EU EXTERNAL REPRESENTATION AND THE INTERNATIONAL LAW COMMISSION: AN INCREASINGLY SIGNIFICANT INTERNATIONAL ROLE FOR THE EUROPEAN UNION?

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1. INTRODUCTION

The desire on the part of the EU to establish itself as an international actor stretches back to the very early days of the European integration process.[1] In economic terms, the international role of the Union has always been significant, not least because of the effect of its internal policies – particularly towards the completion of the Single Market – on the outside world. It was only later that the Union began to explore the possibilities for a 'political' foreign policy at the European level: firstly through the development of European Political Cooperation (EPC) and most notably the establishment of the Common Foreign and Security Policy (CFSP) in the Treaty on European Union (1992). Recent changes brought about by the Treaty of Lisbon have attempted to improve coherency in the Union's external policies, which are not restricted to the CFSP and external trade policies (particularly the Common Commercial Policy) but which have diversified across a great number of policy fields. The Treaties now contain, for example, general provisions on external action of the Union, thus creating a general basis for such external action, as well as further provisions on cooperation and coherency on international actions between the Union and Member States.[2] Needless to say, the Member States have resisted the pooling of sovereignty in the field of political external representation to a much larger extent than many other dimensions of European integration. While the external economic activities of the Union were widely accepted from early on, early attempts to develop cooperation in the field of defence and foreign policy quickly faltered.[3]

The contribution of the EU to the development of international law remains, however, rather paradoxical. As an actor, the EU arguably has more power and influence than most States around the world. It is the world's most developed regional integration entity. It is also, however, a creature of international law and following the basic and original idea of an international organisation – most notably the UN organs – it relies on its Member States to represent it. The development on modern international law, as well as the UN system, pre-

[1] Arts 21, 34 and 35 Treaty of the European Union.

[2] Arts.21, 34 and 35 Treaty of the European Union.

[3] Arts.206-207 Treaty on the Functioning of the European Union; Case 8/75 *Hauptzollamt Bremerhaven v Massey Fergusson* GmbH [1973] *ECR* 897 at para.4; Opinion *1/75 (re OECD Local Cost Standard)* [1975] *ECR* 1355; P. Koutrakos, *EU International Relations Law* Oxford: Hart, 2006, 383-387.

dated the European integration process by only a few years, but the anchoring of the international system of the Westphalian order of States appears at time to be set in stone.

This paper examines the external representation of the European Union within a specific body of the UN, namely the International Law Commission (ILC). This is one of the longest established bodies of the United Nations. It was created by a General Assembly Resolution in 1947[4] and the first article of its founding Statute accompanying the Resolution states that it 'shall have for its object the promotion of the progressive development of international law and its codification'. The ILC has followed the traditional concept of international law and only included States as significant actors. This paper examines the work of the ILC – and the extent to which the EU has succeeded in representing itself in its own right – through the prism of the development of international law on responsibility of international organisations. The ILC began its project on the responsibility of international organisations in 2002, before the conclusion and implementation of Lisbon, and concluded it in August 2011, after the changes of Lisbon came into force.

The paper uses the example of the ILC's project on responsibility to argue, firstly, that the EU (by which in this context primarily means the Commission) is evolving to possess a separate role and identity to exert at the international level and, secondly, that this is a role that is progressively being taken more seriously by actors and institutions which have traditionally been resistant to the influence of non-State actors. This paper considers the long-term development of the external representation of the EU. The paper examines a particular provision of the work of the ILC, namely the *lex specialis* principle and how and why this principle was incorporated. It uses the reports of the Special Rapporteur and the Drafting Committee to consider the reasons behind the inclusion of this principle, and any changes to it. It also looks at the comments of the European Commission on the work of the ILC generally, as well as this provision in particular. While Lisbon, and the new mechanisms it has created, will should enable more effective external representation, the incremental changes in the EU's representation are brought the fore here.

The paper begins with a brief examination of the ILC and its work. It then undertakes an examination of the key *lex specialis* provision within the project of the ILC, and the contributions made by the EU and its Member States. As this is a project that focuses upon the way in which the EU represented itself prior to the changes brought in by the Lisbon Treaty, the paper concludes with some thoughts on how the changes brought about by Lisbon may change and improve the ability of the EU to pursue an autonomous role at the international level. In the concluding section, the paper argues that the EU has moved beyond an existence as a close coalition of States and continues to progress towards as an independent actor. Although this may suggest either a replacement of the role of the Member States in international arenas, or the emergence of rivalries and incoherence between the Member States and the EU, it is

[4] United Nations General Assembly, *Resolution: Establishment of an International Law Commission*, A/RES/174 (II) of 21 November 1947.

contended here that a 'middle way' has been found. Although the views of the EU as an independent actor and the Member States may on occasion differ, the latter are (at least in general sense) supportive of the progression towards the EU becoming more significant as an international actor. In the area surrounding the ILC, at least, there has been a general acceptance of the EU voicing its opinions and in contributing to and helping to shape the development of international legal principles.

