

**I.**

**STUDIES**

**IN INTERNATIONAL LAW**

**AND ORGANIZATIONS**



## DRAWING A LINE BETWEEN THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION AND ITS MEMBER STATES UNDER INTERNATIONAL LAW\*

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**Abstract:** This contribution aims to prove how important it is, from both theoretical and practical points of view, to draw a line between the responsibility of international organizations and that of their Member States under international law. The international reality brings many complex situations of interrelations between States and international organizations. Sometimes, but not always, they are bound by the same international obligations. The responsibility for international wrongful acts is a key institution irrespective of whether the act was committed by a State or an international organization. In most cases, the distribution of competences and rules on attribution makes it possible to attribute the responsibility either to an organization or to its member State. However, there are also many areas of shared or unclear competences where a kind of shared responsibility is very necessary. The ILC Draft Articles provide for several rules concerning the responsibility of an international organization in connection with an act of its Member State or *vice versa*. The potentially most important and yet controversial articles are the two articles dealing with the circumvention of an international obligation by an international organization or by a State when the organization or the State incurs international responsibility. As there are still many “responsibility gaps” caused at the level of primary rules, it is important to limit the number of situations where neither an international organization nor a State incurs responsibility.

**Resumé:** Tento příspěvek se snaží ukázat vztah mezi odpovědností mezinárodních organizací a odpovědností členských států za mezinárodně protiprávní chování. Vzhledem k různému rozsahu primárních závazků a rozdělení kompetencí mezi státy a mezinárodní organizace bývá někdy problém s přiřčením odpovědnosti. I na tyto problémy se snaží v rovině obecně formulovaných sekundárních pravidel reagovat Komise pro mezinárodní právo v novém návrhu článků o odpovědnosti mezinárodních organizací.

**Key words:** Responsibility of international organizations, responsibility of States, attribution, UN International Law Commission, case-law, European Court of Human Rights, European Union.

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## 1. Introduction

In the complex reality of international relations there are more and more situations where a certain act may be attributed to an international organization or to one or more member states, or perhaps to both entities. In the case of a breach of international law (i.e. an internationally wrongful act), the question of responsibility arises. However, who is responsible in such cases: an international organization, its member state or states, both of them or none...?

The answer should be provided by the UN International Law Commission (ILC) which has been dealing with the Draft Articles on the Responsibility of International Organizations since 2002. Special Rapporteur Prof. Giorgio Gaja presented a total of eight reports by 2011. At its session in 2009, the ILC completed the first reading and adopted provisionally the text of 66 articles with commentary. Before the initiation of the second reading, the Commission decided to provide the draft articles to Governments and international organizations for comments and observations.<sup>1</sup> By January 2011, many States and international organizations submitted their comments. And at its session in June 2011, the ILC adopted the slightly amended draft articles in the second and final reading. With a newly added Article 5, the entire project amounted to 67 draft articles.<sup>2</sup>

It is clear that such a complex and controversial matter as the codification of rules on the responsibility of international organizations will still attract the interest of international law doctrine. It appears from the draft articles of the ILC (2009) and from some academic writings that the applicability of the rules on State responsibility to the responsibility of international organizations is generally accepted, even though the special nature of international organizations, being entities created by States, is acknowledged. In my view, however, the simple transposition of rules on State responsibility for the responsibility of international organizations should have certain limits. This concerns in particular the nature of rules of the organization which are different from the internal law of States or the issue of conduct *ultra vires* of the organization.<sup>3</sup>

<sup>1</sup> See the Report of the International Law Commission, Sixty-first session, GAOR, Sixty-fourth session, Suppl. No. 10 (A/64/10), p. 19 ff.

<sup>2</sup> A/CN.4/L.778 (30 May 2011). The numbers of articles within brackets refer to the 2011 (2<sup>nd</sup> reading) version.

<sup>3</sup> Cf. Klein, P., *The Attribution of Acts to International Organizations*. In: Crawford, J., Pellet, A., Olleson, S. (eds.), *The Law of International Responsibility*. Oxford, 2010, p. 297; Klabbers, J., *An Introduction to International Institutional Law*. 2<sup>nd</sup> Edition. Cambridge, 2009, p. 271-272.

As was stated by the International Court of Justice in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

“International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”<sup>4</sup>

Indeed, the special and functional nature of the legal personality and competences of international organizations is well known. It was even suggested, in the comments submitted by the World Health Organization and a group of other organizations, to give more emphasis to “the principle of speciality” in its application to international organizations.<sup>5</sup> However, the ILC had to draft general rules on responsibility applicable as appropriate to various international organizations. The priority of special rules is safeguarded in draft Article 63 (64) on *Lex specialis* which seems to be better placed in part six (General provisions) than in part one (Introduction) of the draft articles.<sup>6</sup>

One of the most complex problems is drawing a line between the responsibility of an international organization and that of its Member State.<sup>7</sup> Put differently, can international organizations be responsible for the acts of states and can states be responsible for the acts of international organizations? And, if so, to what extent? It seems that this question may not have the same answer from the point of view of general international law or within the framework of special treaty regimes, such as regimes on the protection of human rights, on regional economic integration, etc.

