International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime

Aurel Sari* and Ramses A. Wessel**

1. Introduction

The Lisbon Treaty has reconfirmed the EU’s intention to advance its interests and values on the international scene in a more proactive manner, including through the conduct of crisis management missions in third countries as part of its Common Foreign and Security Policy (CFSP).1 Although most missions launched by the Union so far have been relatively modest in their size and objectives,2 even small-scale operations may give rise to a breach of international law or cause damage and injury to private parties. Yet holding EU missions accountable for their activities is hampered by a range of legal and practical difficulties.3 One particularly thorny issue concerns the attribution of the wrongful acts committed by EU military operations: since they are composed of personnel made available to the Union by its Member States and third States, it is not immediately obvious which party—the EU, the contributing States or both—should bear responsibility for their conduct. This question is of great practical significance, for accountability cannot be discharged effectively if it is unclear where responsibility lies. The purpose of this

---

* Lecturer in Law, Exeter Law School, UK (A.Sari@exeter.ac.uk). Some of the ideas developed here were first presented at the Second ESIL Research Forum held in Budapest in September 2007.
** Professor of the Law of the European Union and other International Organizations at the Centre for European Studies, School of Management and Governance, University of Twente, The Netherlands (R.A.Wessel@utwente.nl).

2 See [XREF to Koutrakos, sections ‘The state of CSDP after Lisbon’ and ‘A process-centred policy’].
3 For example, it is not fully settled to what extent the EU is bound by the pertinent rules of international law, including those applicable during armed conflict. See Naert (n 1) 463–540.
chapter is to revisit this issue and establish what rules govern the attribution of wrongful acts committed by EU military operations.

In line with the general topic of this book, the present chapter aims at investigating an area in which the EU’s contribution to global governance is highly visible and which affords the Union with considerable opportunities for shaping the pertinent regulatory frameworks. Due to the complex division of competences between the EU and its Member States in the field of foreign and security policy, a matter which the Lisbon Treaty did little to rectify, the attribution of conduct in the context of EU crisis management missions is arguably even less clear than in the case of military operations led by other international organizations. With the expanding role of the EU in global security governance, a better understanding of the allocation of responsibility between the Member States and the Union therefore becomes ever more important, especially since the Member States have underlined in Article 21 TEU that the EU’s actions on the international scene shall be guided by international law and the principles of the UN Charter. This solemn commitment to the international rule of law raises the question whether the rules of international law governing the responsibility of international organizations laid down in the Draft Articles on the Responsibility of International Organizations (DARIO) adopted by the International Law Commission (ILC) at second reading in June 2011 can accommodate the Union’s constitutional complexity and enable it to contribute to global security in an accountable manner.

Between 2003 and 2011, the European Commission has actively participated in the ILC’s work with the aim of ensuring that the DARIO would ‘allow sufficient room for the specificities of the European Union.’ It has been argued that the European Commission’s contribution to shaping of international law in this area ‘has had demonstrable effects on the final outcome of the ILC’s work and should be regarded as a success on the part of the EU’s external identity.’ This assessment appears overly generous. The ILC’s reluctance to fully embrace the European

---

4 See also Michael Emerson et al., Upgrading the EU’s Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy, Brussels: Centre for European Policy Studies (CEPS), 2011.


6 Comments and Observations received from International Organizations, 14 February 2011, UN doc A/CN.4/637, 7.

Commission’s demands to accord special treatment to the EU has led the latter to suggest that ‘the draft articles, even taking account of the commentaries, [...] do not adequately reflect the situation of regional (economic) integration organizations such as the European Union’. This hardly sounds like a ringing success in asserting the EU’s external identity. Moreover, it is important not to lose sight of the fact that the European Commission’s efforts to influence the development of the DARIO centred exclusively on the ‘Community’ parts of the Union, rather than on the Union’s foreign, security and defence policy. Nor were the ‘post-Lisbon’ global ambitions of the EU, which form the focus of the present contribution, part of the main discussion.

Accordingly, we begin our analysis by noting that no special considerations justify the application of *lex specialis* rules of attribution to EU crisis management missions. While this means that such missions are subject to the general rules of attribution laid down in the DARIO, we argue that the way in which the ILC purports to apply these rules to peacekeeping operations is too narrow. Contrary to the approach adopted by the ILC, any attempt to establish where responsibility lies for the wrongful conduct of EU missions must first of all clarify their position within the legal order of the EU. To this end, we assess the legal framework and practice of EU military operations in order to establish whether they constitute either *de jure* or *de facto* organs of the Union. Based on this analysis, we submit that to be able to contribute to the governance of global security the EU should accept that the wrongful conduct of its crisis management missions are, in principle, attributable to it and seize the opportunity to contribute to the development of the law of international responsibility in this area.

2. **International Responsibility and the EU**

As an international legal person, the EU bears responsibility under international law for any violations of its international obligations. The applicability of this principle is reinforced by

---

8. Comments and Observations (n 6) 38. While the Commission’s comments related to the DARIO as adopted at first reading, it is unlikely that the changes made at second reading have prompted it to change its mind.


Article 3(5) TEU, which provides that in its relations with the wider world, the Union shall contribute to ‘the strict observance and the development of international law’. A narrow reading of this provision may suggest that promoting the strict observance of international law is merely what in the words of Arnold Wolfers may be called a ‘milieu goal’ of EU external relations, that is a goal aimed at shaping the environment in which the EU as a foreign policy actor operates. However, the more detailed objectives of EU external action laid down in Article 21 TEU make explicit what already seems to be implied by Article 3(5) TEU, namely that the Union itself must observe international law when it acts on the international scene. The relevant provisions of the TEU therefore not only express a preference for an international system based on multilateral cooperation and the rule of law, but they also recognize that international law imposes certain constraints on EU external action.

