

The International Responsibility of the European Union

European and International Perspectives

Edited by

Malcolm Evans
and
Panos Koutrakos



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*Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR**

ENZO CANNIZZARO

I. INTRODUCTION

THE ACCESSION OF the EU (European Union) to the European Convention of Human Rights (ECHR) constitutes an important yardstick for appraising, and possibly for developing, the law governing the responsibility of international organisations.

It is common knowledge that an attempt to codify this law was undertaken by the ILC, which approved the draft Articles on the Responsibility of International Organisations, at its 63rd session in 2011 and which were noted by the General Assembly later that year.¹ In the course of its work, one of the most controversial issues was the question of attribution to, and responsibility of, international organisations for conduct carried out by organs of their Member States. The difficulties encountered by the ILC in this regard mirror the uncertainties in scholarly opinions and the inconsistencies in international practice.²

One context in which issues of attribution are likely to be of relevance is litigation before the European Court of Human Rights (ECtHR) involving the alleged breach of the Convention by EU Member States when acting

* An account of the provisional outcome of further negotiations on the Accession Treaty which resumed in the autumn of 2012, and which are still in progress at the time of writing, is given in a postscript at page 359.

¹ With resolution 66/100 of 9 December 2011, the General Assembly took note of the draft articles and decided to include the item in the agenda of its sixty-ninth session, to be held in 2014.

² See the cases discussed in the Second Report of the Special Rapporteur, Giorgio Gaja, UN Doc A/CN.4/541 of 2 April 2004, and the Seventh Report of the Special Rapporteur, Giorgio Gaja, UN Doc A/CN.4/610 of 27 March 2009.

within the framework of EU law. The consideration of the case law of the ECtHR was widely considered in the works of codification of the ILC and might have inspired some solutions adopted in the draft Articles.

Hitherto, the consideration of such issues was governed by the fact that the Member States are parties to the Convention but the EU is not. Attribution of conduct to the EU would therefore have the effect of removing such actions from the scope of the Convention *rationes personae*. Yet, following the indication of Art 6, para 1, of the TEU, on 4 June 2010, the Council of the Union decided to commence negotiations on the accession of the EU, nominated the European Commission as Union negotiator and adopted negotiating Directives. Given the prospect of the EU's accession to the ECHR, one might expect that the issue of attribution will become increasingly significant in its future case law.

The negotiating Directives do not set out any particular positions regarding the question of attribution, but they do deal with the issue indirectly. In the part concerning issues of procedure before the ECtHR, they point out that proceedings must involve Member States and/or the Union, as appropriate. By using the and/or dyad, the Council seems to recognise that applications for alleged breaches of the Convention could be brought against multiple defendants: one or more of the Member States and/or the EU itself. The Directives further establish a principle which must be included in the accession agreement. According to that principle, either entity, the EU or one or more of its Member States, has the right to join the proceedings commenced against the other when there is an intrinsic link between the alleged violation of the Convention and its law. Thus, without expressly addressing the issue of attribution, the negotiating Directives made it clear that this is an issue which the Accession Treaty has to address and, more broadly, that this issue needs to be clarified in order to determine the future relationship between the EU and the Member States as parties to the ECHR, within the scope of their respective competence.

Resolving these questions is proving to be a lengthy and complex task. It is well known that an informal group was set up by the Steering Committee for Human Rights (CDDH) of the Committee of Ministers of the Council of Europe, to negotiate with the Commission. The negotiations commenced with great enthusiasm but soon became considerably more problematic than had been expected. At the time of writing, there is no final outcome; indeed, there is growing anxiety as to the capacity of the negotiators to agree on all the controversial points at stake.

Among these points, one of the most controversial remains the identification of the appropriate entity, the EU and/or one or more of its Member States, against which proceedings are to be commenced before the ECtHR in a given case, since it entails the need to determine a test for attributing the wrongful conduct. There are a number of reasons why this issue is so particularly difficult. First, the relations between the Union and its

Member States are particularly complex and unlikely to be captured by a pre-determined univocal scheme. Secondly, the obligations deriving from the ECHR are themselves multifarious in nature: some can be breached through executive action only, others can be breached by normative action, whilst others require a combination of the two.

For all these reasons, there is good reason to explore this issue in greater detail. Section II will consider, broadly and briefly, the rules on attribution laid down in the draft Articles on the Responsibility of International Organisations, and assess the adequacy of their approach to the future relationship between the EU and its Member States in the context of the ECHR. Section III will look at the case law of the ECtHR in order to search for general trends which might provide guidance when seeking to identify a workable test for attribution. Section IV, critically considers the solutions which are being worked out in the course of the negotiation of the Accession Treaty. It will be argued that the accession agreement should avoid the 'either/or' dichotomy inherent in the classical rules on attribution and adopt a dual attribution rule.³ Finally, the virtues and the inevitable drawbacks of such an approach will be considered.