Quite logically, most of the cases and other relevant practice have their origin in the activities of the European Union and the regional mechanism of human rights protection, such as the European Convention and the European Court of Human Rights, and possibly the Dispute Settlement Body of the WTO. This also opens the question of the relationship between general rules of responsibility and the special rules of such international organizations (*lex specialis*). Nevertheless, I will start from the general rules which are the subject of the codification project of the ILC.

## **2. Responsibility of an international organization in connection with an act of its Member State**

While the normal route to the responsibility of international organizations goes through the attribution of the conduct of organs or agents to an international organization, on some occasions an international organization may incur its

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<sup>4</sup> *I.C.J. Reports 1996*, p. 78, para. 25.

<sup>5</sup> A/CN.4/637, sect. II.B.26.

<sup>6</sup> Cf. Eighth report on responsibility of international organizations (by G. Gaja); A/CN.4/640 (2011), pp. 4-5, para. 3.

<sup>7</sup> In recent literature, see e.g. Symposium on Responsibility of International Organizations and of (Member) States, *International Organizations Law Review* 7 (2010), p. 9 *et seq.*

responsibility directly in connection with an act of a State (or another international organization).<sup>8</sup>

On the one hand, Article 4 of the Draft Articles provides two conditions for an internationally wrongful act of an international organization that entails the international responsibility of that organization: (1) the act is attributable to the international organization under international law, and (2) the act constitutes a breach of an international obligation of that organization. As to the first element, Article 5 (6) sets out the general rule of attribution in the following terms:

“The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.”

According to paragraph 2 of the same article, the rules of the organization apply in the determination of the functions of its organs and agents.

The acts usually attributed to an international organization thus include the conduct of its organs and agents but also the conduct of the organs of a State or of another international organization placed at the disposal of that organization (Article 6[7]). They also include the conduct of an organ or agent of the organization acting in an official capacity and within the overall functions of that organization if the conduct exceeds the authority of that organ or agent or contravenes instructions (acts *ultra vires*; Art. 7[8]) or the conduct acknowledged and adopted by an international organization as its own (Art. 8[9]). In the case of placement of State organs at the disposal of an international organization, e.g. for the purpose of UN peacekeeping forces, the conduct of such organs is attributed to the organization only if the organization exercises effective control over that conduct.<sup>9</sup>

On the other hand, Chapter IV of Part two of the Draft Articles (2009) deals with the responsibility of an international organization in connection with an act of a State or another international organization. It covers several cases, such as aid or assistance in the commission of an internationally wrongful act (Article 13 [14]), direction and control exercised over the commission of an internationally wrongful act (Article 14 [15]), coercion of a State or another international organization (Article 15 [16]). All these provisions correspond to Articles 16 to 18 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA, 2001).<sup>10</sup>

In these cases, an international organization is responsible for aid or assistance in, control over or coercion to the commission of an internationally wrongful act of a State. Moreover, the articles on aid and assistance, on direction and control,

<sup>8</sup> Cf. Kuijper, P.J., Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?, *International Organizations Law Review* 7 (2010), p. 12.

<sup>9</sup> See the Report of the International Law Commission, Sixty-first session, GAOR, Sixty-fourth session, Suppl. No. 10 (A/64/10), pp. 64-66.

<sup>10</sup> YILC, 2001, Vol. II, Part 2, 26.

and on coercion are applicable to all States that are members or non-members of the organization.<sup>11</sup> However, certain questions arise in respect of the possible responsibility of international financial institutions, such as the IMF, the IBRD, etc., for their financial aid and assistance to those projects of a State that would entail an infringement of the human rights of certain affected individuals.<sup>12</sup> In exceptional cases, aid and assistance may be relevant even for some UN or multinational military operations or missions, e.g. the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), if there is a risk of violations by the supported State forces of international humanitarian law, human rights law or refugee law.<sup>13</sup>

Some of these situations, however, in particular the coercion, are not easy to conceive of in relations between an international organization and a State. They seem to be more in the nature of theoretical possibilities.<sup>14</sup>

Significantly more interesting is draft Article 16 [17] (Decisions, authorizations and recommendations addressed to member States and international organizations). There is no such provision in ARSIWA (2001). It rather bridges a gap between State responsibility and the responsibility of international organizations.<sup>15</sup> The purpose of this rule is to ensure that an international organization would not avoid its responsibility in cases where a member State breaches an international obligation on the basis of a binding or recommendatory act of the organization.

According to Article 16 [17], para. 1 of the draft reformulated in 2011, “an international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization”.<sup>16</sup> It does not condition the establishment of international responsibility of an organization whether or not the act in question

<sup>11</sup> Cf. Kuijper, P.J., op. cit., p. 26.