2. THE INTERNATIONAL LAW COMMISSION'S PROJECT ON THE RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

The International Law Commission (ILC) is one of the longest established bodies within the UN system. It was established by a Resolution of the General Assembly in 1947 and held its first session in 1949.[5] Much of international law originally had to be sought out in the form of customary principles. A number of ad hoc attempts at codification were made in the nineteenth century through the holding of conferences.[6] This was relatively limited, however, and while there was some attempt at codification made under the League of Nations, there was nothing comprehensive.[7] In the early days of the ILC's work, account had to be taken of (generally) unwritten principles which had developed over time, according to State practice accompanied by *opinion juris*, a concept meaning that the practice is believed to be law. The establishment of the ILC thus signified a break from the past by a desire to work towards a codified, comprehensive version of law applying between States. The establishment of the ILC drew on the various previous attempts at codification of principles, which had occurred in isolation at different congresses and conferences.[8]

One of the key challenges facing the ILC was that of establishing rules on international legal responsibility. This is a topic which had been on the agenda of an early attempt at codification with the Conference of the League of Nations in 1930, but proved too sensitive.[9] The establishment of the ILC saw a revival of the questions surrounding this topic and it was included on the initial list of fourteen subjects for codification, adopted at the ILC's first session in 1949.[10]

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[5] United Nations General Assembly, *Resolution: Establishment of an International Law Commission*, A/RES/174 (II) of 21 November 1947; Report of the International Law Commission on the work of its first Session, 12 April 1949, Official Records of the General Assembly, Fourth Session, Supplement No. 10, Extract from the Yearbook of the International Law Commission 1949, vol.I.

[6] UN Documents on the Development and Codification of International Law, Supplement to the *American Journal of International Law* Vol.41, No.8, Oct.1947, 32-49.

[7] *Ibid,* 49-61.

[8] United Nations Documents concerning the Development and Codification of International Law, Supplement to American Journal of International Law,41(4), October 1947; Final Act of the International Peace Conference. *The Hague*, 29 July 1899; Final Act of the Second Peace Conference, *The Hague*, 18 October 1907.

[9] A. Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts', in J. Crawford, A. Pellet and S. Olleson (eds.) *The Law of International Responsibility,* Oxford: Oxford University Press, 2010, at 75.

[10] Report of the International Law Commission on the work of its first Session, 12 April 1949, Official Records of the General Assembly, Fourth Session, Supplement No. 10, Extract from the

Initial considerations of the area did not really begin until 1955 and continued through five Special Rapporteurs until 1996 when a first draft of articles was adopted.[11] Finally on 31 May 2001 a second, and final, reading of 59 draft articles took place and the ILC adopted the complete set of 59 draft articles on the 'Responsibility of States for Internationally Wrongful Acts'.[12] Unsurprisingly, the focus of the ILC's work remained on the responsibility of States as the primary actors at the international level.[13] The ILC may have made reference to the idea of the responsibility of international organisations within the articles on State responsibility, but it was clear that this was not to be addressed in any detail. States were the actors with which the ILC was concerned. After completing of a set of principles in relation to States, the ILC turned to other international actors that require consideration in this area; international organisations. The growth in the powers and activities of international organisations had led to concerns about potential breaches of international law and the ILC began considering how principles of responsibility might, and how they could, apply to such entities.[14] It is this project which forms the basis of the research in this paper.

A significant aspect to the work of the ILC on this project has been the involvement of international organisations in the drafting process. While many EU Member States are often involved in voicing opinions on topics of international law, it is less common for organisations to be involved within such an archetypal 'traditional' international body. Yet, in 2002, the ILC recommended that the Secretariat approach international organisations for their contributions on the topic being considered.[15] Consequently, letters were sent to various international organisations between September and October 2003 asking for their comments and materials that related to the topic.

This interaction and involvement of organisations continued throughout the work of the ILC, until the final comments were received in early 2011, shortly before the draft articles were adopted by the ILC on second reading in August 2011 (Draft Articles on the Responsibility of International Organisations (DARIO)).[16] The articles detail the basic requirement for responsibility as being

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Yearbook of the International Law Commission 1949, vol.I, para. 16, at 281.

[11] Report of the International Law Commission to the General Assembly covering the work of its seventh session, 2 May-8 July 1955, Doc. A/2934, para.33, at 42; UN Doc.A/CN.4/L.528/Add.3; Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996) A/51/10, at 57-73.

[12] International Law Commission Report of the Fifty-third Session 2001, Doc. A/56/10, paras. 69-71, at 25; United Nations General Assembly, *Resolution: Responsibility of States for internationally Wrongful Acts*, RES/56/83 of 28 January 2002.

[13] Art. 57 Articles on the Responsibility of States for Internationally Wrongful Acts.

[14] Report of the International Law Commission on the work of its fifty-second session 2000, Annex 'Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of work of the Commission, at 135-136; Report of the Working Group, International Law Commission Report of the Fifty-Fourth Session (2002) Doc.A/57/10, at 228-236.

[15] Report of the Working Group, International Law Commission Report of the Fifty-Fourth Session (2002) Doc.A/57/10, at para.488, 236.

[16] 'Comments and Observations by Governments and International Organizations', 14 February 2011, A/CN.4/637; Draft Articles on the Responsibility of International Organizations, with commentaries, Yearbook of the International Law Commission, 2011, vol. II, part two.

the existence of an internationally wrongful act that consists of a breach of international law that can be attributed, or traced, to the responsible entity. Many of the articles elaborate upon these basic ideas and start to consider the interaction between an organisation and its members, as this can often be complex and mean that the principles of attribution and breach are not so straightforward. The draft articles also elaborate upon these basic principles, looking at the scope of these principles, as well as the consequences of a finding of responsibility, as well as the circumstances that would preclude any wrongful actions. It is the interaction between the ILC and the European Commission on behalf of the EU, as well as the involvement of Member States of the EU that forms the basis of the discussion in this paper.