II. ATTRIBUTION: AN INSIDIOUS NOTION IN THE LAW OF INTERNATIONAL RESPONSIBILITY

A. Committing Wrongful Conduct through the Exercise of EU Competences?

In the classical conceptualisation of the law of international responsibility, it is widely accepted that the same wrongful act may entail a number of secondary consequences of both a substantive and instrumental procedural nature. In contrast, international law has traditionally taken a very cautious approach when considering the possibility of attributing the same conduct to more than one subject. Thus, whereas there might be a plurality of actors responsible for the same conduct, dual or multiple attribution, although not expressly excluded, seems to be confined to exceptional situations.⁴

³ Terminology in this regard varies considerably. In this chapter I will use the term 'dual attribution' as meaning something different from 'dual responsibility'. Dual responsibility means that two, or possibly more, entities are distinctly responsible for the same wrongful event brought about by individual conduct in breach of different obligations. This is well epitomised by the decision of the ECtHR in *Ilaşcu and others v Moldova and Russia*, no 48787/99, judgment of 8 July 2004. Dual responsibility is thus to be kept well distinct from forms of joint or collective responsibility. Dual attribution, a term only recently popularised, has a broader and less precise scope and should mean that the same conduct can be attributed to two or, possibly, more entities, which have concurred in bringing about the same event.

⁴ See ILC's *Commentary of the Articles on the Responsibility of IOs*, UN doc A/66/10, 81: 'Although it may not frequently occur in practice, dual or even multiple attribution

This is logical enough when the wrongful act consists of a single instance of conduct, whether it be an action or an omission, and which is necessarily to be attributed to one entity. However, a similar approach is also taken in cases where the wrongful act constitutes the final result of a chain of actions and omissions, each of which has been performed by different actors. Whilst it is perfectly possible for each action or omission to produce legal consequences for the separate actors or entities engaged in its commission, the wrongful act tends to be conceived of as the final product of the chain, and is generally attributed to a single entity.

The need to identify the author of a breach which consists of a sequence of actions performed by different actors makes the issue of attribution a crucial one in the law of Responsibility of International Organisations. Particular difficulties arise where the international organisation is the EU, an entity which exercises a wide normative competence but whose normative acts are mainly brought into being through the actions of organs of the Member States.

The attribution of wrongful conduct to the EU is relatively straightforward where there is a direct and immediate correspondence between the obligation breached and the exercise of EU competence. It is considerably more difficult where the obligation breached requires material conduct by Member States, with the exercise of EU competence constituting the legal pre-condition for the action taken by them. This is certainly the situation as regards most human rights obligations, which typically are not breached through the enactment of legal rules by the EU, but rather by implementing action on the part of the Member States.

In those cases where the conduct of a Member State is intended to implement EU rules, the alleged breach has a composite origin: rather than being univocally linked to a single international actor, it is the culmination of a series of linked, though segmented, actions. Both of the two entities, the EU and the Member States, have contributed to it, though neither can be considered as its sole author. The question which arises

of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organisation does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organisation'. In its recent decision of 5 July 2011, *Nubanovic v Netherlands*, para 5.9, the Court of Appeal of The Hague seems to have admitted, albeit only theoretically, the possibility to attribute conduct performed by a national contingent in the context of a UN peacekeeping operation to both the sending state and the UN (text in *Oxford Reports on International Law in Domestic Courts*, ILDC 1742 (NL 2011)). Noteworthy, the existence of a dual attribution was pointed out in the context of the 'effective control' test; this should entail that if two entities have individually the duty to prevent a certain event from occurring, and if they have the effective power to do so, their failure to act must be simultaneously attributed to either one. On the decision of the Court of Appeals, see A Nollkaemper, 'Dual Attribution. Liability of the Netherlands for Conduct in Dutchbat in Srebrenica' (2012) 9 *Journal of International Criminal Justice* 1143. On dual attribution, in general terms, see L Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire' (1995) 78 *Rivista di diritto internazionale* 881, 893ff.

is to which of the actors is the breach to be attributed, alternatively or cumulatively, and which must assume responsibility for it?

B. The Effective Control Test in the Works of Codification of the Law of Responsibility of International Organisations

The ILC draft Articles adopt a rigid distinction between attribution and responsibility, and take a strict approach to attribution. Wrongful acts are attributed to an international organisation only if such acts are performed by its organs or, if they are performed by the organs of a Member State or another international organisation, if they do so under its strict and operative control.

