in the case of illegal acts. However, their personality is not original but derived from the sovereignty of their member states[47]. Actually, this aspect is the most important reason why the responsibility of international organisation differs from the state responsibility. In this sense, the Draft Articles could be regarded as a legal basis for preventing and solving any accountability issues. Niels M. Blokker agreed that the Draft Articles "*seem perfectly suitable to be applied to a variety of international organisations*"[48].

International Responsibility and its Attribution: From the Inside Looking Out', in: Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford; Portland, Oregon: Hart Publishing, 2013, p. 68.

44 P. J. Kuijper and E. Paasivirta, *op.cit*., p. 68.

45 United Nations, International Law Commission, Responsibility of international organizations, Comments and observations received from international organizations, Fifty – Sixth Session, 25 June 2004, A/CN.4/545, p. 5.

46 Comments and observations received from international organizations, p. 5.

47 N. M. Blokker, *op.cit*., p.321.

48 *Ibid*., p.336.

To sum up, at this stage, we can undoubtedly claim that the EU is a subject of public international law with proper international legal personality, which means that the EU itself could be responsible for internationally wrongful acts. In consequence, not being the party to the international humanitarian law treaties, the EU is obliged under the customary law to respect international humanitarian law[49]. Concerning human rights, the EU must respect its own human rights law and customary human rights law as well[50].

49 M. Hirsch, op.cit., p. 36

50 International customary law is applicable *mutatis mutandis* to international intergovernmental organizations. (See M. Hirsch, *op.cit*., p. 31.) This issue first had raised with respect to peacekeeping operations carried out by the international organisations after the UN operation in Congo (1960 – 1963). It was claimed that the UN military forces had violated their obligations under customary international law (international humanitarian law). (Moshe Hirsch, *op.cit*., p. 182.)

1.3. Applicability of the Rules on International Responsibility to the EU

Now when there is no more room for doubts that the EU is an international organisation, we can go to the analysis of the DARIO in order to find out whether it can be applicable to the EU military operations or not. The Draft Articles on the Responsibility of International Organisation are a set of 66 draft articles, which have been elaborated by the ILC after analysing law and practice of international responsibility, as well as the *opinio juris*. The DARIO is preceded by a commentary that outlines some significant elements with regard to the codification and practice in the field of international responsibility. In this part I am going to analyse the most relevant Draft Articles to our particular case.

Article 2 of the Draft Articles states that an international organisation is "*an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality*"[51]. In accordance with this requirement an international organisation, to which these provisions would apply, has to hold international legal responsibility. The EU legal nature lies in the scope of this provision. At the first glance, we can therefore claim that the DARIO is applicable to the Union. Evidently, these rules would be relevant for all kinds of EU related litigation, may it arise in the sphere of human rights, trade, or the law of the sea[52]. However, the special relationship between the EU and its Member States may cause some difficulties in this respect. Based on this, the European Commission argued that the ILC should include special rules (*lex specialis*) on responsibility or special exceptions into the DARIO with the aim of addressing the distinguishing legal nature of the European Communities and other international organisations[53]. In contrast, the ILC decided not to take the specific legal nature of the EC/EU into consideration[54]. Eventually, the Draft Articles are not sufficiently relevant to the specific structure and functioning of the EU. As Pieter J. Kuijper and Esa Paasivirta rightfully argued, the International Law Commission in its work had not recognized the "*significant degree to the EU's operational realities based*

51 United Nations, International Law Commission, Draft Articles on the Responsibility of International Organizations, United Nations, 2011, p. 2.

52 Frank Hoffmeister, 'Litigation against the European Union and Its Member States – Who Responds under the ILC's Draft Article on International Responsibility of International Organizations?', in: The European Journal of International Law, Vol. 21, No. 3, 2010, p. 725.

53 United Nations, Sixth Committee, Summary Record of the 21st Meeting, 18 November 2004, UN Doc A/C.6/59/SR.21, p. 5.

54 Seventh Report, p. 38.

on executive federalism", but considered it as an example of an traditional international organisation acting through its own organs[55].

The DARIO does not introduce any special set of rules, which could be applicable to the EU, but it contains one interesting thing in this respect instead. Article 64 of the Draft Articles says that the DARIO does not apply in the situation when the different aspects of responsibility of international organisation are "*governed by a special rules of international law*", which may be reflected in "*the rules of organisation applicable to the relations between an international organisation and its member*"[56]. The aforementioned article contains the reference to the *lex specialis* and, in fact, indicates that it may be special rules in relation to the international responsibility. Obviously, in the absence of special provisions for the EU, we will follow the general rules on responsibility of international organisations embedded within the DARIO.

Draft Article 3 states the general principle: "*Every internationally wrongful act of an international organisation entails the international responsibility of that organisation*"[57]. Under the provision of Draft Article 4 such act exists when conduct (either an act or omission) is attributable to that organisation according to international law and there is a breach of an international obligation. It should be noted, in international legal order subjects of international law are bound by treaty and non-treaty obligations. In others words, the obligation derives either from a treaty binding the international organisation or from any other source of international law, for example customary international law[58]. Accordingly, we may deal with contractual and non-contractual responsibility under public international law respectively[59]. International responsibility arises for any violations of international agreement concluded by the EU, even if the Member States in fact implement certain obligations of the agreement[60]. The same happens when only the Member States conclude agreement. On the other hand, the responsibility is likely to be shared between the EU and Member States in the case of mixed agreement and the obligations of customary international law[61]. Thus, international responsibility for

55 Pieter Jan Kuijper and Esa Paasivirta, *op.cit*., p. 68.

56 Art. 64 DARIO.

57 Draft Articles, p. 2.

58 United Nations, International Law Commission, Draft Articles on The Responsibility of International Organizations, with Commentaries, United Nations, 2011, p. 14.; See also Piet Eeckhout, *EU External Relations Law* (2nd edition), Oxford: Oxford University Press, 2011, p. 299.

59 Interview with Mr Eric Chaboureau, Legal Adviser, Legal Division of the European External Action Service, Brussels, 15 March 2013.

60 P. J.Kuijper and E. Paasivirta, *op.cit*., p. 36.

61 *Ibid.*

EU military operations belongs to non-contractual responsibility. P. J. Kuijper and E. Paasivirta also confirmed that according to the trend in the development of the CFSP towards more and more operational actions, the EU will face with a greater risk of non-contractual dimension of international responsibility[62].

It is widely accepted that the responsibility of international organisations contains the following elements: a breach of an international obligation and the attribution of this breach to the respective international organisations; the damage as the result of the unlawful act; and causation or a causal link between the wrongfulness and the damage[63]. Therefore, the ILC defined damage as not an element necessary for international responsibility to arise. In most cases an internationally wrongful act will entail material damage. However, it is conceivable that the breach of an international obligation occurs in the absence of any material damage. Whether the damage will be required or not depends on the content of the primary obligation[64].

Then, Draft Article 6(1) stipulates that the conduct of an organ or agent of an international organisation shall be considered as an act of that organisation under international law and it matters not what position the organ or agent holds within the institutional structure of that organisation. In this Article, the ILC made a reference to two terms "organ" and "agent". The respective definitions of these notions can be found in Draft Article 2, where "*organ of an international organisation*" means any person or entity, which holds this status with regard to the rules of the organisation, whereas "*agent of international organisation*" is an official or another person or an entity, other than the organ, who is in charge of carrying out, or helping to carry out, functions of an international organisation[65]. The aforementioned definitions cover not only natural persons (officials or not), but all other entities. In its Commentaries the ILC noted that due to the variety of international organisations, it is preferable not to adopt the uniform definitions of these notions[66]. Also the ILC clarified that the different scope that the terms "*organ*" and "*agent*" might have within different international organisations does not exert an influence upon the attribution of conduct[67]. This is of great importance that the international organisation

62 *Ibid*., p. 51.

63 M. Hirsch, *op.cit*., p. 12.

64 Draft Articles, p. 14.

65 Draft Articles with commentaries, p. 3.

66 Draft Articles with Commentaries, p. 6.; The definition of an "agent" is based on the advisory opinion of the International Court of Justice on Reparation for Injuries Suffered in the Service of the United Nations, in which the Court expressed its understanding of the notion"agent". See: *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174 at p. 177.

67 Draft Articles with Commentaries, United Nations, 2011, p. 12.

shall be responsible for "*the conduct of all the organs, instrumentalities and officials which form part of the organisation and act in that capacity*"[68]. It is particularly relevant to the question of conduct attribution to an international organisation. A more detailed and precise examination of relevant provisions in the connection with EU military operations will be made in the framework of the Chapter III.

The fact that an international organisation is responsible for any internationally wrongful act, does not exclude the existence of parallel responsibility of other subjects of international law, particularly Member States, in the same circumstances. Accordingly, the conduct simultaneously attributed to an international organisation and a state entails the international responsibility of both subjects. The Draft Article 16 mostly deals with this issue. And the whole Part Five of the DARIO is also applicable to the responsibility of a state in the light of the activity of an international organisation.