<sup>12</sup> See the Third Report on Responsibility of International Organizations (by G. Gaja), ILC, Fifty-Seventh Session, 2005, UN Doc. A/CN.4/553, p. 11. Cf. also Reinisch, A., Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts, *International Organizations Law Review* 7 (2010), p. 66 *et seq.*

<sup>13</sup> See the document issued by the UN Legal Counsel on 12 October 2009: “If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC’s intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. [...] MONUC may not lawfully provide logistic or ‘service’ support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. [...] This follows directly from the Organization’s obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.” (cited in: A/CN.4/640, p.17, para. 47)

<sup>14</sup> Cf. Kuijper, P.J., op. cit., p. 25.

<sup>15</sup> Cf. Blokker, N., Abuse of the Members: Questions concerning Draft Article of the Draft Articles on Responsibility of International Organizations, *International Organizations Law Review* 7 (2010), p. 39.

<sup>16</sup> Cf. Report (DARIO), op. cit. 1, p. 88, and UN doc. A/CN.4/L.778 (2011), p. 7.

is internationally wrongful for the member State to which the decision, authorization or recommendation is directed (Art. 16, para. 3).

In cases where the international organization adopted merely an authorization or recommendation, it would incur responsibility only if the State commits the act in question because of that authorization or recommendation (Art.16, para. 2). Put differently, if the State relied on that authorization or recommendation.

However, there are some problematic aspects in draft Article 16 [17]. First of all, it concerns the notion of circumvention of an international obligation. To circumvent means to “get round” or to “bypass” and thereby escape a violation of an obligation. Some commentators asked the question of what the notion of circumvention means. In other words, whether circumvention is a second, additional requirement?<sup>17</sup> The Commentary of the ILC only indicates that “a specific intention of circumvention is not required”.<sup>18</sup>

Some States have criticized the notion of circumvention for a lack of clarity,<sup>19</sup> while others supported the reading which interprets it as an intentional misuse of an organization’s powers in order to evade responsibility.<sup>20</sup> Therefore, the Special Rapporteur, in its Eighth report, made it clear that the wording including circumvention was more an explanation than an addition of a condition.<sup>21</sup> Consequently, he proposed a reformulation of the draft article.

Another problem concerns the line between binding and non-binding acts adopted by an international organization. While the first paragraph dealing with binding decisions seems to be widely acceptable, certain States and international organizations were critical of paragraph 2 whereby an international organization incurs responsibility because of a recommendation. E.g., the European Commission expressed the view that “to hold that an international organization incurs responsibility on the basis of mere ‘recommendations’ made to a State or an international organization appears to go too far”.<sup>22</sup> It was also pointed out that in the case of a recommendation, “there needs to be an intervening act – the decision of the State or another international organization to commit that act. The chain of causation would be thus broken”.<sup>23</sup> The proposal of making international organizations responsible for a non-binding recommendation was also criticized in literature. As to the other distinction between the two types of non-binding decisions, i.e. authorizations and recommendations, it seems to be correct. On the one hand, an authorization will normally take away the wrongfulness of an otherwise unlawful conduct (e.g. the authorization by the Security Council to authorize Member States to take all necessary measures, which include the use of

<sup>17</sup> Cf. Blokker, N., *op. cit.*, pp. 42-43.

<sup>18</sup> Report of the ILC, 2009, *op. cit.*, p. 89.

<sup>19</sup> A/C.6/64/SR.16, para. 24 (the United Kingdom).

<sup>20</sup> A/CN.4/636, sect. II.B.14 (Germany).

<sup>21</sup> A/CN.4/640 (2011), p. 19, para. 55.

<sup>22</sup> A/CN.4/637, sect. II.B.12.

<sup>23</sup> A/CN.4/637, sect. II.B.12 (ILO).



force, to enforce certain SC decisions).<sup>24</sup> On the other hand, a recommendation lacks such an effect.<sup>25</sup>

One may go even further and ask the question of whether a distinction should be drawn between very general authorizations, such as the SC resolution 678 (1990), and more specific authorizations, such as the SC resolution 1973 (2011). However, the ILC should draft rather general rules on the responsibility of international organizations and/or States. They cannot deal with too many details as life may bring an infinite number of different cases and situations. It is more a matter of interpretation. Nevertheless, it seems more likely that an international organization incurs international responsibility in the case of a broadly formulated authorization where a State may commit an act that would be internationally wrongful for the organization.

Consequently, the Special Rapporteur admitted the need to reconsider whether draft Article 16 should include the current paragraph 2, which may even lead to its deletion.<sup>26</sup> However, the Drafting Committee adopted, in the second reading, the text of draft Article 16 [17] with an amended paragraph 2, including only a reference to “authorization”, thus scaling back the notion of recommendation.<sup>27</sup> This appears to be a balanced change which may help bring about the acceptance of the idea behind draft Article 16 [17].

