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## Responsibility of international organizations under international law

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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

the terms “responsibility” and “liability” are often used interchangeably<sup>7</sup>. In this paper a distinction between “liability” and “responsibility” will be adopted and only responsibility for acts prohibited under international law will be subject to further considerations.

Art. 4 of the Draft Articles on Responsibility of International Organizations<sup>8</sup> and art. 2 of the Articles on Responsibility of States for Internationally Wrongful Acts<sup>9</sup> provide that an internationally wrongful act entailing responsibility under international law comprises two requisite elements, *i.e.*, the breach of international law, and the attribution of the conduct causing the breach to a subject of international law, a state or an international organization, respectively.

The notion of international responsibility accepted in international law today is a result of the so called “Ago revolution”, which describes the process of re-conceptualization of the traditional understanding of international responsibility in the works of the ILC, most notably these by R. Ago, the ILC’s Special Rapporteur on state responsibility<sup>10</sup>. The most striking feature of this concept of responsibility, as opposed to domestic systems of civil or private law is the exclusion of the element of damage<sup>11</sup>. In the traditional understanding, international responsibility was presented as being of “civil” or “private law” character<sup>12</sup>. Ago decided to exclude the core element of this type of responsibility, namely the injury, from the secondary rules of international responsibility. In consequence, damage is not included as an element of responsibility under international law either in art. 3 ARSIWA or in art. 4 DARIO. As explained in the ILC’s Commentary to art. 4 DARIO, it is dependant upon the content of a primary obligation whether material damage will be required or not in a particular case<sup>13</sup>.

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consequences arising out of acts not prohibited by international law by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN Doc. A/CN.4/334 and Add.1 & Corr.1 and Add.2 (1980), p. 253.

<sup>7</sup> *E.g.*: *The Legal Consequences for Member States of the Nonfulfilment by International Organizations of their Obligations toward Third Parties*, Institute of International Law – Yearbook, volume 66- I, Paris 1995, p. 251.

<sup>8</sup> Draft Articles on Responsibility of International Organizations in Report of International Law Commission at 63<sup>rd</sup> session, “Yearbook of the International Law Commission” 2011, vol. II, Part II, UN Doc. A/66/10 (2011), p. 52.

<sup>9</sup> ILC’s Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission adopted at 53<sup>rd</sup> Session, “Yearbook of the International Law Commission” 2001, vol. II, Part II. UN Doc.A/56/10 (2001), p. 43.

<sup>10</sup> On the development of the concept of responsibility in international law, *see*: G. Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, “European Journal of International Law” 2002, vol. 13 (5), p. 1083.

<sup>11</sup> *See: infra*, Ch. II. III.

<sup>12</sup> Pellet, p. 12.

<sup>13</sup> ILC’s Commentaries to the DARIO in Report of International Law Commission at 63<sup>rd</sup> session, 2011 Yearbook of the International Law Commission, vol. II, Part II, UN Doc. A/66/10 (2011) p. 67, pp. 78-79, para 3 [hereinfter: Commentaries to the DARIO].

In the sense international responsibility is “objective”, *i.e.* it can arise regardless of injury. The rationale behind this approach is the assumption that one of the functions of international responsibility is the development of the principle solidarity in the international community<sup>14</sup>. Thus, the function of responsibility under international law goes beyond the traditional function of responsibility, which is providing of an effective compensatory mechanism for injured parties<sup>15</sup>. Its principal function is condemnation of breaches of international law and restoration of international legality<sup>16</sup>.

## **2. Legal personality of international organizations under international law as a precondition for bearing international responsibility**

As explained by A. Pellet, the ability to bear responsibility by international organizations is „both an indicator and a consequence of their legal personality under international law”<sup>17</sup>. In different words, international organizations’ responsibility must be considered a necessary corollary of their capacity to act under international law<sup>18</sup>. Thus, as recognized by the ILC in art. 2 (i) DARIO, international organizations’ legal personality is a necessary precondition for them to bear responsibility under international law.

*In limine*, the legal personality under domestic law and the legal personality of international organizations under international law must be distinguished. The first enables international organizations to be subject of rights and duties governed by domestic law<sup>19</sup>. In general, the decision to accord domestic legal personality to an international organization rests within discretion of a state. However, member states are bound to bestow legal personality upon an organization in their legal systems to the extent that is indispensable for an effective fulfillment of that organization’s functions<sup>20</sup>. Still, provisions on personality of international organizations within member states’ domestic legal orders are usually comprised in the organizations’ constituent treaties<sup>21</sup>.

<sup>14</sup> Pellet, p. 9.

<sup>15</sup> Pellet, p. 15.

<sup>16</sup> A. Pellet, *The ILC’s Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, p. 76, p. 81 in J. Crawford, A. Pellet, S. Olleson, *The Law of International Responsibility*, New York 2010.

<sup>17</sup> Pellet, p. 6.

<sup>18</sup> *Ibidem*, p. 4.

<sup>19</sup> K. Schmalenbach, *International Organizations or Institutions, General Aspects*, para. 27 in R. Wolfrum (ed.), “Max Planck Encyclopedia of Public International Law” Online Edition 2013 [hereinafter: Schmalenbach].

<sup>20</sup> *Ibidem*.

<sup>21</sup> *E.g.*, Charter of the United Nations, opened to signature on 24 October 1945, entered into force on 24 September 1945, 1 UNTS 16, art. 104; Articles of Agreement of the International Monetary Fund, opened to signature on 22 July 1944, entered into force 27 December 1945, 2 UNTS 39, art. IX(2); *Constitution of the Food and Agriculture Organization*, opened for signature on 16 October 1945, 12 U.S.T. 980, art. 16.

The issue of the second type of legal personality is more complicated. Initially, only states were recognized as persons under international law. Along with the diversification of subjects of international law this monopoly has disappeared. As permanent international institutions had emerged as a new formalized form of international cooperation in the 19<sup>th</sup> century<sup>22</sup>, it was recognized that international organizations should operate more independently from member states in order to effectively discharge their functions. International legal personality was deemed the most appropriate instrument to achieve this purpose.

Constitutions of some international organizations explicitly declare these organizations to possess legal personality under international law<sup>23</sup>. Other constitutions remain silent on this issue. This called into question the effectiveness of the treaty provisions which attribute legal personality to international organizations *vis á vis* third parties. The doctrine of international law has elaborated on the question of a requirement of recognition by non-members for the effectiveness of the international organization's legal personality in the relations between them and the organization<sup>24</sup>. On this occasion the principle *pacta tertiis nec nocent nec prosunt* reflected in art. 34 of the Vienna Convention on the Law of Treaties<sup>25</sup> is often quoted. Pursuant to this rule, a provision of an international treaty attributing international legal personality to the organization is a *res inter alios acta* in relation to third parties, requiring either their express or tacit recognition in order to produce legal effects opposable to them<sup>26</sup>.

The position of international law on legal status of international organizations whose constitutions do not explicitly provide them with international legal personality is not clear. In the course of a vivid academic debate on the issue three schools of thought have been developed<sup>27</sup>. According to the first view, legal personality of an international organization exists only if it was explicitly granted to that organization in its constitution.

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<sup>22</sup> The first permanent international institutions were the early river commissions established in the first half of the 19<sup>th</sup> century: the Rhine Commission in 1814, the Elbe commission in 1821 and the Danube Commission in 1835. The organizations more resembling the modern intergovernmental organizations emerged in the second half of the century: the Universal Postal Union in 1874, the International Union of Railway and Freight Transportation in 1890.

<sup>23</sup> E.g.: Agreement Establishing the International Fond for Agricultural Development, opened for signature on 13 June 1976, entered into force on 30 November 1977, 15 ILM 922, art. 10; Treaty on European Union, consolidated version, 2008 O.J. C 115/01, art. 47.

<sup>24</sup> See: Hartwig, pp. 38-43; P. Sands, P. Klein, *Bowett's Law of International Organizations*, London, 6<sup>th</sup> ed. 2009, pp. 479-480.

<sup>25</sup> Vienna Convention on the Law of Treaties, opened to signature on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331. The same principle is reflected in art. 34 of the 1986 Vienna Convention; Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, opened for signature on 21 March 1986, not yet in force, 25 ILM 543.

<sup>26</sup> Schmalenbach, para. 23.

<sup>27</sup> See: Schemers/Blokker, pp. 988-989.

This view, supported mainly by socialist scholars, is rarely expressed today. The second school, represented by F. Seyersted, assumes an idea of objective legal personality of international organizations. As explained by this scholar, international organizations' legal personality is entirely independent from the provisions of their constituent instruments since "like States, [they] come into being on the basis of general international law when certain criteria exist"<sup>28</sup>. As long as an organization has at least one organ with a will distinct from the will of the member states, in accordance with the objective theory, it is considered *ipso facto* international legal person<sup>29</sup>. The third school, currently constituting the prevailing opinion on the matter, advocates for the concept of derived legal personality of international organizations. International organizations become international legal persons not *ipso facto*, but because this status has been accorded to them either explicitly or, in absence of attribution of this quality in a treaty, implicitly. Legal personality under international law is deemed necessary for international organizations to perform their purposes through, e. g., concluding international treaties, exchanging representatives or mobilizing international forces<sup>30</sup>.

The latter view has been supported by the International Court of Justice in its landmark opinion on the *Reparations* case<sup>31</sup> in which the United Nations' legal personality under international law has been recognized<sup>32</sup>. The ICJ confirmed that international legal personality can be granted to international organizations implicitly. In its assessment the Court asserted that the capacity of the organization to bear rights and duties under international law can be justified on grounds of factual and legal circumstances<sup>33</sup>. The Court did not consider solely or specifically any objective criteria<sup>34</sup>, concentrating on the organization's features reflected in its constituent instrument. In consequence, it arrived at the conclusion that the UN's legal personality must be derived from the founding states' will. This will is hidden behind the organizations' functions and purposes, and can be specified in or inferred from its constituent documents and developed in practice.

<sup>28</sup> F. Seyersted, *International personality of Intergovernmental Organizations. Do their Capacities really depend upon their Constitutions ?*, "Indian Journal of International Law" 1964, vol. 4, p. 5.

<sup>29</sup> F. Seyersted, *Objective International Personality of Intergovernmental Organizations*, "Nordisk Tidsskrift for International Ret" 1964, vol. 34, p.1.

<sup>30</sup> Schemers/ Blokker, p. 988.

<sup>31</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 ICJ Reports, pp.178-179 (11 Apr. 1949).

<sup>32</sup> The international legal personality was only an incidental issue in the advisory proceedings. The case concerned the question of whether the UN may bring an international claim against a state's government for damages caused to either the UN or to the victim when an agent of the organization (in the case, Court Bernadotte, UN Special Negotiator) is injured while performing duties relating to an individual state. It should be noted that Israel which was the state allegedly responsible for the injury was not a member of the UN at the time of the occurrence.

<sup>33</sup> Schmalenbach, para. 19. These circumstances are referred to by the author as the "*indicia of legal personality*".

<sup>34</sup> Amerasinghe, pp. 82-83.

P. Sands and P. Klein point to some logical difficulty in the reasoning of the ICJ (“circular reasoning”)<sup>35</sup>. The Court stressed that some powers not explicitly granted to an international organization in its constituent treaty, such as a power to bring international claims, could be implied from the fact that that organization has international legal personality. The problem is that one could deduce a certain capacity, for instance a general treaty-making capacity, from the very fact of the personality of the organization, even though this personality is itself deduced from a specific treaty-making power<sup>36</sup>.

An international organization’s functions and purposes do not only serve as a basis for its legal personality, but they also determine the extent of that international organization’s personality. As observed by the ILC, “all entities having treaty-making capacity necessarily [have] legal personality. On the other hand it [does] not follow that all international persons have treaty-making capacity”<sup>37</sup>. Sands and Klein underline that the only way to escape the trap of the “circular reasoning” is to take into account that legal personality has no uniform content under international law<sup>38</sup>. Thus, international organizations’ international legal personality and their capacity must be regarded as two separate, yet interdependent, concepts. In case of international organizations a general capacity stemming from legal personality cannot be assumed as it is in case of states<sup>39</sup>. Hence, the scope of rights and duties of an organization must be examined on a case-to-case basis because it is dependent upon its purposes and functions as specified or implied in its constituent documents<sup>40</sup>.

One must bear in mind that the extent of powers of an international organization explicitly attributed to it in constituent instruments can be modified by the doctrine of implied powers<sup>41</sup>. The implied powers, not expressly provided for in constituent instruments, accompany explicit powers to the extent necessary for an organization to discharge its functions<sup>42</sup>. The attribution of implied powers is a result of liberal interpretation of organizations’ constituent instruments<sup>43</sup>. According to Sands and Klein, “the organization must be treated as a dynamic institution, evolving to the changing needs

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<sup>35</sup> Sands/ Klein, p. 476.

<sup>36</sup> *Ibidem*.

<sup>37</sup> UN Doc. A/4169, p.10, para. 8(a) as quoted in Sands/Klein, p.477.

<sup>38</sup> Sands/Klein, p.477.

<sup>39</sup> *Cf.*, *Reparation*, p. 179.

<sup>40</sup> *Ibidem*, p. 180; *cf. Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 78, para. 25 (3 Sept. 1993).

<sup>41</sup> Sands/Klein, p. 477-478.

<sup>42</sup> N. M. Blokker, *International Organizations or Institutions Implied Powers*, para. 3 in R. Wolfrum (ed.), “Max Planck Encyclopedia of Public International Law” Online Edition, 2013.

<sup>43</sup> Sands/Klein, p. 477.

and circumstances and, as time goes becoming further and further removed from the formal language of its constituent treaty<sup>744</sup>.

Having discussed the rationale and the basis for the international organizations personality under international law, it should be considered whether international organizations' international legal personality can produce legal effects toward non-member states. As mentioned above, the principle of *pacta tertiis nec nocent nec prosunt* is deemed applicable in relation to organizations which international legal personality was expressly granted to. In case of an organization whose constituent instruments remain silent on the issue, the situation would be more complicated. In both cases, the requirement of recognition of an international organization as person under international law has been proposed.