68 *Ibid.*

Chapter II. The legal framework and practice of the EU military operations

2.1 CFSP and CSDP: the "Competence Problem"?

The issue of competence and its distribution between the EU and its Member States is the heart of the matter in the light of international responsibility for EU military operations. Doubtless, it is directly relevant to the allocation of international responsibility in this situation. Any discussion relating to the internal division of competence in the framework of international organisations must begin with the analysis of the "*rules of the organisation*"[69]. Hence, the following chapter at the outset will determine the post-Lisbon division of competences in the area of CFSP and CSDP[70]. With this aim in mind I am going to answer the following question: who acts under CFSP and CSDP?

Not like other areas of the EU's competences, the provisions on the CFSP/CSDP are located in the TEU and are, to some extent, separated from other rules of EU competences in the TFEU. Thus, title V of the TEU regulates the Union's external actions. Article 24 (1) TEU says:

> "*The Union's competence in matter of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's*

69 According to the Draft Article 2 (b) "*rules of the organization*" include the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.

70 Common security and defence policy (before the European security and defence policy), is an integral part of the CFSP and includes the progressive framing of a Union defence policy. On the other hand, the CSDP policy provides the EU with an operational capacity for civilian and military operations. The ESDP as the separate dimension of the CFSP was introduced by the Cologne and Helsinki European Councils in 1999. It aims at crisis management in third countries, conflict prevention and post-crisis development. Common Foreign and Security Policy (CFSP) of the European Union. Available at:http://eeas.europa.eu/cfsp/index_en.htm, (consulted on 26/04/2013)). See also Bálint Ódor, Zoltán Horváth, *The Union after Lisbon: The Treaty Reform of the EU*, Budapest: HVG-ORAC Publishing House Ltd., 2010, p. 308.

> *security, including the progressive framing of a common defence policy that might lead to a common defence*".

This provision, in fact, contains two essential elements:

- EU competence in this area covers all fields of foreign policy;
- it includes all issues relating to security.

The aforementioned provision deals with a very vague area as we can see from the wording of this article. Apparently, the fact that the EU holds legal personality does not mean that its competence in the field of the CFSP/CSDP can be analysed simply. Even though, the EU shall have the competence to define and implement a CFSP, the legal nature of such competence is not clarified further. In accordance with article 2 TFEU, the EU exercises exclusive, shared and supporting competences. As Paul Craig and Grainne de Burca argued, none of the three mentioned categories is suitable in this case[71]. Nevertheless, it is beyond doubt that the EU has not been attributed with exclusive competence in the conduct of CFSP by the Lisbon Treaty, because it is not directly mentioned in Article 3 TFEU[72]. Paul Craig and Grainne de Burca explained that "*the substance of the CFSP simply does not accord with the idea of exclusive EU competence*"[73]. Moreover, it is not listed in Article 6 TFEU, which contains provisions relating to the competence to support, coordinate, or supplement the Member State actions. Piet Eeckhout considers the EU competence in the area of CFSP as neither exclusive nor shared, but locates it rather in an indefinite category[74]. He also adds that article 24 (1) TEU excludes the adoption of legislative acts in the framework of the CFSP and in this sense the CFSP does not belong to the shared competence[75]. On the other hand, Ramses A. Wessel pointed out that there are indeed good reasons in favour of shared competence in the area of CFSP and article 2 (2) TFEU consequently applies to the CFSP/ CSDP [76]. Jean-Claude Piris meanwhile considers that the specificity of

71 P. Craig and G. de Búrca, *op.cit*., p. 89; See also A. Sari and R. A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford, Oxford University Press, 2012, forthcoming); J.-C. Piris, *op. cit*., p. 75-76.

72 See A. Sari and R. A. Wessel, *op.cit*, p.171.

73 P. Craig and G. de Búrca, *op.cit*., p. 89.

74 P. Eeckhout, *op.cit*., p. 167.

75 J.-C. Piris*, op.cit.,* p. 171.

76 Ramses A. Wessel, 'Division of International Responsibility between the EU and Its Member States in the Area of Foreign, Security and Defence Policy', in: Amsterdam Law Forum, Vol. 3, No. 3, 2011, pp. 43 – 44.

this field made it politically difficult to put it within one of the mentioned categories of competences[77]. But then he admits that, therefore, the CFSP, most likely, pertains to the category of shared or concurrent competences as the list of shared competences is non-exhaustive (Article 4 TFEU)[78]. This approach nevertheless is unconvincing.

Ramses A. Wessel and Leonard Den Hertog made the presumption in their contribution that the division of competence within the EU suggests that the Union itself would be primarily responsible for any wrongfulness in the field of foreign, security and defence policy[79]. However, such statement seems very questionable. In fact, the scope of the CFSP/CSDP is extremely broad and it is very difficult to catch it in the legal dimension. Likewise, it is mostly described in terms of its objectives and instruments[80], which are different from the other legislative instruments adopted by the EU. They are considered as "international law decisions" with the core features of supranational EU law (for instance, direct effect)[81]. As a result, it is not surprisingly that the CFSP/CSDP is subject to specific rules and procedures. The terms of Article 24 (1) confirm this. Furthermore, the EU has to conduct, define and implement the CFSP on the basis of mutual political solidarity among the Member States (Article 24 (2) TEU). Though, the Lisbon Treaty introduced more efficient structures, decision-making procedures, legal and institutional tools in the field of CFSP, this area remains more intergovernmental and less supranational by comparison with the other EU competences[82]. The Lisbon Treaty also established the so-called permanent structured cooperation as a new instrument aimed at closed integration within the CFSP/CSDP. Under Article 46 (1) TEU the participation in this kind of cooperation opens only to those Member States that make a political commitment to develop their military capabilities and depends on the contribution to the development of rapid response capabilities[83].

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77 J.-C. Piris, *op.cit.,* p. 171.

78 *Ibid.,* p. 77; Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform,* New York: Oxford University Press, 2010, p. 182.

79 Ramses A. Wessel and Leonard Den Hertog, 'EU Foreign, Security and Defence Policy: a Competence-Responsibility Gap?', in: Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford; Portland, Oregon: Hart Publishing, 2013, p. 356.

80 Article 25 TEU contains the list of such instruments and states the EU conduct its CFSP by defining general guidelines (the European Council), adopting decisions, which define actions and positions of the EU (the Council of the EU), or adopting decisions defining arrangements for the implementation of such decisions. See Paul Craig and Gráinne de Búrca, op.cit., p. 328.

81 *Ibid.*, p. 330.

82 *Ibid.*, p. 89; See also Jolyon Howorth, 'Decision-making in Security and Defense Policy: Towards Supranational Inter-Governmentalism?', in: Cooperation and Conflict, Vol. 47, 2012, pp. 433 – 453.

83 B. Ódor, Z. Horváth, *op.cit.,* p.309.

Although the pillar system does not exist anymore, the CFSP still maintains its intergovernmental mechanism of decision-making[84]. On the basis of the points mentioned above, the intergovernmental method of the CFSP/CDSP allows me to state that the term "competence" in this field is inappropriate in any context (either from the side of the EU or from the side of the Member States). The term "cooperation" is more suitable. However, taking into account the degree of specificity of the CFSP/CSDP, it is difficult to evaluate where the border-line between competence/independence and cooperation lies in the post-Lisbon run due to the dynamic and developing nature of this area. Consequently, we have been faced with very complicated and thorny "competence problem", which requires further study.

It should be noted that the complex nature of CFSP/CSDP is not only related to the division of competences, but also to the actual use of these competences in specific situations[85]. Very often the EU actions in the foreign, security and defence domain are characterized by confusion as to whether it is the Member States which act collectively or whether it is the Union taking action. Furthermore, this special relationship between the EU and its Member States is not reflected in the DARIO. Evidently, it demands a case-by-case analysis, which is to take into account the special position Member States occupy in conducting EU military operations.

Considering international responsibility, Ramses A. Wessel indicated that a distinction should be made between international agreements concluded by the EU, decisions made by the EU and military operations within the CSDP[86]. If in two first situations the division of competences is more or less clear, in the last case the attribution of conduct is quite complex. Even in the practice of the WTO dispute settlement we could find some references in support of a "*special rules of attribution*" with regard to the EU, according to which the Member States are regarded as organs of the Union[87].

The ILC remarked in its commentaries that the question of conduct attribution can only arise once the question of apportionment of obligations and responsibilities has been

84 Under the Article 24 (1) TEU the decision-making continues to be in the hands of the European Council and the Council, acting unanimously, while the others institutions, namely Commission and European Parliament, are limited in their action. See also: Bálint Ódor, Zoltán Horváth, *op.cit.,* p. 300; Paul Craig, *op.cit.*, p. 182; Piet Eeckhout, *op.cit.*, p. 166.