It will be clear from the timing of the ILC's work that the involvement of the EU in this project was carried out, largely, before Lisbon came into force. While the changes brought about by Lisbon seek to pursue a greater role for the EU at an international level, this project is testament to the way in which the EU was already developing ways in which to pursue an international role in areas traditionally reserved for States only. The Legal Service of the European Commission has been primarily responsible for providing comments to the ILC on behalf of the EU. In addition, the EU Delegation to the UN has made a number of statements to the Sixth Committee of the General Assembly.[17] The General Assembly is the main deliberative organ of the UN and the discussions it has and the mandates that follow largely drive the work of the UN. This committee of the General Assembly is where legal questions are discussed and allows all UN members to have representation. To make comments to this committee is to contribute to the shaping and development of international law.

It is perhaps significant to note that the submitted comments were identified as originating from the European Commission, and not from the European Community or the European Union. This may perhaps say something about the growth of the role of the European Commission within the realms of the Union more than about the impact of the comments on the work on the ILC. More relevant for the impact of such comments on the work of the ILC is the limitations that the Commission seemed to impose on its own comments. Such comments were limited to areas of action that could be considered as previously falling under the remit of the European Community; the European Commission made no comments on any areas such as foreign, security or defence policy. This is obviously a limitation within the comments and the consideration of the impact of the comments on the work of the ILC and as representing the EU as a whole. The timing of the project was such, however, that the majority of the work was completed prior to Lisbon coming into force when a division between Community and Union still existed and the mandate of the Commission in Union matters was limited. The impact of such comments would always have had limitations unless the project had continued for a period of time following Lisbon coming into force. The impact of the comments given by the

[17] EU Presidency Statement- Report of the ILC: Responsibility of International Organizations, PRES06-284EN, EU Statement- United Nations 6th Committee: Report of the International Law Commission on Responsibility of International Organisations, EUUN11-120EN, 24/10/2011.

European Commission will be considered, with some thoughts in the final section on how this may change in the future or the wider impact that may be felt.

The following section seeks to consider the ways in which the EU has voiced its comments alongside those of its Member States and how such comments were received within the ILC's project on the responsibility of international organisations.

3. THE IMPACT OF THE EU ON THE DEVELOPMENT OF THE *LEX SPECIALIS* PROVISION

From the very beginning of its work the ILC sought to develop a set of principles that were closely modelled on those developed in the project that produced the Articles on the Responsibility of States for Internationally Wrongful Acts.[18] This has precipitated one of the strongest critiques of the DARIO; that they failed to take account of the different nature of organisations compared to States and the diversity of organisations.[19] This is a critique that arose early on in the work of the ILC on the responsibility of international organisations and does not ever seem to have been fully addressed. This has been, furthermore, the dominant critique throughout the comments made on the work of the ILC by the European Commission on behalf of the European Union. [20]

From its very first comments, which were among some of the first received by the ILC in 2003, until its final contributions made in early 2011, the European Commission continually emphasised the *sui generis* nature of the EU as a specific kind of international organisation.[21] While the comments made by the Legal Service of the Commission demonstrate a clear commitment to the ILC's project, and an acceptance that these are legal principles that could have a significant impact upon the EU, this was accompanied by a desire for the unique nature of the EU to be recognised. There was a clear acceptance of the general principles and ideas underpinning international responsibility. This was always accompanied, however, by the argument of the European Commission for a special rule of attribution that would be better able to respond to the internal nature of the Union.

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[18] International Law Commission Report of the fifty-fifth session (2003) A/58/10, para. 44, at 30.

[19] E. Paasivirta and P-J Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', 36 *Netherlands Yearbook of International Law* (2005) p.169; N. Blokker, 'Preparing articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations seriously? A mid-term review', in J. Klabbers and A. Wallendahl (eds.) *Research Handbook on the Law of international Organizations* , Cheltenham: Edward Elgar, 2011, p.313, at, p.337.

[20] *Responsibility of International Organizations Comments and Observations Received from international organizations,* 25 June 2004, A/CN.4/545, 'Comments of the European Commission', p.5; *Responsibility of International Organizations Comments and Observations Received from international organizations,* 14 February 2011, A/CN.4/637, 'Comments of the European Commission', pp.7-8.

[21] *Ibid.*

Much of this insistence on individual treatment commensurate with the *sui generis* nature of the EU was focused around the question of attribution.[22] This principle forms one of the basic requirements for the finding of responsibility. While one requirement is the existence of a breach of international law, there is a second foundational principle that the breach must be 'attributed' to the responsible actor;[23] namely that the action can be traced to them. When considering an organisation, the question as to what actions are those of the organisation and which are those of a Member State goes to the core of the organisation. While the actions and identity of a State is relatively well established at the international level, the label 'international organisation' does little to explain the powers and capabilities of that entity. The internal nature of an organisation can be understood as a sub-system and it is this internal order that establishes the powers of an organisation as well as any division in these powers between the organisation and its members.[24] As such, the complexity surrounding the question of attribution is unsurprising; it may not be so straightforward as to trace an action to the organisation or a Member State. The complex make up of the EU and the interaction between the EU and its members raises even more questions. The Union often relies on its Member States to implement obligations to which it has agreed, even in areas of exclusive competence, leading to the question of who is actually responsible for various actions.[25] There is also, however, a horizontal aspect to the relationship between the Union and the Member States, with the area of shared competence, where both the Union and Member States may be parties, separately, to the same international obligation.[26] There is a constant interaction and interdependence between the Union and its Member States in pursuit of a greater international role and this complex interaction is not easily understood. The result is confusion with any attempt to determine who precisely is responsible for any particular action.