### **3. Responsibility of a Member State in connection with an act of an international organization**

Part five of the Draft Articles, on responsibility of international organizations, was adopted at the end of the work of the ILC. It deals with the responsibility of a State in connection with the act of an international organization. As was expressed in the commentary, the present articles are intended to fill a gap that was deliberately left in the Articles on the responsibility of States for internationally wrongful acts.<sup>28</sup>

It appears that most cases discussed in connection with the responsibility of international organizations concern, at least in part, the responsibility of States in relation to the acts of international organizations. The complexity of the issue may also be due to the case law of international judicial bodies which is far from being uniform, even in cases relating to one organization (e.g. the European Union).<sup>29</sup>

In its judgment in the *Bosphorus* case, the European Court of Human Rights (ECtHR) dealt with an act of a member State of the EU when implementing the

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<sup>24</sup> Cf. e.g. S/RES/1973 (2011).

<sup>25</sup> Cf. Blokker, N., *op. cit.*, pp. 43-46.

<sup>26</sup> A/CN.4/640 (2011), pp. 20-21, para. 58.

<sup>27</sup> A/CN.4/L.778 (2011), p. 7.

<sup>28</sup> Report of the ILC, 2009, *op. cit.*, p. 158.

<sup>29</sup> Cf. Hoffmeister, F., *Litigating against the European Union and its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?* 21 *European Journal of International Law* (2010) No. 3, p. 730 et seq.

binding acts of EC law (regulations of the EU Council) and ruled that Ireland, as a member State, would be fully responsible under the European Convention on Human Rights (ECHR) for all acts outside its strict international obligations.<sup>30</sup> In the case in question, however, the Court concluded that the member State did not do more than it was required to by the Council regulation, therefore it applied the concept of “equivalent protection” and did not find responsibility on the part of the State. However, the Court did not rule (as it was not competent to do so) on the issue of the possible international responsibility of either the EU or the United Nations for the binding acts implemented by the respondent State.

It was suggested by certain writers that the ILC should reflect this case and elaborate rules concerning responsibility in cases where States implement obligations arising from their membership in international organizations. The issue is to what extent the rules of the organization are to be taken into consideration. In any case, the *Bosphorus* judgment should not be interpreted in a way which would relieve an organization from international responsibility.<sup>31</sup> Neither should a State free itself from its obligation under the European Convention by transferring functions to an international organization.<sup>32</sup>

It is possible to say that in responding to critical comments, the ILC adopted draft articles 57 [58] to 62 [63] of the project on responsibility of international organizations. It has filled a gap that was deliberately left in the Articles on the responsibility of States. According to Article 57 of ARSIWA, those articles are without prejudice to any question of the responsibility of any State for the conduct of an international organization.<sup>33</sup>

First, draft articles 57 [58] to 59 [60] are just parallel or mirror provisions to articles 13 [14] to 15 [16] of the present Draft Articles. They cover aid or assistance by a State in the commission of an internationally wrongful act by an international organization, direction and control exercised by a State over the commission of an internationally wrongful act by an international organization, and coercion of an international organization by a State. Since the ILC commentary does not include practical examples, these provisions may be understood as rules adopted just *in eventum*.

The key provision appears to be in draft Article 60 [61] dealing with the circumvention of the international obligations of a State member of an international organization.<sup>34</sup> In fact, this provision mirrors Article 16 [17] concerning the

<sup>30</sup> *Bosphorus Hava Yolları Turizm ve Ticaret AS v. Ireland*, ECtHR, judgment of 30 June 2005, § 157.

<sup>31</sup> Cf. Costello, C., The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe, 6 *Human Rights Law Review* (2006), pp. 127-129.

<sup>32</sup> *Bosphorus* judgment, op. cit., para. 154.

<sup>33</sup> YILC, 2001, Vol. II, Part 2, p. 141. Cf. also Jílek, D., Kodifikační úkol: odpovědnost mezinárodních organizací [Codification task: Responsibility of international organizations], in: Čepelka, Č., Jílek, D., Šturma, P., *Mezinárodní odpovědnost* [International Responsibility], MU, Brno, 2003, pp. 204-205.

<sup>34</sup> Cf. Paasivirta, E., Responsibility of a Member State for an International Organization: Where Will It End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations, *International Organizations Law Review* 7 (2010), pp. 58-60.

responsibility of an international organization which circumvents obligations through decisions addressed to its members. The provision has undergone a rather complicated drafting history, as it started in 2006 with the notion of circumvention (Art. 28, para. 1), which was later abandoned and replaced by the wording “seeking to avoid compliance” (2009 version of Art. 60) and finally restored in the newly amended Article 61 in 2011.

According to the recent wording of this article, “a State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation”.<sup>35</sup>

It is interesting that this provision provoked many critical comments from certain States and international organizations. In substance, the critiques addressed to the ILC point out various problems. For some States, certain amendments or clarifications should be made in the draft article or commentary so as to include the requirement of a specific intent of circumvention.<sup>36</sup> One State felt that responsibility should be conditional on an abuse of rights, an abuse of the separate legal personality of the organization or bad faith.<sup>37</sup> The European Commission also expressed the view that “some basic or general level of intent on the part of the member State should be required”.<sup>38</sup> According to another State, however, the requirement of specific intent to circumvent obligations might make it difficult to establish responsibility in practice.<sup>39</sup>

Although the commentary on draft Article 60 includes the sentence that “an assessment of a specific intent on the part of the member State of circumventing an international obligation is not required”,<sup>40</sup> the ILC recognized in the 2011 version a certain discrepancy between the text of the article and its commentary. It decided to adopt an amended text of Article 60 [61] including the wording “circumvents”, which also allows a more objective interpretation.