85 R. A. Wessel and L. Den Hertog, *op.cit*., p. 357.

86 R. A. Wessel, *op.cit*., p. 40.

87 Joni Heliskoski, 'EU Declarations of Competence and International Responsibility', in: Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford; Portland, Oregon: Hart Publishing, 2013, p. 194.

answered in the affirmative[88]. Yet, in practice of mixed agreement of the EU a declaration of competence is used in order to clarify the division of competence and to define the further attribution of responsibility[89]. But could such declaration of competence be a solution in our particular case? In other terms, the question is whether it could be considered as a useful method of governing the issue of international responsibility for EU military operations. It may appear that it would become a right solution in this case. These are just first thoughts that crossed my mind while considering the significance of such declarations with regard to the responsibility of the EU. I am strongly convinced that this issue deserves special attention in the study of the international non-contractual responsibility of international organisations.

88 International Law Commission, Responsibility of international organisations, Comments and observations received from international organizations, Fifty – Sixth Session, 25 June 2004, A/CN.4/545, p. 14.

89 See Joni Heliskoski, *op.cit*., pp. 189 – 212; Pieter Jan Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', in: Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford; Portland, Oregon: Hart Publishing, 2013, p. 55.

2.2 EU Military Operations: Who Does What?

The EU military crisis management operations, being an instrument of the CSDP, aim at the peace-keeping, crisis prevention and strengthening international security. Since the deployment of the first EU civilian mission in Bosnia and Herzegovina (BiH) and first military operation CONCORDIA in 2003, the EU crisis management has been entered into its operational phase and has been developed increasingly. Yet, the EU has carried out around thirty operations and missions[90], which have fulfilled a variety of tasks (prevention of a potential crisis or its escalating, assistance in other missions, stabilisation of a situation, protection of refugees, evacuation of European citizens in a crisis area, etc.). Among them there are eight military operations, eighteen civilian missions and one of mixed character (see the list of completed and on-going CSDP operations in Annex I)[91]. They include police missions, border control missions, technical assistance mission, peace monitoring missions, rule of law missions and military missions[92]. Half of all the operations were primarily requested by host states or international institutions and the other half was initiated by the EU itself. In two operations, the EU and NATO coordinated in accordance with the "Berlin Plus" Arrangement (for instance, CONCORDIA in Macedonia, and Althea in BiH). Several CSDP operations were launched to replace troops from NATO (CONCORDIA) or the UN (in the DRC in 2003). Others were coordinated by other international organisations as the ASEAN (in Indonesia), and the OSCE (in Kosovo)[93]. The CSDP operations are always responses to crises and each of them is of complex nature[94] (see the EU crisis response cycle in Annex II). In order to analyse the international responsibility for EU military operations we have to clarify who is involved in such missions and basically who does what.

In this section I will focus on the procedure of establishing and deploying the EU military operations as it is significant for the attribution of conduct and international responsibility. First and foremost, let us have a look at the legal basis of EU military

90 For each operation and mission, detailed and updated information can be found on the webpage of the Council. Available at: http://www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en , (consulted on 28.04.2013).

91 For more information see also EU Operations. European External Action Service. Available at: http://www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en , (consulted on 28.04.2013).

92 Typology was made by the prof. D. Mahncke and presented during his course in the College of Europe.

93 R. H. Ginsberg and S. E. Penksa, *op.cit*., p. 31.

94 R. H. Ginsberg and S. E. Penksa distinguished four aspects of CSDP operations: mission catalyst (the motivations, values and interests, the geopolitical context); mission mandate (objectives of the operation); mission launch (planning, recruiting personnel); mission evaluation (operational effects). See R. H. Ginsberg and Susan E. Penksa, *op.cit*., p. 58 – 59.

operations. The legal framework for CSDP operations, as F. Naert correctly noticed, is a mixture of EU law and international law[95]. Despite an unclear division of competence in the area of CFSP/CSDP, the procedure of establishment of military operations is well-codified[96].

International law

Under international law the legal basis of the CSDP operations includes the UN Charter, notably Chapter VII and Chapter VIII, UN Security Council resolutions and other international agreements. There may also be a further specific basis such as the international law of the sea, like, for instance, in the counter-piracy operation ATALANTA[97]. The EU usually concludes a Status of Mission Agreement (EU SOMA) with the host state to regulate the status of an operation in its territory and the EU Status of Forces Agreement (EU SOFA). The EU SOFA is a multilateral agreement which defines the legal status of military and civilian personnel seconded to the EU by the Member States[98]. In theory, any state or international organisation that wants to intervene in a conflict in another state, would conclude a SOFA or SOMA with the host state[99]. The operation may also rely on NATO assets ("Berlin Plus" Agreement) or may be autonomous or allow a participation of third states. The conditions of third states' participation in a CSDP operation are laid down in a special agreement[100] concluded between that State and the EU (it can be concluded *ad hoc* for a particular operation or

95 F. Naert, *op.cit*., pp. 193 – 253.

96 Cesare Onestini, Head of Division Corporate Board Secretariat – SG1, EEAS, *"External Action Service: The Challenge of Building European Diplomacy"*, EEAS, Brussels, 5th of March, 2013.

97 Frederik Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in: Enzo Cannizzaro, Peolo Palchetti, Ramses A. Wessel (eds.), *International law as law of the European Union,* Boston : Martinus Nijhoff Publishers, 2012, p. 193.

98 See Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), 2003/C 321/02.

99 Ademola Adass, 'Extraterrotorial Collective Security: The European Union and Operation ARTEMIS', in: Martin Trybus and Nigel D. White (eds.), *European Security Law*, New York: Oxford University Press, 2007, p. 141.

100 See Draft model agreement between the European Union and a third state on the participation of a third state in an European Union military crisis management operation. Available at: http://pesc-psdc.esteri.it/NR/rdonlyres/BAD14638-A88F-4410-8A22-47AF23AC3EB0/15287/Draft2.pdf , (consulted on 29.04.2013).

in the form of a framework agreement for military operations generally)[101]. Furthermore, alternative provisions may exist, for example, extending a status agreement for a non-EU operation to an EU operation by a UN Security Council resolution (as for ALTHEA[102]).

EU Law

Article 42(1) post-Lisbon EU Treaty stipulates:

> *"The common security and defence policy … shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter".*

Under Article 42 (3) TEU the Member States are obliged to provide civilian and military capabilities to the EU for the implementation of the CSDP as the Union itself does not possess necessary assets and capabilities.

Therefore, the CSDP operations may vary greatly. According to the article 43, they

> '*shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation*' and may '*contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories*'.

Council Joint Action

The main legal instrument of each CSDP operation is a Council decision (the Council Joint Action), based on Articles 43 and 28 TEU. This legal act generally contains provisions on the mandate, the status and the structure of the operation, command and control relations, financial arrangements, the participation of third states, and the duration of the operation etc. It launches the military operation, appoints the Operation

101 See for example Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations, Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations and others.

102 See United Nations Security Council Resolutions 1551 (9 July 2004), para. 20 and 1575 (22 November 2004), para. 12.

Commander and defines its financial issues. Joint Action is elaborated by the Working Group of Foreign Relations Councellors (Relex Group) and adopted by the Council. The Council's work is prepared by several subsidiary bodies and by the High Representative of the Union for Foreign Affairs and Security Policy, who is assisted by the European External Action Service[103]. CSDP operations require unanimity (Article 31 TEU), which means that all Member States except Denmark and any Member State abstaining, have voted in favour of an operation. It can be argued that voting for an operation that will entail engagement in an armed conflict makes the State a party to that conflict, irrespective of whether its forces participated in the operation[104].

Political and Security Committee (PSC) Decisions

The PSC is a permanent crisis management structure of the Council according to Article 38 of the TEU. It plays a central role in the definition of the EU's response to a crisis and a follow-up to crisis management operations[105]. Moreover, the PSC exerts political control of the operation[106]. It draws up a Crisis Management Concept, a planning document, which provides the overall consistency of an operation and describes the EU's political interests, aims and objectives, as well as the main strategic options for responding for a particular crisis situation[107]. During a crisis management operation the Council may authorise the PSC to take the relevant decisions concerning the political control and strategic direction of the operation (Article 38 TEU).

Operational Planning Documents

Operation Planning Documents include the Concept of Operation (CONOPS) and the Operation Plan (OPALAN), both are agreed by the Council unanimity. The OPALAN document regulates the use of force and in details describes how the operation is to be

103 Article 27 of the TEU.

104 Frederik Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in: Enzo Cannizzaro, Peolo Palchetti, Ramses A. Wessel (eds.), *International law as law of the European Union*, Boston : Martinus Nijhoff Publishers, 2012, p. 202.

105 For more details see the Political and Security Committee. Available at: http://europa.eu/legislation_summaries/glossary/political_security_committee_en.htm, (consulted on 28.04.2013).

106 Jochen Rehl and Hans-Bernhard Weisserth (eds.), *Handbook on CSDP: the Common Security and Defence Policy of the EU*, Vienna: Directorate for Security Policy of the Federal Ministry of Defence and Sports of the Republic of Austria, 2010, p. 61.

107 *Ibid.,* p. 60.

organised. Usually it is elaborated by the Operational Commander[108]. Once the OPLAN has been approved, the Council may launch the operation[109].