In the ICJ's *Reparations* opinion, the concept of objective legal personality was introduced. This kind of legal personality does not require recognition by non-member states in order to be effective towards them. However, in this case the Court applied the concept of objective legal personality because the organization in question represented the majority of members of the international community at the time. It found the UN's personality opposable to third parties for the reason that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone"<sup>45</sup>. In respect to the above, the requirement of recognition of the organization by third parties seems to be obsolete. Many commentators indicate that the concept of objective personality runs counter to the principle of relativity of treaties expressed in art. 34 VCLT<sup>46</sup>. Moreover, no state can be compelled to grant its recognition as, in general, this decision is within state's discretionary powers. The majority of legal scholarship holds recognition prerequisite for acquiring a legal personality opposable towards third parties<sup>47</sup>. The UN would constitute a special case which needed to be handled in a particular manner for the reason of its universal character.

### **3. Sources of secondary rules of responsibility of international organizations**

#### **3.1. Draft Articles on Responsibility of International Organizations**

In the ARSIWA, the ILC explained how the rules comprised therein are to be adapted to responsibility of international organizations. Pursuant to art. 57 thereof, the

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<sup>44</sup> Sands/Klein, p.478.

<sup>45</sup> *Reparation*, p. 185.

<sup>46</sup> Sands/ Klein, p. 479.

<sup>47</sup> Schmalenbach, para. 27; Hartwig, p. 39.



provisions of the ARSIWA “are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”. Responsibility of international organizations was considered a “necessary counterpart” to the completed work on rules of state responsibility<sup>48</sup>.

To a large extent the DARIO reflect the principles applicable to responsibility of states contained in the ARSIWA and similar as it is in the case of the latter, their legal character is disputed. With regard to the ARSIWA, the legal scholarship has agreed that the ILC’s study does not constitute a source of international law<sup>49</sup>. They represent rather an evidence of a source of law, *i.e.*, “a subsidiary mean for determination of rules of law” in the wording of art. 38 (1) of the Statute of the ICJ<sup>50</sup>. They are similar to the writings of the most qualified publicists in their legal authority<sup>51</sup>. Nonetheless, it has been argued that the ILC has a particularly high standing among the publicist for its members being the “representative array of experts”<sup>52</sup>. An evidence of its particular authority is reflected in the fact that the international judicial bodies have taken recourse to the works of the ILC on international responsibility. For instance, the ICJ referred to the ARSIWA in its decisions on the cases of *Immunity from Legal Process*<sup>53</sup> and *Gabčíkovo-Nagymaros Project*<sup>54</sup>. Likewise, provisions of the DARIO were quoted by both domestic and international courts even prior to their adoption<sup>55</sup>.

It should be emphasized that the ILC has been entrusted with the assignment of both “the progressive development of international law and its [...] codification”<sup>56</sup>. Thus, the instruments drafted by the Commission can differ in their legal authority and represent either an instrument of progressive development of international law or a codification of

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<sup>48</sup> Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of Work of the Commission, A. Pellet, Responsibility of International Organizations, Report of International Law Commission at 52<sup>nd</sup> session, in “Yearbook of the International Law Commission” 2000, Vol. II, Part II, UN Doc. UN Doc. A/55/10, p.135.

<sup>49</sup> D. D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, “American Journal of International Law” 2002, vol. 96, p. 869.

<sup>50</sup> Statute of the International Court of Justice, adopted 26 June 1945, entered into force 24 October 1945, 15 UNCTAD 355.

<sup>51</sup> B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law*, the Hague 1977, p. 25 . T. Meron, *Human Rights And Humanitarian Norms As Customary Law*, Oxford/ New York 1989, p. 137.

<sup>52</sup> Caron, p. 867; *cf.* M. E. Villiger, *Customary International Law And Treaties*, Dordrecht 1985, p. 79.

<sup>53</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ Reports, p. 87, para. 62 (29 Apr. 1999).

<sup>54</sup> *Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) Judgment, 1997 ICJ Reports, pp. 40–41, paras. 51–52 (25 Sept. 1997).

<sup>55</sup> *Agim and Bekir Behrami v. France and Ruzhdi Saramati v. France, Germany and Norway*, Appl. Nos. 71412/01 and 78166/01, Decision on admissibility of applications of 2 May 2007, paras. 29-; *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, Opinions Of The Lords Of Appeal For Judgment, [2007] UKHL 58, para. 5 (12 Dec. 2007).

<sup>56</sup> General Assembly Resolution 174, UN Doc. A/RES/174(II) (1947).



existing norms of customary international law. Some of the rules on responsibility of states in the ARSIWA reflect the current state of customary international law<sup>57</sup>. However, the ILC points out that while the rules provided in ARSIWA constitute to some extent a codification of existing principles of customary international law, the DARIO are intended to serve rather as an instrument of progressive development of international law<sup>58</sup>. This is conditioned upon the limited availability of pertinent practice relating to responsibility of international organizations<sup>59</sup>, which was one of the main arguments used against putting the works on the responsibility of international organizations on the ILC's agenda. Thus, a paradoxical situation can occur where two corresponding provisions of the ARSIWA and the DARIO which are nearly identical in their wording, do not have the same legal authority<sup>60</sup>.

### 3.2. Constituent treaties of international organizations

In accordance with art. 64 DARIO, which sets forth the principle of *lex specialis* in regard to the rules on responsibility, the 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 organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law”. As explained, such special rules may be provided in “the rules of the organization applicable to the relations between an international organization and its members”.

Such rules refer to relations that certain categories of international organizations or a specific international organization have with states or other international organizations<sup>61</sup>. It has been argued that a special set of rules on responsibility should be applied to the European Union and its member states<sup>62</sup>. The relevant case law concerning responsibility of the EU and its members has been analyzed in the ILC's Commentary to art. 64 DARIO<sup>63</sup>. However, the question of whether a special regime of responsibility applicable to the EU and its member states exists has not been definitely answered.

<sup>57</sup> E.g. art. 4 ARSIWA, *see: Immunity from Legal Process*, para. 62 (the ICJ referred to the rule of attribution of conduct under art. 6 of the ILC's Draft, which is currently embodied in art. 4 ARSIWA); art. 25 ARSIWA, *see: ILC's Commentaries to the ARSIWA*, pp. 190-200, para 11.

<sup>58</sup> ILC's Commentaries to the DARIO, pp. 67-68, para. 5.

<sup>59</sup> ILC's Commentaries to the DARIO, p. 70, para. 5.

<sup>60</sup> ILC's Commentaries to the DARIO, pp. 67-68, para. 5.

<sup>61</sup> ILC's Commentaries to the DARIO, p. 79, para. 1.

<sup>62</sup> *See: P.J. Kuijper/ E. Paasivirta, Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations*, “International Organizations Law Review” 2004, vol. 1, p. 111; F. Hoffmeister, *Litigating against the European Union and its member States: who responds under the ILC's draft articles on international responsibility of international organizations?*, “European Journal of International Law” 2010, vol. 24, p. 723.

<sup>63</sup> ILC's Commentaries to the DARIO, pp. 67-68, paras. 3-7.

In particular, the constituent instruments may contain rules on allocation of responsibility between international organizations and their member states<sup>64</sup>. Typically, such provisions are included in instruments of organizations whose activities involve high financial risk<sup>65</sup>. M. Hirsch lists three principal patterns of the provisions of organization's constituent instruments on the allocation of responsibility<sup>66</sup>. Firstly, there are constituent instruments that comprise provisions excluding the responsibility of members states, as for instance art. 3 (4) of the Agreement Establishing the International Fond for Agricultural Development<sup>67</sup>. Secondly, some constituent treaties, like the Convention for Establishment of a European Space Agency<sup>68</sup>, provide that in case of a deficit in time of dissolution of an organization the deficit must be met by member states proportionally to their contribution to that organization. Lastly, constitutions of some financial institutions limit the responsibility of member states to unpaid portion of issue price of shares, as it is in the case of the Articles of Agreement of the World Bank<sup>69</sup>.

### 3.3. Other international treaties

Rules on responsibility of international organizations can be also included in other international agreements, which deal with general questions of international responsibility in a particular field of activities. A typical example are the rules comprised in the treaties relating to responsibility for activities conducted in the outer space.

The significant role of international organizations in this field has led to the formulation of rules of their international responsibility in this regard<sup>70</sup>. Art. VI of the Outer Space Treaty<sup>71</sup> provides that in event that space activities are conducted by an international organization "responsibility for compliance with this treaty [the Outer Space Treaty] shall be borne both by the international organization and by the State Parties to the Treaty participating in such organization". A more elaborate model of allocation of responsibility is provided in the Convention on International Liability for Damages Caused

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<sup>64</sup> ILC's Commentaries to the DARIO, p. 166, para. 1; p. 168, para.8.

<sup>65</sup> Hartwig, p. 147.

<sup>66</sup> Hirsch, pp. 102-103.

<sup>67</sup> Art. 3 (4) of the Agreement Establishing the International Fond for Agricultural Development reads: "no Member shall be liable by reason of membership, for the acts or obligations of the Fund".

<sup>68</sup> Convention for Establishment of a European Space Agency, opened for signature on 30 May 1975, entered into force on 30 October 1980, 14 ILM 864. Art. XXV (3) provides that "in the event of a deficit, this shall be met by the same [member] states in proportion to their contributions as assessed for the financial year current".

<sup>69</sup> Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature on 22 July, entered into force 27 December 1945, 2 UNTS 134. Art. II (1) (6) provides that the "liability on shares shall be limited to the unpaid portion of the issue price of the shares".

<sup>70</sup> Hirsch, p. 99.

<sup>71</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, opened for signature 27 January 1967, entered into force on 10 October 1967, 610 UNTS 206.

by Space Objects<sup>72</sup>. The legal regime established in art. XXII (3) of the Convention adopts the doctrine of secondary responsibility<sup>73</sup>. This article provides that in case where an international intergovernmental organization is held liable for damage caused by a space object in accordance with the Convention, both the organization and its member states being parties to the Convention are jointly and severally responsible. However, this occurs when the conditions set forth in art. XXII (3) are met, namely: (1) the claim for compensation must be first presented to the organization, and (2) the claimant may invoke the liability of member states only if the organization has not paid the agreed compensation within a period of six months.

#### **4. Assessment**

International responsibility fundamentally differs from the regimes of responsibility in domestic legal systems. It does not distinguish between tort and breach of contract. It does not require injury, nor is it confined to bilateral relations between direct victim and wrongdoer. All of the above features of responsibility under international law are contingent upon its very unique “communitarian” function. These *sui generis* characteristics are not entirely a result of the development of customary rules international law in this area. In a large part, they were adopted as an instrument of progressive development of international law, accepted and developed in the practice of states and international institutions.

The works of the ILC on responsibility of international organizations were considered a natural consequence of the completion of the rules on state responsibility. Yet, contrary to the latter, there were substantial doubts whether the rules on responsibility of international organizations were ripe to be put on the ILC’s agenda.

## **Part II. Elements of responsibility of international organizations under international law**

### **1. The element of breach of an international obligation**

#### **1.1. International treaties**

International organizations are capable of concluding international treaties with states and between one another by virtue of their legal personality under international

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<sup>72</sup> Convention on International Liability for Damages Caused by Space Objects, opened for signature on 29 March 1972, entered into force on 1 September 1972, 961 UNTS 187; 10 ILM 965.

<sup>73</sup> Hirsch, p. 101.

law<sup>74</sup>. International treaties are a source of binding obligations for contracting parties since the principle *pacta sunt servanda* applies also to international organizations<sup>75</sup>. Treaties concluded by international organizations were referred to as a source of obligations of the international organizations in the ICJ's Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951*<sup>76</sup>. International organizations "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"<sup>77</sup>. International treaties binding international organizations include international treaties which constitute them<sup>78</sup> as they do not differ from other forms of international law in regard to their binding effects<sup>79</sup>.

The issue of allocation of responsibility might be more complicated in case of mixed agreements. Members of an international organization can transfer a part of their competence in a certain area to the organization. In a situation where an international treaty concerns a sphere which belongs partly to competence of an international organization and partly of its member states, neither of them has full competence to conclude the agreement acting on its own<sup>80</sup>. For determining which subject of international law shall bear responsibility for a breach of a mixed agreement, a particularly helpful device can be provided in a competence clause included therein. Some agreements explicitly indicate which party is bound to comply with particular provisions of a treaty<sup>81</sup>. The distribution of powers might also be clarified by instruments relating to an agreement<sup>82</sup>. A particularly elaborate mechanism of allocation of responsibility is contained in Annex IX to the UN Convention on the Law of the Sea<sup>83</sup>. When no competence clause has been included in a treaty, the pointing to the responsible party is more problematic. M. Hirsch has proposed three solutions in this respect: 1) the organization and its members are jointly responsible for compliance with all the agreement's provisions, 2) the apportionment of responsibility should follow the distribution of competence between

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<sup>74</sup> A legal framework for adoption of international treaties by international organizations has been provided in the 1986 Vienna Convention.

<sup>75</sup> Hirsch, p. 18.

<sup>76</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. Reports, p. 73 (20 Dec. 1980).

<sup>77</sup> *Ibidem*, pp. 89-90.

<sup>78</sup> M. Hartwig, *International Organizations or Institutions, Responsibility and Liability*, para. 16 in R. Wolfrum (ed.), "Max Planck Encyclopedia of Public International Law" Online Edition 2013.

<sup>79</sup> *Ibidem*.

<sup>80</sup> Hirsch, p. 20.

<sup>81</sup> E.g. Lomé II Convention, adopted on 31 October 1979, entered into force on 1 January 1981, 19 ILM 327; for more examples, see: Kuijper/ Paasivirta.

<sup>82</sup> Hirsch, p. 20.

<sup>83</sup> Hirsch, pp.21-23.

the organization and its members<sup>84</sup>, 3) the parties would be required to bring their claims against the organization and the latter will decide together with its members who is responsible for a breach of a particular provision<sup>85</sup>.

It seems that, generally, the responsibility for performance of the mixed agreements should follow the respective competence of either state or the organization<sup>86</sup>.