In addition, the fact that Articles 3(5) and 21(2)(b) TEU direct the EU to contribute to the development of international law and to consolidate and support its principles hints at the Union’s ambition to shape the international legal order in its own image, including by exporting its regulatory standards and models to the international level as discussed by Gráinne de Búrca in this volume. In principle, this engagement may take two main forms. On the one hand, it may lead to a growing convergence between international law and EU law to the extent that European law as a highly effective mode of legal governance offers a ‘possible horizon’ for the development of the international legal system. On the other hand, it may also lead to greater differentiation and pluralism should the EU’s institutions choose to emphasize the autonomy and distinct features of the European legal order, as the Court of Justice has done on successive occasions, notably in Kadi, and demand special treatment for the Union on these grounds. The European Commission has adopted exactly this position with regard to the international

---

12 Arnold Wolfers, Discord and Collaboration: Essays on International Politics (Johns Hopkins Press 1962) 73. The promotion of international law is one of the milieu goals specifically mentioned by Wolfers (ibid 74).
13 Art 21(1) and (3) TEU.
14 See [XREF to Koutrakos in this volume, section ‘Space for a mutually reinforcing relationship’].
15 Cf Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, Judgment of 21 December 2011 (Grand Chamber), not yet reported, para 101.
16 See [XREF to de Búrca in this volume, ‘Conclusion’, paragraph beginning ‘In terms of the second question…’ ].
responsibility of the European Community (EC).

2.1 *Lex specialis* rules of attribution

In a series of comments concerning the ILC’s work on the responsibility of international organizations, the European Commission underlined that the EC ‘was not the “classic” type of international organization’.21 Unlike classical intergovernmental organizations, the Community constituted ‘a legal order of its own, with comprehensive legislative and treaty-making powers, deriving from transfer of competence from the member States to the Community level’.22 While certain principles of the law of international responsibility applied to all international organizations, the Commission argued that in other areas account had to be taken of the special supranational features of the EC.23 One such area concerned the attribution of measures adopted by its Member States in the implementation of Community law.

Even in fields where the EU enjoys exclusive competence, the implementation of its decisions is normally left to the Member States.24 However, such implementing measures are not attributable to the EU since the Union does not to exercise a sufficient degree of control over its Member States that would justify imputing their acts to it.25 From the perspective of EU law, this non-attributability may create difficulties in cases where national implementing measures contravene an international agreement to which both the EU and the Member States are parties. In such instances, the EU may enjoy an exclusive competence under its internal law to regulate the conduct of the Member States, yet it is their responsibility, not that of the EU, which is engaged under international law. This outcome sits somewhat uneasily with the requirement of unity in the international representation of the Union26 and the autonomy of its legal order.27 The European Commission has therefore adopted the position, in particular in the context of WTO

23 Ibid 5.
24 Paasivirta and Kuijper (n 9), 183.
litigation, that measures of the Member States adopted in the implementation of exclusive Community competences should be attributed to the Community and engage its international responsibility.\(^{28}\)

Based on this practice, the European Commission reasoned that the ILC should incorporate special rules of attribution of conduct, special rules of responsibility or a special exception or saving clause into the DARIO in order to address the distinct features and situation of the EC and similar organizations.\(^{29}\) However, as neither Special Rapporteur Giorgio Gaja nor the ILC saw the need for special rules of attribution or responsibility,\(^{30}\) the DARIO attempts to address the Commission’s concerns in a savings clause which stipulates that its provision do not apply, amongst other things, where and to the extent that the content or implementation of the international responsibility of an international organization are governed by special rules of international law.\(^{31}\)

### 2.2 The Common Foreign, Security and Defence Policy

The European Commission’s position regarding the attribution of national measures adopted in the implementation of exclusive Community competences raises the question whether similar considerations apply in the field of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), in particular with respect to EU crisis management missions. Clearly, some parallels between these different policy areas exist. As already noted, the EU must rely on its Member States and third parties to conduct military operations in third countries just like the Community had to rely on the national authorities of the Member States in order to put its decisions into practice. However, these parallels do not run much deeper.

In its observations on the ILC’s work, the European Commission was careful to confine its comments to the EC and to Community law without expressing any view on the international responsibility of the EU within its specific areas of activity, including the CFSP. This self-restraint no doubt stemmed from the Commission’s limited competence in these areas.\(^{32}\) Indeed, the Commission expressly declined the ILC’s invitation to comment on the attributability of the

---


\(^{29}\) Sixth Committee, Summary record of the 21st meeting, 18 November 2004, UN doc A/C.6/59/SR.21, 5.

\(^{30}\) Third Report on Responsibility of International Organizations, UN doc A/CN.4/553, 13 May 2005, 4–6..

\(^{31}\) Art 64 DARIO.

\(^{32}\) Cf Art 18(4) TEU (Nice).
conduct of peacekeeping forces on the basis that this question did not relate to Community law. However, it is likely that the Commission’s silence on the international responsibility of the EU was also motivated by the fact at the time the Union constituted a separate legal regime which did not share the supranational features of the Community legal order. Most importantly, the activities carried out in the context of the EU, including the CFSP and CSDP, were generally understood not involve a transfer of competence by the Member States to the EU resulting in a loss of authority on their part: in other words, the Member States did not endow the EU with an exclusive competence in its specific areas of activity.