As we have seen, firstly, the key decision-making body in the CSDP operations is the Council, which decides to launch, to conduct and to terminate the operation, and approves such key documents as the CONOPS and the OPLAN. Secondly, the PSC plays a significant role and exercises political control over the whole of military operations on the decision-preparing level. The PSC takes appropriate action with regard to the participation of third states in an operation. Thirdly, the EU Operation Commander is appointed by the Council or the PSC with further Council authorization. Since it is a highly intergovernmental area, the Member States meet at different levels (the PSC, the Council of the EU) and play a pivotal role in its own capacity than the EU institutions.

Even though the good decision-making structure functions well relating to the EU military operations, there are not any permanent capabilities for such operations and, consequently, any permanent military command and control structure. The EU military operations are carried out by troops voluntarily sent at the disposal of the EU by its Member States, and sometimes by non-member States. Article 42 (3) TEU says that the Member States shall make civilian and military capabilities available to the Union for implementation of the CSDP. Dr. Dieter Mahncke admitted during his presentation that in the area of CSDP the EU has good structures and decision making, but in terms of everything else it depends on the Member States, which is one of its weaknesses[110].

Therefore, clear and sufficient arrangements are needed to provide the successful conduct of military operations. Hence, the EU possesses three strategic options for commanding and controlling military operation:

NATO common assets and capabilities in accordance with the "Berlin Plus" arrangements[111];

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108 *Ibid.*, p. 61.

109 *Ibid.*

110 Presentation by Professor Dr. Dieter Mahncke on "CSDP Operations: Case Studies", College of Europe, Natolin Campus, Warsaw, 14 – 15 March 2013.

111 The „Berlin Plus" Agreement between the EU and NATO finalised by an exchange of letters (whose exact content remains confidential) in March 2003. It rests on the principle of the presumption of availability of NATO assets and capabilities for CSDP operations. In this case NATO's Supreme Headquarters Allied Power Europe (SHAPE), provide offices and facilities and de-facto hosts the EU Operation Headquarters. See Luis Simon, 'Command and Control? Planning for EU Military Operations', in: EU Institute for Security Studies Occasional Paper, No. 81, 2010, p. 15; The Copenhagen European Council adopted on 12 and 13 December 2002 a Declaration stating that the "Berlin plus" arrangements and the implementation thereof will apply only to those EU Member States which are

recourse to the assets and capabilities of the Member States under the Framework Nation concept;

the EU can activate its Operations Center within the EU Military Staff to plan and conduct an autonomous operation (special decision of the Council is required)[112].

In fact, the Council decides which option to choose, either the "Berlin Plus" scenario or the "Framework Nation" operations[113].

Therefore, the EU's military crisis management can only be successful if the varieties of different instruments are well-coordinated with each other. Without doubts, one of the most striking features of it now is a growing capabilities-expectation gap, what means that missions are growing faster than capabilities (institutional, financial and procedural)[114].

From these arguments one might conclude that the CSDP operations lie in the complicated decision-making structure. It comprises three levels of decision-making: international, European and national. First, the EU military operation is launched on the basis of the UN Security Council mandate, since only this body is charged with the authorization of military action including the establishment of peace-keeping operations in order to restore international peace and security[115]. Secondly, it requires the political decision of the Council of the EU (a Joint Action) to activate the EU's military crisis management system. Thirdly, each Member State decides whether to provide the necessary capabilities and assets for an operation or not. The military crisis management of the EU, as a result, is characterized by the interplay between the EU, the EU Member States and other subjects of international law (the UN, NATO, non-Member States). And the last but not least point, the planning of the "Berlin Plus" operations involves parallel decision-making processes in the North Atlantic Council (NATO) and the PSC. It leads to the conclusion that various legal orders, legal regimes and institutional mechanisms are involved in the setting-up process of an EU operation. Ramses A. Wessel underlined that without explicit rules on the division of responsibilities "*military operations are primarily to be seen as being conducted by the EU*"[116]. However, in my personal opinion it demands case-by-case analysis.

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also either NATO members or parties to the "Partnership for Peace", and which have consequently concluded bilateral security agreements with NATO.

112 J. Rehl and H. Weisserth, *op.cit.*, p. 62.

113 Luis Simon, 'Command and Control? Planning for EU Military Operations', in: *EU Institute for Security Studies Occasional Paper*, No. 81, 2010, p. 15.

114 Karen E. Smith, *European Union Foreign Policy in a Changing World* (2nd edition), Cambridge: Polity Press, 2008, p. 72.

115 See Articles 24 and 42 of the UN Charter.

116 Ramses A. Wessel, *op.cit.*, p. 41.

Chapter III. What Happens If An International Organisation Breaches Its International Obligations?

3.1. Attribution of Wrongful Conduct to International Organisation in International Law

As it could be seen, it is very hard to analyze the CFSP in the legal discourse due to its very dynamic nature. Below the main emphasis is to be placed on the question of attribution of wrongful conduct under international law, rather than internal division of competences between the EU and its Member States. The first is different from the second one. In recent years the issue of conduct attribution in military operations has become the subject of academic discussion[117], since it is a decisive, but not always clear, point for the invocation of international responsibility. The following considerations attempt to find the suitable criteria for the assessment of attribution issues.

In the academic literature therefore several approaches exist. M. Hirshe emphasised that three factors determine the rules of attribution in international law: control link, institutional link and territorial link[118]. By contrast, P. J. Kuijper and E. Paasivirta introduced three models of conduct attribution: the "organic model", the "competence model" and the "consensus model"[119]. According to the "*organic model*" the international organisation acts through its organs. In other terms, the conduct, which can lead to the international responsibility, is attributed to the organs or the personnel of international organisation. It means an automatic attribution of illegal conduct to the particular subject of international law. Certainly, the DARIO has been elaborated on the basis of this approach[120]. It seems obvious that the aforementioned model easily works for the

117 See in particular the contributions of the following authors: A. Sari (2011), R. A. Wessel (2011), F. Hoffmeister (2010).

118 M. Hirsch, *op.cit*., p. 62.

119 P. J. Kuijper and E. Paasivirta, *op.cit*., p. 48.

120 See for instance Articles 6-9 of the DARIO.

EU as well, when it acts using its organs. Under the "*competence model*" the responsibility depends on the division of competences[121]. And finally the "*consensus model*" is mostly about the joint responsibility of international organisation and its member states[122].

Being the part of customary international law[123], the rules of attribution however play a prominent role in the DARIO[124]. The ILC set up four articles relating to the attribution of conduct. Moreover, in its Second Report the ILC put stress upon the so-called "*functional link*" between the agent and the organisation acting through one of its bodies established, directly or indirectly, on the basis of the constituent instrument of the organisation[125]. This is of great importance that the international organisation shall be responsible for "*the conduct of all the organs, instrumentalities and officials which form part of the organisation and act in that capacity*"[126].

A final aspect to be scrutinized, particularly in a study focusing on the international responsibility for EU military operations, is the legal status of such operations. The CSDP operations are regarded as "*a separate legal entity or as an organ of the EU*"[127]. F. Naert came to such a conclusion after analysing Joint Actions and the relevant provisions of SOFAs, which provide the rights and obligations of operations and its personnel. Nevertheless, the EU has not clearly expressed this position as the UN did with regard to the UN peacekeeping forces[128].

F. Hoffmeister rightfully indicated that "*this well-established rule reflects the self-evident proposition that the organization acts through its organs with the consequence that the latter's acts are attributable to the former*"[129]. Draft Article 7 is also very important in the light of the attribution problem. It stipulates that "*the conduct of an organ of a state or an organ or agent of an international organization that is placed in the disposal of another international organization shall be considered under international law an act of*

121 P. J. Kuijper and E. Paasivirta, *op.cit*, p. 54.

122 *Ibid*., p. 63.

123 *Ibid*, p. 67.

124 See Part II, Chapter II "Attribution of conduct to an international organization" of the DARIO.

125 United Nations, International law Commission, Second Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, International Law Commission, Fifty-fifth session, Geneva, 2 April 2004, A/CN.4/541, p. 9.

126 United Nations, International Law Commission, Responsibility of International Organizations, Comments and observations received from international organizations, Fifty – Sixth Session, 25 June 2004, A/CN.4/545, p. 13.

127 F. Naert, op.cit., p. 355.

128 Second Report of the ILC, *op.cit*., note 125, p. 17.

129 F. Hoffmeister, *op.cit.*, p. 726.

the latter organization if ***the organization exercises effective control over that conduct***"[130] (emphasis added). The UN has provided comments on this matter and stated that a necessary element in the determination of whether a person or entity is an "agent" of the organization depends on whether such a person or entity performs the mandated functions of the organization, however, it may not be decisive and should be considered on a case-by-case basis[131]. F. Hoffmeister remarked that this article, as commentaries show, was written to codify the rules concerning the international responsibility of the UN or other regional organisations for military operations[132]. It would seem to be simple and straightforward at first glance. However, it can be very doubtful to define in practice whether an international organisation exercises "effective control" over military troops put at its disposal by a state or another international organisation.

The effective control test is generally accepted in the context of military operations, while it has been given different interpretations in judicial practice. The contribution of Russell Buchan is very interesting in this sense[133]. In his article he analysed the different approaches elaborated by international courts on the subject of conduct attribution with regard to the UN peacekeeping operations.

