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in

MEMBER STATE LIABILITY FOR INTERNATIONALLY WRONGFUL ACTS OF INTERNATIONAL ORGANIZATIONS

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INTRODUCTION

International Organizations [hereinafter IO] have grown in the last decades both in importance and in number gaining essential relevance as non-State actors in the international scenario. Notwithstanding such significance, the presence of IOs and, more specifically, the relationship with both their member States and third States, still falls in the grounds of ambiguity. This uncertainty derives from the immunities usually granted to IOs both in national and in international courts. In addition, the latter very rarely have jurisdiction to consider questions relating to IOs, for instance only States may address and stand in front of the International Court of Justice [hereinafter ICJ] in contentious cases[1].

Such unclearness embraces the definition of IO, as results clear from the 1986 Vienna Convention on the Law of Treaties between States and IOs and between IOs, which opted for a minimalist approach to the subject by defining them as "*intergovernmental*

[1] see Statute of the International Court of Justice, Annexed to the United Nations Charter, adopted on the 26th June 1945, Article 34.1: " *Only states may be parties in Cases before the Court*"; Alvarez, J.E., "Misadventures in Subjecthood", 29th September 2010

organizations[2]". In the opinion of professor Philippe Gautier, an IO can be defined as "*an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane*[3]".

The International Law Commission [hereinafter ILC] has been contributing to the clarification of their role by elaborating a series of draft articles regarding the responsibility of IOs. Article 2 of the draft articles defines an international organization as follows: "*an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include members, in addition to States, other entities…*[4]". As will be stressed later on, the Commission found and continues to find difficulties in the elaboration of such articles. This is due mainly to the lack of practice in such field and to the impossibility, as affirmed by part of doctrine, to extend *in toto* the discipline on the responsibility of States to IOs.

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[2] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations with Commentaries, open to signature on the 21st of March 1986, art. 2, para. 1, letter i

[3] Gautier, Philippe, "The Reparation for Injuries Case Revisited: The Personality of the European Union", Max Planck Yearbook of United Nations Law, J.A. Frowein and R. Wolfrum (eds.), Kluwer Law International, 2000, pg. 333

[4] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, Sixty-first Session, 4 May-5 June and 6 July-7 August 2009

Necessary premise to this survey consists in pointing out the existence of major differences among States and IOs, especially in the field of personality[5]. In fact, States are the only subjects of international law to have a full international legal personality. It is necessary to keep this in mind during the analysis, since from the incapacity to recognize the differences in the personalities of States and IOs resides the major part of the difficulties relatively to the attribution to States of the unlawful acts committed by or through international organizations.

[5] See Chapter 1.1 on the International Legal Personality of International Organizations

1 RELATIONSHIP BETWEEN LEGAL PERSONALITY AND INTERNATIONAL RESPONSIBILITY OF IOS

1 INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

1.1 CONCEPT OF LEGAL PERSONALITY

Obligatory premise to the topic of international legal personality of international organizations is the same meaning of international personality. Such concept, recalling the thought of Kelsen, is central in order to identify the subjects of international, or domestic law, to which the law attributes rights and duties[6]. Therefore the term

[6] Kelsen, Hans, "General Theory of Law and State", Russell & Russell (eds.), New York, 1945, pg. 93; Anzilotti, D., "Corso Di Diritto Internazionale", Cedam (ed.), Padova, Ristampa Anastatica del 1964, pp. 111-112; Sereni, A. P., "Diritto internazionale", Giuffrè (ed.), Milano, 1956, pg. 235; Schwarzenberger, "A Manual Of International Law", IV Ed., Stevens And Sons (ed.), London, 1960, pg. 53; Arangio, Ruiz G., "Gli Enti Soggetti dell'Ordinamento Internazionale", Giuffrè (ed.), Milano, 1951, pg. 9; Arangio-Ruiz, G., Margherita, L., and Arangio-Ruiz, E. Tau, "Soggettività nel Diritto Internazionale", Digesto delle discipline pubblicistiche, 1999, pg. 303

personality has to be seen only as a "*shorthand for a proposition that an entity is endowed by international law with legal capacity*[7]".

Two are the main theories of personality. The first theory conceives personality as a fiction[8], distinguishing the natural person from the legal one; this last characterized by the inability to act and by the inborn lack of personality[9]. The realist theory, having as major exponents Maitland and Gierke, on the contrary affirms the real existence of such entities, constituting real persons having a will of their own[10].

Central problem, independently from the point of view to be preferred, is how to distinguish the will of the entity from that of its' members and, moreover as a corollary, if these last must be kept completely separate from the entity they compose. Nevertheless conceiving personality as a "*bundle of rights, competences, and*

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[7] O'Connell, D.P., "International Law", Stevens and Sons (ed.), London, 1970, pg. 81

[8] Keeton, G.W., "The Elementary Principles of Jurisprudence", Pitman & Sons (ed.), London, 1949, pg.168

[9] Klabbers, Jan, "The Concept of Legal Personality", 11 Ius Gentium 35, 2005, pg. 7; Derham, David, "Theories of Legal Personality" in L. C. Webb (ed.), Legal Personality and Political Pluralism, University of Melbourne Press, Melbourne, 1958, pg.10-11

[10] Gierke, Otto, "Political Theories of the Middle Age", Thoemmes (ed.), reprint of the 1900 edition, Bristol, 1996 , pg. 67 et seq.

obligations[11]" has the positive effects on one side of subordinating it to the presence of an effective attribution more than on a norm formally providing it and, on the other, of gradating it[12]. The conception of a flexible and gradable personality results to be in conformity with the position taken by the ICJ, which affirmed that "*the subjects of law in any given legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community*.[13]" Such graduation exists between the international legal personality of States, original and equivalent for all, and that of international organizations, on which more will be said in the following pages.