Although the entry into force of the Lisbon Treaty has clouded rather than clarified the exact division of competences between the EU and its Member States in the field of the CFSP/CSDP, it is beyond doubt that the EU has not acquired an exclusive competence in the conduct of foreign, security and defence policy following the entry into force of the Lisbon Treaty. This is a significant point, for the exclusive nature of the EC’s competence lay at the heart of the arguments advanced by the European Commission in its quest to see special rules of attribution applied to national measures adopted in the implementation of Community law.

Given that the Union’s competence over the CFSP/CSDP is not exclusive, the reasoning and precedents invoked by the Commission to justify the special treatment sought for the EC do not apply directly to the conduct of EU crisis management missions. In fact, as Esa Paasivirta and Pieter Jan Kuijper have pointed out, the EU ‘is in many ways a classical intergovernmental organization with problems similar to the UN in respect of peace-keeping and police action.’ The attribution of wrongful conduct committed by EU military operations must therefore, primarily, be determined with reference to the general rules of attribution laid down in the

33 Comments and Observations (n 22) 16.
34 Kadi (n 20) para 202.
37 This is so despite the somewhat ironic fact that international agreements in the field of the CFSP are concluded exclusively by the EU without any provision for mixed agreements.
39 Paasivirta and Kuijper (n 9) 174.
DARIO and any contribution of the EU to global security governance take place within that general regulatory framework.

3. Attribution of Conduct in Peace Operations: The Missing Link

In recent years, the rules governing the attribution of wrongful acts committed in the context of peace support operations have been the subject of intense discussion, in particular in the aftermath of the widely criticized decision of the European Court of Human Rights in Behrami and Saramati.40 Although this debate has demonstrated that academic opinion insist on a high level of factual control for holding States and international organizations responsible for the conduct of peace operations,41 it has stopped short of addressing the underlying question of whether factual control is the only relevant ground of attribution in this context. In this section, we argue that the DARIO provides too narrow an answer to this question.

3.1 Dual organ status and the DARIO

Since no international organization, including the EU, enjoys the competence to raise its own armed forces by way of direct recruitment, international organizations conducting military operations have to rely on personnel made available to them by their member States or third countries. In placing members of their armed forces at the disposal of international organizations, States do not detach them from their body politic and divest them of their status as State officials. If that were the case, assigning troops to international organizations would be tantamount to disbanding them. To avoid this effect, States usually transfer only limited powers of operational control over their forces to international organizations,42 and retain supreme authority, known as full command,43 for themselves.44 The armed forces of a State thus never

---

43 NATO Military Committee, ‘Overall Organization of the Integrated NATO Forces’, MC 57 (Final), 11 October 1957, 10 (on file with the authors).

© Aurel Sari and Ramses A. Wessel
lose their institutional status as State organs during their secondment to an international organization.\textsuperscript{45}

However, none of this precludes an international organization from temporarily incorporating national contingents into its own institutional structure with the consent of the contributing States. The UN offers some lessons in this respect: beginning with the United Nations Emergency Force (UNEF), peacekeeping operations conducted by the UN have been established as subsidiary organs of the General Assembly or the Security Council in exactly this manner. In the case of UNEF, this arrangement was recognized in express terms in the status of forces agreement concluded between the UN and Egypt, which described UNEF ‘as an organ of the General Assembly of the United Nations established in accordance with Article 22 of the [UN] Charter’.\textsuperscript{46} This precedent was followed in subsequent operations and is reflected in their legal instruments, including the applicable force regulations\textsuperscript{47} and status of forces agreements.\textsuperscript{48} The International Court of Justice (ICJ) has confirmed the legality of these institutional arrangements in the \textit{Certain Expenses} case.\textsuperscript{49} Consequently, it is a well-established aspect of UN peacekeeping practice that national contingents serving in UN operations hold a dual institutional status as organs both of their contributing State and of the UN.\textsuperscript{50}

The dual organ status of UN peacekeeping operations poses a dilemma in so far as their


\textsuperscript{46} Exchange of Letters constituting an Agreement concerning the Status of the United Nations Emergency Force in Egypt, 8 February 1957, 260 UNTS 62. Art 22 of the UN Charter entitles the General Assembly to ‘establish such subsidiary organs as it deems necessary for the performance of its functions’.

\textsuperscript{47} Eg Art 6, Regulations for the United Nations Force in Cyprus (UNFICYP), UN doc ST/SGB/UNFICYP/1, 25 April 1964, reprinted as Annex II to Exchange of Letters Constituting an Agreement between the UN and Canada, 21 February 1966, 555 UNTS 119.

\textsuperscript{48} Eg Art IV(14), Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina, 15 May 1993, 1722 UNTS 78; Art IV(15), Agreement between the UN and the African Union and the Government of Sudan (UNAMID), 9 February 2008 (on file with the authors).

\textsuperscript{49} \textit{Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)}, Advisory Opinion (1962) ICJ Rep 151, 177.

wrongful conduct may be attributed to more than one party. Whilst recognizing that ‘the question of attribution of conduct is not clear-cut’,\(^{51}\) Special Rapporteur Gaja proposed a straightforward solution to this problem in his Second Report on the Responsibility of International Organizations, suggesting that the ‘decisive question in relation to attribution of a given conduct appears to be who had effective control over the conduct in question’\(^{52}\). The ILC agreed, but went one step further by declaring this to be the only relevant factor. The Commentary to the DARIO thus distinguishes between State organs which are ‘fully seconded’ to an international organization on the one hand and State organs which to a certain extent still act in a national capacity during their secondment, such as national contingents participating in UN peacekeeping operations, on the other hand.\(^{53}\) The DARIO accordingly applies two distinct and mutually exclusive rules of attribution to these two situations: it treats the conduct of fully seconded State organs as an act of the receiving organization under Article 6, but applies the test of effective control to not fully seconded State organs under Article 7 in order to determine whether their conduct should be attributed either to the contributing State or to the receiving organization.