At the beginning of its comments, the EU focused upon incorporating reference to the rules of the organisation within the principles on attribution of conduct.[27] The Commission argued that the complex relations between an organisation and its Member States, in particular that between the EU and its Member States, warranted reference to the rules of the organisation. As it is

[22] Chapter II, 'Attribution of Conduct to an International Organization' Draft Articles on the Responsibility of International Organizations, *Yearbook of the International Law Commission, vol. II, Part Two* (2011); Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 13; Comments of the European Commission, 'Comments and Observations by Governments and International Organizations', 12 May 2005, A/CN.4/556, at 5-6.

[23] Art. 4 DARIO

[24] C. Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties*, Oxford: Hart, 2007, 27-29

[25] P.J. Kuijper and E. Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' 1 *International Organizations Law Review* (2004) at 123-132.

[26] *Ibid at* 116-123.

[27] Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 13.

the rules of the organisation that establish how obligations are divided between an organisation and its members, they must be referred to in order to establish whether a breach is that of the organisation or of one, or indeed several, Member States.[28] Before responsibility can be established, it must be clear whose obligation was in fact the subject of the breach. This can surely only be done by reference to the rules of the organisation, as it is only these rules which determine to whom different obligations belong. The European Commission consistently sought to claim a link between apportionment of obligations and the division of responsibility. It has argued that there must be a determination of the apportionment of obligations before any consideration of attribution can take place. If the breach in question was not in fact a breach of an obligation of the organisation, then there can be no attribution of conduct, nor yet any responsibility.[29] The European Commission is clear in this argument that the rules of the organisation must play a key role in determining the question of attribution, but also the question of apportionment of obligations. The latter question is, in fact, the primary concern and must be addressed prior to any consideration of attribution.[30]

With the division of competence between the EU and its Member States being so fluid and developmental – especially given the context of the ongoing processes of Treaty reform within the EU during the 2000s – the European Commission has argued that reference to the internal rules of the organisation are crucial for addressing attribution.[31] It has also put forward three possible solutions to the question of attribution.[32] These are, firstly, a special rule of attribution so that the actions of organs of Member States can be attributed to organisations. An example of this with the EU is with the tariff agreements contracted between the EU and third States. It is not organs of the EU that are charged with implementing these, but rather the customs authorities of Member States. The European Commission considers this to show a 'separation between responsibility and attribution'.[33] With the traditional idea of attribution, actions would be attributed to the Member States, when the responsibility should really lie at the EU level. The second possibility was the implementation of special rules of responsibility to enable responsibility to be placed with the organisation, even if the prime actors in the breach of the organisations obligation were the organs of Member States.[34] The final option put forward was a special exemption or savings clause for the EU, which was, in fact, least favoured by the European Commission.[35] It seemingly did not want to go too far in its attempts to recognise the individuality of the EU. It was clear that this

[28] Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 13.
[29] *Ibid*. at 13-14.
[30] *Ibid*. at 14.
[31] *Ibid*. at 13.
[32] Comments of the European Commission, 'Comments and Observations by Governments and International Organizations', 12 May 2005, A/CN.4/556, at 6.
[33] *Ibid*. at 6.
[34] *Ibid*. at 6.
[35] *Ibid.* at 5.

would not be recognised and perhaps would detract from the growing desire of the EU to pursue a role within an 'effective multilateral' international community. The ILC was originally not keen to establish such an exemption clause. The Special Rapporteur considered that it would be possible to draft a general rule attributing actions that implemented binding acts of an organisation to that organisation.[36] While the ILC was, furthermore, not sure on the existence of a special rule of attribution,[37] the idea of a general *lex specialis* provision was first voiced within the reports of the Special Rapporteur in 2007, before being incorporated into the draft articles in 2009. The *lex specialis* provision is contained with Article 64 of DARIO and states:

> 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.'

The principle is modelled on article 55 of the articles on the Responsibility of States for Internationally Wrongful Acts and is designed so that continued reference to 'special rules' throughout the articles is not necessary.[38] It basically follows the international law maxim *lex specialis derogat legi generali* which considers that where more specialised legal provisions exist, they will take precedence over general legal principles.[39]

The inclusion of this principle is able to show two significant developments in the external identity of the EU. The first of which is the way in which the opinions of the EU on this show a distinct view on behalf of the European Union and move away from any consideration of the EU simply voicing the opinions of a collection of States. The second of these developments is the influence that the comments of the EU had. These are comments that were distinctly those of the EU, and furthermore, they were responded to, showing an actual influence of the EU in the development of international law. The following section explores this claim in more detail.

4. THE ILC AND *LEX SPECIALIS*: A RESULT OF EU OPINION?

The *lex specialis* principle within the work on the responsibility of international organisations is actually relatively new. The first mention of this idea arose in the fifth report of the Special Rapporteur, Giorgio Gaja, in 2007. He recognised

[36] Seventh Report on the Responsibility of international Organisations by Giorgio Gaja, Special Rapporteur, A/CN.4/610, at 12.

[37] Seventh Report on the Responsibility of international Organisations by Giorgio Gaja, Special Rapporteur, A/CN.4/610, at 38-39.

[38] Commentary to Draft Article 64 Draft Articles on the Responsibility of International Organizations, para. 7, *Yearbook of the International Law Commission 2011, vol. II, Part Two*.