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[11] Klabbers, Jan, "The Concept of Legal Personality", supra note 9, at pg. 7

[12] Jolowicz, H.F., "Roman Foundations of Modern Law", Oxford University Press, Oxford, 1957, pg. 127; Barberis, Julio A., "Nouvelles Questions concernant la Personnalité Juridique Internationale", Recueil des Cours de l'Académie de Droit International de La Haye, vol. 179, 1983-I, pg. 145 et seq.

[13] ICJ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, 11th April 1949, available in ICJ Reports, pg.178

1.2 AUTONOMOUS LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

Before focusing on the problems arising from a possible extension of the rules on State responsibility[14], an analysis of the main features of personified IOs appears necessary. As an obligatory premise to our topic, it is widely accepted in the international community that the legal personality of an organization is founded on the implicit or explicit will of its member States. It has also been widely affirmed the subjective constitutive element is not sufficient by itself to found the legal personality of an IO, as it appears essential the presence of an effective autonomy and independence of the organization from its member States. [15]

The necessity of an effective autonomy has caused a series of problems especially in the case of IOs, originally and effectively

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[14] See Chapter 2.2 on the Rules On The Responsibility Of States And Of International Organizations

[15] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", International Organizations Law Review, vol. 4, afl. 1, 2007; Schermers, Henry G.,and Blokker, Niels M., "International Institutional Law: Unity Within Diversity", Martinus Nijhoff (ed.), 4th rev. ed., 2003, pg. 1566; Klabbers, Jan, "Introduction to International Institutional Law", Cambridge University Press, Cambridge, 2002, pp. 55-56; Brownlie, I., "Principles of Public International Law", 6th ed., Oxford University Press, Oxford, 2003, pg. 649; Verheoven, Joe, "Las Reconnaissance Internationale dans la Pratique Contemporaine", Pedone (ed.), Paris, 1975, pg. 214

independent, losing the latter only in a second moment. As for States, these organizations, for a part of doctrine, once endowed with legal personality cannot be deprived of it. Nevertheless, failing the autonomy requisite, State members exercising overwhelming control cannot shield behind such personality avoiding the responsibility deriving from the unlawful acts that, if committed directly by them, would have constituted a violation of international law[16].

The question whether IOs are endowed with international legal personality, autonomous and distinct from that of their member States, has its origin and its first solution in a leading case of the International Court of Justice[17]. The Court, in an Advisory Opinion of 1949 dealt with the issue of the Reparation for the Injuries suffered in the Service of the United Nations [hereinafter *Reparation case*].

In particular the controversy regarded the existence of the right of the UN to bring a claim for the murder of Count Bernadotte, a Swedish diplomat and noble. The Count had been appointed in 1948 as UN Mediator for Palestine by the UN General Assembly and sent for this purpose to Israel. His proposals, including the creation of a

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[16] See Chapter 4.2.2 on the Responsibility Of Both Member States And Third States For The Exercise Of Direction And Control Over The Commission Of An International Wrongful Act By An International Organization

[17] ICJ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, 11th April 1949, supra note 13, at pg.175

Union between Palestinians and Israeli and the demilitarization of Jerusalem, started to be seen as a threat among the far-right Zionist extremist groups. One of them, LEHI (Freedom Fighters for Israel), decided to assassinate Bernadotte, finally achieving their objective through a terrorist attack to its convoy on the 17th of September[18].

The question submitted to the World Court by the United Nations General Assembly [hereinafter UNGA] was whether the IO had the capacity to bring an international claim against a non-member State, enabling in this way the Secretary-General to obtain reparation for the injuries suffered by the agents of the same organization, or if such capacity had to be considered to be exclusive of the National State, in this particular case of Sweden.

The Court had preliminarily to deal with the issue of the international legal personality of the United Nations [hereinafter UN], being this last the necessary assumption for the eventual accordance of functional immunity to the same organization. In other words the international legal personality of an international organization appears to be the *conditio sine qua non* in order to be able to bring a claim against both member than non member States.

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[18] Katsineris, Steven, "The Murder of Count Bernadotte and The Killing of Peace in Palestine", 3rd February 2008; Statement by General Aage Lundstrom, Chief of Staff, United Nations Truce Supervision and Personal Representative of Count Bernadotte in Palestine, 17th September 1948

It has to be noted that no reference to it had been made in the constitutive act of the organization. The proposal made in this sense by the Belgian delegation[19] was in fact retained. The Court considered the international legal personality of the organization to be a consequent and logical attribution deriving from the same functions and rights conferred by the member States to the UN through the means of its' constituent instrument[20]. In particular the Court affirmed that "*to achieve these ends the attribution of international personality [wa]s indispensable*[21]". It is therefore nowadays undeniable that IOs constitute international legal persons when it appears to be the intention of its founding member States[22]. Moreover, in conformity with the reasoning of the ICJ, if the capacity to operate on an international level is to be considered one of the main features of IOs, the attribution of international legal personality to them results as necessary. The main effect of the recognition of

[19] Statement of Mr. Kaeckenbeeck, Representative of Belgium, in the Oral Proceedings relating to the ICJ Reparation Case, pleadings, Oral statements, ICJ Reports 1949, pg.96

[20] Gautier, Philippe, "The Reparation for Injuries Case Revisited: The Personality of the European Union", supra note 3, p. 333, at pg.349

[21] ICJ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, 11th April 1949, supra note 13, at pg.13

[22]Brownlie, I., "Principles of Public International Law", supra note 15, at pg.649

such personality consists in the distinction from that of the single member States[23].