The sharp distinction that the DARIO attempts to draw between fully and not fully seconded State organs is artificial. A State will always retain a substantial degree of authority over any organs it makes available to an international organization, otherwise they would cease to be State organs by definition. Even in the European Union this starting point is undisputed. Since every secondment of a State organ requires the seconding State and the receiving organization to share their authority in some form, it is difficult to follow the ILC’s argument that national contingents forming part of peacekeeping operations are in a class apart from other seconded State organs. The difference is at best one of degree, not one of principle. If no precise distinction can be drawn between fully and not fully seconded organs, the possibility must be accepted that entities enjoying a dual organ status, such as national contingents serving in UN operations, could fall under Article 6 DARIO.\(^{54}\)

### 3.2 A rebuttable presumption

The DARIO discounts the legal and institutional ties that bind national contingents to an international organization in favour of attributing their conduct solely on the basis of factual


\(^{52}\) Ibid 19.

\(^{53}\) DARIO Commentary (n 5) 85.

\(^{54}\) Cf the position of INTERPOL in relation to seconded officials, in Comments and Observations received from Governments and International Organizations, 12 May 2005, UN doc A/CN.4/556, 24.
criteria. This approach is highly problematic, since it deliberately ignores the institutional law of the international organization concerned. Rather than giving effect to the rules of the international organization in determining whether any person or entity possesses the status of an organ of that organization—which according to Article 2(c) DARIO should be the decisive factor\(^{55}\)—the ILC has in effect reserved that decision for itself. Moreover, in the case of the UN, this approach flies in the face of long-standing and consistent practice whereby the UN has accepted responsibility for the wrongful acts of its peacekeeping operations. As the Office of Legal Affairs made clear in a Memorandum submitted to the ILC in 2004, the UN takes the view that its responsibility arises in such circumstances because ‘[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization’.\(^{56}\)

It is important to underline that the justification for attributing the acts of peacekeeping forces to the UN is based on their legal and institutional status as subsidiary organs of the Organization. As Dan Sarooshi has shown, UN law and practice defines a subsidiary organ as an entity established by a principal organ of the UN and operating under its authority and control.\(^{57}\) The exercise of control therefore forms one of the preconditions for the establishment and continued existence of a subsidiary organ. However, control in this context is a requirement of the institutional law of the UN (‘the rules of the organization’) and must not be confused with control as a distinct basis of attribution of wrongful conduct.\(^{58}\) This means that the degree of control to be exercised over a subsidiary organ does not necessarily have to equate to ‘effective control’. In the case of UN peacekeeping forces, the exercise of overall authority and control by the Security Council is sufficient to permit their establishment as a subsidiary organ of the UN.\(^{59}\) In addition, it must be borne in mind that contributing States relinquish certain powers of control over their national contingents whenever they make them available to the UN to be incorporated into a peacekeeping operation.\(^{60}\) This transfer of authority creates a presumption that national contingents act exclusively on behalf of the UN during their assignment and that

\(^{55}\) See also the European Commission’s observations in Comments and Observations (n 22) 13.


\(^{58}\) This would amount to repeating the Grand Chamber’s mistake in Behrami, but in reverse: see Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’ (2008) 8 HRLR 151, 164.

\(^{59}\) Sarooshi (n 57) 440–441.

their conduct is therefore attributable to the Organization, rather than the contributing State.\textsuperscript{61} This presumption may be rebutted, however, whenever national contingents operate under the direct instructions of their contributing State and thereby in fact fall outside the reach of the UN’s effective control.\textsuperscript{62}

The advantage of this rebuttable presumption is that it gives effect to the status of UN peacekeeping operations as subsidiary organs of the Organization, and thus fully respects the constitutional rules and practice of the UN, but recognizes that the dual institutional status of national contingents leaves contributing States with considerable authority over their troops. However, the reasons for attributing the acts of national contingents to the UN are purely normative: it is the institutional status of UN peacekeeping operations as subsidiary organs which necessarily entails the attributability of their acts to the UN and it is the formal transfer of legal authority over national contingents which gives rise to a presumption that they act exclusively on behalf of the UN in the exercise of their mandates.\textsuperscript{63}

4. The Institutional Status of EU Military Operations

The evidence suggests that the UN has accepted that the wrongful conduct of national contingents serving in its peacekeeping operations is attributable to it on the basis of general legal principles.\textsuperscript{64} The rules of attribution applied to UN peacekeeping operations therefore may be applied to other international organizations. Consequently, if it can be established that EU military missions constitute subsidiary organs of the EU, a rebuttable presumption may be said to exist in favour of attributing their wrongful conduct to the Union, rather than to the contributing States. In order to be able to assess the responsibility issues flowing from the EU’s ambitions in global security governance, we need to take short ‘internal examination’ into the institutional position of military operations within the EU. Section 3 has shown that two basic


\textsuperscript{62} Interoffice Memorandum (n 56), 355.

\textsuperscript{63} Cf *Stephens v Cyprus, Turkey and the UN*, Admissibility Decision, App No 45267/06, 11 December 2008.

conditions must be satisfied for our presumption to arise in the present context: the contributing States must transfer their legal authority over national contingents to the EU and the contingents must be incorporated into the institutional structure of the EU as its organs.