Finally, draft Article 61 [62] completes the picture of situations where a State may incur responsibility for an internationally wrongful act of an international organization. According to this rather subsidiary rule, “a State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility.”

This provision seems to be less controversial. Yet it caused certain critical comments. State practice as well as case law show that member States are not as a rule held responsible for the wrongful acts of international organizations. The first

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<sup>35</sup> A/CN.4/L.778 (2011), p. 24.

<sup>36</sup> E.g. France (A/C.6/64/SR.15, para. 65) and Germany (A/CN.4/636, sect. II.B.31, para. 2).

<sup>37</sup> Belgium (A/CN.4/636, sect. II.B.31, para. 2).

<sup>38</sup> A/C.6/64/SR.17, para. 22.

<sup>39</sup> Ireland, A/C.6/64/SR.16, para. 66.

<sup>40</sup> Report of the ILC, 2009, op. cit., p. 166, para. 7.

exception [in paragraph 1 (a)], i.e., the case when the State accepts responsibility, is on the whole acceptable. Rather more questionable is the second exception [paragraph 1 (b)], mainly because of the considerable lack of clarity. In this case, the condition for incurring responsibility is not implicit consent, but the existence of circumstances that have led the injured party to rely on the State's responsibility for the conduct of an international organization. The Commission's commentary does not throw much light on the issue.<sup>41</sup> Subparagraph 1(b) was also criticized by the European Commission.<sup>42</sup>

It is important to stress that any responsibility of a State under paragraph 1 of this article is presumed to be subsidiary. As the Special Rapporteur commented, "given the fact that in the case in hand it is the international organization that committed an internationally wrongful act, it seems likely that member States intend to acquire an obligation to make reparation only when the organization fails to meet its obligations."<sup>43</sup>

In general, the mere membership of a State in an international organization should not be a ground for its responsibility for an internationally wrongful act of that organization. Other relevant provisions of the Draft Articles, in particular draft Article 60 [61], provide for a sufficient basis of the State responsibility which may substitute or supplement the responsibility of the organization.

#### 4. Some relevant cases

The codification of the rules on the responsibility of international organizations in relation to the responsibility of States is complicated by the fact that there are relatively few cases available. Moreover, those cases are of a heterogeneous nature. Most of them are related to the practice of the EU and the European Court of Human Rights.

However, the traditional view is to be presented first. Accordingly, an international organization (e.g. the United Nations) is responsible only for missions or operations under its control, not for authorized operations under national command. The International Court of Justice did not have an opportunity to decide on merits in the case concerning *Legality of Use of Force*, despite the argument in the Preliminary Objections of the French Republic.<sup>44</sup> The other nine NATO member States sued before the ICJ did not share this argument.

It seems to be significant that in the settlement of damage caused by an incident during the NATO campaign in Yugoslavia in 1999, the United States, not NATO, offered a payment *ex gratia* to China after bombing the Chinese Embassy in Belgrade.

Still in relation to the NATO intervention in Yugoslavia, the European Court of Human Rights did not help resolve the issue of the responsibility of NATO or

<sup>41</sup> Comments of the Czech Republic (A/CN.4/636/Add.1, sect. 17, p. 18).

<sup>42</sup> A/CN.4/637, sect. II.B.25, para. 2.

<sup>43</sup> A/CN.4/640 (2011), p. 36, para. 112.

<sup>44</sup> *Case Concerning Legality of Use of Force (Yugoslavia v. France)*, Preliminary Objections, ICJ, 5 July 2000, para. 46: "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."

its member States in its *Banković* decision.<sup>45</sup> The Court did not resolve the question of whether the act of bombing the Serbian Radio-Television (RTS) was the act of a State or of an organization. The Court did not find that the extraterritorial act would fall within the jurisdiction of defendant States in the sense of Article 1 of the ECHR. Therefore the Court declared the application inadmissible because of its incompatibility *ratione loci* with the European Convention.

In other cases, however, the European Court of Human Rights considered its jurisdiction *ratione personae* in relation to the conduct of forces placed at the disposal of some United Nations missions or authorities in Kosovo or Bosnia and Herzegovina. First, in its Decision on admissibility in the *Behrami* and *Saramati* cases,<sup>46</sup> the Court dealt with the acts of contingents placed at the disposal of the UN Interim Administration Mission in Kosovo (UNMIK) or authorized by the United Nations – Kosovo Forces (KFOR) of NATO. Referring to the work of the ILC, the Court interpreted in a highly unusual way the criterion of “effective control”. Departing from the meaning of the term used by the International Court of Justice in the *Nicaragua* case<sup>47</sup> and in the *Genocide* case,<sup>48</sup> as well as in the ILC draft articles on Responsibility of States and Responsibility of international organizations, the Court took the view that the decisive factor was whether “the United Nations Security Council retained ultimate authority and control so that operational command only was delegated”.<sup>49</sup> The Court concluded that “KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, ‘attributable’ to the UN”.<sup>50</sup> Of course, neither the United Nations, nor NATO are parties to the European Convention, therefore the Court lacks competence to deal with the issue of their responsibility and any legal consequences arising from it. However, the Court did not ask the question of whether the “operational” control was or was not more effective than the “ultimate” control of the UN Security Council.