This approach was maintained by the European Court of Justice [hereinafter ECJ] in the famous case 22/70 *Commission v. Council*[24] [hereinafter *ERTA case*], having at issue whether the European Community [hereinafter EC] "*was empowered to conclude a treaty with Switzerland on road transportation, or whether the power to conclude such agreements still rested, in whole or in part, with the member States*.[25]" The Court preliminary dealt with the issue of the international personality of the EC in order to legitimate its treaty-making power in the fields of transportation.

In the view of a number of authors, since IOs are created by other subjects of international law, i.e. States, it is necessary to examine the constitutive instruments in order to verify the member States' effective will to create an organization endowed with a separate legal personality. Other authors, instead, do not consider the international convention to be a crucial test for the assessment of

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[23] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", Bruylant (ed.), Edition de l'Université de Bruxelles, 1998, pp. 430-431

[24] ECJ, Commission of the European Communities v Council of the European Communities, Case 22/70, 31st of March 1971, available in Reports of Cases before the Court, 1971, S. 263.

[25] Klabbers, Jan, "The Concept of Legal Personality", supra note 9, at pg. 14

the international personality of the organization. In fact, in their opinion this last should be based on the existence of a series of criteria "*met when international organs…may assume obligations on their own*"[26].

The constitutive instrument may tantamount to an objective test. The ICJ, always in the *Reparation case*, acknowledged the international legal personality of the UN not only, as previously stated, on the existence of powers and capacities of the IO, but even on a series of relevant factors included in the UN Charter[27]. For the sake of argument, the Court deduced such personality from the "*existence of organs and tasks; obligation for members to give assistance to the organization in action undertaken by it and to respect decisions taken*…[28]".

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[26] Gautier, Philippe, "The Reparation for Injuries Case Revisited: The Personality of the European Union", supra note 3, at pg. 335 ; see as well Seyersted, Finn, "International Personality of Intergovernmental Organizations – Its Scope and its validity Vis-À-Vis Non-Members. Does the Capacity Really Depend upon the Constitution?", I.J.I.L., 1964, p.1 at pg. 53

[27] United Nations Charter, signed on 26th June 1945, in San Francisco, into force on 24th October 1945

[28] Gautier, Philippe, "The Reparation for Injuries Case Revisited: The Personality of the European Union", supra note 3, at pg. 339

Although only few constitutive treaties recognize expressly the international legal personality of the organization[29], it is necessary to look at their content in order to assess whether such personality can or cannot be inferred from the rights and obligations conferred to the organization. This prospective is moreover confirmed by the response motivation of the non-insertion of a provision in the UN' Charter explicitly providing such organization with international legal personality. Clear are the words of the Subcommittee IV/2/A on the juridical status of the organization: "*as regards the question of international juridical personality, the Subcommittee has considered it superfluous to make this the subject of a test. In effect, it will be determined implicitly from the provisions of the Charter taken as a whole*[30]". In conclusion, the mere insertion of a declaratory provision of such international personality is not sufficient *per se* to fund it[31].

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[29] Agreement concerning the establishment of an European Central Inland Transport Organisation, 27th September 1945, section 13, available in UNTS, vol. 5, no. 35; United Nations Convention on the Law of the Sea, opened for signature at Montego Bay, Jamaica, on the 10th December 1982 and entered into force on the 14th November 1994 of 10th December 1982, article 176

[30] XIII Documents of the UNCIO, San Francisco, 1945, pg. 817, quoted in: "Digest of Internationl Law", Whiteman M., 13, 1968, pg. 12

[31] Hahn, H., "Euratom : the Conception of an International Personality", Harvard Law Review, 6, 1956-7, 1001 et seq; Dupuy, Renè-Jean, " le Droit de Relations entre les Organisations Internationales" , Recueil des Cours de l'Academie de Droit International, 1960-II, pp. 457-589

Furthermore the same absence of a clear intention to endow the organization with international legal personality is not by itself an obstacle if such entity effectively exercises functions on an international level. Illustrative of such assertion is the case of the Organization for Security and Cooperation in Europe [hereinafter OCSE], whose international legal personality is commonly accepted, which constitutes a regional arrangement under Chapter VII of the UN Charter[32], even if it was set up through a political instrument, and that has been given the status of observer in the UNGA[33].

1.3 INTERNATIONAL LEGAL PERSONALITY OF THE EUROPEAN UNION

Interesting is the case of the European Union, which has been, before the Lisbon Treaty, in the centre of a vast debate concerning its existence as a legal entity. In fact, differently from the Treaty establishing the EC[34] [hereinafter TEC], in the Treaty establishing the

[32] UNGA Resolution A/Res/47/10 of 28th October 1992, on the Cooperation between the United Nations and the Conference on Security and Cooperation in Europe

[33] UN Resolution A/Res/48/5 of the 13th October 1993 granting the OCSE the Status of Observer in the United Nations

[34] Treaty establishing the European Economic Community (EEC), signed in Rome on 25 March 1957 and entered into force on 1 January 1958, article 210: "*the Community shall have legal personality*"

European Union [hereinafter TEU] a specific provision assessing the international legal personality of the Union is not retrievable.

The question of the Union's legal personality was raised especially in connection with international relations and the power of the Union "*to conclude treaties or accede to agreements or conventions*[35]". In fact, differently from the EC, permeated with the power to conclude and negotiate agreements, the Union did not have such institutionalised treaty-making powers. The same treaty, on the other side, strengthened the confusion on the personality of the Union providing a form of treaty-making power through the introduction of former articles 24 and 38 TEU, allowing the negotiation, by the Presidency, and the conclusion, by the Council, of agreements in the fields of common foreign and security policy, title V, and police and judicial cooperation, title VI.