The ICJ legal test

In the *Nicaragua*[134] case (1949) the ICJ examined whether the violations of international human rights law and international humanitarian law committed by the contra rebels in Nicaragua could be attributed to the USA. The Court revealed that the effective control test was the most appropriate as it requires a high degree of factual control over the wrongful conduct. This was reaffirmed in the *Bosnian Genocide*[135] case in 2007 by the ICJ.

130 Draft Articles, p. 7

131 United Nations, International Law Commission, Responsibility of International Organizations, Comments and observations received from international organizations, Sixty-third session, Geneva, 26 April-3 June and 4 July-12 August 2011, A/CN.4/637/Add.1, p. 9.

132 F. Hoffmeister, *op.cit.*, p. 726.

133 Russell Buchan, 'UN Peacekeeping Operations: When Can Unlawful Acts Committed by Peacekeeping Forces Be Attributed to the UN?', in: Legal Studies, Vol. 32, No. 2, 2012, pp. 282 – 301.

134 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) (Merits)* (1986) ICJReports 14.

135 *Application of the Convention on the Protection and Punishment of the Crime of Genocide (Bosnia v Serbia)* (2007) ICJ Reports 1.

The ICTY and "overall control" criterion

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed the overall control test in the case *Prosecutor v. Tadic*[136] (1999). The Appeals Chamber explained that overall control over the operation goes "*beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of operations*"[137]. In fact, it requires "lower degree of control" than the effective control test.

An Alternative Approach of the European Court of Human Rights (ECHR)

The ECHR in already mentioned *Behrami and Saramati*[138] case (2007) directly dealt with determining the UN responsibility for illegal acts committed by national contingents placed at its disposal (KFOR). Having departed from the ICJ legal test, the ECHR has introduced "*ultimate authority and control*" test as an alternative approach. The European Court examined whether the international organisation has delegated its powers to the group or individuals that have acted unlawfully.

One should note here that the "effective control" and "overall control" approaches were developed in the context of state responsibility. The "ultimate authority and control" test concerns the responsibility of international organisations and is likely more suitable for our special case. Nonetheless, the application of the effective control principle was confirmed by the UN practice as regards to the military operations in Korea (1950 – 1953) and the Congo (1960 – 1964)[139]. The mutual connection between effective control and international responsibility was clear in the practice of the NATO and even the Warsaw Treaty Organisation[140]. As a result, the ILC has accepted the ICJ formula of effective control (article 7 of the Draft Articles) and has rejected the *Bahrami and Saramati* test[141]. Thus, there is no reason why the EU military operations would be necessarily required a radically different legal test from the UN peacekeeping operations as both operate by means of contingents that states provide for them[142]. P. J. Kuijper and E. Paasivirta are convinced that, even though, the EU does not, like the UN, explicitly consider its military missions as subsidiary bodies, the "effective control" test is mostly

136 *Prosecutor v. Tadic* ICTY – 94 – 1 – A (1999) 38 ILM.

137 *Ibid.*, para. 131 and 137

138 *Behrami and Behrami v France, Saramati v France, Germany and Norway* App Nos 71412/01 and 78166/01, Grand Chamber Decision, 2 May 2007.

139 M. Hirsch, *op.cit.*, p. 68.

140 *Ibid.*, p. 71.

141 See Second Report of the ILC; R. Buchan, *op.cit.*, p. 295.

142 P. J. Kuijper and E. Paasivirta, *op.cit.*, p. 54.

applicable in the case of the EU military operations[143]. Considering the "effective control" rule, F. Hoffmeister proposed three decisive criteria in order to check whether conduct can be attributed to the EU or its Member States according to the international law: who is the factual actor of the alleged breach? Who has the legal power to bring an end to the alleged breach? Who bears the international obligation invoked concerning the alleged breach?[144]

Since the EU does not possess a permanent military command and control structure, it is not always clear how the EU and the Member States are involved in such kind of operations. F. Naert considered that the EU exercises effective control over the national contingents, which are put at the disposal of the EU through the Council, the PSC and the Operation and Force Commanders[145]. Speaking about the establishment of the military operations, we can't avoid the issue of command and control (C2). Likewise, the criterion of effective control applies when the Member States have granted an operational command to the organisation. Given that the attribution of unlawful conduct is based on the exercise of factual control, it is necessary to examine control and command arrangements[146].

As was mentioned above, the EU does not hold any permanent C2 structures and mechanisms. In order to provide a military C2 structure for EU-led military operations the EU Military Control and Command (C2) Concept has been developed[147]. Under this document the EU-led military operation is an operation decided upon by the Council, which also exercises the overall responsibility for their conduct, and is characterized by political control and strategic direction by the PSC, *ad hoc* chain of command, multinationality, and contribution of assets and capabilities on case by case basis. In this significant document we can find clear definitions of command and control[148]. Thus, command is regarded as the authority granted to an individual of the armed forces for the direction, coordination, and control of military forces, while control is "*the authority exercised by a commander over part of the activities of subordinate organisations not normally under his command, which encompasses the responsibility for implementing orders or directives*"[149]. Furthermore, different levels of the EU C2 are

143 *Ibid.*

144 F. Hoffmeister, *op.cit.*, p. 745.

145 F. Naert, *op.cit, pp. 515 – 516.*

146 R. Buchan, *op.cit.*, p. 284.

147 See Council Doc 11096/03 EXT 1 (26.07.2006).

148 *Ibid.*

149 *Ibid.*, p. 6.

distinguished: full command, operational command and operational control, tactical command and tactical control (see Annex III). The highest level of military command in CSDP operations goes to the Operation Commander, who will normally receive operational control over forces put at his disposal by the troop-sending States via a transfer of authority[150]. The unity of command as one of the crucial principles of the EU C2 Concept can be achieved by granting the authority to direct and coordinate the actions of all forces and military assets to a single commander[151]. Another key principle is the Framework Nation Concept, which had been approved by the Council on 24 July 2002 as the conceptual basis for conducting EU-leading operations without recourse to the NATO[152]. According to it, a Framework Nation could be a Member State or a group of Member States that voluntarily provide the Operation Commander, the military chain of command with its staff support and make a significant contribution to strategic and operational planning[153]. Touching participation of third states, all forces and personnel participating in the EU military crisis management operation shall remain under the full command of their national authorities[154].

Control over military forces notwithstanding is never full and complete. There will be always some degree of autonomous action, even though an attempt may be made to establish a tight system of supervision[155]. There is a lot of confusion over the legal test for determining when an illegal conduct committed by a member of a peacekeeping force can be attributed to an international organisation. On the one hand, the effective control test was supported by the ICJ and the ILC. On the other hand, the approach of the ECHR seems to be relevant as well.

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150 See Council Doc. 9919/07 EXT 2 (1.02.2008).

151 Council Doc. 11096/03 EXT 1 (26.07.2006), p. 7.

152 Simon Duke, 'EU Decision-making in CSDP: Consensus Building on Operation Artemis', in: Daniel C. Thomas (ed.), *Making EU Foreign Policy: National Preferences, European Norms and Common Policies*, New York: Palgrave Macmillan, 2011, p. 102.

153 Council Doc 11096/03 EXT 1 (26.07.2006), p. 11.

154 National authorities shall transfer the Operational and Tactical command and/or control of their forces and personnel to the EU Operation Commander. See Draft model agreement between the European Union and a third state on the participation of a third state in EU military crisis management operation. Available at: http://pesc-psdc.esteri.it/PESC_PSDC/Menu/I_rapporti_bilaterali/Guidelines+e+modelli+di+accordi+relativi+ad+operazioni+PSDC/Framework_Agreements.htm, (consulted on 2.05.2013).

155 Christian Tomuschat, Attribution of International Responsibility: Direction and Control, in: Malcolm Evans and Panos Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives*, Oxford; Portland, Oregon: Hart Publishing, 2013, p. 14.

The question of conduct attribution to one or another subject of international law is definitely a practical one. The conduct is not necessarily attributed exclusively to one subject of international law. The ILC revealed that in some cases the attribution could take place simultaneously to an international organisation and one or more of its member states[156]. The ILC in its Second Report on Responsibility of International Organisations drew the attention to one very remarkable example of NATO sued before the ICJ in the case on *Legality of use of force* and before the European Court of Human Rights in *Bankovic*. One may argue that attribution of conduct to an international organisation does not automatically exclude attribution of the same conduct to a Member State, nor does, vice versa, attribution to a State rule out attribution to an international organisation. Thus, one envisageable solution would be appropriated for the relevant conduct to be attributed both to NATO and to one or more of its Member States, as those States contributed to planning the military action or to carrying it out.[157] In this case we deal with so-called "dual" attribution of conduct, which leads consequently to joint responsibility[158]. Similarly, the EU military operations pose the same questions. M. Hirsh pointed out that the joint responsibility was well recognized within the EC[159].

156 Second Report of the ILC, p. 3.

157 *Ibid*., pp. 3 – 4.