The first condition is undoubtedly satisfied. Although no document affecting a transfer of authority by a Member State to the EU is in the public domain, the available evidence suggests that contributing States confer operational control over their personnel on the EU Operation Commander. This is confirmed by the participation agreements concluded with third countries contributing to EU operations, which typically declare that all forces and personnel remain under the full command of their national authorities, but provide for the transfer of operational and tactical command and/or control to the EU Operation Commander. However, such a transfer of authority does not transform the national contingents concerned into a de jure organ of the EU. To satisfy the second condition, a separate step in the form of a legal instrument or another expression of will is required whereby the EU formally incorporates the assembled military personnel and assets into its own institutional structure. The fact that the legal acts establishing EU military operations do not expressly designate them as subsidiary organs is not determinative of this question, since their institutional status within the EU is a substantive and not a terminological matter. Whether or not they form part of the Union instead depends, first, on whether the EU enjoys the necessary competence to incorporate national contingents into its institutional framework and, second, whether the legal acts establishing EU operations evidence an intention to do so in individual cases.

4.1 Competence and legal basis

Although the Lisbon Treaty has left the nature of the EU’s competence in the field of foreign, security and defence policy unclear in important respects, here we are concerned not with the


67 But it may transform them into a de facto organ: see Section 5 below.

68 Sarooshi (n 57) 438–446. Cf Seyersted (n 50) 462–463.

69 DARIO Commentary (n 5) 82.

70 Cf Cremona (n 10) 65.
nature of the EU’s competence, but its scope. According to Article 24(1) TEU, ‘[t]he Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.’ While the material scope of the EU’s competence in the field of foreign and security policy could hardly be broader, its competence in defence questions is more limited.\footnote{Piet Eeckhout, \textit{EU External Relations Law} (2nd edn, OUP 2011) 168.} However, the specific provisions on the Common Security and Defence Policy (CSDP) laid down in Section 2 of Title V of the TEU confirm in express terms that the \textit{Union} may conduct military operations drawing on capabilities provided by the Member States.\footnote{Art 42 TEU.} Consequently, there is no doubt that the Member States have clothed the EU with the legal capacity to dispose over military assets made available to it for the purposes specified in the TEU.\footnote{von Kielmansegg (n 65) 130–133.}

Since all legal acts relating to the launch, conduct and termination of EU military operations are adopted by the Council,\footnote{Arts 42(4) and 43(2) TFEU.} the latter is the only EU institution capable, in principle, of establishing military operations as its subsidiary organs. Pursuant to Article 240 TFEU, the Council enjoys the power to determine the organization of its General Secretariat. In the past, the Council has relied on the predecessor of this provision to create new military bodies within the General Secretariat, in particular the EU Military Committee and Military Staff,\footnote{Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the EU, OJ [2001] L27/4; Council Decision 2001/80/CFSP of 22 January 2001 on the establishment of the Military Staff of the European Union, OJ [2001] L27/7, as amended. The EU Military Staff has since been transferred to the European External Action Service.} and to lay down rules applicable to national military staff on secondment to the General Secretariat.\footnote{Council Decision 2001/496/CFSP of 25 June 2001 on the rules applicable to national military staff on secondment to the General Secretariat of the Council in order to form the European Union Military Staff, OJ [2001] L181/1, since replaced by Council Decision 2007/829/EC of 5 December 2007, OJ [2007] L327/10.} The adoption of these instruments demonstrates that the Council enjoys the competence to temporarily incorporate military personnel belonging to the Member States into its own institutional structure.\footnote{At least this is how the Council has applied Article 240 TFEU and its predecessor for almost a decade, without ever being challenged in this interpretation.}
Article 28 TEU and its predecessor, which enables the Council to adopt decisions in situations where operational action by the Union is required.78 The operational nature of EU crisis management missions seems to have been the key consideration leading the President of the General Court to deny in the case of H v Council and Commission that the EU Police Mission (EUPM) in Bosnia and Herzegovina could be classified as a body, office or agency of the Union subject to judicial review under Article 263 TFEU.79 In his view, the EUPM was merely ‘a “mission”, in other words, a simple activity’ of limited duration, which unlike the European Defence Agency had not been accorded the legal status of an agency and enjoyed no legal personality.80 Notwithstanding the President’s assessment, the fact that the Council established the European Defence Agency under what is now Article 28 TEU81 shows that this provision is perfectly capable of serving as a legal basis for decisions having institutional implications:82 if the Council has the power to establish independent agencies under Article 28 TEU, it must have the power to create subsidiary organs in this area too. While the absence of separate legal personality may disqualify EU crisis management missions from being classified as bodies or agencies of the EU within the meaning of its internal law,83 the conferral of legal personality is not a necessary requirement for the establishment of a subsidiary organ.84 Nor is it necessary for subsidiary organs to be established on a permanent basis.85 Both the relevant Treaty provisions and past practice therefore confirm that the Council enjoys the capacity to incorporate military personnel

79 Case T-271/10 R, H v Council and Commission, Order of the President of the General Court, 22 July 2010, not yet reported, para 20.
80 Ibid para 19.
84 While subsidiary organs must enjoy a degree of functional independence from their principal organ, separate legal personality is not essential. See Sarooshi (n 57) 416–417.
85 UN peacekeeping operations are established only for a limited period: Bothe (2002) (n 45) 688.
within its own structure as subsidiary organs. 86

4.2 Are EU military operations subsidiary organs of the Council?

Since the Council has not developed its own rules to guide the establishment of subsidiary organs, the criteria developed by the UN and may be applied to by analogy. 87 These require that a subsidiary organ must be established by a principal organ and operate under its authority. In addition, the creation of a subsidiary organ must not violate the competences of other principal organs and the functions entrusted upon it may not be broader than the competences of the international organization of which it forms a part. EU military operations satisfy all of these conditions. All military operations launched so far have been established by the Council, which is one of the institutions, or principal organs, of the EU. 88 All operations perform their tasks under the overall authority and control of the Council, exercised by the Political and Security Committee (PSC) on its behalf. 89 The creation of EU military operations does not violate the prerogatives of any other EU institution, since only the Council enjoys the power to adopt legal acts concerning the launch and conduct of EU crisis management missions. 90 Finally, the functions carried out by EU military operations do not exceed the competences of the EU. As we have seen, the EU enjoys the express competence to conduct military operations in third countries. Nothing therefore precludes the relationship between the Council and EU military operations from being classified as a relationship between a principal and a subsidiary organ.