This was the cause of the flourishing of contrasting positions among eminent scholars on the existence of the Union's international legal personality. There was the assertion of: an implicit personality[36], a presumptive personality[37], or, on the opposite, the

[35] Europa.eu Glossary, "Legal Personality of the European Union", available at http://europa.eu/scadplus/glossary/union_legal_personality_en.htm

[36] Maganza, G., "Refléxions sur le Traité d'Amsterdam; contexte général et quelques aspects particuliers", Annuaire Français de Droit International, vol. 43,

absence of any form of international personality, both internal and external[38].

In the determination of whether the EU was a legal entity even before the entry into force of the Lisbon Treaty, a confrontation with the content of the *Reparation case* appears useful. Firstly it has to be noted that in both cases the charters of the two organizations did not contain an express provision affirming such personality. Furthermore in the negotiation of both treaties the insertion of such provision was proposed and in both cases denied. In fact such view was prevailed in Maastricht by the position of those, especially France and United Kingdom, who feared that the attribution to the Union of legal personality would either compromise the member States' sovereignty in foreign relations or "*impinge on the legal personality of the Community.*[39]" From this last fact part of doctrine has deduced "*the*

1997, pg. 657 et seq.; Des Nerviens, P., "Les Relations Extérieures", Revue Trimestrielle de Droit Europeen (Fr), 33, 1997, pg. 807 et seq.

[37] Klabbers, Jan, "Presumptive personality: the European Union in International Law", M. Koskenniemi (ed.), in "International Law Aspects of the European Union", Nijhoff publishers, 1998

[38] Vignes, D., "L'Absence de Personalitè Juridique de l'Union Européenne : Amsterdam Persiste et Signe", Liber Amicorum (ed.), Seidl-Hohenverdern, 1998, pg. 187 et seq.; Pliakos, A., "La Nature Juridique de l'Union Européenne", Revue Trimestrielle de Droit Europeen (Fr), 29, 1993, pg. 211

[39] De Schoutheete, Philippe, and Andoura, Sami, "The Legal Personality of the European Union", EGMONT Royal Institute for International Relations, Studia Diplomatica vol. LX, 2007 n° 1, pg. 1; see also Cloos, J. et al., "Le Traitè de

intention of the drafters…not to accept the personality of the Union[40]".

Nevertheless recalling the *Reparation case* and following the reasoning of the ICJ, this is not sufficient *per se* to exclude the international legal personality of an intergovernmental organization; on the contrary, the absence of such provision appears the rule for most of the constitutive acts of international organizations[41].

In favour of the recognition of the international legal personality of the EU, always in conformity with the World Court's logic, was the wording of the founding Treaty, through which it appeared as "*an institution in detachment from its members, entrusted with a capacity to act on international level*[42]." In light of such scope it must be mentioned especially article 1 of the TEU (former art. A), which described the creation of the Union as a "*new stage in the process of creating an even closer union among the peoples of Europe*", and article 2 (former art. B), attributing the objectives of the Union "*to*

Maastricht", Bruylant (ed.), 2nd Ed., Bruxelles, 1994, pg. 165 ; Constantinesco, V. et al., "Traitè sur l'Union Européenne", Economica (ed.), Paris, 1995, pg. 89

[40] Gautier, Philippe, "The Reparation for Injuries Case Revisited: The Personality of the European Union", supra note 3, at pg. 348

[41] Vignes, D., "L'Absence de Personalitè Juridique de l'Union Européenne : Amsterdam Persiste et Signe", Liber Amicorum (ed.), Seidl-Hohenverdern, 1998

[42] Gautier, Philippe, "The Reparation for Injuries Case Revisited: The Personality of the European Union", supra note 3, at pg. 350

assert its identity on the international scene, in particular through the implementation of a common foreign and security policy[43]", which appeared to have as a logical basis the recognition of the Union as an international legal entity.

Before arriving to the Lisbon Treaty, reference must be made to the conclusion of the working group on legal personality, created in the context of the 2002 European Convention in Bruxelles. In the final report of the group, headed by Giuliano Amato, was assessed "*that there was a very broad consensus (with one member against) that the Union should in future have its own explicit legal personality. It should be a single legal personality and should replace the existing personalities*[44]".

This future has now become the present with the 2007 Lisbon Treaty[45], expressly providing, in article 46 A, that "*[T]he Union shall have legal personality*". The Conference of the Representatives of the Governments of the member States, provided in any case to specify in one of the declarations annexed to the Final Act that "*the fact that*

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[43] Treaty of Maastricht, or treaty of the European Union (TEU), signed on the 7th February 1992 and entered into force on the 1st November 1993

[44] Final Report of European Union Working Group on Legal Personality, Document CONV 205/02, 1st October 2002

[45] Treaty of Lisbon amending the Treaty on European Union and the TEC, signed at Lisbon on the 13th December 2007, entered into force the 1st December 2009

the European Union has a legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.[46]" With the Lisbon Treaty the pillar structure is abolished and the EC is merged by the EU[47], as results from article 1(3) of the Reform Treaty TEU: "*the Union shall be founded on the present Treaty and on the Treaty on the functioning of the European Union. Those two treaties shall have the same legal value. The Union shall replace and succeed the EC*[48]".

In this way the condition imposed by the British Government in order to support the granting of legal personality to the Union were accomplished: "*the Government would only accept it on the basis that the distinct arrangements for the Common Foreign and Security Policy and aspects of Justice and Home Affairs were fully*

[46] Declaration n° 24 concerning the Legal Personality of the European Union, adopted by the Conference of the Representatives of the Governments of the Member States of the European Union, annexed to the Lisbon Final Act, Official Journal of the European Union, C 306/231, 17th December 2007

[47] House of Lords Research Paper 07/80, "the EU Reform Treaty: Amendments to the Treaty on European Union", House of Commons Library, 22nd November 2007

[48] Treaty establishing the European Union, consolidated Version, 30th March 2010

safeguarded, along with the existing arrangements for representation in international bodies[49]".