Mixed agreements are widely employed by the EU<sup>87</sup>. Within the EU the joint participation of both the member states and the EU is required whenever all matters covered by an agreement fall under the scope of exclusive competence of either the member states or the organization<sup>88</sup>. With regard to the EU, a distinction between parallel and shared mixity is often made<sup>89</sup>. Parallel mixity refers to a situation where the EU and its member states are parties to an agreement with full rights and obligations and the organization's participation has no direct effect on the rights and obligations of member states. An example of such mixity would be the European Convention on Human Rights<sup>90</sup> after the EU's succession. The inherent nature of mixed agreements is reflected rather in the case of shared mixity<sup>91</sup> which entails a division of specific rights and obligations under the agreement<sup>92</sup>.

## 1.2. Customary international law

International customary law is *mutatis mutandis* applicable to international organizations<sup>93</sup>. This was clearly stated in the academic debate on the question of responsibility for damage sustained in violations of humanitarian law committed by military forces in course of the UN's peacekeeping operations. The UN has always been unwilling to explicitly admit that its peacekeeping forces were bound by the customary rules of law

<sup>84</sup> In cases where one party has exclusive competence, this party would be held responsible. In other cases, *i.e.* where the obligations are under concurrent competence or the agreement lacks clarity who shall bear responsibility, both the members and the organization would be held responsible. *See: Hirsch, p. 24.*

<sup>85</sup> Hirsch, p. 24.

<sup>86</sup> P. Craig/ G. de Búrca, *EU Law. Text, Cases and Materials*, New York 5<sup>th</sup> ed. 2011, p. 334.

<sup>87</sup> On the EU's mixed agreements, *see: P. Koutrakos/ C. Hillion (eds.), Mixed Agreements Revisited: The EU and Its Member States in the World*, Oxford/ Portland 2010; J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, the Hague 2001; D. O'Keefe/ H.G. Schermers, *Mixed Agreements*, Deventer 1983.

<sup>88</sup> On the division of competences between the EU and its member states, *see: Treaty on the Functioning of the European Union, consolidated version, 2008 O.J. C 115/47, arts. 2-6.*

<sup>89</sup> A. Rosas, *The European Union and Mixed Agreements* in A. Dashwood/ C. Hillion, *The General Law of E.C. External Relations*, London 2000; Craig/ de Búrca, p. 334; M. Möldner, *European Community and Union, Mixed Agreements*, para.7 in R. Wolfrum (ed.), "Max Planck Encyclopedia of Public International Law" Online Edition 2013.

<sup>90</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950, entered into force on 3 September 1953, ETS 5; 213 UNTS 221.

<sup>91</sup> Möldner, *European Community...*, para. 8.

<sup>92</sup> Craig/ de Búrca, p. 334.

<sup>93</sup> Hirsch, p. 31; Schermers/ Blokker, p. 1004.

reflected in the provisions of the Geneva Conventions<sup>94</sup>. Instead, the UN issued an instruction in which it guided the troops to “observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel”<sup>95</sup>. This practice of the UN was largely commented by the legal scholarship with the majority opinion stating that the UN forces participating in military operations are bound to comply with the law of war as far it has become customary international law<sup>96</sup>.

The binding customary norms encompass these of a *jus cogens* character. Just as the VCLT, the 1986 Vienna Convention provides that a treaty is void if it is in conflict with a peremptory norm of general international law. In contrast to the general agreement on the binding force of the *jus cogens* norms, there is no concurrence as to the content of these norms. Nonetheless, it is widely recognized that these include the prohibition of aggression, genocide, crimes against humanity, slave trade and racial discrimination<sup>97</sup>.

### 1.3. General principles of law

The general principles of law were listed by the ICJ as a source of international organizations’ obligations in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951* case. According to H. G. Schemers and N. M. Blokker, the general principles are derived from national legal orders of member states and treaties which majority of an international organization’s members are parties to<sup>98</sup>. Following the example of the EU, the EU Court has applied general principles of law such as estoppel,

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<sup>94</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609.

<sup>95</sup> See: United Nations Emergency Force Regulations, UN Doc. ST/SGB/UNEF/1, Art. 44 (1957); United Nations Operation in the Congo Regulations, UN Doc. ST/SGB/ONUC/1, Art. 43 (1960).

<sup>96</sup> Y. Sandoz, *The Application of Humanitarian Law by the Armed Forces of the United Nations Organization*, “International Review of the Red Cross” 1978, vol. 18, p. 283; P. Bekker, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, “American Journal of International Law” 2000, vol. 94, p. 406; D. Schindler, *United Nations Forces and International Humanitarian Law*, Geneva/ the Hague 1984, p. 526

<sup>97</sup> I. Brownlie, *Principles of Public International Law*, New York 7<sup>th</sup> ed. 2008, p. 511.

<sup>98</sup> Schemers/ Blokker, p. 998.



*non bis in idem*<sup>99</sup>, or basic principles of human rights incorporated in the general principles of the EU law<sup>100</sup>.

#### 1.4. Unilateral acts of international organizations

Although, unilateral acts of subjects of international law are not included in the catalogue in art. 38 (1) of the ICJ Statute, they are universally accepted as a source of binding rights and obligations under international law<sup>101</sup>. Once the requirements for a binding unilateral act under international law are fulfilled, an organization can be held responsible for a breach thereof committed against third parties.

### 2. The element of attribution of conduct to international organization

#### 2.1. General rule of attribution of conduct to international organization

As it is in the case of states<sup>102</sup>, the basic principle is the attribution of acts of an entity's organs and agents to that entity. The principle of attribution of acts of organs and agents to legal entity in whose service they act is considered a norm of international customary law<sup>103</sup>. Pursuant to the first paragraph of art. 6 DARIO, a conduct of organs and agents of an international organization carried out in performance of their functions is to be seen as an act of that organization under international law, disregarded of the position that organ or agent holds in the organization. According to the second paragraph, while determining the functions of organs and agents of the organization the rules of the organization apply.

An "organ" is defined as "an element of structure of an international organization through the latter acts, expresses its will and discharges its duties"<sup>104</sup>. The notion of an "agent" has been explained by the ICJ as "any person [...] who has been charged by an organ of the organization with carrying out or helping to carry out one of its functions -

<sup>99</sup> *Ibidem*.

<sup>100</sup> E.g. Case 29/69, *Stauder*, Judgment, European Court of Justice, ECR 1969 at 425 (12 Nov. 1969); Case 4/73, *Nold*, Judgment, European Court of Justice, ECR 1974, at 507 (14 May 1974); Case 44/79, *Hauer*, Judgment, European Court of Justice, ECR 1979, at 3727 (13 Dec 1979).

<sup>101</sup> *Cf. Legal Status Of Eastern Greenland* (Denmark v Norway) Judgment, Merits, 1933 P.C.I.J., Ser. A/B N°53, p. 71 (Apr. 5, 1933); *Nuclear Tests Case* (Australia v France) Judgment, Merits, 1974 I.C.J. Reports, p. 457, paras.43-50 (Dec. 20, 1974).

<sup>102</sup> *Cf. art. 4 ARSIWA*.

<sup>103</sup> *See: M. Shaw, International Law*, New York, 6<sup>th</sup> ed. 2008, p. 785. As held by the ICJ in *Application of the Convention on the Prevention and Punishment of Crime of Genocide* judgment, in respect to state responsibility, it is "a well-established rule, one of the cornerstones of the law of state responsibility, that the conduct of a state organ is to be considered an act of a state under international law". *Application of the Convention on the Prevention and Punishment of Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment, 2007 I.C.J. Reports, p. 202, para. 385 (Feb. 26, 2007).

<sup>104</sup> J. Salmon, *Dictionnaire de droit international public*, Brussels 2001, p. 721.



in short any person through whom it acts”<sup>105</sup>. Little significance should be given to the distinction between a conduct of organs and officials, and a conduct of persons entrusted with part of the organization’s functions<sup>106</sup>, as “the essence of the matter lies not in their administrative position but in the nature of their mission”<sup>107</sup>. The functions of the organization are to be determined through application of the “rules of the organization”.

Art. 2 (b) DARIO defines the rules of the organization to include, in particular, “constituent instruments, decisions, resolutions, and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization”. However, the rules of the organization are not the only criterion for assessment whether a person acts within functions of that organization. The wording of paragraph 2 of art. 2 (b) DARIO is intended to leave open the possibility that, in exceptional circumstances, certain functions may be considered granted to an organ or an agent even if not provided so in the rules of the organization<sup>108</sup>. Otherwise, the attribution would depend largely on the use of a particular terminology in internal law of the organization concerned<sup>109</sup>.

## 2.2. *Ultra vires* acts of organs and agents of international organization

According to art. 8 DARIO, a conduct of an organ or an agent of an international organization is attributed to that organization even if the organ or agent acting in its official capacity and within the overall functions of the organization exceeds its authority or contravenes its instruction. The term of *ultra vires* conduct covers two situations: an *ultra vires* conduct which is within competence of an organization, but exceeds authority of an acting organ or agent; and a conduct which exceeds competence of an organization, which in this also means acting beyond the scope of authority of an organ or of an agent who performed it<sup>110</sup>. With regard to the second case, it must be noted that, unlike states, international organizations do not enjoy a general competence, but are limited in their actions by virtue of the principle of speciality. This principle restricts their functions only to these conferred on them by their member states<sup>111</sup>. In this respect, the issues of

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<sup>105</sup> *Reparation*, p.177.

<sup>106</sup> Second report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/541(2004) p. 24, para. 24.

<sup>107</sup> *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 1989, p. 194, para. 47 (15 Dec. 1989).

<sup>108</sup> ILC’s Commentaries to the DARIO, p.84, para. 9.

<sup>109</sup> Cf. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission with commentaries thereto in Report of the International Law Commission at 56<sup>th</sup> session, UN Doc. A/59/10(2004), p. 104, para. 1.

<sup>110</sup> ILC’s Commentaries to the DARIO, pp. 91-92, para. 1; Gaja, Second report, p. 23, para. 51.

<sup>111</sup> *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, PCIJ, Series B, No. 14, p. 64 (8 Dec. 1927); *Nuclear Weapons in Armed Conflict*, pp. 66, 78–9.

competence of an organization and its legal capacity must be distinguished. The question is what effect does overstepping of an external competence of an organization have for a third party injured by an external *ultra vires* act of that organization. Although, members of the organization may claim invalidity *ipso jure* of acts of the organization taken outside of the scope of the attributed functions and powers, the invalidity an *ultra vires* act contended by the members should not affect third parties if they confide in its validity on *bona fide* grounds<sup>112</sup>.

For the attribution of an *ultra vires* act of an organ, an entity, a person or an official to an organization, a close relation between the *ultra vires* conduct and functions entrusted to them is required<sup>113</sup>. It is unanimously accepted that a conduct of an agent of an international organization within the scope of “private domain” is not attributable to that organization<sup>114</sup>.

The attribution of *ultra vires* acts of organs or agents of an organization to the organization has been recognized by the ICJ in its *Certain Expenses Advisory Opinion*<sup>115</sup>.

The extension of the rules of attribution to *ultra vires* acts finds its justification in protection of third parties for which an act in question may appear to be in a close connection with an official function of an organ or an agent<sup>116</sup>. Unless the action is attributed to an organization, the consequences of the wrongdoing are shifted on the injured party as without attribution to the entity it is deprived of all redress<sup>117</sup>. M. Hirsch argues that the principle of attribution of *ultra vires* acts should not be regarded as absolute and include certain exceptions based on good faith<sup>118</sup>. According to the author, a conduct would not be attributable to an international organization in cases where a conduct of an organ or an agent was carried out in violation of the organization’s internal rule of fundamental importance known to a third party, and this party could have prevented the injury<sup>119</sup>.

### 2.3. State organs placed at disposal of international organization

Art. 7 DARIO deals with attribution of conduct of organs or agents of a state or an international organization placed at disposal of another international organization. Pursuant to this provision, such a conduct is attributable to the latter if it exercises effective control over a conduct in question.

<sup>112</sup> Schmalenbach, para. 52.

<sup>113</sup> Gaja, Second report, p. 26, para. 57.

<sup>114</sup> P. Klein, *The Attribution of Conduct to International Organizations*, p. 297, para. 306 in J. Crawford/ A. Pellet/ S. Olleson, *The Law of International Responsibility*, New York 2010.

<sup>115</sup> *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Reports, p. 151 (20 Jul. 1962).

<sup>116</sup> Klein, p. 305; Gaja, Second report, p. 24, para 53.

<sup>117</sup> Hirsch, p. 94.

<sup>118</sup> Hirsch, pp. 90-95.

<sup>119</sup> Hirsch, p. 94; cf. 1986 Vienna Convention, art. 46.

The case of state organs placed at disposal of an international organization has large practical relevance, particularly in cases of peace-keeping operations authorized by the UN. Under Chapter VII of the UN Charter, the UN Security Council is competent to authorize coercive operations without involving the organization directly. The UN conducts its operations through military forces comprised of national contingents of its member states. Military forces deployed in such an operation are not formally tied to the organization and remain subjected to their national command and control<sup>120</sup>. Members of national contingents are subject to the authority of the UN for the period of their assignment to the force, still remaining in the service of their state<sup>121</sup>. This puts the peacekeeping troops in an odd position. Although they are soldiers in the UN forces, they are still bound by the commitments made to the states of origin<sup>122</sup>.

A vivid debate over the appropriate test for attribution of conduct under art. 7 DARIO arose on the occasion of the joint decision on admissibility of the cases on *Behrami v. France* and *Saramanti v. France, Germany and Norway* by the European Court of Human Rights<sup>123</sup>. This decision is considered to be a landmark decision on this issue. In this case the Court considered its *ratione personae* jurisdiction to decide on the issue of responsibility of the actions and the omissions made under the authority the UN Interim Administration Mission in Kosovo and Kosovo Force<sup>124</sup>. The Strasbourg Court claimed to base its assessment on the criterion of effective control under the provisionally adopted art. 5<sup>125</sup>, but in fact it introduced a new test for attribution of conduct, namely the test of ultimate authority and control<sup>126</sup>. The decisive point for the attribution of the actions and omissions of the military contingents to the UN was the consideration that

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<sup>120</sup> On the organization of the UN peace-keeping forces, see: K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen*, Frankfurt am Main, 2004, pp.156-509.