The general rule on attribution of conduct performed by state organs placed at the disposal of an international organisation is set out in Draft Article 7, which provides:

The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.

Thus the test for attribution is whether the organ is acting under the effective control of the international organisation. The commentary to the Articles makes clear that it has the effect of attributing to the organisation single actions performed under its direct operational control.⁵ It does not result in acts which are in fact performed by organs of Member States being attributed to the international organisation, even though they are performed at its behest and under its 'ultimate' control.

The strictness of this approach based on effective control is mitigated to a degree by the adoption of a more flexible approach to the distribution of responsibility. The draft Articles contain provisions dealing specifically with the responsibility of international organisations as regards the conduct of states and other international organisations. In particular, Article 17(1) indicates that the use of normative power by an international organisation might engage its international responsibility if it imposes, or even authorises, conduct inconsistent with its international obligations. This provision, however, does not go as far as attributing responsibility to the international organisation for their role in relation to wrongful conduct of the Member State. It only relates to situations in which an international

⁵ Official Records of the General Assembly, Sixty-sixth session, Supplement No 10 (A/66/10), 23. For a recent assessment of the notion of "effective" control" under Art 7, see T Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troops Contingents as United Nations Peacekeepers' (2010) 51 *Harvard International Law Review* 113.

organisation uses its normative power to bring about a course of conduct by a Member State rather than undertake that course of conduct itself, and which would have been unlawful had it done so. It therefore attributes direct responsibility to the international organisation for inducing Member States to perform conduct in lieu of the organisation itself. Consistently with this idea, Article 17(3) makes it clear that international organisations would incur responsibility for imposing or authorising conduct by states in such circumstances even if that conduct did not in and of itself amount to a breach of the state's own international obligations.

This makes it clear that the two kinds of responsibility—the responsibility of an international organisation for its own normative activity under Article 17(1), and responsibility arising out of wrongful conduct of states acting under the effective control of an international organisation under Article 7—are different in nature. Whereas under Article 7 an international organisation incurs responsibility for wrongful conduct, under Article 17 its conduct is not unlawful as such. The differing nature of responsibility in these two situations also entails different legal consequences, reflecting the different content of the international organisations' responsibility in each of them.

Be that as it may, neither of these two legal approaches to attribution of responsibility seems to apply neatly to the various situations created by actions taken jointly by the EU and by its Member States which seems to straddle the boundaries between them and thus require a combination, in different degrees, of the normative elements of both in order to capture the essence of the situation. As things stand, situations in which the EU exerts normative influence over conduct of Member States which results in those states acting in breach of their international legal obligations tends to fall outside of the classical framework established to address the international responsibility of international organisations.

III. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In judicial practice, issues of attribution to the EU of conduct amounting to a breach of human rights obligations have been considered almost exclusively by the ECtHR. A common feature of these cases is the tendency of the Court to attribute to the Member State conduct allegedly in breach of the Convention, regardless of the fact that the conduct in question was taken in pursuance of normative measures enacted by the EU. The most obvious explanation for this is that, for the time being, it is only the Member States and not the Union itself which are parties to the ECHR. Thus attributing conduct to the EU would have resulted in

the conduct falling outside the scope of the Convention, resulting in a gap in its system of protection.⁶

If one looks more closely at these cases, however, there are useful insights to be had since they shed light on the most common situations in which the action of the EU interfaces with that of the Member States as regards questions of human rights and do offer some guidance on how the resulting problems might be resolved. In particular, the case law seems to suggest that it may be possible to develop a number of possible tests for the purpose of attribution. The first tends to give importance to the degree of discretion left to national authorities when implementing EU obligations. The second tends to focus on the nature of the legal act which gives rise to the alleged violation of the Convention. The third focuses on the degree of normative control exerted by one entity upon the other.

A. Cantoni and the Degree of Discretion to National Authorities

A first approach, conceptually very simple, is to consider the binding effect of the measures taken by the EU and the degree of discretion which the Member State has as regards its implementation. In a number of cases in which it has been alleged that Member States have been in breach of the Convention, the Member States have argued that their conduct ought to be attributed to the EU since it is the implementation of EU rules which require them to act in breach of their obligations under the Convention.