It is "*only the European Union which may bear the responsibility for an internationally wrongful act*[50]", especially with regard to the treaty obligations assumed by the former EC. On the field of responsibility a brief mention must be made to article 340 (2), former article 288 (2) TEC, under which the "*Union bears non-contractual liability for damage caused by its institutions or by its servants in the performance of their duties*[51]".

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[49] UK Europe Minister Denis MacShane declaration in: Government White paper, A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference Cm 5934, September 2003

[50] Hoffmeister, Frank, "Litigating against the European Union and Its Member Strates- Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", European Journal of International Law, volume 1 n°3, 2010, pg. 724

[51] Hoffmeister, Frank, "Litigating against the European Union and Its Member Strates- Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", supra note 50, at pg. 740

2 INTERNATIONAL RESPONSIBILITY AS A CONSEQUENCE OF A SEPARATE LEGAL PERSONALITY

There is no doubt that international responsibility constitutes an inherent consequence of international legal personality[52]. In the words of Jan Klabbers, professor of international law at the University of Helsinki, "*somehow international legal personality is thought to be a condition sine qua non for the possibility of acting within a given legal situation… a threshold which has to be crossed*[53]". The responsibility for any wrongful act committed by an IO endowed with international legal personality should apparently fall exclusively on the IO itself; not on its' member States. This assumption finds confirmation in the *Reparation case*. In fact, if the Court funded on such personality the right of the UN to "*bring claims for harms done to its interest"* ,the latter should also be held "*…liable for harms that*

[52] Verheoven, Joe, "La Reconnaissance Internationale dans la Pratique Contemporaine", supra note 15, at pg. 204 ; Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 430; Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1ST September 1995, Session of Lisbon, art. 1

[53] Klabbers, Jan, "The Concept of Legal Personality", supra note 9, at pg. 2

it inflicts on third parties[54]". In other words, it should be responsible for its acts.

Nevertheless, other scholars still affirm the responsibility of member States for such acts, due either to the non-acceptance of the independent legal personality of the IO or on the subordination of the legal effects of the IO's legal personality to non-member States' recognition[55]. Nowadays this position cannot however be accepted. This is the approach taken by the ILC in art. 2 of the Draft Articles on the responsibility of IOs [hereinafter IO Draft Articles], which states that IOs have their "*own international legal personality*".[56]

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[54] Alvarez, José E., working paper for the "35th Annual Conference on Responsibility of Individuals, States and Organizations International Organizations: Accountability or Responsibility?", Luncheon Address, Canadian Council of International Law, 27th October 2006

[55] Seidl-Hohenveldern, I., "Die völkerrechtliche Haftung für Handlungen Internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten", Österreichische Zeitschrift für öffentliches Recht, vol. XI, 1961, p. 497, at pp. 502-505; Stein, T., "Kosovo and the international community: the attribution of possible internationally wrongful Acts: responsibility of NATO or of its member States", in C. Tomuschat (ed.), Kosovo and the International Legal Community: A Legal Assessment, Kluwer Law International, The Hague/London/New York, 2002, p. 181, at pg. 192

[56] Seidl-Hohenveldern, I., "Die völkerrechtliche Haftung für Handlungen Internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten", supra note 55, p. 497, at pp. 502-505; Stein, T., "Kosovo and the international community: the attribution of possible internationally wrongful Acts: responsibility of NATO or of its member States", supra note 55, p. 181, at p. 192.

2.1 THE CASE OF A MERE ASSOCIATION OF STATES

It is widely accepted that in absence of such personality, for instance in the case of a mere association of States, "…*the entities do not exist in law, and accordingly cannot perform the sort of legal acts that would be recognized by that legal system, nor even be held responsible under international law...*[57]". Special Rapporteur Giorgio Gaja, in his first report to the ILC, stated that the "…*norms of international law cannot impose on an entity…obligations unless that entity has legal personality under international law*[58]". Therefore in absence of an obligation no responsibility may arise and, moreover, such obligations inevitably should fall on the States, the only subjects of international law to be originally endowed with such personality. This appears to be the consequence of the fact that in such situations the organizations are not entrusted with tasks they fulfil through their own organs.[59]

When an IO does not distinguish itself from its' components and, as has been clearly stated by professor Amerasighe, "*where…it*

[57] Klabbers, Jan, "The Concept of Legal Personality", supra note 9, at pg. 2

[58] ILC, A/CN.4/532, First Report of Special Rapporteur Giorgio Gaja On the Responsibility of International Organizations, 2003

[59] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg.94

is obvious that in spite of this expressed attribution the organization does not have independent functioning capacity or organs…and that the attribution is a subterfuge for the creating States to avoid their direct responsibilities the attribution may legitimately be ignored by third States[60]". Nevertheless the assessment of whether an organization must be considered a mere association of States or an entity endowed with autonomous legal personality is a very complicated task.

The Westland affair[61] represents an excellent example of such difficulties, which rose from the interpretation given by the International Court of Arbitration [hereinafter ICC] of the statute of the Arab Organization for Industrialisation [hereinafter AOI]. In particular, the articles referring directly to the four member States were revealing of the absence of an intention by the member States to disappear behind the AOI, considering on the opposite their aim "*de parteciper à AOI en qualité de 'membres responsables*[62]".

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[60] Amerasinghe, C.F., "Principles of the Institutional Law of International Organizations", Cambridge University Press, Cambridge, 1996, pg.85

[61] Cour d'Arbitrage International, Westland Helicopters Limited v. Arab Organization for Industrialization, sentence prèjudicielle n° 38/79, 25 mars 1984, J.D.I., 1985, pg. 240

[62] Cour d'Arbitrage International, Westland Helicopters Limited v. Arab Organization for Industrialization, supra note 61, at pg. 240

In reality, as Dominicé has brilliantly noted[63], the ICC should have based its decision on two particular features of the AOI. Firstly, the admission of other members was subordinated to the agreement between the four original member States. It was not, therefore, taken by an organ of the organization itself. Furthermore, the High Committee, instituted by the Treaty, functioned more as a common organ to the four member States than, once more, as an organ of the AOI itself.