<sup>121</sup> Hirsch, p. 66.

<sup>122</sup> T. Danenbaum, *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 Troop Contingents Serving as United Nations Peacekeepers*, "Harvard Journal of International Law" 2010, vol. 51(1), p. 115.

<sup>123</sup> *Supra*: note 93.

<sup>124</sup> In *Behrami* claims were brought against France for the failure of French-contributed KFOR troops to clear mines dropped during the NATO bombardment in 1999. In the case of *Saramanti* a Kosovar man challenged his arrest and detention under UNMIK authority for attempted murder and illegal possession of weapons as well as his re-arrest and detention under KFOR authority for involvement in armed groups. The charges were brought against Germany as it was the lead contributing nation in charge of the sector where he was arrested and against Norway and France because the Commanders of KFOR issued the orders for his arrest and detention were, consecutively, a Norwegian and a French officer.

<sup>125</sup> Report of the International Law Commission adopted at 56<sup>th</sup> session, UN Doc. A/59/10(2004), p. 99. The wording of the draft art. 5 is identical with the wording of art. 7 DARIO. While examining its *in personae* jurisdiction the Court quoted art. 5 *in extenso* and invoked various paragraphs of the related commentary, see: *Behrami and Saramanti*, paras.29-33.

<sup>126</sup> Gaja, seventh report, pp. 11-12, para. 30.

“the UN Security Council retained the ultimate authority and control so that operational command was only delegated”<sup>127</sup>. This conclusion was drawn from the Court’s interpretation of the UN SC resolution 1244 (1999)<sup>128</sup> which was to imply the SC’s intention to retain ultimate authority and control over the KFOR’s security mission and to delegate the operational command to NATO<sup>129</sup>.

The application of the ultimate control test by the ECtHR met with strong criticism of the legal scholarship<sup>130</sup>. It has been argued that a test linked to the operational command over the conduct would be more appropriate as the ultimate control hardly implies a role in an act in question<sup>131</sup>. The effective control over a conduct should be rather assigned to an entity that is competent to issue orders in the action regarded as wrongdoing. In particular, the ILC’s Commentary to draft art. 5 should be considered. It states that the attribution test should be based “on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal”<sup>132</sup>. The academic debate on the *Behrami and Saramanti* decision concentrated on the issue whether the ECtHR’s construction of the draft art. 5 was contrary to the intention of the ILC.

The commentary to art. 7 DARIO links the attribution to the “factual control over the specific conduct”. The prevailing view represented in the legal scholarship has been that the criterion of the effective control in art. 7 DARIO shall be construed in the same way as the test of effective control implied under art. 8 ARSIWA<sup>133</sup>. Art. 8 states that a conduct of a person or an entity is to be considered an act of a state if that person or that entity is in fact acting on instructions of, or under direction or control of, that state. This

<sup>127</sup> *Behrami and Saramanti*, para. 133.

<sup>128</sup> UN Doc. S/RES/1244 (1999).

<sup>129</sup> *Behrami and Saramanti*, para. 135.

<sup>130</sup> K. M. Larsen *Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test*, “European Journal of International Law” 2008, vol. 19 (3), p. 509; M. Milanovic/ T. Papic, *As Bad As It Gets: the European Court of Human Rights’s Behrami and Saramati Decision and General International Law*, “International and Comparative Law Quarterly” 2009, vol. 58, p. 267; C. A. Bell, *Reassessing Multiple Attribution: the International Law Commission and the Behrami and Saramanti Decision*, “N.Y.U. Journal of International Law and Politics” 2009-2010, vol. 42, p. 501; C. Leck, *International Responsibility in the United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct*, “Melbourne Journal of International Law” 2009, vol. 10, p. 346; A. Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Casus*, “Human Rights Law Review” 2008, vol. 8, p. 151; P. Klein, *Responsabilité pour les faits commis dans le cadre d’opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l’homme: quelques considérations critiques sur l’arrêt Behrami et Saramati*, “Annuaire Français de Droit International” 2007, vol. 53, p. 43.

<sup>131</sup> Danennbaum, pp. 153-154.

<sup>132</sup> ILC’s Draft articles on responsibility of international organizations provisionally adopted so far by the Commission with commentaries thereto in Report of the International Law Commission, adopted at 56<sup>th</sup> session, UN Doc. A/59/10 (2004), p. 111, para. 3.

<sup>133</sup> Larsen, p. 514.

provision implies the effective control test applied by the ICJ in the cases of *Nicaragua*<sup>134</sup> and *Genocide*<sup>135</sup>, and, to a lesser extent, the overall control test applied by the Appeals Chamber in the ICTY in the *Tadić* case<sup>136</sup>. As explained by the ICJ in the *Nicaragua* case, the test of effective control requires an entity to direct or enforce the perpetration of acts contrary to international law<sup>137</sup>. Thus, the test employed by the ICJ in the *Nicaragua* case is linked directly to operational command exercised over the impugned conduct. Thus, in the *Behrami and Saramanti* case, only this test of attribution would be consistent with the ILC's intention manifested in its Commentary. Yet, the ECtHR opted for a different criterion leading to an entirely different result. In the *Behrami and Saramanti*, the UN had neither issued directions concerning specific operations nor enforced those operations<sup>138</sup> as these decisions were left to the national command.

It has been contested whether the attribution test employed by the ECtHR can serve as a basis for the later development of a general principle on the issue. As the ILC's Special Rapporteur Giorgio Gaja commented on the Court's decision "it would be difficult to accept, simply on the strength of the *Behrami and Saramanti* judgment, the criterion there applied as a potentially universal rule"<sup>139</sup>. Despite of the very critical opinions, the Court upheld this formula for attribution of conduct in its later decisions in the cases of *Karasumaj v. Greece*<sup>140</sup>, *Gajić v. Germany*<sup>141</sup> and *Berić and others v. Bosnia and Herzegovina*<sup>142</sup>. These conclusions were also referred to in similar cases before national courts, such as *Al-Jedda* decision by the UK's House of Lords<sup>143</sup> or *H.N. v the Netherlands*<sup>144</sup>.

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<sup>134</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Merits, Judgment, 1986 I.C.J. Reports, p. 14 (27 Jun. 1986).

<sup>135</sup> ILC's Commentaries to the ARSIWA, pp. 104-105, paras.4-5.

<sup>136</sup> *Prosecutor v. Duško Tadić*, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A (15 Jul.1999). However, in the ICJ's view manifested in the *Genocide* case did not find the test of *overall control* to appropriate to determine on the issue of state responsibility as it was employed by the ICTY to decide if a conflict may be qualified as international. In opinion of the Appellate Chamber if a state exercises overall control over a group that is involved in the conflict it is to be qualified as of international character. See: *Genocide*, p. 210, para. 404.

<sup>137</sup> *Nicaragua*, p. 64, para. 115 ; cf. *Genocide*, pp. 208-209, paras. 399-401.

<sup>138</sup> Cf. A. Cassesse, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, "European Journal of International Law" 2007, vol. 18(4), p. 653.

<sup>139</sup> Gaja, Seventh report, p. 9, para.23.

<sup>140</sup> *Ilaz Karasumaj v. Greece*, Appl. No. 6974/05, Decision on the admissibility of Application, ECtHR (5 Jul. 2007).

<sup>141</sup> *Slavisa Gajić v. Germany*, Appl. No. 31446/02, Decision on the admissibility of Application, ECtHR (28 Aug. 2007).

<sup>142</sup> *Dušan Berić and al. v. Bosnia and Herzegovina*, Appl. Nos. 36357/04, 36360/04, 38346/04, et al., Decision on the admissibility of Application, ECtHR (16 Oct. 2007).

<sup>143</sup> *Supra*: note 93.

<sup>144</sup> *H. N. v. the Netherlands*, Judgment, District Court of The Hague, case no. 265615/HA ZA 06-1671 (10 Sept. 2008).

## 2.4. Implementation of binding acts of international organizations

In the course of the ILC's work on the rules on responsibility of international organizations, the European Commission has proposed to add a special rule on attribution for cases of implementation of binding acts of the European Community or any "other potentially similar organization"<sup>145</sup>. Under the proposed rule, a conduct of an organ of a member state taken in order to implement a binding act of an international organization would be attributed to that international organization. As pointed out by Special Rapporteur Gaja, this rule would assume that "the state organ would [...] act quasi as an organ of the international organization"<sup>146</sup>. Such an assertion is justified as far as member states implementing these acts have no discretion as to their enforcement. It is worth mentioning that some writers include the situation of organs of member states of the EU entrusted with collection of taxes and other monies owed to the organization as an example of state organs "borrowed" by an international organization handled in the section above<sup>147</sup>. Nonetheless, a provision consistent with the European Commission's proposal was not included in the DARIO. This, however, does not diminish the significance of the problem for the current practice of the international organizations, especially in the context of the EU.

The issue of implementation of the EU's regulations by its member states and the specific question of responsibility for their actions related to the implementation has been already handled by several international judicial bodies<sup>148</sup>. The results of these proceedings were drastically different from the proposed rule of attribution introduced in the beginning of this section. The most significant decision in this regard was the *Bosphorus* before the ECtHR. The case was concerned with Ireland's impounding of an aircraft made in accordance with a respective obligation under an EC regulation which was based on the UN Security Council's resolution. On this occasion the ECtHR stated that "a Contracting Party is responsible under article 1 of the [ECHR] for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations"<sup>149</sup>. The Strasbourg Court concluded that it is not contrary to the Convention for a state to join an international organization and transfer a part of its sovereign powers

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<sup>145</sup> UN Doc. A/C.56/59/SR.21, para. 18 in Gaja, Seventh report, p. 12, para. 31.

<sup>146</sup> Gaja, Seventh report, p. 12, para 31.

<sup>147</sup> P. Klein, p. 300.

<sup>148</sup> *Matthews v United Kingdom*, Appl. No 24833/94, Judgment, ECtHR (18 Feb. 1999); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Appl. No. 45036/98, Judgment, ECtHR (30 Jun. 2005); *Kadi, Al Barakaat International Foundation v. Council and Commission*, Judgment, ECJ, joined cases C-402/05 P and C-415/05 P, (3 Sept. 2008).

<sup>149</sup> *Bosphorus*, para. 153.



on it<sup>150</sup>. However, it is member states' obligation to ensure that a protection of rights guaranteed under the ECHR equivalent to this under the Convention is provided in the framework of the international organization<sup>151</sup>. In consequence, whenever a standard of protection provided by an international organization is not sufficient, any failure to comply with the obligations under the ECHR will entail the responsibility of the member states and not the organization. The ECJ arrived at a similar conclusion when considering the attribution of a regulation adopted by the EC in order to provide a compliance with a binding resolution of the UN Security Council in the *Kadi* case<sup>152</sup>.

Moreover, when considering the issue of responsibility for implementing of binding decisions of international organizations, the provision of art. 17 DARIO must be addressed. Art. 17 DARIO deals with circumvention by an international organization of its international obligations through decisions and authorizations addressed to its members. In its first paragraph, this article provides that if an international organization circumvents one of its international obligations by adopting a decision binding upon its member states to commit an act that would be internationally wrongful if committed by that organization, the responsibility shall be imputed to the organization. According to the second paragraph of the provision, the same rule applies to wrongful actions authorized by the organization. Hence, the situation in which a member state has no discretion as to the implementation of a decision must be distinguished from the one in which a state possesses a dose thereof. Whilst the first paragraph of art. 17 is to applicable in the first case, the second is handled in the second paragraph. The likelihood of circumvention of an organization's obligations is considerably higher when a conduct of a member state would not be in breach of its own international obligation. Therefore, art. 17 (3) DARIO provides that the above principle is deemed applicable disregarded whether an act in question is internationally wrongful for member states to which the decision or authorization is addressed. It must be noted that the notion of "circumvention" implies a specific intent of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation<sup>153</sup>. The application of this requirement might be difficult in practice. It is suggested that the existence of this intention is to be interpreted from the particular circumstances of a case<sup>154</sup>. The circumvention of responsibility by the EU was not in issue in the *Bosphorus* case. In fact, the legal doctrine has manifested some concern about the principle in art. 17 DARIO. Firstly, it is doubted whether it reflects the current state of customary

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<sup>150</sup> *Bosphorus*, para. 152.

<sup>151</sup> *Bosphorus*, para. 155.

<sup>152</sup> *Kadi*, para. 314.

<sup>153</sup> ILC's Commentaries to the DARIO, p. 106, para 4.

<sup>154</sup> *Ibidem*.



international law, and secondly it is criticized for confusing the primary and secondary rules on international responsibility<sup>155</sup>.

### 2.5. Conduct accepted by international organization as its own

Art. 9 DARIO states that a conduct which is not attributable to an international organization under arts 6 to 8 DARIO is nevertheless to be considered an act of that organization if and to the extent that the organization acknowledges and adopts a conduct in question as its own.

As explained by the ILC in its Commentary to the corresponding provision of the with regard to the attribution of conduct, the terms “acknowledges” and “adopts” must be distinguished from phrases such as “endorses” or “supports”<sup>156</sup>. Such declarations require a cautious interpretation as the latter expressions may denote a mere acknowledgment of the factual existence of conduct or a verbal approval of it<sup>157</sup>. Since these declarations constitute unilateral acts of subjects of international law it seems that the general rules concerning interpretation of international law shall apply<sup>158</sup>.

### 3. Assessment

According to art. 3 DARIO, responsibility of international organizations comprises two elements: a breach of an international obligation of the organization and attribution of the breach to the organization. Although some scholars advocated to the contrary, damage is not considered as an element of organizations’ responsibility.

An observation can be made that the primary as well as the secondary rules of responsibility of states are generally applicable *mutatis mutandis* to international organizations. The provisions of the DARIO are largely based on the customary rules on state responsibility reflected in the ARSIWA. The position of international law on the first element of responsibility is quite clear, with the exception of a more complex issue of allocation of responsibility for breach of mixed agreements. Controversies arise in relation to the second element, namely the attribution of conduct to the international organization. In particular, a situation where the organization does not act through its own organs, but relies on the organs of its member states, involves numerous practical questions. Generally, it could be asserted that in this respect the general principle of international responsibility requiring an effective control to be exercised by the entity to which the conduct is to be attributed, is to be applied. This principle underpins the whole system of

<sup>155</sup> Tzanakopoulos.