The possibility of attributing responsibility to the EU in situations where conduct allegedly inconsistent with the ECHR was imposed on Member States by a binding EU measure has been considered and rejected by the Court in a number of cases. In *M v Federal Republic of Germany*,⁷ the applicant complained that a writ issued by German authorities for giving effect to a fine decided by the European Commission (at that time the 'Commission of the European Communities'), and upheld by the ECJ, was in violation of Art 6 of the European Convention. Germany asked that the

⁶ This was the practical effect of the decision of the Court in *Behrani v France; Saraceni v France, Germany and Norway*, no 71412/01 and 78166/01, decision of 2 May 2007 where responsibility was attributed to the United Nations rather than to its Member States. A different course was taken in *Al-Jedda v the United Kingdom*, no 27021/08, judgment of 7 July 2011. In this case, the ECtHR, applied two different tests: the 'effective control' test envisaged by the draft Arts on the Law of Responsibility of International Organisation and the 'ultimate authority and control' test. The Court concluded that the internment of the applicant within a military detention facility run by British troops in Iraq, whose deployment was authorised by the UN Security Council, could not be attributed to the UN, since the UN had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force. Consequently, the conduct was to be attributed solely to the UK. Cf paras 83-84.

⁷ *M & Co v Federal Republic of Germany*, no 13258/87, decision of 9 January 1990. This was in fact decided by the European Commission on Human Rights, prior to its being abolished in 1998 by Protocol No 11 to the European Convention.

European Commission of Human Rights dismiss the case, claiming that it could not be 'responsible under the Convention for acts and decisions of the European Communities'.⁸ The European Commission of Human Rights did not take a position on the issue of attribution, observing that 'a transfer of powers does not necessarily exclude a state's responsibility under the Convention with regard to the exercise of the transferred powers' and that states are thus required to ensure that the guarantees of the Convention remain 'practical and effective'. However, whilst a state party remained liable for any 'resulting breach' of the Convention, the Commission took the view that 'the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection'.

In *Cantoni*⁹ the ECtHR had to face similar objections raised by the defendant state. The Court was asked to decide whether a French national statutory provision which made it a criminal offence to sell medical products outside a pharmacy was in breach of Article 7 of the European Convention due to a lack of precision in the definition of the prohibited conduct. France claimed that it ought not to be held responsible under the Convention since the statutory provisions were introduced in order to implement a Directive which, in spite of its nature, did not leave the Member State with any margin for discretion as to the manner of implementation. In a rather terse passage, the Court found that 'the fact, pointed to by the Government, that Article L. 511 of the Public Health Code is based almost word for word on Community Directive 65/65 (did) not remove it from the ambit of Article 7'. Although very concise, this passage conveys the idea that state action performed in order to fulfil an obligation under EU law still remains an act attributable to the state for the purposes of the European Convention, and must be subject the same degree of scrutiny under the Convention system, as any other act of that state.

B. Matthews and the Legal Nature of the Act

A different situation, conceptually the opposite from that in *Cantoni*, was considered by the ECtHR in *Matthews*.¹⁰ The applicant in *Matthews* claimed that the exclusion of residents of Gibraltar from being able to

⁸ Germany argued that 'the Federal Minister of Justice, in granting a writ of execution for a judgment of the European Court of Justice, did not have to examine whether the judgment in question had been reached in proceedings compatible with fundamental rights guaranteed by the European Convention on Human Rights or the German Basic Law. He only had to examine whether the judgment was authentic. Therefore he neither had to determine a civil right, nor a criminal charge within the meaning of Art 6 of the Convention'.

⁹ *Cantoni v France*, no 17862/91, judgment of 15 November 1996.

¹⁰ *Matthews v the United Kingdom*, no 24833/94, judgment of 18 February 1999.

vote in elections to the European Parliament (a situation resulting from Annex II of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage of 20 September 1976) amounted to a breach of Protocol I, which provides for the right to free elections.

In the proceedings before the Court the parties expressed different views regarding the nature of the Act which laid at the heart of the alleged breach and, consequently, on the attribution of the allegedly wrongful conduct. In the UK's view, this Act, having the status of a treaty, was to be assimilated to an Act of the EU Institutions. It was 'adopted in the Community framework and could not be revoked or varied unilaterally by the United Kingdom'. In the UK's opinion, this meant that the Court should dismiss the claim since it could not be held responsible for possible violations which were the result of an Act of the EU. The applicant drew the opposite conclusion, maintaining that since the 1976 Act was an international treaty entered into by the UK, the breach of the European Convention which the Act brought into being was to be attributed to the UK and it was the UK which was to be held responsible.

The Court endorsed the views of the applicant. It did not enter into a discussion of the nature and effect of the 1976 Act under EU law, but limited its analysis to the process of formation of the Act under international law. Proceeding on this basis, the Court could easily conclude that, whereas

acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. . . . in the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. The Council Decision and the 1976 Act, and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments which were freely entered into by the United Kingdom.¹¹

As a result, the Court found that depriving British citizens residing in Gibraltar the right to vote in elections to the European Parliament amounted to a violation by the United Kingdom of its obligations under Article 3 of the First Protocol to the ECHR.