It is a fact that such formulas are present in approximately all constitutive instruments of IOs, even in the United Nation Charter especially in reference to articles 3 and 56. Therefore this should not be considered a valid argument[64]. In the past years authors have departed from such a rigid interpretation of IO's responsibility, doubting and hypothesizing member States' accountability based on the amount of control exercised in the IO's decision-making process[65]. I will deal it below in the text.

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[63] Dominicé Christian, "Le Tribunal Fédéral face à la Personnalité Juridique d'une Organisme International", Revue de Droit Suisse, 1989, pp. 527-9

[64] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 433

[65] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 92;

2. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS AND MEMBER STATES FOR WRONGFUL ACTS OF INTERNATIONAL ORGANIZATIONS

SECTION I

1 CONCURRENT AND EXCLUSIVE RESPONSIBILITY

Baring in mind the general aim to grant the implementation of the obligation of IOs, different hypotheses have been made with the intent of extending such responsibility to the member States. Doctrine is divided between those who affirm the existence of a subsidiary responsibility, "*une responsabilité qui permet aux tiers qui ont une réclamation juridique à l'égard d'une organisation internationale d'intenter une action contre les Etats membres en cas*

de défaillance de l'organisation et seulement dans ce cas[66]", or a concurrent one, " *qui permet aux tiers qui ont une réclamation juridique à l'égard d'une organisation internationale d'agir, ò leur gré, soit contre l'organisation, soit contre le membre*[67]".

Classically it has been affirmed the exclusive responsibility of IOs endowed with international legal personality for an international wrongful act. Member States cannot, from this point of view, be held liable even if the unlawful act would have constituted an infringement of their obligation if directly committed by them.

On the other side the idea of a concurrent responsibility of member States, even though presently seen as an exception, is not in any case implausible. Examples of this are the 1967 Treaty on principles governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies and the 1972 Convention on International Liability for Damage caused by Spaces Objects[68]. The same principle can even be found in a series of

[66] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, art. 2 b

[67] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, art. 2 b

[68] Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, opened to signature the 27th of January 1967 and entered into force the 10th of October 1967, UNGA

"*accords mixtes*"[69], open to the joint participation of the IOs and of the member States, such as the case of the EC and in several international instruments founding responsibility regimes outside the case of the commission of a wrongful act[70].

Two important arbitral awards, *Westland Helicopters Limited v. Arab Organization for Industrialization* and *International Tin Council arbitration*, which focused on such topic, are a manifestation of the absence of any clear and net jurisprudential position in favour of a concurrent member State responsibility or an exclusive responsibility either of the organization or of the member States[71].

The choice[72] expressed both by the ILC and the Institut de Droit International [hereinafter IDI] in favour of the principle of the

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resolution 2222/66, art. XXII.3; Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly the 13th of February 1946, artt. XI-XII

[69] See Chapter 3.2.1 on the Mixed Agreements Of The European Union

[70] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, p. 427, at pp. 452-456

[71] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 92 ; Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pp. 430-438 ; Cour d'Arbitrage International, Westland Helicopters Limited v. Arab Organization for Industrialization, supra note 61, at pg. 240

[72] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 95

exclusion of the responsibility of member States for the wrongful acts committed by an IO, confirmed by main stream doctrine[73], has a political character, as will be later clarified[74]. There are as well situations, despite the prevalent position, in which member States are held responsible for acts formally committed by IOs[75].

It is therefore a matter of fact that till now a general principle of international law regarding such a subsidiary responsibility never has emerged. Recalling the words of Lord Kerr: "*In sum, I cannot find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable — let alone jointly and severally — in any national court to the creditors of the ITC for the debts of the ITC*

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[73] Wellens, K., "Remedies against International Organizations", Cambridge University Press, Cambridge, 2002, pg. 45-50; Cahier, P., "The Strengths and Weaknesses of International Arbitration Involving a State as a Party", in J.D.M. Law (ed.), Contemporary Problems of International Arbitration, 1986, pg. 244

[74] See Chapter on the Principle Of The Exclusion Of State Responsibility For Acts Formally Attributed To The IO and Chapter 2.1.4.3 on the Policy Reasons; see also ILC Report, A/61/10, Fifty-eighth Session, 1 May-9 June and 3 July-11 August 2006, pg. 287; ILC, A/CN.4/564/add.2, Second Addendum to the Fourth Report Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, 2006; Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, art. 5

[75] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 96

resulting from contracts concluded by the ITC in its own name[76]". There are cases, nevertheless, in which such subsidiary responsibility of the member States exists, but only as a consequence of the existence of a specific legal norm[77].

1.1 CONTROVERSIAL LEGAL PRACTICE

For the investigation over the possible existence of a responsibility of the member States for an internationally wrongful act formally attributed to the IO to which they are members, the work of Giorgio Gaja for the ILC is central. In particular in the second addendum to the fourth report to the ILC he analyzed two important cases[78]: *the Westland Helicopters Ltd. v. the Arab Organization for Industrialization and the Four States Members of that Organization* and two cases treated jointly in front of the Court of Appeals of England on the *Responsibility of Member States originated in the*

[76] Judgment of 27th April 1988, Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, in International Law Reports,vol. 80, pg. 109

[77] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23; Waelbroeck, Michel, "Observations sur le Rapport Préliminaire de R. Higgins à l'IDI", A.I.D.I., VOL. 66-I, 1995, pg. 382

[78] ILC, A/CN.4/564/add.2, supra note 74

Failure of the International Tin Council [hereinafter ITC] to Fulfil its Obligations under Several Contracts.