<sup>156</sup> ILC’s Commentaries to the ARSIWA, p. 120, para. 6.

<sup>157</sup> *Ibidem*.

<sup>158</sup> Cf. *Fisheries Jurisdiction Case* (Spain v Canada) Jurisdiction of the Court, 1998 I.C.J. Reports, p. 453, para. 46 (4 Dec. 1998) concerning the interpretation of declarations of states made under art. 36 of the ICJ Statute.

international responsibility as the same remark could be applied to the question of responsibility for breach of a mixed agreement in relation to the first element of responsibility. As concluded above, in general, the competence of an entity, a member state or the organization, for discharging a particular obligation entails the responsibility for breach thereof. However, the principle of effective control was modified, or even reversed, in decisions of judicial bodies while adjudging on the issues relating to responsibility of international organizations. In fact, the test of ultimate control established by the ECtHR results in a separation of the responsibility for wrongful conduct impugned to an international organization from the factual control over the conduct in question. In my opinion, the criticism of this formula in the legal scholarship is fully justified. The problem of the abuse of separate legal personality of either of the entities was frequently invoked in the legal writings as well as practice of international law with regard to the relations between member states and international organizations. As it can be deduced from the provisions of the DARIO, in particular art. 17 dealing with the issue of circumvention of responsibility as well as the ILC's Commentary thereto, that the rules proposed by the Commission were designed to specifically address this problem. This problem could be considered successfully resolved if not for the questionable interpretation of the criterion of effective control by the ECtHR and other judicial bodies following the line of reasoning presented in the *Behrami and Saramanti* decision. Special Rapporteur Gaja has concluded that the ultimate control theory is not likely to give rise to an universal rule on the matter. Given the strong criticism of the discussed principle in the legal scholarship, whose views I share to a great extent, it is justified to expect that Mr. Gaja's predictions will prove correct in the future decisions dealing with the same issue.

### **Part III. Responsibility of members states for acts of international organizations**

#### **1. Question of secondary and concurrent responsibility of member states**

The propositions have been made that member states of international organizations should be held responsible for violations of international law incurred by the organizations by virtue of membership alone.

Both forms of responsibility, secondary and parallel, would be based upon the mere fact of states' membership in international organizations. The rationale behind these rules of responsibility is that member states which benefit from activities of organizations should also bear the burden of accounting to third parties for injuries caused by a wrongful act. In case of secondary liability, a third party with a legal claim against the international organization would be in the first place required to pursue its remedy

against the organization<sup>159</sup>. Concurrent liability would permit an aggrieved third party to pursue a remedy, at its election, against either an international organization or a member state<sup>160</sup>.

The view on member states' responsibility for acts of international organizations has been advanced in two approaches. The first relies on the absence of norms of international law providing for limited liability of international organizations, as opposed to limited liability treatment of corporations by various municipal legal systems<sup>161</sup>. However, this argument can be easily challenged by the absence of these norms being accompanied by the absence of affirmative rules imposing secondary liability. Moreover, this would suggest an untenable assertion of the analogy between the position of corporations under municipal law and the status of international organizations under international law<sup>162</sup>. The second approach presumes that the inclusion of limited responsibility clauses in constitutions of international organizations implies that, in the absence of such a clause, member states would be held responsible for acts of organizations. Under this approach, the clauses are to be construed as rules modifying a principle of general international law<sup>163</sup>. However, according to R. Wilde, these clauses demonstrate rather the organization's uncertainty as to the current state of international law on this subject and serve as a warning to third parties on the issue of responsibility<sup>164</sup>. Furthermore, in construction of any constituent treaty the intention of the framers must be taken into the consideration. In the absence of limited responsibility clauses, it can be conceived that a limited responsibility is to be presumed because the intention of the framers was to create an organization with a separate legal personality, rather than one similar to a partnership, and to give the entity a total juridical independence from the founding members<sup>165</sup>.

As both approaches can be easily questioned, a conclusion must be drawn that they cannot provide a valid ground for concurrent or secondary responsibility of international organizations' member states under international law. Moreover, there is nothing in the DARIO which could support the assertion that member states could be held responsible for acts of international organizations in secondary or concurrent manner. This absence may be understood as an implied assertion that no such principle exists<sup>166</sup>.

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<sup>159</sup> Sturmer, p. 556.

<sup>160</sup> *Ibidem*.

<sup>161</sup> R. Wilde, *Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake*, "ILSA Journal of International and Comparative Law" 2005, vol. 12, p. 402 (2005); C. Ryngaert/ H. Buchanan, *Member State responsibility for acts of international organizations*, "Utrecht Law Review" 2011, vol. 7 (1), p. 137.

<sup>162</sup> Wilde, pp. 402-403.

<sup>163</sup> Wilde, p. 402.

<sup>164</sup> Wilde, p. 403.

<sup>165</sup> Amerasinghe, p. 441.

<sup>166</sup> Sturmer, p. 569.

In reaction to the proposition of member states' responsibility for acts of an international organization by virtue of mere membership numerous concerns were demonstrated in the legal scholarship. Firstly, it was emphasized that this kind of responsibility would obstruct the discharging an organization's functions. Member states would be likely to intervene in an international organizations' decision making process in order to minimize the risk of facing charges of violations of international law entailing their very own responsibility<sup>167</sup>. This would deprive the organization of one the elements considered constitutive for organizations' legal personality under international law which is their ability to make decisions which are distinct from the will of its member states. The second point of criticism is the impact of adopting the principle of secondary and concurrent responsibility on organization's international legal personality. The responsibility of member states for acts of the organizations would challenge the principle of their separate legal personality, which results in their ability to bear responsibility under international law. As famously put by R. Higgins, the former president of the ICJ, "if members were liable for the defaults of the organization, its independent personality would be likely to become increasingly a sham"<sup>168</sup>.

In consequence, the majority view on the issue rejects the claim of concurrent and secondary responsibility of international organization's members for the acts of an organization<sup>169</sup>. The lack of a principle of international law providing this kind of responsibility of international organizations' member states was confirmed in practice. The English Court of Appeal and, subsequently, the House of Lords rejected the possibility of concurrent and secondary responsibility of the members for debts of the International Tin Council after its collapse<sup>170</sup>. Similarly, in the *Westland Helicopters* ruling the Federal Supreme Court held that the "total legal independence" of the Arab Organization for

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<sup>167</sup> Hirsch, pp. 150-151; Stumer, p. 569; C.F. Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, "International and Comparative Law Quarterly" 1991, vol. 85, p. 278.

<sup>168</sup> R. Higgins, *The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties* in Institute of International Law – Yearbook, volume 66 - I, Paris, 1995, p. 445.

<sup>169</sup> See: Amerasinghe, pp. 425-444; C. Ryngaert/ H. Buchanan., p. 137-138. On the contrary views, see: I. Seidl- Hohenveldern, *Piercing the Corporate Veil of International Organizations: The International Tin Council in the English Court of Appeals*, "German Yearbook of International Law" 1989, vol. 32, p. 43.

<sup>170</sup> *ITC Case*, Court of Appeals [1988] 3 All ER, p. 377; *ITC Case*, Judgment, House of Lords, Opinions of Lord Templeton and Lord Oliver [1989] 3 WLR (H.L) p. 983, pp. 1008-15. On the legal issues related to the collapse of the International Tin Council, see: P. Sands, *The Tin Council Litigation in the English Courts*, "Netherlands International Law Review" 1987, vol. 34 (3), p. 367, R. Sadurska/ C. Chinkin, *The Collapse of the International Tin Council: A Case of State responsibility?*, "Virginia Journal of International Law" 1989, vol. 30 (4), p. 845; Hartwig, pp. 307-332.

Industrialization precluded that its acts could be regarded as undertaken on behalf of the member states<sup>171</sup>.

## **2. Obligations related to sovereign powers of member states transferred to international organizations**

States may transfer a part of their sovereign powers to international organizations. The key question arising with regard to the above is whether such a transfer may result in absolving of member states from responsibility for wrongful acts arising from breaches of obligations of the member states which are related to the transferred powers.

The issue of responsibility of member states in connection with a transfer of sovereign powers to an international organization has been explored in the jurisprudence of the ECtHR. On a number of occasions, the ECtHR explicitly stated that a transfer of sovereign powers of a state to an international organization is not *per se* prohibited under international law<sup>172</sup>. However, when transferring their powers the member states have a duty of due diligence under international law in providing that the transfer will not interfere with their international obligations<sup>173</sup>.

In this respect the Strassbourg Court set forth a standard of equivalent protection, according to which member states must provide that a standard of protection of the rights guaranteed under the ECHR by an international organization will be equivalent to the standard of protection required by the Convention<sup>174</sup>. If this standard is not provided, any breach of obligations under the Convention arising from implementation of the obligations regarding the membership in the organization and related to the powers transferred to the organization, is to be impugned to the member states. The requirement of equivalent protection by the ECtHR is considered to be largely influenced by the conclusion reached by the German Verfassungsgericht in its *Solange II* decision concerning the constitutional protection of fundamental rights in respect to the membership in the EU<sup>175</sup>.

A test designed for examination of the compliance of the EU's member states with the obligations under the ECHR was formulated by the Strassbourg Court in the *Bosphorus* case. According to this formula, in cases of implementation of legal obligations flowing from membership in an international organization which leave no discretion to the member states, there will be a presumption that a state has acted in compliance with the

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<sup>171</sup> *Westland Helicopters Ltd. v. Arab Org. for Industrialization*, Judgment, Federal Supreme Court (Switzerland), 80 I.L.R., p. 658 (19 Jul. 1988).

<sup>172</sup> *Matthews*, para. 32, *M. & Co. v. Germany*, Appl. No. 13258/87, Decision on the admissibility of Application, EComHR, (9 Feb. 1990); *Bosphorus*, para. 152.

<sup>173</sup> Stumer, p. 563.

<sup>174</sup> *M. & Co.*; *Bosphorus*, para. 155.

<sup>175</sup> *Solange II*, German Constitutional Court, BVerfGE 73, 339, BvR 197/83 (22. Oct. 1986).

Convention<sup>176</sup>. However, the presumption must not be applied if it can be demonstrated that the protection of rights under the ECHR was “manifestly deficient” in the circumstances of a particular case<sup>177</sup>. Hence, the test introduced by the Court is to be applied in two stages. At the first stage, it is examined whether an organization provides an equivalent protection, which will lead to application of the presumption. At the second stage, the Court asks whether that presumption has been rebutted in a particular case because of a manifest deficit in the protection of human rights<sup>178</sup>.

It must be noted that in the *Bosphorus* formula, in order to incur responsibility of a member state, it is required that the state takes a positive action<sup>179</sup>, such as implementation of a binding decision of the international organization in a domestic act<sup>180</sup> or reference to the organization’s institution made by a domestic court<sup>181</sup>. In the absence of such a positive action the Court determines lack of its *ratione personae* jurisdiction<sup>182</sup>. However, the criterion of a positive action of a state was relaxed in the more recent cases before the ECtHR and extended to a mere presence of a structural due process lacuna in the international organization’s procedures in respect of the mechanism where employees of the organization can bring their employment related claims against the organization<sup>183</sup>.

The ECtHR’s jurisprudence corresponds with art. 61 DARIO. This article provides that a member of an international organization incurs international responsibility if, taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the state’s international obligations, it circumvents that obligation by causing the organization to commit an act which if committed by the state, would have constituted a breach of the obligation. However, art. 61 DARIO, similarly to art 17, requires a state to have a specific intent to circumvent its obligations<sup>184</sup>.

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<sup>176</sup> *Bosphorus*, paras. 155-156.

<sup>177</sup> *Bosphorus*, para. 156.

<sup>178</sup> Lock, p. 530.

<sup>179</sup> *Supra*, Part II, 2 (4).

<sup>180</sup> *Bosphorus*, para 156 ; cf. *Behrami and Saramanti*, para. 106.

<sup>181</sup> *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*, Appl. No. 13645/05, Decision on the admissibility of Application, ECtHR (20 Jan. 2009). While deciding which formula of attribution of conduct should be applied, the *Bosphorus* test or rather the one employed in *Behrami and Saramanti*, the Court stated that „[...] the applicant’s complaint is based on an intervention by the ECJ which had been actively sought by a domestic court in proceedings pending before it. It cannot therefore be said that the respondent Party was in no way involved.”

<sup>182</sup> *Bernard Connolly v. 15 member states of the EU*, Appl. No. 73274/01, Decision on the admissibility of Application, ECtHR (9 Dec. 2008).

<sup>183</sup> *Emilio Gasparini v. Italy and Belgium*, Appl. No. 13645/05, Decision on the admissibility of Application, ECtHR (12 May 2009). However, the Court did not find the obligation in question breached as, applying the *Bosphorus* formula, it did not find the procedure within NATO was to be tainted with “manifest insufficiency” in relation to the equivalent protection standard.

<sup>184</sup> ILC’s Commentaries to the DARIO, p. 159, para. 2

### 3. Responsibility of member states in connection with conduct of international organization

#### 3.1. Direction and control

Art. 59 DARIO provides that in cases where a state directs or controls commission of an act by an international organization, the conduct of the latter is to be attributed to the state. Art. 59 (1) DARIO requires two elements to be satisfied in order to impute a conduct to a state exercising direction and control over an international organization's conduct. Firstly, a state in question must act with knowledge of the circumstances of the internationally wrongful act; and, secondly, the act would be internationally wrongful if committed by that state. This provision corresponds with art. 17 ARSIWA concerning direction and control over a state's conduct exercised by another state as well as art. 15 DARIO regarding direction and control over a state's conduct by an international organization.

The notions of "direction" and "control" were explained by the ILC in its Commentary to art. 17 ARSIWA. The term "directs" denotes "actual direction of an operative kind" and not a mere incitement, and "control" is to be understood as "domination over the wrongful conduct, rather than oversight"<sup>185</sup>. Moreover, the assertion of the ICJ made in its *Nicaragua* judgment where the rule reflected in art 17 ARSIWA was applied can be of assistance in this regard<sup>186</sup>. The Court stated that this form of attribution requires evidence that a state was in a relationship of "effective control" over a third party, to the extent that it directed that party in the performance of the allegedly wrongful act<sup>187</sup>.