158 *Ibid*., p. 4.

159 Moshe Hirsch mentioned the case of "Joint Nuclear Research Centres" established by the EURATOM and its Member States which raised the question of potential damages for third parties. For more details see M. Hirsch, *op.cit.*, p. 65.

3.2. Attribution of Illegal Conduct: How does it work in practice?

In this section I will test the "effective control" approach on two case studies. Even though international practice has not yet known the real breaches of human rights law and international humanitarian law by the EU in military operations, it could be very useful to put the "effective control" test in practice. In order to do this, let's look at two different EU military operations.

EUFOR Artemis

EUFOR ARTEMIS (12 June to 1 September 2003) was the first fully independent military operation and second peace-keeping operation conducted by the EU. It was launched on 12 June 2003 in response to an appeal by the UN Secretary-General for the rapid deployment of an Interim Emergency Multinational Force (IEMF) in support of the UN Mission in the DRC (MONUC)[160]. To some extent, ARTEMIS was the first manifestation of the EU's security and defence dimension and has demonstrated the ESDP capabilities for the first time. However, it was characterized by limited scale and scope. For instance, the time of deployment took three months and the area of operations was limited to Bunia[161].

The operation was launched on the basis of the mandate set out in the UNSC resolution 1484 (2003), adopted under Chapter VII and Chapter VIII of the UN Charter, to stabilize the situation in Bunia and to support the political process in Ituri in the DRC[162]. It is regarded as an enforcement action under Chapter VII of the UN Charter[163].

According to the EU law, the Council of the EU adopted the Joint Action on the 5th of June 2003. Article 7 of the Joint Action assigned that the PSC exercised under the responsibility of the Council the political control and strategic direction of the operation, reported to the Council on regular basis and took appropriate action as to participation

160 Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo.

161 European Parliament, Directorate-General For External Policies Of The Union, Directorate B, Policy Department, CSDP Missions And Operations: Lessons Learned Processes, April 2012, Expo/B/Sede/Fwc/2009-01/Lot6/16, p. 42.

162 UN Res 1484 (2003), 30 May 2003, p. 1; About the contextual background of the operation ARTEMIS see Ademola Adass, 'Extraterrotorial Collective Security: The European Union and Operation ARTEMIS', in: Martin Trybus and Nigel D. White (eds.), *European Security Law*, New York: Oxford University Press, 2007, pp. 138 – 139.

163 See A. Adass, *op. cit*., pp. 146 – 148.

arrangements of third parties[164]. Moreover, it previewed the participation of third states (art. 10)[165]. Thus, ARTEMIS benefited from the participation of Canada, Brazil, South Africa and Cyprus[166].

Since France became the main force contributor and a leading country in this operation (about 2000 troops, 85 per cent), its legal status was designed as "framework nation". Thus, operation ARTEMIS was established under the "framework nation" concept with France providing the Operation Headquarters and the Operation Commander. Consequently, the Operation Headquarters were located in Paris, and a French general, Bruno Neveux, was assigned as the Operation Commander[167]. Contributions of other countries were much smaller. Only five others EU Member States actively took part in this operation, among them Belgium, Germany, Greece, Sweden and the UK [168]. And ultimately, it looked like a "*French operation in European Union disguise*"[169]. However, General Bruno Neveux confirmed in his interview that it was real European operation[170].

With France as a main contributor, operation ARTEMIS put the Framework Nation Concept to the first practical test. However, questioning this concept, F. Naert suggests that it should be balanced by broader member state participation[171]. However, ARTEMIS is a clear indication of the fact that sometimes the Member States use the CSDP to promote primarily its own interests. Likewise, that military engagement in the DRC, as

164 Council Joint Action 2003/423/CFSP.

165 *Ibid*.

166 F. Naert, *op.cit*., p.115.

167 Art. 2, 3, 4 of COUNCIL JOINT ACTION 2003/423/CFSP; see also an interview with general B. Neveux at 'La témoignage du Général de division Bruno Neveux, ancien commandant de l'opération de l' Union européenne en RDC (ARTEMIS) du 5 juin au 10 septembre 2003', in: Doctrine Tactique, Numéro Spécial, 2006, pp. 54 – 61. Available at: http://www.cdef.terre.defense.gouv.fr/publications/doctrine/no_spe_chefs_francais/version_fr/art12.pdf , (consulted on 06.05.2013).

168 Frederik Naert, *op.cit*., *p. 113*.

169 Peter Schmidt, 'The EU's Military Involvement in the Democratic Republic of Congo: Security Culture, Interests and Games', in: Peter Schmidt and Benjamin Zyla (eds.), *European Security Policy and Strategic Culture*, New York: Routledge, 2013, p. 86.

170 La témoignage du Général de division Bruno Neveux, ancien commandant de l'opération de l' Union européenne en RDC (ARTEMIS) du 5 juin au 10 septembre 2003, p. 58. Available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.cdef.terre.defense.gouv.fr%2Fpublications%2Fdoctrine%2Fno_spe_chefs_francais%2Fversion_fr%2Fart12.pdf&ei=OKyLUYO_BMaTOOXpgYgG&usg=AFQjCNGkkgEJsYDjXTf9ZKlujn1fcTIPpg&sig2=g75YwelqaXxWzVX85pvGVA&bvm=bv.46340616,d.ZWU, (consulted on 05.05.2013).

171 European Parliament, Directorate-General For External Policies Of The Union, Directorate B, Policy Department, *CSDP Missions And Operations: Lessons Learned Processes*, April 2012, Expo/B/Sede/Fwc/2009-01/Lot6/16, P. 42.

Peter Schmidt considers, was part of France's strategic culture and one of France's major foreign policy preferences (restoring its influence in the region)[172]. One more argument in support of this point of view is that SOFA was not concluded between the EU and the DRC, instead of this a SOFA was signed between France and Uganda and extended to the EU[173].

In the case of ARTEMIS, a certain level of planning already existed. Preparing its own operation (operation "Mamba"), France did serious planning activities for it. Thus, when the EU eventually decided to launch its own mission, most of the planning was used for EUFOR ARTEMIS which allowed the EU to start the operation in less than a month[174]. Operation Artemis ended on 12 September 2003 and the full responsibility was returned to MONUC.

What do we have eventually? A French-backed EU operation on the basis of the UN Security Council mandate, in the framework of which three levels of decision-making incite confusion in the chain of command and control. Furthermore, an important question arises regarding the UN and its role relating to command and control arrangements[175]. In this case Article 54 of the UN Charter should be taken into consideration as it obliges regional organisations to inform the UN Security Council of measures they take towards conflict resolution[176]. And finally, who performed the effective control over the military troops involved in the operation ARTEMIS? Most likely these questions will remain unanswered. We can see on this example no single chain of command existed. Reporting channels ran from the UN Security Council to the national command. Therefore, as was defined in the *Bahrami* case by the ECHR, it is crucial in what capacity a member or members of military troops committed the illegal act[177]. Examining the legal relationship between the UN and KFOR (NATO forces),

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172 Peter Schmidt, 'The EU's Military Involvement in the Democratic Republic of Congo: Security Culture, Interests and Games', in: Peter Schmidt and Benjamin Zyla (eds.), *European Security Policy and Strategic Culture*, New York: Routledge, 2013, pp. 85—86; Simon Duke, *op.cit*., pp. 92 – 110.

173 F. Naert, *op.cit.,* p.115.

174 Petar Petrov, 'Early Institutionalisation of the ESDP Governance Arrangements: Insights From the Operations Concordia and Artemis', In: Sophie Vanhoonacker , Hylke Dijkstra and Heidi Maurer (eds)., *Understanding the Role of Bureaucracy in the European Security and Defence Policy*, European Integration online Papers (EIoP), Special Issue 1, Vol. 14, 2010, p. 8. Available at: http://eiop.or.at/eiop/texte/2010-008a_htm, (consulted on 03.05.2013).

175 A. Adass, *op.cit*., p. 152.

176 *Ibid*, p. 150.

177 Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', in: Human Rights Law Review, Vol. 8, 2008, p. 6.

the Court concluded, on the basis of the "ultimate authority and control" test, that the wrongful conduct was attributable to the UN[178].

Althea

The operation ALTHEA in BiH is the biggest and most challenging operation undertaking by the EU so far. It was launched on 2 December 2004 and aims at supporting BiH efforts to maintain the safe and secure environment in BiH, providing capacity-building and training support to the Armed Forces of Bosnia and Herzegovina[179]. The combination of the Dayton Agreement and the UNSC Resolution 1575 constitutes the legal basis for ALTHEA[180]. Moreover, on 28 June 2004, the Council also issued a Joint Action providing legal frame for ALTHEA[181]. It followed the decision by NATO to conclude its SFOR-operation and the adoption by the UN Security Council resolution 1575[182]. Due to the improving security situation, operation ALTHEA has been rearranged several times, most recently in September 2012[183]. It currently continues to act in accordance with the mandate under Chapter VII of the UN Charter, as specified in the latest UN Security Council Resolution 2074 (2012):

> *"the Member States acting through or in cooperation with the EU to establish for a further period of twelve months, starting from the date of the adoption of this resolution, a multinational stabilization force (EUFOR ALTHEA) as a legal successor to SFOR under unified command and control, which will fulfil its missions ….. in cooperation with the NATO Headquarters presence in accordance with the arrangements agreed between NATO and the EU...., which recognize that EUFOR ALTHEA will have the main peace stabilization role under the military aspects of the Peace Agreement*[184]*".*

178 *Ibid*., p. 9.