[39] Fifth Report on Responsibility of International Organizations 2007, A/CN.4/583, para. 7, at 4.

the continued critique of the articles being made in comments, such as those from the European Commission, but also more generally in academic literature, that they did not sufficiently consider the variety of international organisations.[40] Gaja reasoned, however, that the fact that not all articles would be relevant and apply to all organisations did not preclude these general provisions from being included in the draft. It was not necessary that *all* articles would have to apply to *all* organisations. He did consider, however, that particular features of certain organisations might affect the application of certain rules.[41] Gaja considered there to clearly exist special rules in certain situations that warranted the ability to make reference to them and deviate from the general regime being drafted by the ILC.[42] The Rapporteur considered that the inclusion of reference to the possibility of specialised rules in this *lex specialis* provision would respond to the critique that the draft articles take insufficient account of the variety of organisations.[43]

Only one real change to this article was made by the ILC Drafting Committee from its first inclusion to the final set of articles adopted on second reading by the ILC. This change was to replace the phrase 'such as the rules of the organization' with that of 'including the rules of the organisation'.[44] The reasoning behind this proposal furthermore reinforces the reasons behind its original inclusion' to emphasise the diversity of organisations and the need to apply the articles in a flexible way.[45] It was felt by the Drafting Committee that there needed to be a greater emphasis on the specific characteristics of each organisation and so a greater reference on the rules of the organisation as forming a substantial part of the potential *lex specialis* that this article refers to.[46]

It is clear to see from Gaja's statements that the very reason for the inclusion of this principle was that of the peculiarities of different international organisations needing to be taken into account. The arguments made from 2004 onwards

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[40] Fifth Report on Responsibility of International Organizations 2007, A/CN.4/583, para. 7, at 4, See Comments of the European Commission 'Comments and Observations Received from international organizations', 25 June 2004, A/CN.4/545, at 5; 'Comments of the International Monetary Fund', at 7; N. Blokker, 'Preparing articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations seriously? A mid-term review', in J. Klabbers and A. Wallendahl (eds.) *Research Handbook on the Law of international Organizations*, Cheltenham: Edward Elgar, 2011, at 321; See also P-J Kuijper, 'Introduction to the symposium on Responsibility of International Organizations and of (Member) states: Attributed or Direct Responsibility or Both?' 7 *International Organizations Law Review* (2010) p.9; N. Blokker, 'Abuse of the Members: Questions concerning Draft Article 16 of the Draft Articles on Responsibility of International Organizations' 7 *International Organizations Law Review* (2010) p.35; A. Reinisch 'Aid or Assistance and Direction and Control between states and International Organizations in the Commission of Internationally Wrongful Acts' 7 *International Organizations Law Review* (2010) p.63

[41] Fifth Report on Responsibility of International Organizations2007, A/CN.4/583, para. 7, at 4.

[42] *Ibid*. para. 7, at 4.

[43] *Ibid.* para.7, at 4.

[44] Statement of Drafting Committee, Statement of the Chairman of the Drafting Committee Mr. Marcelo Vázquez-Bermúdez, 6 July 2009, at 6.

[45] *Ibid.* at 7.

[46] *Ibid.* at 7.

by the European Commission seem to precipitate the reasoning of the ILC. The Commission has been claiming the importance of the rules of the organisation, in particular in the area of attribution since its very first involvement in the ILC project. The Special Rapporteur seemed to almost respond to this by his inclusion of the *lex specialis* principle. It has been included to address the difficulty of there existing such a variety of organisations. While this certainly has not satisfied the EU in all of its claims, it has begun to incorporate the references to the rules of the organisations. From the final comments made by the European Commission on these articles, it appears as if it considers that even this provision does not completely address the issues of the 'different' nature of the EU:

> 'For now the European Union remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organization such as the European Union, even when account is taken of some of the nuances now set out in the commentaries. [...]
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> In view of these comments the European Commission considers that the International Law Commission should give further thought as to whether the draft articles and the commentaries, as they stand now, are apt for adoption by the Commission on second reading or whether further discussion and work is needed.'[47]

While the Commission seems to consider that these articles have not gone far enough, the development of a greater inclusion and focus on the rules of the organisation has gone some way towards recognising the individual nature of the EU. It was not the special rule on attribution requested by the European Commission but it was recognition of some differences. With the inclusion of the *lex specialis* principle, and its focus on the rules of the organisation, this moves towards recognising the individuality of the EU, without openly allowing or accepting individual exceptions for the EU. If any such rule were to exist and be codified this would perhaps remove the Union from such an international system of responsibility.

The EU was not the only proponent of this critique, but it was certainly at the forefront of the contributors. While the critique came up in other comments and academic contributions, none were as strong or as focused as those from the EU. The need to recognise the unique nature of the EU goes to the core of every comment made by the European Commission on behalf of the EU. The commentary to article 64, furthermore, focuses entirely on the EU as an example. While the EU was not the only organisation to support the inclusion of this article, the ILC chose to focus entirely upon the EU in the commentary. The ILC considers it impossible to identify all potential rules that may be incorporated under this category of *lex specialis* and so uses the example of the potential existence of a special rule on attribution to the European Union of

[47] Comments of the European Commission, Comments and observations received from international Organizations, 14 February 2011, Doc. A.CN.4/637, at 8.

conduct of Member States when implementing binding acts of the Union.[48] The potential existence of this special rule is a question that has continually arisen since this question of responsibility began.[49] It has become a complex question, which is certainly not settled. There are a number of different factors that complicate the matter, not least the changing and fluid competences of the European Union and its Member States.

The overall approach of the ILC has been to mirror the articles on those developed in relation to States and to, at certain points, attempt to come up with certain exceptions, such as this *lex specialis* provision. The way in which the ILC has incorporated so many references to the rules of the organisation, as the European Commission has been claiming that it should include, shows a reaction to these comments. The inclusion of the EU's comments in the final draft of the articles – and the initial instigation of a project on responsibility of non-State actors – perhaps demonstrates a growing respect towards the EU as a global actor. At the very least, it shows a recognition that the EU is able to voice opinions in its own right and is gaining an identity that is greater than simply a grouping of States.