Art. 59 DARIO applies to both, member states of an international organization and third party states. However, a significant distinction must be drawn between direction and control in a commission of an act by a member state and by a state not being a member of the organization. According to second paragraph of art. 59, an act of a member state of an international organization done in accordance with the rules of the organization does not engage the international responsibility of that state. Thus, a mere involvement in decision-making process in an international organization will not amount to the "direction and control" in terms of art. 59 if done in accordance with the rules of the organization. Prior to adoption of the DARIO, an argument based on exercising of control over an international organization by a member state through its participation in an organization was made in the *Westland Helicopters* case. The Swiss Federal Tribunal rejected this argument as "the predominant role played by [the founding member] states

<sup>185</sup> ILC's Commentaries to the ARSIWA, 164, para. 7

<sup>186</sup> Stumer, p. 561.

<sup>187</sup> *Nicaragua*, p. 65



and the fact that the supreme authority of the [AOI] is a Higher Committee composed of ministers cannot undermine the independence and personality of the organization<sup>188</sup>.

The practical application of art. 59 is questionable. For the autonomous character of international organizations, the member states can have the ability to assert the requisite direction and control only in exceptional circumstances<sup>189</sup>.

### 3.2. Aid or assistance

Art. 58 DARIO provides that a state can be held internationally responsible if it aids or assists an international organization in commission of an internationally wrongful act, provided that it acts with knowledge of the circumstances of the wrongful act and that the act in question would be internationally wrongful if committed by the state.

Art. 58 DARIO applies to states which are members of an international organization as well as to those who are not. According to second paragraph, similarly as in case of art. 59 (2) DARIO, in order to incur international responsibility the involvement of a member state must exceed beyond the mere participation in an organization's decision making process provided that it is exercised pursuant to the rules of that organization. The same difficulty which relates to the application of art. 59 DARIO occurs in case of determination whether aid or assistance has taken place in borderline cases. The ILC suggest to take into consideration the factual context such as the size of membership and the nature of the involvement of the member state in the conduct in question<sup>190</sup>. It should be noted that the fact that international responsibility for aiding or assisting an international organization of which it is a member state will not be *per se* incurred if done in accordance with the rules of the organization, it does not imply that the state would then be allowed to ignore its own international obligations<sup>191</sup>. These obligations may include conduct of a state in an international organization. When acting in this capacity, responsibility of a state would not be determined under art. 58 DARIO, but rather under the ARSIWA.

### 3.3. Coercion

Art. 60 DARIO imputes responsibility to a state which coerces an international organization to commit a wrongful act which would, but for the coercion, be internationally wrongful for the coerced international organization. It closely corresponds with the provision of art. 16 DARIO addressing the coercion exercised by an international

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<sup>188</sup> *Westland Helicopters Ltd. v. Arab Org. for Industrialization*, Judgment, Federal Supreme Court (Switzerland), 80 I.L.R., p. 658 ( 19 Jul. 1988).

<sup>189</sup> Ryngaert/ Buchanan, p. 139.; Stumer, p. 561.

<sup>190</sup> ILC's Commentaries to the DARIO, p. 157, para. 6.

<sup>191</sup> *Ibidem*, para. 5.

organization over conduct of a state, and art. 18 ARSIWA concerning coercing a state commit a wrongful act by another state.

A direct link between a coercion and a commission of a wrongful act is required. Thus, the coercion must refer specifically to the act in question<sup>192</sup>. Moreover, as required by art. 60 DARIO, a coercing state must have knowledge of the circumstances of the wrongful act. This provision is applicable to both member states of an organization and third party states. Hence, a distinction must be made between an coercion and a mere participation in a decision-making process within the organization<sup>193</sup>. Art. 60 DARIO does not comprise a paragraph similar to paragraphs 2 of arts. 58 and 59. It seems highly unlikely that an act of coercion could be taken by a state member of an international organization in accordance with the rules of the organization. However, as the ILC noted in its Commentary to art. 60 DARIO, one cannot assume that the act of coercion will necessarily be unlawful<sup>194</sup>.

As to the plausible scenarios of situation where a member state coerces an international organization to commission of an act, it has been argued that economic pressure could amount to coercion if it is exercised in a manner that the international organization has no other choice but to comply with the coercing state's demands<sup>195</sup>. Such a pressure could, for instance, arise in cases where a member state threatens to withhold its contribution payments to an organization unless the organization commits a wrongful act<sup>196</sup>. It must be noted that in order to constitute a coercion, the pressure imposed by a state on the organization must reach a high threshold. In order to constitute a coercion the pressure must have the same essential character as *force majeure* under art. 23 ARSIWA and 23 DARIO<sup>197</sup>. Thereby, the notion of coercion must be construed restrictively<sup>198</sup>. As explained by the ILC, "nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State"<sup>199</sup>. The act in question must involve an irresistible force going beyond the control of the state concerned; making it materially impossible in the circumstances to perform the obligation<sup>200</sup>.

<sup>192</sup> D'Aspremont, p. 100; ILC's Commentaries to the DARIO, p. 158, para. 1

<sup>193</sup> Ryngaert/ Buchanan, p. 141.

<sup>194</sup> ILC's Commentaries to the DARIO, pp. 158-159, para. 3.

<sup>195</sup> D'Aspremont, p. 100.

<sup>196</sup> Ryngaert/ Buchanan, p. 141.

<sup>197</sup> *Ibidem*.

<sup>198</sup> ILC's Commentaries to the ARSIWA, p. 166, para 3.

<sup>199</sup> ILC's Commentaries to the ARSIWA, pp. 183-184, para. 2

<sup>200</sup> *Ibidem*.

### 3.4. Accepting responsibility by member state

Under art. 62 (1) (a) DARIO a state is to be held subsidiarily responsible for an internationally wrongful act of an organization if it has accepted responsibility for that act towards the injured party. This provision corresponds with the absence of a rule of general international law setting forth subsidiary responsibility of member states for acts of international organizations<sup>201</sup>. A member state cannot be held responsible for the organization's acts in a subsidiary of concurrent manner unless it accepts the responsibility. As provided in the Commentary to art. 61 DARIO, there is no qualification for a declaration of acceptance by a state and it may be "expressly stated or implied and may occur either before or after the time when responsibility arises for the organization"<sup>202</sup>. The latter case could be reflected in the provisions on acceptance of the responsibility for an organizations' actions by member states in that organization's constituent instrument or other rules of the organization. It must be emphasized that the acceptance of responsibility by one member state of an international organization does not affect the responsibility of its remaining members<sup>203</sup>.

The acceptance of responsibility as a basis of attribution requires not only acknowledgement of a factual situation, but also demands that a state concerned identifies itself with the conduct in question and accepts it as its own. As example was provided in *United States Diplomatic and Consular Staff in Tehran* case before the ICJ, where the Islamic Republic of Iran was held responsible for the occupation by students of the embassy of the United States in Tehran because it had issued a decree in which it endorsed and approved their acts<sup>204</sup>.

### 3.5. Reliance on responsibility of member state

Art. 62 (1) (b) DARIO provides that a member state of an international organization can be held responsible for an internationally wrongful act committed by the organization if it has led the injured party to rely on its responsibility.

This type of responsibility originates from the principle of estoppel or *venire contra factum proprium* which is widely recognized as a general principle of public international law<sup>205</sup>. For instance, this provision would be triggered when a state's conduct would give a third party a reason to believe that if an international organization lacks

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<sup>201</sup> *Supra*: Ch. III.I.

<sup>202</sup> ILC's Commentaries to the DARIO, p. 163, para. 6.

<sup>203</sup> ILC's Commentaries to the DARIO, p. 164, para. 12.

<sup>204</sup> *United States. Diplomatic and Consular Staff in Tehran* (United States of America v Iran) Judgment 1980 I.C.J. Reports, p. 35 (24 May 1980).

<sup>205</sup> T. Cottier/ J. P. Müller, *Estoppel*, para. 9 in R. Wolfrum (ed.), "Max Planck Encyclopedia of Public International Law" Online Edition 2013.

necessary funds for making a reparation to a third party, a member state would step in<sup>206</sup>. However, as it was explained by the ILC, there is no presumption under international law that a third party could rely on the responsibility of member states<sup>207</sup>. The reliance if a basis for reliance by a third party exist will depend from the circumstances of a particular case<sup>208</sup>.

#### 4. Assessment

The mainstream doctrine of international law rejects the view that member states of an international organization could be held responsible for the organization's acts on the sole basis of membership, *i.e.*, under the principle of concurrent or secondary responsibility. However, the principle of separate legal responsibility of international organizations coupled with their jurisdictional immunity creates a risk that member states of the organization are likely to abuse its separate legal personality pursuing their own interest under the organizational veil<sup>209</sup>. In systems with developed law of corporations there is extensive case law regarding shareholders' liability for acts of companies. The propositions have been made to apply the doctrine of "piercing" or "lifting the corporate veil" derived from corporate law of domestic legal orders to responsibility of members of international organizations under international law<sup>210</sup>. Yet, this would jeopardize the principle of autonomy of international organizations and obstruct the effective discharge of their functions. Art. 62 DARIO confirms this conclusion, providing that member states cannot be held responsible for international organizations' actions unless they accept them as their own or otherwise incur their own responsibility by actions committed within or in connection with an international organization. The principles of responsibility enshrined in the DARIO are intended to strike a balance between the principle of international organizations' separate legal responsibility and the prevention of its abuse by member states. The most evident manifestation of this intention is represented in the provision of art 61 DARIO. The logical consequence of this norm would be member states' inability to avoid their obligations by taking advantage of the separate legal personality of an international organization. However, art. 61 DARIO requires an intention of circumvention of legal obligations when transferring member states' obligations to an organizations which can incur practical problems in the application of this rule. In this situation, the standard of "due diligence" or "equivalent protection", adopted in the

<sup>206</sup> Ryngaert/ Buchanan, p.145; C.F. Amerasinghe, *Liability to Third Parties...*

<sup>207</sup> ILC's Commentaries to the DARIO, p. 164, para 10.

<sup>208</sup> Ryngaert/ Buchanan, p.145.

<sup>209</sup> See: D'Aspremont.

<sup>210</sup> I. Seidl- Hohenveldern, *Piercing the Corporate Veil of International Organizations: The International Tin Council in the English Court of Appeals*, "German Yearbook of International Law" 1989, vol. 32, p. 43.

jurisprudence and proposed in the legal writings, serves as the most effective instrument of protection of third parties to whom obligations are owed by member states.

## **Part IV. Enforcement of responsibility of international organizations**

### **1. Enforcement of responsibility of international organizations by domestic courts**

#### **1.1. Domestic courts as forum for adjudicating of responsibility of international organizations**

Domestic courts may adjudicate claims against international organizations applying rules of international law since norms of international law binding on a state become a part of its legal orders. Essentially, domestic courts may determine that an internationally wrongful act has been committed in situations in which an individual has a valid claim against an international organization based on a violation of an individual primary right accorded by international law. In particular, such claims could be based on violations of human rights. However, the domestic courts mostly decide on such claims applying the domestic law on responsibility. Municipal courts are not likely to expressly hold that a breach of a rule of international law has engaged international responsibility of a state or an international organization. This issue touches upon the question of the relationship between municipal and international law or more precisely the problem of the “domestication” of international law<sup>211</sup>. States employ different methods of embedding norms of international law in their domestic legal orders. In some domestic legal systems certain international rules are immediately incorporated, e.g., customary norms or international human rights norms incorporated *en bloc* in some states, norms in ratified international treaties in other states (incorporation). Other states require the norms to be transformed or transposed through a domestic implementing act (transformation)<sup>212</sup>. Once the norms of international law become a part of a national legal order, municipal courts apply the rules of domestic law that incorporates an international obligation. This can be seen as an application of “purely” domestic law. In cases in which national courts determine breaches of primary rules of international law incorporated into norms of the municipal legal system, the courts tend to apply domestic rules on attribution, defenses, reparation, disregarding the relevant rules of international law on this matter<sup>213</sup>.

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<sup>211</sup> A. Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, “American Journal of International Law” 2007, vol. 101, p. 787.

<sup>212</sup> A. Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, “Loyola of Los Angeles International and Comparative Law Review” 2011, vol. 34, p. 163 (2011).

<sup>213</sup> Nollkaemper, p. 761.

The further problem for applying the secondary norms of international responsibility is based on their legal character. The rules comprised in the DARIO do not constitute a primary source of international law. Thus, apart from the rules reflecting customary international law and incorporated into the municipal legal orders by virtue of a norm of constitutional character, which is rather not the case of the DARIO, these principles are not a part of binding obligations of states. The situation can be different when the national legal order incorporates the secondary rules comprised in treaty law described as *lex specialis* to the DARIO as presented in the first part of this paper.

International responsibility substantially differs from domestic regimes of tort law given its “objective” character. Contrary to many domestic legal systems, international responsibility does not distinguish between contractual and tortious responsibility. This regime of international responsibility does not find any precise counterpart in national legal systems<sup>214</sup>. Yet, many secondary rules of international responsibility can be relevant to the cases decided before domestic courts. The secondary obligations may affect rights directed towards individuals, e.g. they can concern procedural remedies, such as the obligation of reparation and the obligation to provide access to court<sup>215</sup>. Especially, the general principle that a breach of an international primary right must entail obligation to provide reparation is of particular relevance<sup>216</sup>. Although international law on responsibility contains many autonomous principles, for the reasons explained above, domestic courts may employ rather domestic rules of responsibility to determine a violation of a primary rule of international law and choose remedies for the international wrong.

Still, there are some convincing arguments for the application of secondary rules of responsibility under international by the national courts. A. Nollkaemper contends that the secondary rules of international responsibility should be considered “a [normative] penumbra in which primary rules operate”<sup>217</sup>. As the primary and the secondary norms are “interdependent and inseparable”, domestic courts deciding on cases involving questions of international law should operate within this framework. This argument is consistent with the case law concerning international responsibility. In *Reparation* case, the ICJ held that “as the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim”<sup>218</sup>. Moreover, this is supported

<sup>214</sup> *Ibidem*.