The ECtHR took the same position in other decisions concerning attribution to the United Nations of conduct by national contingents allocated to KFOR.<sup>51</sup> Moreover, in the *Berić* case, the Court reiterated its previous decision in the *Behrami* and *Saramati* cases and reached the conclusion that the conduct of the High

<sup>45</sup> *Banković and Others v. Belgium and other 16 NATO Member States*, Decision on admissibility, 12 December 2001.

<sup>46</sup> *Behrami and Behrami v. France*, and *Saramati v. France, Germany and Norway*, Decision (GC) as to the Admissibility of Applications No. 71412/01 and No. 78166/01, 2 May 2007.

<sup>47</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment, ICJ Reports 1986, pp. 64-65, para. 115.

<sup>48</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para. 400.

<sup>49</sup> *Behrami* and *Saramati* cases, op. cit., para. 133.

<sup>50</sup> *Ibid.*, para. 141.

<sup>51</sup> *Kasumaj v. Greece*, Decision on the admissibility of application No. 6974/05, 5 July 2007; *Gajić v. Germany*, Decision on the admissibility of application No. 31446/02, 28 August 2007.

Representative in Bosnia and Herzegovina also had to be attributed to the United Nations.<sup>52</sup>

A different conclusion was reached by the House of Lords in the *Al-Jedda* case,<sup>53</sup> concerning a claim arising from the detention of a person by British troops in Iraq. The majority opinions referred both to the work of the ILC on the responsibility of international organizations and to the decision of the ECtHR in *Behrami* and *Saramati*, but distinguished the facts of the case and concluded that it could not “realistically be said that US and UK forces were under the effective command and control of the UN”. Contrary to the civil and security presences in Kosovo, “the multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN.”<sup>54</sup>

Finally, the judgment of the Grand Chamber of the ECtHR in the *Al-Jedda* case of 7 July 2011 seems to have taken a 180-degree turn from the previous approach followed by the Court in *Behrami* and *Saramati*. Instead, it carefully studied the factual situation in Iraq, the relevant resolutions of the Security Council, the decision of the House of Lords, the Hague Regulations of 1907 and the Geneva Convention (IV) of 1949, as well as the relevant case-law of the ICJ, the ECJ and the US Supreme Court, but also the ILC draft Articles on the Responsibility of international organizations and the ILC Report of the Study Group on “Fragmentation of international law” (2006) in respect of Article 103 of the UN Charter. Based on this background, the Court concluded that “the United Nations’ role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999.” The ECtHR was of the view “that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations. The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout.”<sup>55</sup>

Moreover, in the same judgment, the ECtHR explained, as to the priority of the obligations under the Charter (Art. 103) over Article 5 of the ECHR, in a clear and convincing manner, that it did not believe that the language used in Resolution 1546 „indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. (...) In the absence of clear provision to the contrary, the presumption

<sup>52</sup> *Berić and others v. Bosnia and Herzegovina*, Decision on the admissibility of application No. 36357/04 and 24 other applications, 16 October 2007.

<sup>53</sup> Decision of 12 December 2007, *R. (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58.

<sup>54</sup> *Ibid.*, paras. 23-24 (opinion of Lord Bingham of Cornhill).

<sup>55</sup> *Al-Jedda v. the United Kingdom* [GC], Application No. 27021/08, judgment of 7 July 2011, paras. 83-85.

must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.<sup>56</sup>

In a similar vein, the Grand Chamber of the ECtHR decided on the attribution of acts and violation of procedural obligations under Article 2 of the Convention in respect of the failure to investigate the death of several persons caused by the British troops of the Multi-National Force in Iraq.<sup>57</sup>

In a certain number of cases the intersection of the responsibility of international organizations and the responsibility of States is due to the decision-making on the part of an organization and implementation measures taken by a State. One of the key issues here is to evaluate whether or to what extent the State had a margin of appreciation or was simply obliged to implement the decision of the international organization. Therefore, in certain situations, both a member State and an international organization may incur international responsibility.

Here again, the jurisprudence of the European Court of Human Rights provides a few examples of States incurring responsibility under the European Convention when they have attributed competence to an international organization in a given field. First, in the *Waite and Kennedy* case, involving the immunity of the European Space Agency in relation to claims concerning employment, the Court said that “where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, ... there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention...” In this case, however, the Court concluded that the applicant’s right to a court under the Convention had not been impaired as there was an alternative legal process available to them.<sup>58</sup>

Similarly, the ECtHR decided in the above mentioned *Bosphorus* case with regard to a State measure implementing the binding acts of EC law (regulations of the EU Council). The Court repeated that “absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention.”<sup>59</sup> In this case, however, the Court concluded that the member State did not do more than it was required to by the Council regulation, therefore it applied the concept of “equivalent protection” and did not find responsibility of the State.