1.1.1 THE WESTLAND HELICOPTER CASE

Object of the *Westland Helicopters Ltd. v. the Arab Organization for Industrialization and the four States members of that organization* (Egypt, Qatar, Saudi Arabia and the United Arab Emirates) [hereinafter *Westland Helicopter case*] was the request based on an arbitration clause in a contract that had been concluded between the company and the AOI. The Court faced two main issues: the competence of the tribunal in relation to the case and the liability of the four member States for the acts of the organization.

In its reasoning the Arbitral Tribunal did not apply a well known theory, originated in Roman times: "*Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent*[79]". This last excludes the cumulative liability of a legal person, an IO and of the individuals which constitute it. This motive was based on the assertion that "*the designation of an organization as 'legal person' and the attribution of an independent existence do not provide any*

[79] Digest 3, 4, 7, 1

basis for a conclusion as to whether or not those who compose it are bound by obligations undertaken by it [80]". The Court submitted that, based on the general principles of law and on the principle of good faith, "*in default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability*[81]". Moreover, the Court assessed that the four States did not want to vanish behind the organization, *au contraire*, there was a clear identification of the States with the AOI, as results from the composition of its High Committee. This last, which not only approved the Basic Statute, but even set up the provisional directorate and directed its' general policy with "*dominating authority*[82]", was composed by the competent Ministers of the Four member States and from article 56 of the Statute, which disposes that "*in case of disagreement within the Committee, reference should be made to the Kings, Princes and Presidents of the States*[83]".

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[80] International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, Case 3879/AS, 5th March 1984, quoted from the English translation published in International Law Reports, vol. 80 at pg. 612

[81] International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, supra note 80, at pg. 613

[82] Basic Statute of the Arab Organization for Industrialization, approved and promulgated the 17th August 1975, Article 23

[83] International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, supra note 80, at pg. 614-15

The Court then affirmed that the member States were actually bound by the arbitration clause concluded by the AOI, as much as they were bound by the obligations contracted by the organization, "*since the obligations under substantive law cannot be dissociated from those which exist on the procedural level*[84]". The Court based such considerations even on the concept of equity assessed in a famous case in front of the ICJ: "*[E]quity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment* [85]."

The Court of Justice of Geneva set aside the arbitral award by request and in relation only to Egypt; firstly as it found the arbitral tribunal incompetent[86]. Moreover the Court dissented from "*the conclusion of the Arbitral Tribunal that the AOI [was] in some way a general partnership (société en nom collectif) which the four States did not intend to hide behind but agreed to take part in as 'members*

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[84] International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, supra note 80, at pg. 615

[85] ICJ Contentious Case concerning the Barcelona Traction, Light And Power Company, Limited (Belgium v. Spain), 5th February 1970, quoted from International Law Reports of E. Lauterpacht,C. J. Greenwood, pg. 616; International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, supra note 80, at pg. 616

[86] Court of Justice of Geneva, Case concerning the Award in Westland Helicopters V AOI arbitration, 19th July 1988, available in Revue de l'Arbitrage, vol. 18 (1989), p. 515

with liability' (membres responsables)…[87]", without giving legal grounds on why it considered the "*AOI a legal entity under international law and then assimilating it to a corporation under private law, recognized by national legislations and subject to the rules of these legislations*[88]".

The Federal Supreme Court of Switzerland, subsequently to the unsuccessful Westland Helicopters' appeal, confirmed that the clause did not bind Egypt. In fact, nor the predominant role of the member States, nor the fact that the supreme authority of the AOI was composed of ministers, actually undermined the independence and personality of the Organization. Moreover, according to the Supreme Court, nothing could have lead to the conclusion that when organs of the AOI dealt with third parties they consequently even bounded the founding member States[89].

Lastly there was a new arbitration panel which considered the issue of the liability of AOI and of the three member States which had not challenged the interim award. In this judgment the Court stressed

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[87] International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, supra note 80, at pg. 643

[88] International Chamber of Commerce Court Arbitration, Westland Helicopters V AOI, supra note 80, at pg. 643

[89] Court of Justice of Geneva, Case concerning the Award in Westland Helicopters V AOI arbitration, supra note 86, at pg. 658

out that the member State's responsibility could be "*assessed only on the basis of the acts constituting the joint organization when construed also in accordance with the behaviour of the founder States*"[90]. The Court found that the member States did not have nor manifest the intention to exclude their liability and the legitimate expectation of the third contracting parties. In any case the final award was given only against the AOI, but its' text hasn't yet been published[91].

1.1.2 THE CASES OF MEMBER STATES' RESPONSIBILITY DERIVING FROM THE FAILURE OF THE ITC

Different were the cases treated by the English High Court relatively to the responsibility of the member States originated in the failure of the International Tin Council. In relation to our first case*, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, in which the plaintiffs sued the United Kingdom Department of Trade and Industry, 22 foreign States and the

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[90] Paragraph 56 of the Award of 21st July 1991, as quoted by Higgins, R., "The Legal Consequences for Member States of Non-fulfilment by International Organizations of their Obligations towards Third Parties: Provisional Report", Annuaire de l'IDI, vol. 66-I, 1995, pg. 373,

[91] Federal Supreme Court of Switzerland, Westland Helicopters V AOI, Final Award, 28th of June 1993

European Economic Community, central results the reasoning of judge Staughton.

The honourable judge, in light of international law principles, assessed the existence of a general principle of international law by which the international legal personality of an IO was not *per se* inconsistent with the liability of its member States. This was due to the fact that "*both in the domestic law of some countries and in public international law, the fact that an association is a legal person is not inconsistent with its members being liable to creditors for its obligations*[92]". Furthermore judge Staughton ascertained the absence of a principle affirming the liability of member States for IO's obligations vis-à-vis third parties[93].