Still, the status of an entity as a subsidiary organ cannot be simply presumed, but requires formal recognition of some sort. 91 Neither the Council decisions establishing EU military operations nor any related instruments, such as the status of forces agreements concluded with host States, describe EU operations as subsidiary organs or otherwise evidence the Council’s intention that they should form part of its institutional structure. 92 This may be contrasted with the clear language adopted in the Joint Action establishing the European Defence Agency, which provides that the ‘Agency shall act under the Council’s authority … within the single institutional

---

86 It is noteworthy that in H v Council and Commission, the President of the General Court held that the ‘Council retain[ed] responsibility for the action of the EUPM in several respects’ and that the decisions taken by the Head of EUPM therefore may have been attributable to the Council: see (n 79) paras 24 and 25.

87 Sarooshi (n 57) 416.

88 For a detailed account of the legal framework of EU missions, see Naert (n 1) 97–191.

89 Art 38 TEU.

90 Art 43(2) TEU.


92 See also Schmalenbach (n 45) 572.
Various signs suggest that EU military operations too fall within the single institutional framework of the EU, including their international nature, the fact that they are conducted under the authority of the Council and the language of the relevant Treaty provisions more generally. Yet none of this can substitute for the absence of a clear expression of will on part of the Council to establish military operations as its subsidiary organs. The absence of such formal recognition, which is the hallmark of a *de jure* organ, militates against the view that EU military operations constitute *de jure* organs of the EU. For this reason, no presumption can be said to exist to the effect that the wrongful conduct of national contingents serving in such operations should be attributed to the EU on these grounds.

5. **EU Military Operations as *de facto* Organs**

States may exercise such comprehensive control over persons or entities not forming part of their institutional structure that the latter may be regarded as their *de facto* organs and be treated as acting on their behalf. There is no reason why international organizations should not be capable of acquiring *de facto* organs under similar circumstances. Accordingly, if it can be shown that the EU exercises the requisite level of control, this creates a presumption that the activities of its military missions must necessarily be attributed to it in the same way as if they were its *de jure* organs. However, while the notion of a *de facto* organ is reasonably well-established, it is not recognized as a distinct ground of attribution in either the Draft Articles on State Responsibility or the DARIO. For the purposes of the present analysis, two understandings of *de facto* organs may be distinguished: one based on factual and one based on normative control.

5.1 **The ‘complete dependence’ test**

The ICJ has defined and applied the concept of *de facto* organ in a strict manner. According to the *Nicaragua* and *Genocide* cases, persons, groups of persons or entities not holding the status of a formal State organ may be equated with one of its organs for the purposes of international responsibility provided that they act in ‘complete dependence’ of that State so that, ultimately, they are merely its instrument. The Court has emphasized that a finding to this effect would be

---

93 Art 1(2), Joint Action 2004/551/CFSP (n 81) (emphasis added).
94 Cf Art 4, Agreement between the EU and the Government of the Swiss Confederation (n 66).
95 E.g the image created by Art 42 TEU is that EU operations are ‘owned’ by the Union.
exceptional and ‘requires proof of a particularly great degree of State control’.\textsuperscript{98} Adapting this to international organizations, a person, group of persons or entity may be considered a \textit{de facto} organ of an international organization provided they act in complete dependence of the latter and under its particularly high level of control.

At first sight, EU military missions may appear to satisfy these requirements. After all, the EU establishes a single chain of command for all operations,\textsuperscript{99} running from the political level down to the military-strategic, operational and tactical levels. Overall responsibility for the conduct of EU missions lies with the Council:\textsuperscript{100} it is for the Council to launch and terminate operations,\textsuperscript{101} to determine their mandate,\textsuperscript{102} to appoint the Operation and Force Commanders\textsuperscript{103} and to approve key documents, such as the Operation Plan and the Rules of Engagement.\textsuperscript{104} Acting under the authority of the Council, the PSC exercises political control and strategic direction of EU missions on a day-to-day basis.\textsuperscript{105} In particular, it sets political-military objectives and, acting through the EU Military Committee, translates these into military guidance and directives for the Operation Commander. Since the Operation Commander and any subordinate levels in the chain of command act under the exclusive direction of the political and military bodies of the EU and must report back to these in the performance of their tasks,\textsuperscript{106} EU military missions may be said to be completely dependent on the EU from a political and military-strategic point of view.

Nevertheless, it is difficult to see how national contingents and other assets, including international headquarters, made available to the EU act in complete dependence of the Union para 392.

\textsuperscript{98} Ibid para 393.


\textsuperscript{100} Art 43(2), TEU.

\textsuperscript{101} Eg Art 5, Joint Action 2006/319/CFSP of 27 April 2006 on the EU military operation in support of MONUC during the election process, OJ [2006] L116/98.

\textsuperscript{102} Eg Arts 1 and 2, Joint Action 2008/851/CFSP of 10 November 2008 on a EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ [2008] L301/33.