It seems that the reasoning in the *Bosphorus* case is behind the idea of a circumvention of the international obligations of a State that is a member of an

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<sup>56</sup> Ibid., para. 105.

<sup>57</sup> *Al-Skeini and Others v. the United Kingdom* [GC], Application No. 55721/07, judgment of 7 July 2011.

<sup>58</sup> *Waite and Kennedy v. Germany*, application No. 26083/94, judgment of 18 February 1999, ECHR Reports, 1999-I, pp. 410-412.

<sup>59</sup> *Bosphorus Hava Yolları Turizm ve Ticaret AS v. Ireland*, EtCHR, judgment of 30 June 2005, para. 154.

international organization, although the State in question was not found to have sought to avoid complying with its obligations under the Convention.

The other facet of the problem may be the determination of whether or not the act in question is internationally wrongful. Here again, the situation was rather atypical. On the one hand, the European Union was not and still is not bound by the ECHR. That is why, under the draft Articles of the ILC, an international organization would not incur responsibility. This should change as a result of the recently negotiated protocol on the accession of the European Union to the European Convention on Human Rights. On the other hand, the legality of the acts in question, i.e. the EC Regulation and even the sanction resolution of the UN Security Council (which was at the origin of the whole problem), was not put under scrutiny from the point of view of international law, not even as a preliminary question.

It happened otherwise in two cases decided by the Court of First Instance of the EU (at that time known as the CFI) in September 2005.<sup>60</sup> The problem at issue was a partial annulment of the Council regulation 467/2001 and the Commission regulation 2062/2001, and later also of the Council regulation 881/2001, concerning some special restrictive measures, in particular freezing the assets of persons and entities in connection with Usama bin Laden, Al-Qaeda and Taliban. The CFI adopted the opinion that it had to first review the link between the international legal order and the internal law of States or EU law. From the point of view of international law, the obligations of the UN member States under the Charter shall prevail over any other international agreement (Art. 103 of the Charter), including obligations under the European Convention on Human Rights, for members of the Council of Europe, or under EU/EC treaties for those which are also members of the EU.

Resolutions adopted by the Security Council under Chapter VII of the UN Charter are legally binding for all member States of the EU/EC, which have to adopt all measures necessary to their implementation. Member States thus have the right and the duty to avoid the application of any provision of EU/EC law which would obstruct the fulfillment of their obligations under the UN Charter.

The CFI first recalled in the *Kadi* case that a judicial review is an expression of the general principle of law which lies at the basis of the constitutional traditions common to member States and is expressed in Articles 6 and 13 of the ECHR. Any review of the internal lawfulness of the regulation would entail an indirect review of an SC resolution, which is excluded from the ambit of CFI competences. However, the Court claimed that such a review was possible as far as the compatibility of the regulation, and also the resolution, with *jus cogens* were concerned. In this case, the Court concluded that no breach of the *cogent* core of the right to respect for property and the right to be heard occurred.

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<sup>60</sup> Judgment of the CFI of 21 September 2005 in case T-306/01, *Ahmed Ali Yusuf a Al Barakaat International Foundation v. Council and Commission*; and in case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*.



Mr. Kadi appealed to the European Court of Justice (ECJ). Following the opinion of the Advocate General Poiares Maduro, the ECJ set aside the CFI judgment and annulled the contested regulation in so far as it concerned Mr. Kadi. Unlike the CFI, the AG and the ECJ viewed international law and EC/EU law as two independent legal orders. Therefore EU courts had jurisdiction to review the contested regulation from the point of view of its compatibility with the Community legal standard and with the legal effects of the ruling remaining limited to the EC/EU order.<sup>61</sup>

Put differently, the ECJ did not address international law, including UN Security Council resolutions or norms of *jus cogens*. It clearly took a “dualistic” position, based on a strict and formal separation of international law and EU law.<sup>62</sup> However plausible this judgment may be from the point of view of human rights protection, it seems to pose serious problems from the point of view of the normative and institutional coherence of international law. Dealing with EU law as if it were a kind of constitutional law, the ECJ seemed to claim, at least implicitly, an exclusive status for the EU in the international system. This may raise objections from other, non-EU States, other regional economic integration organizations (REIO) as well as from universal organizations such as the United Nations.