179 See the Council fact sheet on ALTHEA. Available at: http://www.consilium.europa.eu/eeas/security-defence/eu operations/althea/factsheets?lang=am , (consulted on 02.05.2013).

180 F. Naert, *op.cit.,* p. 127.

181 Council Joint Action 2004/570/CFSP.

182 Resolution 1551 (2004); Under resolution 1575 (2004), the UN Security Council has defined the EU operation Althea (BiH) as the "*legal successor to SFOR under unified command and control, which will fulfil its missions... in cooperation with the NATO HQ presense in accordance with the arrangements agreed between NATO and the EU* ".

183 See United Nations Security Council Resolution 2074 (2012); United Nations Security Council Resolution 2019 (2011); United Nations Security Council Resolution 1948 (2010); United Nations Security Council Resolution 1895 (2009); United Nations Security Council Resolution 1575 (2004); United Nations Security Council Resolution 1551 (2004).

184 United Nations Security Council Resolution 2019 (2011), para. 10.

According to the Council Joint Action, the chain of command of the EU Force remains under "*the political control and strategic direction of the EU throughout the operation*"[185]. On the European level, as in the previous case, the PSC exercises the "*political control and strategic direction*" of the operation ALTHEA under the responsibility of the Council of the EU. Such political control and strategic direction cover the powers to amend the planning documents, including the Operation Plan, the Chain of Command and others documents, and the powers to take decisions concerning the appointment of the EU Operation/Force Commander [186].

In the framework of operation ALTHEA, the EU initially deployed around 7000 troops[187]. In May 2007 the size of the contingent was limited to 2,200 from 27 countries[188]. In comparison with operation ARTEMIS, ALTHEA is carried out with recourse to NATO's assets and capabilities, under the "Berlin Plus" arrangements. Subsequently, it belongs to the "Berlin Plus" operations. Among the contributing states there were 20 EU Member States (Spain and Italy as the main contributors), Albania, Chile, the Former Yugoslav Republic of Macedonia, Switzerland and Turkey[189].

An interesting situation has occurred regarding the SOFA of ALTHEA operation. The SFOR SOFA is part of the Dayton Peace Agreement and has consequently, from the beginning applied only to the NATO forces. Nevertheless, the UNSC resolutions (notably, UNSC resolution 1551 and 1575) have changed this state of affairs and made it applicable to the operation ALTHEA. For instance, the UNSC resolution 1551 (2004) confirmed that the status of forces agreement would "*apply provisionally in respect to the EU mission and its forces*"[190]. Moreover, this SOFA includes some essential elements concerning the responsibility of the military personnel. It states that the military personnel are subject to the exclusive jurisdiction of their national elements in the case of any offences committed by them in BiH[191].

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185 Art. 13of Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina.

186 Art. 6 of Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina.

187 See the Council fact sheet on ALTHEA. Available at: http://www.consilium.europa.eu/eeas/security-defence/eu-operations/althea/factsheets?lang=am , (consulted on 02.05.2013).

188 F. Naert, *op, cit.,* p.126.

189 See the Council fact sheet on ALTHEA. Available at: http://www.consilium.europa.eu/eeas/security-defence/eu-operations/althea/factsheets?lang=am , (consulted on 02.05.2013).

190 United Nations Security Council Resolution 1551 (2004), para 20.

191 See Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel, Appendix B To Annex

Operation ALTHEA shows us another side of the attribution of illegal conduct to the EU military operation. Operation ALTHEA belongs to the "Berlin Plus" operations. The recourse to the NATO assets and capabilities therefore adds some multiple additional chains of command and control. In this case, the Operation Commander, being a double-hatted official, had to report to both the North Atlantic Council (NAC) and the PSC. In turn, it has influenced the ability of the EU to exercise effective control and limit the EU's autonomy over the command and control of the operation.

1-A, A/50/790 S/1995/999, para. 7.

Conclusion

Ensuring effective accountability of international actors is the main aim of the international legal order. The burden of international responsibility occurs when an international obligation is violated and unlawful conduct is attributed to the relevant subject. However, the continuing growth of international organisations both in number and in the scope of activities has not been followed by a simultaneous progress of the law of international responsibility. The most successful attempt to improve this situation has been made in the Draft Articles on the Responsibility of International Organisations by the International Law Commission. It can be regarded as a real breakthrough in the law of international responsibility. Even though the Draft Articles are based on limited practice, it constitutes the progressive development of public international law. On the other hand, it is difficult to provide a comprehensive assessment of the DARIO, because these provisions have not yet been tested in practice. Moreover, there are doubts concerning its suitability with regard to a variety of international organisations. Nevertheless, one can claim that it is a legal basis for preventing and solving accountability issues with respect to international organisations at this stage.

At the outset of this Master's Thesis two hypotheses were proposed to examine. I can argue that both statements have been proved.

Hypothesis I

Returning to the first question, it is now possible to state that the problem of international responsibility for EU military operations is complex and multifaceted. The Lisbon Treaty has finally ended the debate on the legal status of the EU on the international arena. It explicitly conferred the EU legal personality. This has considerable impact on the EU's capacity to act as an independent subject of public international law. Possessing an international legal personality, the EU may bear the international responsibility and could be responsible for international illegal acts or omissions.

In this Master's Thesis an attempt was made to examine the applicability of the Draft Articles in the case of EU military operations. Finally, this contribution has clearly shown, *prima facie*, that the DARIO does not take into account the specific institutional structure and functioning of the EU. The legal nature *sui generis* of the Union therefore requires *lex specialis* in the international responsibility regime. The practical application of the Draft Articles causes a lot of legal difficulties due to its very general and abstract character.

Hypothesis II

Although under the Lisbon Treaty the pillar system does not exist anymore, the CFSP/CSDP still remains a more intergovernmental area in comparison with other EU competences. Thus, the intergovernmental method of the CFSP/CSDP allows me to argue that the notion of "competence" in this field is insufficient. In my opinion, the term "cooperation" is more suitable. However, it is difficult to measure where the limit between competence and cooperation exists within the EU since the nature of the CFSP/CSDP is very dynamic. In order to clarify the division of competence and solve this inadequate legal situation, it is suggested to use a declaration of competence. This legal instrument is already well-known in practice of EU mixed agreements. It could become an appropriate tool for the attribution of wrongful conduct in the case of the EU-led military operations. I am strongly convinced that this issue might receive special attention in the study of international non-contractual responsibility of international organisations.

From the findings of the Master's Thesis one might conclude that the CSDP operations are launched via a complicated decision-making structure. It comprises three levels: international (the EU military operation is launched on the basis of the UN Security Council mandate), European (the Joint Action of the Council of Europe to start a military operation, or/and the parallel decision-making processes in the North Atlantic Council (NATO) in the case of the "Berlin Plus" operations) and national (a decision of contributing state to provide the necessary capabilities and assets). Thus, the EU military crisis management is characterized by the functional interconnections between the EU, the troop-sending states and other international actors, in particular the UN and NATO. It means that in the deployment of the EU military operation various legal regimes and decision-making mechanisms are involved.

Another aspect which should be taken into account are the command and control arrangements of each military operation. This issue is absolutely decisive in the attribution of illegal conduct. Judging from the above described complicated decision-making

structure of the EU military operations, I argue that it is very difficult to define the chain of command and control, and particularly the political control, in practice. As peacekeeping military actions always take place on the territories of different states, unpredictable circumstances on the ground sometimes lead to a deeper involvement in a conflict. Furthermore, very often we deal with a "mission creep" when military troops act beyond their mandate. Hence, command and control cannot be full and total. Some possibility of autonomous action will always be presented. For this reason, each case of the EU military operations should be examined separately.

Accordingly, this work scrutinized the two case studies, operation ARTEMIS and operation ALTHEA. ARTEMIS was the first fully independent EU-led military operation. After examining this case of EU peacekeeping, it could well be claimed that it was a French-backed EU operation under the UN Security Council mandate. Because of the three levelled decision-making scheme, I have faced lack of clarity in the chain of command and control. Furthermore, some confusion arises in respect of the UN role in the political control system of this military operation.

Being the "Berlin Plus" operation, ALTHEA shows us another side of conduct attribution. The recourse to the NATO assets and capabilities creates some additional chains of control and command. Consequently, the Operation Commander had to report to the North Atlantic Council and the Political and Security Committee of the EU. It demonstrates that NATO could have an impact on the ability of the EU to exercise overall control and affect the EU's autonomy in the command and control over the operation.

Since each military operation is composed of personnel provided by different states (EU and non-EU), it is not clear who should bear responsibility for any wrongful act committed by the military personnel. The "effective control" test may demonstrate that the international organisation and the contributing state or states jointly exercised the command and control over the forces that committed the illegal act. Subsequently, both the international organisation and the contributing state will bear responsibility and share legal consequences.