Unlike the cases mentioned in the previous paragraph, in the *Matthews* case the Court engaged in a close analysis of the process underlying the action alleged to form the basis of the breach of the Convention; it gave considerable importance to the role of state consent in that process, and downplayed the nature of the act within the EU legal system. Arguably, the fact that the legal nature of acts of this type is highly disputed within the EU legal system, meaning that it could not easily be equated to an

¹¹ *Ibid*, para 33.

act of the EU, might be a reason not to make any generalisations on the basis of this decision. *Matthews* also highlights the ambiguous nature of some such acts and suggests that it may be necessary to look beyond the formal nature of EU acts in order to understand the real role of Member States in their process of formation.

C. Bosphorus and the 'Ultimate Normative Control' Test

In *Bosphorus*, the Court was called to decide whether Ireland should be considered responsible under the European Convention for actions which it performed under the normative influence of EU law. The applicant, the Turkish company *Bosphorus*, claimed that by impounding an aircraft, which it was leasing from a Yugoslavia company, Ireland was breaching the right to property protected by Article 1 of the First Protocol. The Irish measure was taken in order to implement EU Regulation 990/93/EC, which was in turn giving effect to the sanctions regime adopted by the UN Security Council against Yugoslavia, and in particular UN Resolution 820 (1993). The EU Regulation was preceded by a decision taken by the Member States in the framework of political cooperation and, in the words of the ECJ, through this act, the Member States decided 'to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations'.¹²

The reasoning of the European Court is well known. First, the Court engaged in a lengthy and complex demonstration that the Irish measures were 'not the result of an exercise of discretion by the Irish authorities, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law'.¹³ This conclusion was not exclusively based on the binding effect of Regulation 990/93/EC but also on the basis of the decision of the ECJ which had binding force upon the Irish judges who had referred the question to it (C-84/95).¹⁴ As a result, the legality of the impounding of the aircraft within the EU legal order was firmly established. Second, the Court found that the EU 'is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party'.¹⁵ The consequence of this finding was that Ireland was held responsible for conduct of its organs, albeit its conduct was dictated by acts of the EU.

¹² See ECJ, Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, judgment of 30 July 1996, [1996] ECR I-03953.

¹³ See n 10, para 148.

¹⁴ See n 10.

¹⁵ *Ibid.*, para 152.

Finally, the Court devised a means of attenuating the responsibility of the EU Member States when they act in compliance with EU law, stating that

State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.¹⁶

At the same time, the Court in *Bosphorus* reaffirmed that states are unconditionally responsible under the Convention when they are giving effect to obligations 'freely entered into' by them.¹⁷ Therefore, in order to determine in which situations states will be held responsible under the Convention, *Bosphorus* seems to call for a comprehensive evaluation, seeking to identify, in each case, whether it is the EU or the Member State which has ultimate normative control effective enough to direct the action of the other.

The application of this test, however, might give rise to considerable difficulty. The *Bosphorus* case itself¹⁸ shows that the search for the entity which exercises ultimate control might prove almost impossible in the context of the multifaceted political and constitutional setting of the EU. The content of the Irish measure was entirely predetermined by the EU Regulation which in turn was enacted to give effect to a decision of the Member States in the framework of political cooperation, the process of adoption of which indisputably relied on the unanimous consent of the Member States themselves.¹⁹ From both a factual and a legal point of view, the identification of the entity which directed, through its normative activity, the action of the other remains highly controversial.

¹⁶ Ibid, para 155. For a recent case in which the ECtHR exercised effective scrutiny in order to assess the respondent states' compliance with the principle of equivalent protection, see *Gasparini v Italy and Belgium*, no 10750703, judgment of 12 May 2009. The Court concluded that 'the protection afforded to the applicant in the present case by NATO's internal dispute resolution mechanism was not "manifestly deficient" within the meaning given to that expression by the *Bosphorus* judgment, particularly in the specific context of an organisation such as NATO'.

¹⁷ Ibid, para 157.

¹⁸ For an examination of the issues of attribution raised in *Bosphorus*, see G Gaja, 'The Review by the European Court of Human Rights of Member States' Acts Implementing European Union Law: "Solange" Yet Again?' in P-M Dupuy, B Fassbaender, MN Shaw and KP Sommermann (eds), *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat* (Kehl, NP Angel Verlag, 2006) 518.

¹⁹ In its judgment of 30 July 1996, Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, above n 11, the ECJ said: 'it should be noted that by Regulation No 990/93 the Council gave effect to the decision of the Community and its Member States, meeting within the framework of political cooperation, to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations . . .' (para 13).