5. THE EU AS MORE THAN THE SUM OF ITS MEMBER STATE-PARTS?

The Commission and its Legal Service made the various contributions of the EU towards the work of the ILC. From an institutional perspective, and considering the mechanisms available prior to those brought in by Lisbon, it is interesting that it was this part of the EU that took on representing this external identity of the Union here. While in some areas, for example with various actions under the Common Foreign and Security Policy, it has been the Presidency, High Representative or the Council that has taken on voicing the opinion of the EU, here it was the one institution that could be said to be acting solely on behalf of the Union. The actions of the Commission could not be mistaken to be those of the Member States as a collective, but will be those of the Union. In this sense, the external representation by the Commission of the EU as a whole resembles the role the Commission had in terms of the delegations of the Commission in third countries (before Lisbon) – cooperation with Member States, but certainly not acting under mandates from them.

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[48] Commentary to Draft Article 64 Draft Articles on the Responsibility of International Organizations, para.1, *Yearbook of the International Law Commission, vol. II, Part Two,* (2011).

[49] E. Paasivirta and P. J. Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', *36 Netherlands Yearbook of International Law* (2005) at 169; F. Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' *21 European Journal of International Law* (2010) at 723; S. Talmon 'Responsibility of International Organizations: Does the European Community require Special Treatment?' in M. Ragazzi (ed.) *International Responsibility Today*, Leiden: Brill, 2005, at 405.

Comments were made by fourteen States in total, of which eight are Member States of the EU.[50] Thus, even though only some EU Member States submitted comments, there was more involvement from EU members than from non-members in the process. This inevitably leads to the question as to whether there is any synergy between the comments made by the Commission and the EU Member States. First and foremost, it can be said that no such conflict between the comments of the Member States of the European Union and those of the Commission can really be seen. Member States have not been seen to openly critique the position of the Commission. This is not to say that there has been complete agreement and that all comments between the Union and its Members have been the same or come to the same conclusions. It is significant, however, that there has been no critique from either side of the position from the other side and also that even where differences of opinion have arisen, these differences have been possible without conflict arising. This reinforces the nature of the role of the EU in this arena as that of the Union alone; the Member States will not openly conflict or interfere with the views put across because they are the views of a separate international actor and the Member States is able to voice their own opinions on matters.

This can be seen, for example, with the Belgian comments on the last draft of the *lex specialis* principle. Belgium considered this principle to be too broad and capable of opening up too widely the possibility of organisations evading any responsibility and "as it stands [it] could render the draft articles entirely pointless."[51] This is in contrast to the opinion of the Commission, which is generally supportive of the principle. The Commission considers that the articles are insufficient in considering the situations of the EU and of similar entities that may be termed regional economic integration organisations.[52] As such the *lex specialis* principle is seen as "particularly important [...] to explicitly allow for the hypothesis that not all of [the draft articles] can be applied to regional (economic) integration organisations."[53] It appears that while some States, including Belgium, see this provision as too broad and needing to be deleted or at the very least limited in scope, the European Commission views this as a compromise and not one that truly goes far enough in addressing the issues that arise with the EU.

The comments of the Commission, in fact, consider this principle to be a way in which the individual characteristics of organisations, but most particularly the unique nature of the EU can be taken into account. While this is a difference in opinion between the EU and one of its Member States, there has been no conflict or fallout from this. Both are able to express these views, as

[50] EU Member States: Portugal, Belgium, Germany, Austria, Czech Republic, Netherlands, Italy and Poland; Other States: Cuba, El Salvador, Republic of Korea, Mexico, Switzerland, Democratic Republic of the Congo.

[51] Belgium comments, Comments and Observations received from Governments, 14 February 2011, Doc. A/CN.4/636, at 41.

[52] Comments of the European Commission, Comments and observations received from international Organizations, 14 February 2011, Doc. A.CN.4/637, at 38.

[53] Comments of the European Commission, Comments and observations received from international Organizations, 14 February 2011, Doc. A.CN.4/637, at 38.

equal participants within this drafting process. This may not show coordination between the EU and its Member States, but it does show something just as significant; the growth of the EU beyond a collection of Member States capable of expressing its own distinct views.

There does also, however, exist coordination between the EU and some of its Member States. The comments on this principle from Germany are generally supportive of the principles in terms similar to those used by the Commission. Germany considered the draft articles adopted on first position to 'fall short of fully reflecting' the fact that 'the relationship between an international organization and its Member States is [...] exclusively governed by the internal rules of that organization.'[54] Germany views the inclusion of the *lex specialis* as a way of enabling 'interpretation on a case-by-case basis' to compensate for the lack of understanding of the importance played by the relationship between an organisation and its Member States.[55] Germany also makes reference to these ideas in comments on other articles. Germany considers the relationship between an organisation between an organisation and its members to be so fundamentally different to that between States as, while the latter is governed by general international law, the former, 'is created by [the members'] wilful act'.[56] Germany goes as far as to consider there to be 'simply no room to resort to general international law, apart from specific indications to the contrary'[57] as any questions surrounding breaches of members' obligations towards the organisation are solely an internal question for that organisation:

> 'It is hence for an organization's members to stipulate and precisely define the relationship between them and the newly created international legal entity, including the legal powers an international organization may resort to, should one of its members breach an existing obligation vis-á-vis the organization.'[58]

Germany seems to be aligning its opinions here with those considered by the European Commission both in terms of the general importance of the internal relationship of the organisation, as well as the importance of the *lex specialis* provision in responding to this issue. There is support for the EU voicing its own distinct voice but these comments from Germany also show support and coordination from a Member State of the EU for the approach taken by the EU towards these issues.