Generally, the attribution of conduct must be determined under the general rules outlined in the DARIO. By contrast, in practice we deal with highly technical and complex legal matters. This research has evidently shown that there are a lot of unclear moments concerning the "effective control" test. Taking into account that the conduct does not necessarily has to be attributed solely to one subject of international law, the ILC supported the idea of joint international responsibility and revealed the wrongful act could be attributed simultaneously to more than one international actor. Thus, the

attribution of conduct to a subject of international law is definitely a practical question. And, obviously, the statements without practical testing make little sense.

Who Guards the Guardian?

Finally, I have come to the conclusion that the invocation of joint responsibility is the most suitable and possible scenario as to the international responsibility for EU's military operations. Yet, the idea of EU's exclusive responsibility is very weak and questionable. The joint responsibility states that the EU and troop-sending states will divide secondary obligation to compensate for damages towards third parties. However, no legal remedies can be available against the EU as an international organisation. Any international court does not exercise jurisdiction over the EU. For instance, the ICJ decides legal disputes where parties can be only states[192]. The International Criminal Court exercises its jurisdiction over persons for the most serious international crimes[193]. Moreover, the EU is not a party to the European Convention of Human Rights or any other international human rights agreements and international humanitarian law treaties. This excludes the EU from other international mechanisms of human rights protection. The EU's accession to the European Convention of Human Rights would change this situation. However, possessing international legal personality and being an active security actor in international relations, the European Union is as bound by customary international law as other subjects[194].

There is no single solution which would fit all aspects of international responsibility for the EU military operations. Many contradictions illustrated in this research have presented important issues in need of further investigation. Nonetheless, the results of this contribution support the idea that the troop-contributing states will bear international responsibility for violations committed in the EU military operations as no mechanism exist in respect of the invocation of EU's responsibility under international law. A future study regarding the practical application of the "effective control" criterion would be very interesting and desirable.

192 Article 34 of the Statute of the International Court of Justice. Available at: http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II, (consulted on 03.05.2013).

193 Article 1 of the Rome Statute of the International Criminal Court. Available at: http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rome%20statute.aspx, (consulted on 03.05.2013).

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Annexes

Annex I. EU Crisis Management Operations and Missions

Table 1. Completed missions: April 2013

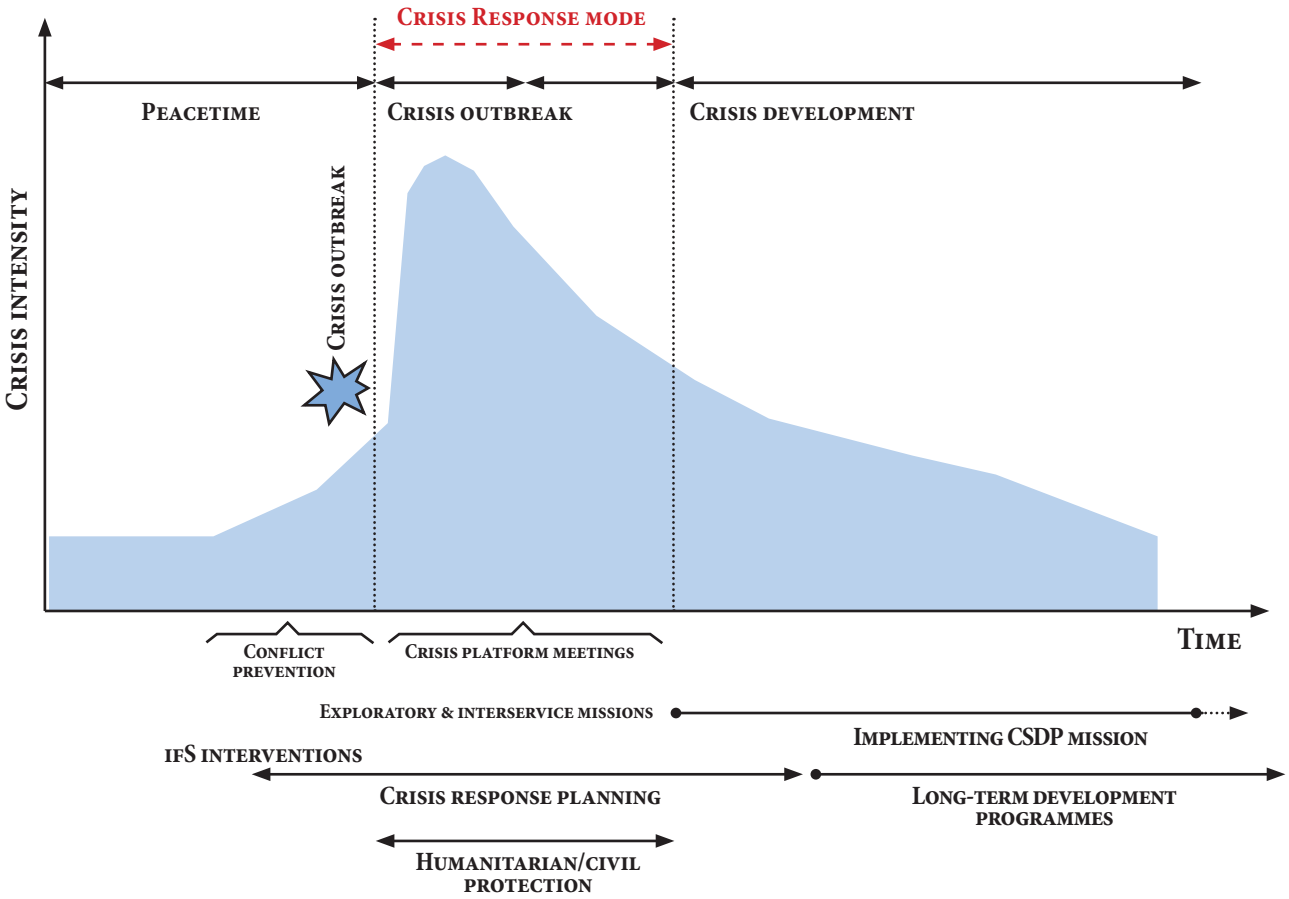
	Africa	Balkans/Caucasus/ East Europe	Asia	Middle East
Military Operations	**Artemis** (DRC)	**Concordia** (Macedonia)		
	EUFOR (DRC)			
	EUFOR (Tchad/RCA)			
	EUFOR (Libya)			
Military Training Missions				
Supporting Missions (security sector)	**EUSSR** (Guinea Bissau)			
	EUNAVCO (Somalia)			
Other supporting Missions	**Amis** (Sudan AU)	**EUSR BST** (Georgia, border)		
		EUPAT (Macedonia, police)		
		EUPT (Kosovo, rule of law)		
Monitoring Missions		**EUMM** (Former Yugoslavia)	**AMM** (Aceh)	
Rule of Law Missions		**EUJUST Themis** (Georgia)		
Police Missions		**EUPM** (BiH)		
		EUPOL Proxima (Macedonia)		
		EUPOL (Kinshasa)		
Border Missions				

Table 2. Ongoing missions: April 2013

	Africa	Balkans/ Caucasus/ East Europe	Asia	Middle East
Military Operations	**EUNAVFOR Atalanta** (Somalia)	**EUFOR** Althea		
Military Training Missions	**EUTM** (Mali),			
	EUTM (Somali)			
Supporting Missions (security sector)	**EUAVSEC** (South Sudan),			
	EUCAP Nestor (Horn of Africa) **EUCAP Sahel** (Niger),			
	EUSEC (DRC)			
Other supporting Missions				
Monitoring Missions		**EUMM** (Georgia)		
Rule of Law Missions		**EULEX** (Kosovo)		**EUJUST LEX** (Iraq)
Police Missions	**EUPOL** (DRC)			**EUPOL** (Afghanistan)
				EUPOL COPPS (Palestinian territories)
Border Missions		**EUBAM** (Ukraine)		**EUBAM** (Rafah)

Source: Jochen Rehl and Hans-Bernhard Weisserth (eds.), *Handbook on CSDP: the Common Security and Defence Policy of the European Union*, Vienna: Directorate for Security Policy of the Federal Ministry of Defence and Sports of the Republic of Austria, 2010, p. 62.

Annex II. The EU Crisis Response Cycle



Source: http://eeas.europa.eu/crisis-response/what-we-do/response-cycle/index_en.htm, (consulted on 28/04/2013)

Annex III. EU Command and Control Structures

Political and Strategic Level	Council, Political and Security Committee and
	EU Military Committee
Military Strategic Level	Operation Commander
Operational Level	Force Commander
Tactical Level	Land Component Command/Air Component Command/Maritime Component Command

Source: Jochen Rehl and Hans-Bernhard Weisserth (eds.), Handbook on CSDP: the Common Security and Defence Policy of the European Union, Vienna: Directorate for Security Policy of the Federal Ministry of Defence and Sports of the Republic of Austria, 2010, p. 62.