<sup>215</sup> *Ibidem*.

<sup>216</sup> *Factory at Chorzow* (Germany v Poland) Jurisdiction, Judgment, PCIJ, Ser. A No. 9, p. 21 (26 Jul. 1927).

<sup>217</sup> Nollkaemper, pp. 783-786.

<sup>218</sup> *Reparation*, p. 180; see also: *Compañía de Aguas del Aconquija S.A. v. Argentina*, Decision on Annulment, ICSID No. ARB/97/3, 41 ILM 1135, 1154, para. 96 (3 Jul. 2002).

by the practice of domestic courts which apply the principles of international law concerning treaty interpretation when interpreting international law<sup>219</sup>. The reason for this is the observation that rules of international law should be given the meaning that was ascribed to them by the legal system in which they were originated<sup>220</sup>.

The practical relevance of the problem of application of the secondary rules is well illustrated in a case before the German Constitutional Court concerned with the question of availability of defenses based on circumstances precluding wrongfulness under international law of state responsibility in proceedings before domestic courts. The Bundesverfassungsgericht examined the question whether Argentina was entitled to invoke necessity as a circumstance precluding wrongfulness under international law as a defense against claims brought in German courts by private individuals for the country's default on sovereign bonds<sup>221</sup>. The Court answered to the above question in the negative stating that Argentina's obligation of payment to private inventors was governed by German private law. This decision met with strong criticism<sup>222</sup>.

It might be argued that national courts are not an appropriate forum for adjudging international responsibility. In particular, it could be claimed that international responsibility is confined to the international legal order and claims for international legal wrongs are to be asserted in international rather than municipal courts<sup>223</sup>. Domestic courts whose powers find their basis and limits in domestic legal systems, are not obliged or authorized to determine a an international wrong in another legal order<sup>224</sup>. A domestic court's determination will produce effects only in national law. Its findings may or may not be shared by courts of different jurisdictions or international judicial bodies as a consequence of the principle of sovereign equality, and will not produce any automatic legal effects for the alleged wrongdoing<sup>225</sup>. However, it has been suggested that the strict dualist perspective, in which the above arguments find their justification, has lost much of its

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<sup>219</sup> *E.g.*: *Attorney General v. Zaoui*, Judgment, New Zealand Supreme Court, 1 N.Z.S.C. 289, para. 12, ILDC 81 (NZ 2005) (21 Jun. 2005). *See*: Nollkaemper, p. 784, fn. 130.

<sup>220</sup> Nollkaemper, p. 785.

<sup>221</sup> Decision of the German Constitutional Court, BVerfG, 2 BvM 1/03 (8 May 2007). *See also*: S. W. Schill, *German Constitutional Court Rules on Necessity in Argentine Bondholder Case*, "ASIL Insights" 2007, vol. 11 (20).

<sup>222</sup> For the critical views on the Court's majority decision, see: Dissenting Opinion by Judge Lübke-Wolff, BVerfG, 2 BvM 1/03, paras. 65-95; Nollkaemper, p. 786. Especially, the argument based on the investment law decisions confirming the availability of the defense of necessity to a state against private investors was raised, *cf.* *CMS Gas Transmission Co. v. Argentine Republic*, Award, ICSID No. ARB/01/8, paras. 304-394, 44 ILM 1205, pp. 1248-49 (12 May 2005); *Enron Corp. v. Argentine Republic*, Award, ICSID No. ARB/01/2, paras. 288, 345 (22 May 2007).

<sup>223</sup> *Cf.* *Council of Canadians v. Canada* (Attorney General), Judgment, Ontario Supreme Court of Justice, *Case 01-CV-208141*, Carswell Ontario Cases 2005, p. 2973, paras 41, 43 (8 Jul. 2005).

<sup>224</sup> Nollkaemper, p. 774.

<sup>225</sup> Nollkaemper, p. 775.



persuasive force<sup>226</sup>. Under this approach it is recognized that determinations made by national courts have a “double effect” as modern international law addresses situations located partly in domestic legal orders and the domestic courts usually are the bodies competent to give effect to such obligations<sup>227</sup>.

Despite of the aforementioned difficulties, an emerging practice of application of the secondary rules of international responsibility of international organizations in domestic courts can be observed. It has been exemplified in the decisions of the national courts of the United Kingdom and the Netherlands which have already taken recourse to the principles of attribution in the DARIO in the cases of *Al- Jedda*<sup>228</sup> and *Mothers of Srebrenica*<sup>229</sup>.

## 1.2. Jurisdictional immunity of international organizations

The possibility of the adjudication on commission of an internationally wrongful act by an international organization in a domestic court is substantially limited by international organizations’ jurisdictional immunity. Contrary to the immunity of states, the principle that international organizations shall not be submitted to jurisdiction of domestic courts evolved from specific treaty provisions, not from customary international law. As to the status of the norms of international law providing for immunity of international organizations, there is no general and consistent practice or *opinio juris* in this area which could give rise to a general customary rule of immunity<sup>230</sup>. Thus, the treaty provisions serve as a primary legal basis for the jurisdictional immunity.

The prevailing doctrine supports the view that the rationale for international organizations’ jurisdictional immunity is the “functional necessity”<sup>231</sup>. According to this approach, and contrary to state immunity which is based on the principles of sovereignty and equality, the immunity of international organizations from jurisdiction of national courts is justified by the necessity to fulfill their purposes and functions without any ungrounded intervention on the part of a forum state<sup>232</sup>. The rationale for the immunity of international organizations based on “function necessity” corresponds with the “functional” justification for providing them with international legal personality.

<sup>226</sup> Nollkaemper, p. 774.

<sup>227</sup> *Ibidem*.

<sup>228</sup> *Supra*: note 93

<sup>229</sup> *Supra*: note 194.

<sup>230</sup> A. I. Young, *Deconstructing International Organization Immunity*, “Georgetown Journal of International Law” 2012, vol. 44 (2), p. 355.

<sup>231</sup> M. Möldner, *International Organizations or Institutions, Privileges and Immunities*, para. 12 in R. Wolfrum (ed.), “Max Planck Encyclopedia of Public International Law” Online Edition 2013.

<sup>232</sup> *Ibidem*; Shaw, p. 1319.

The scope of immunity will vary between different organizations. In order to determine the extent of immunity granted to the organization, a case-to-case approach is required. Still, in the majority of cases domestic courts do not carry out a functional necessity analysis and simply apply the provisions of international legal instruments which define the scope of the immunity of the organization in question. Most often these legal acts provide for an absolute immunity<sup>233</sup>.

H. G. Schermers and N. M. Blokker conceive that even in the absence of an express provision on the immunity of an international organization, national courts may use a variety of means to avoid dealing with the substance of cases concerning international organizations<sup>234</sup>. In particular, they may grant immunity based on the fact that international organizations are composed of sovereign states which enjoy immunity from proceedings before national courts under customary international law<sup>235</sup>. Another avoidance technique is represented in the example of the US courts who have applied the act of state doctrine or the doctrine of the “political questions” to international organizations<sup>236</sup>.

### 1.3. Limits to jurisdictional immunity of international organizations

The doctrine of functional necessity should be considered the first restriction to the immunity of international organizations. According to it, the international organizations would have only the extent of immunity necessary for them to discharge their functions free of unilateral government interference<sup>237</sup>. However, the majority of the legal instruments defining the international organizations’ privileges and immunities provide for an absolute immunity from any legal process, disregarding the field of activities concerned<sup>238</sup>. There seems to be a manifest contradiction between the functional rationale for granting immunity to international organizations and the absolute immunity from legal process which they enjoy in practice. It is well illustrated with the example of the UN. Under the UN General Convention the organization enjoys unlimited immunity, yet, according to the wording of art. 105 (2) UN Charter it shall enjoy the immunity “necessary for the fulfillment of its functions”.

Despite of the difficulties, the practice of domestic courts shows that the functional immunity may serve as a bar to the unlimited immunity of international organizations. In the jurisprudence, the functional immunity of international organizations was considered

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<sup>233</sup> Amerasinghe, p. 494.

<sup>234</sup> See: Schermers/ Blokker, pp. 1033-1034.

<sup>235</sup> *Ibidem*.

<sup>236</sup> See: A. Reinisch, *International Organizations before National Courts*, New York 2010, pp. 35-127.

<sup>237</sup> E. Gaillard/ I. Pingel-Lenuzza, *International Organizations and Immunity from Jurisdiction: to Restrict or to Bypass*, “International and Comparative Law Quarterly” 2002, vol. 51, p. 6.

<sup>238</sup> Sands/ Klein, p. 494.

a rule of customary international law, yet, applicable only in the disputes over acts immediately connected to the functions of international organizations<sup>239</sup>.

It has been proposed that the restrictive theory of immunity which evolved as a doctrine limiting the immunity of states could be applied to international organizations. Under this theory state immunity covers exclusively sovereign acts of states, *acta iure imperii*, which are to be distinguished from the notion of *acta iure gestionis*, covering the realm of commercial activities of states. Some scholars contend that the same limitation of jurisdictional immunity is to be applied to the international organizations<sup>240</sup>. Still, the prevailing opinion rejects such a possibility<sup>241</sup>. For instance, C. F. Amerasinghe, finds the distinction on *acta iure gestionis* and *acta iure imperii* inapplicable to international organizations as, contrary to states, they lack sovereignty and simply are not capable of performing, what could be described as, sovereign acts<sup>242</sup>. The practice of international law serves does not help to answer the question of applicability of the *iure gestionis* exception as the case law on the issue is not conclusive<sup>243</sup>.

Just as in the case of the immunity of states, international organizations may waive their immunity and submit themselves to jurisdiction of national courts<sup>244</sup>. However, a waiver of jurisdictional immunity does not cover an execution of a judgment given by a domestic court. It was suggested that a voluntary submission of an international organization to arbitration proceedings could constitute an implied waiver of the organization's immunity in respect of the supervisory jurisdiction of the domestic courts of the seat of the arbitration<sup>245</sup>. Yet, it is difficult to assess whether this rule is accepted under

<sup>239</sup> See: *AS v Iran-United States Claims Tribunal*, Final appeal judgment, LJN: AC9158; ILDC 1759 (NL 1985) (20 Dec. 1985); *Greenpeace Nederland v. Euratom*, Judgment on appeal in cassation, Supreme Court (the Netherlands), LJN: BA9173; RvdW (2007) No 992; ILDC 838 (NL 2007) (13 Nov. 2007); *X v. European Patent Organization*, Final appeal judgment, Supreme Court (the Netherlands), Case No 08/00118; LJ BI9632; ILDC 1464 (NL 2009) (23 Oct. 2009).

<sup>240</sup> Sands/ Klein, p. 494;

<sup>241</sup> Schermers/Blokker, p. 1033.

<sup>242</sup> Amerasinghe, pp. 494-495. Similarly, Shaw, p. 1319.

<sup>243</sup> For application of the distinction, see: e.g., *Nacci v. Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies*, Italian Court of Cassation, 114 ILR 539 (8 Jun. 1994); *AS v Iran-United States Claims Tribunal*, Final appeal judgment, Supreme Court (the Netherlands) LJN: AC9158; ILDC 1759 (NL 1985) (20 Dec. 1985); *Dupree Associates Inc. v. The Organization of American States*, Judgment, US States District Court for the District of Columbia, 63 ILR 92 (31 May 1977). Against the distinction, see: e.g., *F. S. A v. G.*, Swiss Federal Tribunal (22 Jun. 1995), unpublished, partly reproduced in "Revue suisse de droit international et de droit européen" 1996, vol. 4, p.657.

<sup>244</sup> Schermers/ Blokker, p. 1037. For the examples, see: Fourth report on relations between States and international organizations, by Mr. Leonardo Díaz-González, Special Rapporteur in Report of the International Law Commission, Yearbook of the International Law Commission 1989, vol. II Part I, UN Doc. A/CN.4/424 and Corr.1 (1989) p. 163, para. 77.

<sup>245</sup> Wickremasinghe, para. 11.

international law as the case law on the issue does not provide any definite answer to the question<sup>246</sup>.

Furthermore, an argument could be advanced that human rights standards could serve as a factor restricting the immunity of international organizations. It has been suggested that state immunity must be restricted in situations in which it bars an individual's right to access justice in cases concerning grave human rights violations<sup>247</sup>. This is based on the theory of the normative hierarchy of international law according to which the norms of *jus cogens* status, which encompass, *i.a.*, fundamental human rights, must take precedence over the norms not having the same status under international law<sup>248</sup>. As the jurisdictional immunity does not have a status of a peremptory norm, it ranks lower in the hierarchy of international law and must give way to an *jus cogens* norm when such a conflict arises. This argument was raised with regard to the immunity of states, however this could be applied as well to international organizations given the "objective" binding force of the *jus cogens* norms of international law. However, the *jus cogens* exception was recently rejected by the ICJ in its judgment on the case of the *Jurisdictional Immunities of the State* as not being of a part of customary international law<sup>249</sup>.

## **2. Enforcement of responsibility of international organizations by international courts and tribunals**

The legal basis for instituting proceedings against an international organization in an international forum must be provided in the instrument defining standing before the respective international court or tribunal. Thus, the issue of the availability of these fora to international organizations is closely related to the question of their treaty making capacity. The analysis of these provisions leads to a conclusion that the possibility of giving effect to responsibility of international organizations in international courts is quite limited.

The problem is well presented by the example of the international court of fundamental importance for the issues of international responsibility, the ICJ. According to

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<sup>246</sup> For the decisions supporting such an implied waiver, see: *Boulois v. UNESCO*, Decision, Paris Court of Appeal, 1999 Revue de l'Arbitrage, p. 343 (19 Jun. 1998). For the decisions rejecting such a proposal, see: *Groupement d'Enterprises Fougerolle v CERN*, Decision, Swiss Federal Tribunal, 102 ILR 20 (21 Dec. 1992).