Last, but not least, a problem of international responsibility may arise, in particular for the EU member States, bound both by their obligations under the UN Charter and by EU law. In any case, States would risk incurring international responsibility for a violation of one of the concurring obligations. It is much less clear, however, whether the international organization which adopted a binding decision, implemented by its member State, would incur responsibility under Article 16 [17], para. 1, of the present Draft Articles.<sup>63</sup>

Of course, all these problems connected with the EU as an organization which often acts on the international plane, in lieu of its members, reopen the question of whether the draft articles on the responsibility of international organizations address adequately the responsibility of different kinds of international organizations.<sup>64</sup> In other words, does one size fit all?<sup>65</sup>

The possible answer may lie in one of the residual provisions, namely Article 63 [64] on *Lex specialis*. According to this article, amended by the Drafting Committee in 2011,

<sup>61</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, European Court of Justice, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008, para. 24.

<sup>62</sup> Cf. Šturma, P., Bilková, V., Targeted Anti-Terrorist Sanctions and Their Implications for International Law Normative and Institutional Coherency. In: Constantinides, A., Zaikos, N. (eds.), *The Diversity of International Law. Essays in Honour of Professor Kalliopi K. Koufa*, Leiden-Boston: MNP, 2009, pp. 217-237.

<sup>63</sup> Cf. Seventh report on Responsibility of International Organizations, A/CN.4/2009, para. 33.

<sup>64</sup> Cf. Hoffmeister, F., Litigating against the European Union and its Member States – Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations? 21 *EJIL* (2010), No. 3, pp. 728-730.

<sup>65</sup> Cf. Paasivirta, E., Kuijper, P.J., Does One Size Fit All?, 36 *Netherlands Yearbook of International Law* (2005), pp. 169-226.

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

This article may serve as an escape clause for a special rule of attribution which seems to apply for the EU (and possibly, in the long run also for other REIOs) in relation to a breach of obligations under the WTO agreements.<sup>66</sup> This approach was endorsed by the WTO panel in case *EC – Protection of Trademarks and Geographical Indications*, which “accepted the European Communities’ explanation on what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at the Community level but rather through recourse to the authorities of its member States which, in such situation, ‘act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general’”.<sup>67</sup>

In short, where the EC (now the EU) stepped by way of (implicit) succession into treaty obligations held previously by its Member States,<sup>68</sup> one can speak about a kind of ‘executive federalism’ or ‘*dédoublement fonctionnel*’.<sup>69</sup> In other words, Member States appear as organs of the EU when executing EU law. And the organization, not its member States, would be responsible under international law. However, this approach working at the WTO level has not been confirmed by other relevant case law, namely by the European Court of Human Rights.

That is why the reference to *lex specialis* is extremely important. The ILC’s attempt to codify general secondary rules on responsibility of international organizations cannot include all special cases. In particular, this is not feasible where differentiation arises from primary rules, including the rules of the organization.

It appears that a very interesting solution may be brought by the currently prepared protocol on the accession of the EU to the European Convention on Human Rights. Once this protocol enters into force, both the EU and its Member States will be bound by substantive obligations under the Convention and will also be subject to the judicial mechanism of the European Court of Human Rights. In cases of violation of the Convention obligations by the conduct of a State which merely implements a binding legal act of the EU, it will give rise to a co-responsibility of the EU and its Member State, both appearing as defendants before the Court. This might be a vertical relationship different from cases of a joint responsibility of several States and/or international organizations.

<sup>66</sup> Cf. Kuijper, P.J., op. cit., pp. 30-31.

<sup>67</sup> WTO Panel Report, *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by the United States*, WT/DS174/R, adopted on 20 April 2005, para. 7.725.

<sup>68</sup> Paasivirta, E., op. cit., p. 56.

<sup>69</sup> Kuijper, P.J., op. cit., pp. 14-15, 31.

## 5. Conclusions

The above analysis aimed to prove how important it is, from both theoretical and practical points of view, to draw a line between the responsibility of an international organization and that of its Member States under international law. The international reality brings many complex situations of interrelations between States and international organizations. Sometimes, they are bound by the same international obligations. On many occasions, they have different obligations. This is based on the primary rules of international law.

The responsibility for international wrongful acts is a key institution irrespective of whether the act was committed by a State or an international organization. In most cases, the distribution of competences and rules on attribution make it possible to attribute responsibility either to an organization or to its member State. However, there are also many areas of shared or unclear competences where a kind of shared responsibility is very necessary. The ILC Draft Articles provide for several rules concerning the responsibility of an international organization in connection with an act of its Member State or *vice versa*. The articles that are potentially the most important and yet controversial are the two articles dealing with the circumvention of an international obligation by an international organization or by a State when the organization or the State incurs international responsibility. In some cases, both the international organization and its member State may have shared responsibility or the latter's responsibility may be subsidiary.

The codification and development of rules on the responsibility of international organizations is a task made all the more difficult due to the great diversity among organizations and the rather scarce and discrepant case-law of international courts. Not surprisingly, most cases relate to the EU and to the European Court of Human Rights. In particular, the EU seems to claim exceptional approaches. This may be resolved by the clause referring to *lex specialis*, as the ILC rightly aims to codify the general secondary rules of international law. These rules seek to provide remedies for all possible situations. However, there are still many "responsibility gaps" but their causes lie at the level of primary rules. Anyway, it is important to limit the number of situations where neither an international organization nor a State incurs responsibility.