6. POST-LISBON EVOLUTION?

The European Commission has clearly managed to carve a significant role for itself within the project of the ILC. It has done so by utilising the institutions and

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[54] Germany comments, Comments and Observations received from Governments, 14th February 2011, Doc. A/CN.4/636, at 41.

[55] *Ibid.* at 41.

[56] *Ibid.* at 22.

[57] *Ibid.* at 22.

[58] *Ibid.* at 22.

mechanisms already in existence prior to Lisbon to pursue this external representative role on behalf of the EU. The work of the ILC was not completed until after the implementation of Lisbon, though the contributions of the EU remained largely unaffected by any of the changes. Even the interventions made to the 6th Committee of the UN General Assembly have remained largely the same in terms of content. A difference can be seen in who such comments are attributed to, with pre-Lisbon there being 'European Community Statements' or 'EU Presidency Statements' and after Lisbon there being only 'EU Statements' but the content in these statements is consistent. An interesting aspect to the statements made before this body is perhaps the final 'EU Statement' being made by the Principal Legal Advisor to the Commission. Despite having established a number of new mechanisms and institutions for the purpose of external action, the Commission Legal Service retained the capacity to make statements and has retained a significant role in the EU Delegation at the UN. The question does remain as to how the changes brought in by Lisbon may affect such a role.

With one of the main aims behind Lisbon being the promotion of a greater global identity for the EU,[59] the growth of the role of the European Commission has begun the move towards this increased international role. The EU has developed a role for itself distinct from its Member States in the ILC's project on responsibility and the very fact that there was a need to consider the responsibility of international organisations demonstrates the importance of legal consequences resulting from the EU's external activities. The question of the relationship between the EU and its Member States is one that goes to the core of the difficulty of the external representation of the EU; the complexity of the interaction between the EU and its Member States. The EU seemed to achieve this impact by acting through existing institutions that could be viewed as distinctly 'European', namely the Commission and the EU Delegation to the UN (which was part of the Commission prior to the establishment of the European External Action Service).

The changes brought in by Lisbon have the potential to have a significant impact on the external identity of the Union and enable it to set itself apart from its Member States. There are three main ways in which such a potential impact arises; the establishing of a 'single' European Union with explicit legal personality, the new institutional roles that have been created and the greater development of obligations on Member States to cooperate and support Union external positions and policies. While all of these changes are potentially positive for the further progression of the Union, their actual impact is, as yet, uncertain and a number of challenges do still remain.

The creation of a single European Union with explicitly conferred legal personality (Article 47 TEU) has significant external impact. Prior to Lisbon, only the European Community had legal personality conferred upon it. While there does remain a simultaneous dependence on and independence from its Member States, the development of the EU into a single entity rather than a number

[59] Preamble, Art.3(5), Art.21 Treaty of the European Union.

of disparate ones does create a more certain identity. The definitive answer to the long debated question on the legal personality of the EU also shows it as an international actor and as capable of acting of its own accord without its Member States. The single legal personality allows the conclusion of international agreements under the name of the Union. It is debatable whether there are any formal, legal consequences of the change. What is clear, however, is that the new Article 47 will prevent the disjointed approach that arose on occasion. The most obvious example of this was in the relationship between the European Community and the (non-UN) international organisations which it was a member of, primarily the World Trade Organization. While it was clear what the involvement of the European Community was for a long time, the consequences for the European Union were for some time uncertain. Now that such a clear statement has been made on the part of the EU in terms of its international identity, there remain some questions about what this will truly mean in practical terms. It may raise a number of questions yet, as the existence of personality of the Union, while not controversial in its basic idea, does not affect the complex nature of the Union and the continued strong involvement of the Member States in the actions of the Union. It is now clear that the EU has the potential to act as an international legal person, if this was ever in question, but when actions will be considered to be those of the Union and when they will be those of the Member States is something that will remain a difficult subject.

Lisbon has furthered this theme of consistency and solidarity beyond the creation of a single legal entity and has strengthened many provisions previously within the Treaties to create a greater undertaking on Member States to coordinate their positions externally and to support the EU. There is, most visibly, an obligation to coordinate actions and positions within international organisations and conferences, as well as supporting the position of the Union in these forums.[60] Of course, the aim of this provision is to ensure consistency across the Union's actions and not only between the EU and the Member States. As well as this, there now also exists an obligation on Member States of consultation and 'convergence of [...] actions' in the area of foreign and security policy.[61] Not only is the EU put forward as an entity capable of international action, but the greater obligations of Member States exist to promote a significant and coherent international actor. This is perhaps one of the most significant developments in pursuing an international role for the EU. A clear desire can be seen to gain a coherent international approach on the part of the EU and identify itself, and its policies, at the international level. The challenge that remains, however, is how this will work in practice. With clear examples of diverging approaches from Member States towards international crises, such as during the break-up of Yugoslavia and the conflict in Iraq, along with the sensitive nature of foreign policy, raises the question of politically, how such coherence can be achieved. It remains to be seen how much things will change

[60] Art. 34 Treaty of the European Union.
[61] Art. 32 Treaty of the European Union.

through legal requirements on Member States to act consistently with European Union policy.