<sup>247</sup> A. Belsky, M. Merva, N. Roht-Ariaza, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, "California Law Review" 1989, vol. 77, p. 365; A. Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, "European Journal of International Law" 2007, vol. 5, p. 955; L. McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, "European Journal of International Law" 2007, vol. 5, p. 903.

<sup>248</sup> VCLT, art. 53.

<sup>249</sup> *Jurisdictional Immunities of the State* (Germany v. Italy, Greece intervening) Judgment, ICJ, available at: <http://www.icj-cij.org/docket/files/143/16883.pdf> (accessed on 10 Jun. 2013).

art. 34 (1) of the ICJ Statute, only states can be parties to the disputes submitted to the jurisdiction of the World Court. The question of *rationae personae* jurisdiction of the ICJ in relation to international organizations arose in *Legality of the Use of Force* cases brought before the Court by Serbia and Montenegro against eight member states of the NATO<sup>250</sup>. The cases concerned the alleged violation of the prohibition of the use of force by the bombing of the Federal Republic of Yugoslavia by the NATO in 1999. As Serbia and Montenegro<sup>251</sup> was not able to institute proceedings against the organization due to the *ratione personae* limitation of the Court's jurisdiction, it decided to bring a suit against its member states. The applicant claimed that the NATO members were "jointly and severally responsible for the actions of the NATO military command structure"<sup>252</sup>. The ICJ never had the opportunity to respond to the question of the responsibility of the NATO member states as the cases were dismissed because of the lack of the *ratione temporis* jurisdiction. Nonetheless, this shows the implications of deficiency of the system of settlement of international disputes concerning the wrongful acts of international organizations. Injured parties might find themselves in a better position to take legal actions against member states instead of an international organization since the mechanism of the enforcement of international responsibility of states is far more efficient.

There are only a few international judicial bodies providing an international forum available to international organizations. The Dispute Settlement System of the World Trade Organization<sup>253</sup> is open to regional economic integration organizations<sup>254</sup>. The only international organization which in fact exercises its *ius standi* in the WTO is the EU. Another international judicial institution providing a dispute settlement mechanism open to the international organizations is the International Tribunal for the Law of the Sea. According to art. 20 of the Statute of the ITLOS<sup>255</sup>, the Tribunal may exercise jurisdiction

<sup>250</sup> *Legality of Use of Force*, Judgment, Preliminary Objections (15 Dec. 2004): (Serbia and Montenegro v. Belgium) 2004 ICJ Report, p. 279; (Serbia and Montenegro v. Canada) 2004 ICJ Report, p. 429; (Serbia and Montenegro v. France) 2004 ICJ Report, p. 579; (Serbia and Montenegro v. Germany) 2004 ICJ Report, p. 720; (Serbia and Montenegro v. Italy) 2004 ICJ Report, p. 865; (Serbia and Montenegro v. Netherlands) Judgment, Preliminary Objections, 2004 ICJ Report, p. 1011; (Serbia and Montenegro v. Portugal), 2004 ICJ Report, p. 1160; (Serbia and Montenegro v. United Kingdom) 2004 ICJ Report, p. 1307.

<sup>251</sup> The Federal Republic of Yugoslavia changed its official name to Serbia and Montenegro on 4 February, 2003.

<sup>252</sup> *Legality of Use of Force* (Serbia and Montenegro v. Canada) Oral Pleadings of Serbia and Montenegro, CR/99/14 (May 10, 1999).

<sup>253</sup> The legal framework for the dispute settlement in the WTO is provided in the Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement Establishing the World Trade Organization, Annex 2, opened for signature on 15 April 1994, entered into force on 1 January 1994, 1869 UNTS. 401, 33 I.L.M. 1226.

<sup>254</sup> A. del Vecchio, *International Courts and Tribunals, Standing*, para. 21 in R. Wolfrum (ed.), "Max Planck Encyclopedia of Public International Law" Online Edition 2013.

<sup>255</sup> UNCLOS, Annex VI.

over states parties to the UNCLOS. Under art. 305 (1) (f) UNCLOS the term “states parties” is to be construed to cover also intergovernmental organizations which have acceded to the Convention in accordance with Annex IX to the Convention. Art. 7 of Annex IX provides that these organizations can choose one or more of the means of dispute settlement of disputes listed in art. 287 (1) of the Convention which includes recourse to the ITLOS and the ICJ. However, the possibility of resorting to the ICJ is excluded for the reasons explained above. The EU being a party to the UNCLOS has already exercised its *ius standi* before the ITLOS in *Swordfish Stock* dispute<sup>256</sup>. Another legal basis for participation of international organizations as parties in proceedings before the ITLOS is provided in art. 20 (1) of the ITLOS Statute. Pursuant to this article, international organizations which have not acceded to the Convention, can submit a dispute to the ITLOS’ jurisdiction “in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case”.

Moreover, pursuant to art 6 (2) TEU, the EU shall accede to the ECHR under the conditions set forth in Protocol No. 8 to the Convention. Up to now, the EU has not become a party to the Convention. In June, 2010 the Commission has been authorized by the Council of the EU to negotiate the specific terms of the accession with the other parties to the Convention. The issue of the terms of the accession has not been resolved yet. The last draft Accession Agreement was concluded on 19 March, 2013<sup>257</sup>. One of the consequences of the accession will be the possibility of filing complaints against the EU before the ECtHR in both the individual complaint and the inter-state procedure. Some aspects of the accession are disputed in the legal doctrine, in particular, the possibility of filing of an inter-state complaint under art. 33 ECHR against the EU by its member states<sup>258</sup>.

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<sup>256</sup> *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile v. EU) Order, ITLOS, Case No. 7 (20 Dec. 2000).

<sup>257</sup> Report of the Fifth Negotiation Meeting Between The CDDH *ad hoc* Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 47+1(2013)R05, available at:[http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting\\_reports/Web\\_47\\_1%282013%29R05\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/Web_47_1%282013%29R05_EN.pdf) (accessed on 10 Jun. 2013).

<sup>258</sup> It been indicated that the inter-state complaint proceedings by the EU member states could interfere with art. 344 TFEU which provides that „Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”. See: M. Kuijer, *The Accession of the European Union to the ECHR: a Gift for the ECHR’s 60th Anniversary or an Unwelcome Intruder at the Party?*, “Amsterdam Law Forum” 2011, vol. 3, pp. 30- 31.



### **3. International arbitration as a method of enforcement of responsibility of international organizations**

International arbitration can serve as an efficient mechanism of enforcement of international responsibility of international organizations as it provides much more flexibility in comparison to the international courts and tribunals. The jurisdiction of the arbitration tribunals is governed by the principle of consent. As they operate on an *ad hoc* basis, their competence depends on written agreements between disputing parties. Their jurisdiction over person and subject-matter is defined in these agreements. The factor decisive for the attractiveness of international arbitration is the flexibility of the procedure. The parties to disputes may directly or indirectly, influence the tribunal's constitution, the designation of its mandate, the conduct of its proceedings, and the tribunal's development or application of legal principles. Legal determinations made by arbitral tribunals have a binding effect and enjoy similar authority to those of international courts and tribunals.

Still, there is some controversy surrounding the immunity of international organizations in the supervisory proceedings before domestic courts. In such instances, a voluntary submission to arbitration could be interpreted as an implied waiver of immunity. However, this proposal still would not solve the problem of invoking immunity as a defense in the execution of the arbitral awards. As explained above, a waiver of immunity from jurisdiction and a waiver immunity from execution must be distinguished. As the effectiveness of international arbitration relies on the domestic mechanisms of execution, the effectiveness of international arbitration as a method of enforcing responsibility of international organizations could be undermined.

### **4. Assessment**

There is a large deficiency in mechanisms of enforcement of international responsibility of international organizations. The limitations exist on both national and international level. National courts constitute a forum with limited competence to determine whether violation of international law has been committed by an international organization. This limitation is caused by domestic courts' reluctance to apply the rules of responsibility under international law and the jurisdictional immunity of international organizations. As to the second restriction, the immunity of organizations has in fact been isolated from its legal justification which is securing an impartial discharge of organizations' functions. In domestic courts' practice it evolved to an absolute immunity posing a substantive threat to third parties entering into legal relations with international organizations. The attempts to apply the doctrine of restrictive immunity have been rejected because of the different origin of international organizations' immunity and due to



the limited state practice on the issue. However, this reasoning lacks logical consequence. In my opinion, state sovereignty provides a stronger justification for immunity than the “functional necessity”. Yet, courts are more likely to restrict the immunity of the states than that of the organizations.

International courts and tribunals could provide a more appropriate forum for adjudicating claims involving international organizations’ responsibility. However, these judicial bodies generally do not extend their *ratione personae* jurisdiction over international organizations. In fact, only the EU is the only international organization which can appear as defendant before international courts. The option chosen by the EU, in which both the organization and its members have *ius standi*, is the most desirable solution from the perspective of compliance with international law. As proven in the cases of *Legality of use of force*, injured parties are in a better position to take legal actions against member states than the organization as the enforcement of state responsibility is far more accessible than it is in case of international organizations. Such actions, however, are not likely to be successful as the principles on responsibility in the DARIO exclude responsibility for organizations’ actions based on sole membership. The only situations in which member states could be held responsible in connection with an international organization’s actions are these in which they engage responsibility by their own conduct as presented in Part III. Thus, when responsibility is incurred by an organization, an injured party would be simply unable to obtain a remedy. When both member states and an organization have *ius standi* before an international court, the issue of allocation of responsibility would not be likely to give rise to a denial of justice. Other desirable solution is the submission of international organizations to jurisdiction of arbitration tribunals. As these bodies operate on an *ad hoc* basis, this can be easily accomplished by setting up appropriate arrangements.

## Conclusions

The ILC’s works on rules of responsibility of international organizations constitute a prime example of the progressive development of international law. There has been a growing need of the exploration of this area of international law because of the dynamic development of international organizations and their increasing role as actors in the international plane. Throughout this paper many examples of activities which create a risk of engaging responsibility of international organizations were presented. The ICJ’s Advisory Opinion on the *Reparation* case confirmed that international organizations are subjects of international law and as such they are able of incurring own responsibility for their actions under international law.

The development of the rules on responsibility of international organizations, in particular the DARIO, must be seen as an instrument of large practical relevance. There might be controversies surrounding their validity as a source of international law. Nonetheless, they have provided some clarity on many aspects of international responsibility which were not definitely settled in the doctrine and the practice of international law.

The progressive development of these rules is not coupled with the equal development of the procedural aspects of enforcing responsibility of international organizations. Therefore, the development of law of responsibility of international organizations could be described as asymmetrical. While a widely accepted set of rules applicable to the responsibility of international organizations has been developed, there is still a large deficiency in the mechanisms of settlement of disputes involving international organizations. The possibility of adjudicating claims involving their responsibility by national courts is barred by the jurisdictional immunity. International organizations can appear before only a few international judicial bodies. International arbitration is not employed to an extent which could provide for an effective mechanism of enforcement alternative to the international courts and tribunals.

A proper regulation of the issue of international responsibility of international organizations requires balancing between the conflicting interests and principles. The interests of three actors involved in the relations which arise as consequence of an internationally wrongful act, *i.e.*, an international organization, its members and an injured party, must be observed. As to the conflicting principles, a balance must be reached between preserving of an international organization's autonomy, on the one hand, and eliminating of the risk of abuse of that organization's legal personality, on the other; as well as between the securing of the organization's impartial discharge of functions and the providing of a legal remedy to the victim of an international wrong.

In my opinion, the substantive rules of responsibility of international organizations, as presented in Parts II and III, give a satisfactory result with regard to the relations between the organization and its member states. They manage to strike a balance between the principle of separate legal personality and the need to minimize the risk of abuse of the legal personality of organizations by its member states. The rejection of the concepts of concurrent and secondary responsibility of member states eliminated the greatest threat to the principle of separate legal personality of international organizations. The equivalent protection doctrine developed by the ECtHR has been designed to prevent abuse of separate legal personality of international organizations to the effect of evading of member states' international obligations. Striking a similar balance can be difficult in borderline cases in which the issue of allocation of responsibility of an organization and its member states is not clear. My suggestion is to conduct an attribution

of conduct analysis in each of these cases applying principle of effective control understood in its traditional meaning, *i.e.*, the *Nicaragua* formula and not the doctrine of ultimate control as developed in the jurisprudence of the ECtHR.

As to the tension between the interests of the injurer organization and the injured party, international law fails to provide a satisfactory solution. The system fails at the procedural level of enforcement of responsibility. The international law provides for instruments safeguarding the autonomy of international organizations. They have legal personality which allows them exercise competences granted to them by their member states. The natural course of action would be that they could be held responsible for their acts violating international law. However, the deficiencies of the enforcement mechanisms of international law often render this impossible. Immunity of international organizations, lack of standing before international courts and tribunals, and absence of arbitration arrangements allowing for settlement of disputes involving international organizations create a situation in which a victim of a violation of international law is deprived of remedies under international law. This also has its consequence in the application of substantial law on responsibility, as the injured parties will be likely to argue that the actions of the organizations are to be attributed to the member states, hoping to obtain a remedy in the more effective mechanisms of enforcement of state responsibility. At the national level, restricting of the immunity of international organizations should be recommended. In my view, the limitations should be based not on the restrictive doctrine of immunity of state implying the *acta iure imperii* and *acta iure gestionis* division as I share the opinion on the inappropriateness of this distinction to the international organizations. The restrictions should go back to the very justification of their immunity under international law. The “functional necessity” analysis would constitute an useful tool for proving whether the acts in question in fact fall within the scope of activities requiring jurisdictional immunity.

At the international level granting standing before the international courts and tribunals to the international organizations would be required in order to establish an effective enforcement mechanism of international responsibility of the organizations. In the absence of such a reform the enforcement of responsibility through international arbitration can provide a satisfactory alternative.

## Summary

### **Responsibility of International Organizations under International Law**

The rising number of cases involving breaches of international law by international organizations signals their increasingly significant role in the modern international community. Unlike the rules on the international responsibility of states, the law on the responsibility of international organizations remains an uncertain and largely unexplored territory. This article examines the current state of law of international responsibility of international organizations. It also aims to assess whether international law at its current stage of development provides for a balance between the interests of the parties, as well as between the conflicting principles of international law.