Although not expressly dealing with attribution, the *Bosphorus* case illustrates difficulties surrounding this process in the intricate context of EU-Member State relationships. It highlights the need to consider the force of law whilst at the same time recognizing the weaknesses and ambiguities of this approach. Not surprisingly, in spite of the many different readings offered by international scholars, the case still defies clear explanation and remains somewhat impenetrable.

IV. TOWARDS A SPECIAL RULE ON ATTRIBUTION?

A. Implications from the Analysis: Effective Approach v Normative Approach

The analysis presented in Section III leads to a double-edged conclusion. On the one hand, it demonstrates the difficulty of applying a test of attribution which is based on the 'effective control' approach adopted in the Draft Articles on the Responsibility of International Organisations. On the other hand, it also illustrates the difficulties which flow from adopting tantalizing but insidious alternative tests and, in particular, the 'ultimate normative control' test.

The approach based on 'effective control' does not seem capable of capturing all the subtleties of the relationships between the EU and its Member States. In particular, it fails to work properly in situations where organs of one entity discharge functions on behalf of, or even under the direction of, organs of another. This is frequently the case as regards administrative organs of a state which are called to enact measures whose content is predetermined by the administration organs of the EU.

Significantly, however, the practice of co-administration also offers examples, albeit less frequent, which work in the opposite direction; that is, measures taken by EU organs which are predetermined by the national organs of Member States, as in the case of *Oleificio Borelli*.²⁰ In such situations, the degree of the normative control exercised by the organs of one entity upon the organs of the other seems to be an important factor for determining attribution. Similar examples of ad hoc hierarchical relations can be found in other areas, such as the binding effect of decisions of the ECJ upon national judges who have made referrals to the Court. It seems safe to conclude that it is difficult to determine attribution in situations where the combined action of both EU and Member State organs are at issue and both have contributed to the course of conduct in question.

On the other hand, it would be unwarranted to regard normative control as the only criterion for attribution. As the *Bosphorus* case shows,

²⁰ Judgment of 3 December 1992, Case C-97/91 [1992] ECR I-6313.

there is a fundamental tension between autonomy and dependence within the EU legal order. The adoption of the normative control approach inevitably raises the question of how to determine the degree of normative influence necessary to entail attribution in a given case, bearing in mind that there are many potentially applicable approaches, such as exclusive or shared competence; binding acts or soft law; direct or indirect effect, and so on, and not all need point to the same outcome even in relation to the same situation.

Finally, focussing on the normative dimension is difficult to combine with traditional understandings of attribution, and in particular with the idea that conduct may be attributed to an entity even when it is acting *ultra vires*, since this implies that an action may be attributed to an entity even if it is beyond the limits of its normative competence.²¹ It is not coherent to assume that the conduct of state organs acting under EU law is to be attributed to the EU when it is in accordance with EU law, but must be attributed to the Member States when it is in breach of EU law. This is tantamount to saying that the normative approach determines attribution only when the law is effectively complied with. Yet the degree of effectiveness of legal obligations is an important, perhaps the most important, criteria when applying the normative approach.

These observations demonstrate the difficulties of determining attribution, in this particular context at least, through an either/or scheme. Attribution is, by nature, an all-or-nothing notion that does not mesh easily with the more nuanced and multi-coloured logic which inspires the legal relationship between the EU and its Member State, in particular in the field of the obligations deriving from a human rights treaty addressing both entities within their respective field of competence.

All this seems to point to the need for a special rule on attribution to be included in the EU accession agreement to the European Convention on Human Rights. The possibility of a *lex specialis* applicable to the EU was also envisaged by the ILC Draft Article 64, which provides that:

These draft 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 responsibility of an international organisation, or of a State in connection with the conduct of an international organisation, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organisation applicable to the relations between an international organisation and its members.

²¹ See Art 8 of the Draft Articles on the Responsibility of International Organisations, which provides that '[t]he conduct of an organ or agent of an international organisation shall be considered an act of that organisation under international law if the organ or agent acts in an official capacity and within the overall functions of that organisation, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'.

Moreover, in its Commentary to Article 64 (*Lex Specialis*), the ILC refers to the approach taken by a number of WTO panels, noting that:

[T]his approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a Member State, state authorities would be considered as acting as organs of the Community.²²

B. The Co-respondent Mechanism

This idea might have inspired the drafting of the rule including a co-respondent mechanism, allowing either entity, the EU or one of the Member States, to act as a co-respondent in proceedings brought against the other entity before the ECtHR.

This mechanism, broadly envisaged by the negotiating Directives adopted by the Council in 2010, was included in various versions in the draft accession agreement. The difference between these versions does not allow one to identify clearly the legal nature of this mechanism. The most immediate impression is that it aims at establishing, without making it obvious, a special rule on attribution. Alternatively, this mechanism could be seen as rendering superfluous the search for the sole author of the breach and replacing it with an approach which seeks to distribute responsibility among a plurality of entities which have contributed to the breach without the need to identify one entity as the sole author.