Article 3(5) TEU also now lists the development of international law as an objective of the Union. The work of the European Commission shows that this commitment began prior to Lisbon. Perhaps the inclusion of this with the Treaties shows this as action that will be increasingly pursued by the Union as a whole. It may have been the Commission under a limited mandate that involved itself in this project. With this increased commitment, it is arguable that perhaps a more comprehensive approach from the Union may be seen in the progressive development of international legal principles. This may be the signal of increased involvement of the EU within projects such as these. The Commission may have had some influence on principles here, but these were principles that had the potential to significantly impact upon the EU. It may be interesting to see how this obligation towards the development of international law is pursued by the EU. It may be, for example, that a broader approach is taken towards the areas over which it seeks to exert an influence. This may furthermore indicate a role for one of the newer institutional mechanisms that could be said to represent the Union as a whole. The actions of the European Commission here could be seen to have laid the foundations upon which this new obligation can now be pursued; the Commission has already paved a way towards influencing and enabling the development of international law.

On the institutional front, the introduction of the High Representative for Foreign Affairs and Security Policy, the 'permanent' President of the European Council and the European External Action Service (EEAS) enable actions to be seen as solely 'European' and create a clearer distinction between action of the Member States and that of the EU. These three new institutional aspects to the EU all contribute to one of the overriding aims of Lisbon; to create clarity and consistency in the global role of the EU. The various roles of the High Representative as Vice President of the Commission, Chair of the Foreign Affairs Council and representing the Union on matters of foreign and security policy pursue this by making a role that has responsibility for this idea of consistency across different areas of external relations. The EEAS has furthermore been created to assist and enable this role to be fulfilled sufficiently.

The Union has created entities that can clearly identify themselves internationally as acting on behalf of the EU and can work towards developing this as a significant role and one which is taken seriously by other international actors. These are institutions, however, that are unique to the Union and the precise capabilities of such actors are likely only to become clear after some experience. The role of such entities is uncertain, for example, as compared to the Commission and its Legal Service, and the role that it developed within the International Law Commission. The European Commission has gradually developed more involvement at the international level but the meaning of such a role, now that there are more dedicated international actors is unclear. With the role of the Commission being seen as quite limited in its remit throughout the project on responsibility, the newly unified Union will perhaps opt for these new dedicated international actors to develop the role of the Union. The role

of the Commission was limited throughout this work to comments only on the previously Community aspect of the Union's action. These new actors represent a newly unified external identity and would be capable of responding on behalf of the EU as a whole. It will be interesting to see what role these new institutions will take on in areas such as interaction with the ILC as compared to the Commission. Perhaps they may be able to pursue the influence of the Union further. It may have more significance, however, for the internal dynamics of the EU in terms of who represents the Union and acts as its voice internationally.

Overall the changes brought in by Lisbon are positive in moving the development of the EU's external legal identity further forward. While the work of the EU within the ILC shows that it was clearly able to garner a role for itself and represent itself internationally, with certain limitations this was only able to go so far. Much of what has been discussed in this paper is, inevitably, based on speculation and interpretation on the influence exerted by the Commission. It is clear that it was able to have some impact, which in itself is significant. This was an influence that was limited, however, and it was always going to be within the limited remit of the Commission and also the limited perspective of the ILC on this project. Perhaps the changes brought in by Lisbon may show some significant steps in pushing this potential for such an international role further forward. It has not taken radical initial steps in this area, however, it has continued work that began a long time ago. Ultimately, the changes brought in by Lisbon have sought to progress the external role of the Union, but they have not changed the unique nature of the EU and the interaction that exists between the Union and its Member States. If anything, the new institutional arrangements and the increased international commitments have created an even more complex arrangement.

Ultimately Lisbon has not fundamentally changed the nature of the EU and the continued involvement of its Member States. The continued importance of the State and the way in which international entities are structured and designed around states, means that in spite of the continued push of the Union towards increased international representation, this is restricted. Ultimately, this is not a development of the Union towards the existence of a State. The changes brought in by Lisbon push the EU towards an increased international identity but not without raising futher complex questions in terms of its competence, role and relationship with its Member States. The continued role of Member States with the Union means that the new ideas brought in by Lisbon are not entirely straightforward. The new institutional arrangements, for example, do not necessarily result in a clear and distinct external identity for the Union.

7. CONCLUSION

While the changes brought in by Lisbon will certainly assist in promoting the EU as a global actor, it is argued that the way in which this is really being achieved is from developments that have been much longer-standing. Statements made by the European Commission providing genuine impact upon the

development of an area of 'pure' international law gives some hint as to the potential of the EU as an autonomous actor. The development of the EU as a global actor in its own right, distinct from its Member States, has been developing since the early 1990s. Generally speaking, international organisations and their relationships with Member States have a complex idea of autonomy if the organisation involves a supranational element. This is certainly the case for the EU.

Despite the changes made at Lisbon which point to a greater capacity of the EU to be an international actor in its own right, the way in which the EU acts at the international level will continue to have a strong link to its Member States. On the substance of the ILC's project itself – that of responsibility - the question will continually arise as to whether X or Y action is that of the organisation or of the Member State(s). The contribution of the EU to the work of the ILC has affected the ILC's work and should be regarded as a success on the part of the EU's external identity, as well as a necessary pre-cursor to any developments in external activities where responsibility is likely to be an important consideration. One should not be surprised that the contributions by Member States may on occasion differ from those submitted by the Commission on behalf of the EU, since after all, the formation of an EU external identity does not depend on the full and unanimous agreement of all the Member States on specific issues. It is highly unlikely that the Member States would all come to one view (whether on the responsibility of international organisations or another issue entirely) with the EU and its institutions holding an opposing view. Therefore, it appears that a 'middle way' exists: though the views of the EU as an independent actor and the Member States may on occasion differ, the latter are (at least in general sense) supportive of the progression towards the EU becoming more significant as an international actor. In the area surrounding the ILC, at least, there has been a general acceptance of the EU voicing its opinions and in beginning to contribute to and help to shape the development of international legal principles.