\textsuperscript{103} Eg Arts 2 and 4, Joint Action 2004/570/CFSP of 12 July 2004 on the EU military operation in Bosnia and Herzegovina, OJ [2004] L252/10. The Council may delegate this power: see Art 6, ibid.


\textsuperscript{105} Art 38, TEU.

\textsuperscript{106} EU Military C2 Concept (n 65) 17–18. Eg Arts 7(2)–(3) and 8(2), Joint Action 2003/423/CFSP of 5 June 2003 on the EU military operation in the DRC, OJ [2003] L143/50.
within the meaning of the *Nicaragua* and the *Genocide* cases. What the ICJ seems to have had in mind was factual dependence and not a relationship of strategic or legal subordination. In both cases, the Court was concerned with establishing whether the persons and entities concerned were completely dependent on the practical assistance and support of the respondent States. Clearly, national contingents and other assets made available for EU crisis management operations do not depend on the EU in this sense. Bearing in mind that the financing, transportation and logistic support of assets is the responsibility of the contributing States and third parties, it is actually the other way around: the EU depends completely on the support of its Member States and third parties to conduct military missions. Consequently, while EU crisis management missions are completely dependent on the EU in terms of their mandate and strategic direction, this is not sufficient to allow them to be classified as *de facto* organs of the Union pursuant to the strict test espoused by the ICJ.

5.2 Alternative approaches

The test employed by the ICJ has not gone unchallenged. In particular, the validity of the high threshold of control it entails has been questioned by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case. Considering the significant legal consequences attached to a finding that an entity is a *de facto* organ of an international organization, lowering the threshold of control along the lines proposed in *Tadić* does not seem appropriate. However, it does not seem unreasonable to relax the threshold as regards the type of control required. The notion of a *de facto* organ is a hybrid rule of attribution which combines factual and institutional considerations into one: if a person or entity is subject to the comprehensive control of an international organization in fact, it must be considered as part of its institutional structure in law. Nothing suggests or demands that the evidence of such factual control must be based entirely on casual links to the exclusion of all normative relations. In other words, what needs to be demonstrated is complete dependence in fact, but the evidence for such dependence does not necessarily have to be deduced exclusively from factual

---

107 *Nicaragua* (n 97) para 109; *Genocide* (n 97) para 392.
considerations. In principle, a particularly high degree of normative control may also suffice.

The Geographical Indications Dispute case offers a precedent for this approach, where the WTO Dispute Panel accepted the position put forward by the European Commission that in the execution of Community law, the Member States ‘act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general’.\(^{112}\) Clearly, in a narrow factual sense it is the EU which is dependent on the Member States for the execution of EU law, rather than the other way around.\(^{113}\) Nonetheless, what justifies treating the Member States as de facto organs of the EU in this context is that they have transferred their respective competences upon the EU and consequently exercise Union powers in the implementation of its laws. Their dependence on the EU and its corresponding control is therefore based on legal, not factual, considerations. Understood in this way, the attribution of implementing measures adopted by the Member States of the EU in the exercise of its exclusive competences does not have to be conceived as a *lex specialis* rule as the European Commission has argued,\(^{114}\) but can be derived from the general principles of attribution.

A similar argument may be made in relation to EU military operations. As we have already indicated, the reasoning adopted by the European Commission in the Geographical Indications Dispute case does not apply directly to the activities carried out in the context of the CFSP/CSDP, since in this field the EU continues to share its competence with the Member States.\(^{115}\) However, Member States and third parties contributing to EU missions nevertheless find themselves in a broadly analogous situation. By placing their forces at the disposal of the EU, contributing States not only transfer certain powers of command and control to the EU, but also undertake a series of corresponding commitments which limit their freedom to exercise control over those forces themselves. In particular, all contributing States are bound by the relevant legal instruments establishing the mission,\(^{116}\) including any agreements with third states concluded by the EU, while EU Member States are also subject to a general duty of loyal cooperation, which includes the obligation to refrain from any steps which are contrary to the


\(^{113}\) See n 25.

\(^{114}\) See section 2.1 above.

\(^{115}\) See section 2.2 above.

\(^{116}\) For EU Member States, this obligation results from Art 28 TEU, while in the case of contributing third States it is based on the applicable participation agreements, eg Art 1, Agreement between the EU and the Russian Federation on the participation of the Russian Federation in the EU military operation in the Republic of Chad and in the Central African Republic (EUFOR Tchad/RCA), 5 November 2008, OJ [2008] L307/16.
interests of the Union or likely to impair its effectiveness. The position of national contingents serving in EU operations therefore differs dramatically from the position of the Nicaraguan rebels and their relationship with the United States forming the basis of the proceedings in the Nicaragua case. Bearing in mind the applicable legal arrangements, it seems justified to conclude that the EU acquires a ‘particularly great degree of control’ over national contingents participating in its missions, albeit be it on a temporary basis, and that the contingents are completely dependent in their action upon the EU during their assignment. On this reasoning, EU military missions should be classified as de facto organs of the EU.118

6. Conclusion

As Piet Eeckhout has aptly observed, the EC’s eagerness to assume international responsibility for implementing measures adopted by its Member States which contravene its treaty obligations is counterintuitive: normally, one would expect an international actor to minimize or evade its exposure to legal liability.119 The EC’s practice is of course entirely consistent when seen from the perspective of the Community legal order. Since the rules of international law governing the attribution of wrongful conduct do not necessarily reflect the division of competences between the EC and its Member States, the European Commission has insisted that the Community should be subject to special rules of attribution which better respect its internal law. Yet this practice poses a direct challenge to the idea that the international responsibility of international organizations is governed by a single set of rules which applies in a uniform manner. As such, it also exposes a possible tension between the promotion of ‘multilateral solutions to common problems’ as a milieu goal of EU external action and the advancement on the international level of the EU’s more narrowly defined constitutional values and principles.120

The conduct of military operations by the EU raises a similar question: taking account of the EU’s ambitions laid down in the current Treaties to contribute to global security governance,

117 Art 24(3) TEU. See Christoph Hillion and Ramses A Wessel, ‘Restraining External Competences of EU Member States under CFSP’ in Marise Cremona and Bruno de Witte (eds), EU Foreign Relations Law: Constitutional Fundamentals (Hart 2008) 79.