The draft accession treaty seems to consider that the co-respondent will be a full-fledged party to the proceedings before the ECtHR. The status of the co-respondent as a party to the proceedings arguably should mean that it will be considered as a co-author of the alleged violation.²³ As a party to the proceedings, the co-respondent would be under a legal obligation to abide by the judgments of the Court and to bear the responsibility flowing from that violation.²⁴

The decision to include this mechanism in the Accession Treaty was probably inspired by a sense of expediency. The co-respondent mechanism offers significant advantages for the entities party to the Convention and for individual applicants. The EU and the Member States might claim the right to be party to the proceedings. This would allow the EU to present before the ECtHR arguments related to EU law without having to rely on the Member States. Applicants might also avoid the complicated operation

²² UN doc A/66/10, 167.

²³ This conclusion emerges from the reading of Art 34 of the ECHR, which indicates that proceedings are started by applicants claiming 'to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto'.

²⁴ See Art 46, para 1, ECHR, which envisages that '(t)he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

of singling out which entity has committed the allegedly wrongful conduct: in most cases a *probatio diabolica*.

Beyond such practical or pragmatic motivations, however, the co-respondent mechanism also has sound theoretical underpinnings. It expresses the idea that, where the competence of the EU and of the Member State is closely interwoven and a breach is the result of composite conduct, either the breach must be collectively attributed or, without prejudice to the issues of attribution, the various entities involved must accept responsibility for their contribution to the breach. This does not, however, necessarily entail a collective allocation of responsibility: an issue which remains outside the scope of this Chapter.²⁵

The co-respondent mechanism reflects the fact that there might be situations in which the application of the classical test on attribution will lead to inappropriate or untenable solutions. However, in the light of the difficulties in determining in the abstract what such situations may be, this special rule on attribution should be flexibly applied and have as wide a scope of application as possible.

These were the features of the co-respondent mechanism which emerged from the first draft of the Accession Treaty. Article 4 of that draft conceived this mechanism as a flexible tool to be used in proceedings brought against one entity, either the EU or one or more of the Member States, in situations where there was an apparent 'substantial link' between the alleged violation and other entity.

Clearly, this lacked precision and prompted the observation that the requirement of a substantial link does not clarify how substantial that link must be to justify the triggering of the mechanism. On the other hand, this was probably one of the test's main virtues. It would be incoherent to assume, on the one hand, that a special rule is needed to overcome the rigidity of the rules on attribution and, on the other hand, to rigidly pre-determine the situations in which such a special rule must apply. It is much more appropriate to have an expansive approach to such a special rule, without pre-determining the situations in which it might apply, leaving it to subsequent practice to identify the precise scope of its application.

In the course of the negotiations, however, the mechanism underwent significant changes. Without entering into details, and without investigating the reasons for the change, the final draft, made public in July 2011,²⁶ made the functioning of the mechanism dependent upon the degree of discretion enjoyed by the entity that performed the final act. If such conduct

²⁵ As pointed out above, dual attribution of the conduct does not necessarily entail that responsibility must be allocated according to a dual or to a collective scheme. Nor dual or collective responsibility is necessarily based on dual attribution of the wrongful conduct. An example of dual responsibility which does not entail dual attribution of the conduct comes from the above mentioned decision of the ECtHR *Ilascu and others v Russia and Moldova*, no 48878/99, judgment of 8 July 2004.

²⁶ Doc CDDH-UE (2011), fn 16.

is performed by a Member State, the EU is entitled to join the proceedings as a co-respondent only if it is proven that the violation could have been avoided by disregarding an EU law obligation incumbent upon the acting state. In other words, the EU cannot be a co-respondent if EU law does not impose upon the Member State obligations inconsistent with the ECHR, either because the Member State has a margin of discretion allowing them to implement binding EU law in accordance with the obligations flowing from the European Convention, or because the conduct inconsistent with the Convention is not required by EU law but simply recommended or authorised. Conversely, if the conduct in question is carried out by the EU, a Member State can be a co-respondent only if the violation could have been avoided only by disregarding an obligation incumbent upon the EU by virtue of an act which only the Member State can repeal. This provision is intended to prevent the Member State from being a co-respondent unless the EU action allegedly in breach of the Convention is not required by the founding treaties.

Thus, the scope of the mechanism of the co-respondent tends to interest with the two situations evoked in *Cantoni* and in *Matthews*. In *Cantoni*, the defendant state claimed to be exempted from responsibility under the Convention because it had acted under a binding EC act which left no margin for discretion. On the basis of the provision included in the draft accession treaty, the EU would have the right to join such proceedings as a co-respondent, since the national statute, whose application was at the origin of the alleged breach, was the simple reproduction of provisions of a EU Directive, which predetermined the action of the Member State organs. In *Matthews*, the applicant claimed that the attribution of the conduct to the UK was the result of the particular nature of the 1976 Act, an international treaty freely entered into by the Member State and binding on the EC. After the Accession Treaty, such a claim would be presumably brought against the EU, and, in such a case, the UK would have the right to join the proceedings as a co-respondent, since the EU's action was completely pre-determined by an act adopted by the Member State whose formation was based on the consent of the UK.

However, this approach also has its shortcomings. It is based on a facile paradigm according to which an entity can be a co-respondent only if it has compelled the other to commit the alleged breach. This solution is not a felicitous one, as it does not take sufficiently into account the effect of non-binding acts. For example, the EU could not join as co-respondent proceedings started by individuals against acts taken by national antitrust authorities following the guidance contained in non-binding notices of the Commission on antitrust law, in spite of the high degree of effectiveness of these instruments. Likewise, one of the entities, either the EU or the Member States, cannot join proceedings started before the European Court against the final act adopted by the other, that concludes a complex

procedure of co-administration, composed of binding and non-binding measures and deliberations of administrative organs of either entities: since each act of the sequence exerts varying degrees of influence on the other, none can be deemed to predetermine the content of the final act.

As has been said, one of the aims of the co-respondent mechanism should be to facilitate the search for the author of the breach, which might prove a difficult task for individuals that have suffered harm. To achieve this, the accession agreement should include a provision to the effect that individual applications are admissible if they are brought either against the entity which performed the conduct allegedly in breach of the Convention, or against either entity whose law has an intrinsic link with the alleged breach.

The beneficial effect of such a provision is obvious, since it would allow individual claimants to rely on the presumption of multiple attribution and avoid imposing the burden of identifying the sole entity to which the wrongful conduct must be attributed. In cases where the wrongful conduct is the final result of a chain of binding and non-binding acts adopted by EU and by Member State Institutions, this appears inappropriate, particularly given the time limits on the submission of an application.

V. CONCLUSION

As a consequence of its accession to the ECHR, the EU will be the first international organisation to be party to a major human rights treaty.²⁷ Not surprisingly, therefore, accession is seen as an historical event which could serve as a model for future membership of other international organisations to human rights treaties.

Among other beneficial effects, accession is also expected to remedy the current situation whereby the Member State might be called on to bear the responsibility flowing from breach of the Convention even if the conduct amounting to a breach was carried out in order to comply with obligations deriving from EU law. This is a technical issue, but it has theoretical significance. It makes it necessary to mould and adapt the general law on attribution of wrongful conduct to international organisations to the idiosyncratic situations created by the accession of the EU to the ECHR. The solution of this issue thus requires great legal skill and, equally, great political sensitivity.

²⁷ In 2009 the EC became party to the UN Convention on the Rights of People with Disabilities. See the Council Decision of 26 November 2009 concerning conclusion of the Convention, 2010/48/EC, OJ 53 L23 of 27 January 2010. Absent a general competence of the EU to conclude international conventions on human rights, this decision is based, *inter alia*, on a provision of the founding Treaties which gives to the Union the power to 'take action to combat discrimination based on . . . disability' (Art 13 TEC, which corresponds to Art 19 TFEU).

In order to fulfil this task, the adoption of a special mechanism might be opportune; a mechanism that allows for either entity, the EU or the Member State, to be a co-respondent in proceedings against the other. This mechanism might be construed according to two alternative schemes. It can be seen as a special rule on collective responsibility. Alternatively, and without indulging in theoretical inquiries upon its precise nature, it can be seen as a mechanism rendering superfluous the process of attribution of the alleged wrongful conduct to a particular entity. In either case, its effect is to open the way to the logically subsequent step of allocating responsibility among the various actors, which contributed to the breach.

Due to the infinite variety of situations which might give rise to a breach of the Convention as a result of combined action by the EU and by its Member States, such a mechanism ought to be as flexible as possible. It should provide a general frame of reference, leaving the task of determining the detailed legal regime to subsequent judicial and diplomatic practice.

On the conceptual level, this mechanism can help to dispel some of the mysteries which still linger concerning the identification of the author of a human rights breach committed through a combination of normative acts and material conduct undertaken in varying degrees by the EU and its Member States. It can also serve as an icebreaker in the still treacherous waters of collective attribution and allocation of responsibility among a plurality of co-authors.