118 Provided one ignores the Commentary’s instructions to deal with peacekeeping operations under Art 7, as we have suggested earlier, this position is compatible with Art 6 DARIO, which covers the conduct of both organs and agents and thereby combines, or rather conflates, the institutional and agency paradigms. See DARIO Commentary (n 5) 84.

119 Eeckhout (n 28) 456.

120 Art 21(1) TEU.

121 See (n 16) and the accompanying text.
do the rules of attribution laid down in the DARIO provide an adequate system for allocating responsibility between the EU and contributing States? Whereas the European Commission played a visible role in the debate on the DARIO by pointing to the special nature of the Community, its contribution did not extend to the complex questions emerging from the role of the EU as a global security actor. We have suggested that the way in which the ILC purports to apply the rules on the allocation of responsibility to peace operations is too narrow. By focusing exclusively on factual control as a ground for attribution, the Commentary to the DARIO deliberately disregards the institutional and legal ties which may exist between national contingents and international organizations. This approach is inappropriate in cases where an international organization incorporates national contingents into its own institutional structure, since such an act of incorporation gives rise to a rebuttable presumption that the conduct of national contingents is attributable to the international organization rather than to the contributing States.

Whether or not such a presumption of attribution exists in the case of EU military operations depends on their status within the institutional and legal order of the EU. We have found that the picture is a mixed one. The EU certainly enjoys the competence to incorporate military assets into its institutional structure and the Council is competent to establish military operations as its subsidiary organs. However, none of the legal acts adopted in relation to EU military operations provide clear evidence of the Council’s intention to confer the status of a subsidiary organ on them. Since this intention cannot be presumed, we were led to conclude that EU military operations are not de jure organs of the EU. However, they may still be classified as de facto organs, provided that the Union exercises the necessary degree of control over them. Although EU operations do not satisfy the high threshold of complete dependence demanded by the ICJ in its case-law, a strong argument can be made that they are subject to a particularly high degree of normative control by the EU and may be considered as its de facto organs on this basis. Accordingly, if our analysis is correct, a presumption exists in favour of attributing the conduct of EU military operations to the EU on the grounds that they constitute de facto organs of the Union.

Nevertheless, we believe that there are significant benefits to be had in formalizing this presumption by granting EU military operations the status of de jure subsidiary organs of the Council in the legal acts establishing them. For a start, this would eliminate any doubts about the institutional status of EU operation and remove the incentive created by Article 7 DARIO to

---

contest which party exercised effective control over the wrongful conduct in each particular case. The presumption of attributability would therefore help to avoid potentially distracting disputes between the EU and contributing States and indicate to prospective claimants that their remedy lies with the Union. To borrow a term used by the Editors in the Introduction to this volume: it would be an ‘external projection of an internal reality’. For example, pursuant to the decision of the European Court of Human Rights in Behrami, any breaches of the European Convention on Human Rights committed by EU military operations would be attributable to the EU alone if such operations were subsidiary organs of the Council. Formally recognizing that the conduct of EU military operations is attributable to the EU would also create a sound basis for the development of a coherent claims settlement practice by the EU. In the past, claims brought by private parties suffering injury or damage at the hands of EU operations would normally receive compensation from the authorities of the national contingent involved in the incident. However, in the absence of binding standards shared by all contingents, this quickly leads to inconsistencies and the fragmentation of claims settlement practice along national lines, in particular in large operations. If the responsibility to settle claims lies with the EU, this would allow the Union and contributing States to develop a coherent set of principles and procedures to be applied in all EU crisis management operations. Of course, this requires that the contributing States provide the EU with the financial and other resources to meet its liabilities.

More generally, a formal recognition by the Council that the conduct of EU military operations is attributable to the EU would signal to the international community that the EU is ready to accept that its growing global engagement as an international security actor brings with it a duty to act in an accountable manner. The EU cannot entrust the implementation of its security and defence policy to its Member States and other parties and disavow responsibility for its adverse effects or hide behind the effect control test set down in Article 7 DARIO. Accepting that the wrongful conduct of its crisis management missions engages the Union’s international responsibility would not only better reflect the spirit of the principles laid down in Article 21 TEU, but it could also serve as an example for other international organizations,

123 Cf Zwanenburg (n 3), 403–405; von Kielmansegg (n 65), 330–331.
124 Behrami (n 40).
125 See also Stephens (n 63).
126 Compensation for the damage caused by the two Belgian drones was thus paid by the Belgian authorities.
127 See also Nigel D White, ‘The EU as a Regional Security Actor within the International Legal Order’, in Trybus and Nigel D White (eds), European Security Law (OUP 2007) 329, 348.
128 Cf Wolfrum (n 111), 431.
including NATO,\textsuperscript{129} and thereby make a broader contribution to the development of the law of international responsibility in this particular field.

\textsuperscript{129} See Häußler (n 61) 231.