In reference to national English law he noted the absence, once more, of a principle disposing the non liability of the member States. Judge Millett, in the *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry case*, shared the same approach[94].

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[92] High Court of England, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, judgment of the 24th June 1987, International Law Reports, vol. 77, p. 55, at pg.76

[93] High Court of England, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, supra note 92, at pp.79-80

[94] High Court of England, Maclaine Watson & Co. Ltd. v. Department of Trade and Industry Case, Judgment of the 29th July 1987, available in International Law Reports, vol. 80, p. 39, at p. 47

The two cases were decided jointly by the Court of Appeal. Lord Kerr, who had one of the majority opinions, affirmed the absence both of a clear position in international law and of a settled jurisprudence on the liability of the member States. On the regard only the personal opinions of a part of doctrine could be retrieved. Therefore, he assessed the impossibility to conclude in favour of the existence of "*any rule of international law, binding upon the member States of the ITC, whereby they can be held liable…for the debts of the ITC resulting from contracts concluded by the ITC in its own name*[95]". The judge affirmed the absence even in municipal law of norms under which the assumption of obligations by the member States could be made.

In Lord Ralph Gibson's opinion, going further on, the liability of the member States was excluded as well. Such exclusion was a consequence of the separate legal personality of the IO, which had only one exception: when secondary liability of the latter can be assumed from the constitutive document of the entity and from the deficiency of any State practice in the direction of an

[95] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, supra note 95, at pg. 110

acknowledgment of the direct liability of any State, due to the absence of an exclusion clause[96].

More interesting and innovative appears to be the dissenting opinion of Lord Nourse, which gave decisive importance to the attitude taken by the member States, in other words their clear intention to be held liable for ITA6's obligations[97]. The judge contrasted the opinion of the other colleagues, sustaining the irrelevance of ITC's separate legal personality in regards of the joint member States' liability for the debts in England. On the relevance of the conduct of a member State suitable to make a third State rely on its liability we will return, in this same chapter, later on[98].

Nevertheless the House of Lords confirmed the majority opinions of the Court of Appeal, relatively firstly to the lack of evidence on the existence of the alleged rule of international law imposing on "*States members of an IO, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the IO clearly disclaims any liability on the*

[96] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, supra note 95, pp. 172-174

[97] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, supra note 95, pp. 141-147

[98] See Chapter 2.1.4.2 on the Conduct of the Member State

part of the members[99]". The Court, through the recalled words of Lord Templeman, as well affirmed that even if this international rule existed it could nevertheless be enforced only under ternational law[100].

A few months later, the view that member States could not be held responsible, because of their part in the internal decision-making process of the organization, was maintained by Advocate-General Darmon in his opinion in the case *Maclaine Watson & Co. Ltd v. Council and Commission of the European Communities*[101].

1.2 THE OPINION OF STATES

[99] House of lords, Australia & New Zealand Banking Group Ltd and Others v. Commonwealth of Australia and 23 Others; Amalgamated Metal Trading Ltd and Others v. Department of Trade and Industry and Others; Maclaine Watson & Co. Ltd v. Department of Trade and Industry; Maclaine Watson & Co. Ltd v. International Tin Council, Judgment of 26 October 1989, opinion of lord Templeman, available in International Legal Materials, vol. 29 (1980), p. 671, at p. 674

[100] Judgment of the English House of Lords, Maclaine Watson & Co. Ltd v. International Tin Council, in International Legal Materials, vol. 29 (1980), pg.675

[101] ECJ, Maclaine Watson & Co. Ltd v. Council and Commission of the European Communities, Case C-241/87, Opinion of Advocate General, available in ECJ Reports, 1990-I, p. 1797, at p. 1822 (para. 144)

The special rapporteur as well analyzed the Canadian Government's claims in relation to the injuries caused by the crash of a Canadian helicopter, in 1989, while it was operating in Sinai for an organization established by Egypt and Israel, the Multilateral Forces and Observers. In such occasion, the argument of the liability of the member States of an IO was incidentally touched, giving some support to the claim against the two member States rather than on the organization. [102]

Gaja reported as well the opinions of various States on the question of the responsibility of member States in connection with the current study of the Commission. In particular the German Government "*advocated the principle of separate responsibility before the European Commission of Human Rights (M. & Co.), the European Court of Human Rights (Senator Lines) and ICJ (Legality of Use of Force) and [had] rejected responsibility by reason of membership for measures taken by the EC, NATO and the UN*[103]". Other delegations

[102] ILC Report, A/CN.4/545, Responsibility of International Organizations, Comments and Observations received from International Organizations, Geneva 3rd May-4th June and 5th July-6th August 2004, pp. 29-31 and Annex; Exchange of Letters between the Director-General of MFO and the Ambassador of the United States to Italy, relating to a claim arising form the crash of an aircraft, 3rd May 1990; Exchange of Letters between Canada and MFO, dated 4th and 9th November 1999

[103] ILC Report, A/CN.4/556, Responsibility of International Organizations, Comments and Observations received from Governments and International

expressed on the point a different position sustaining that, even though in principle member States are not responsible, they can incur responsibility in "*certain exceptional circumstances*[104]", as in the cases of "*negligent supervision of organizations*[105]" or "*particularly with regard to IOs with limited resources and a small membership, where each member State had a high level of control over the organization's activity*[106]".

Concluding, the special rapporteur reported the position of the International Criminal Police Organization (Interpol) on the responsibility of a State for internationally wrongful acts of an IO, affirming that it may exist only if prescribed by the constituent instrument or other rule of the IO, as *lex specialis*, of which it is a member[107].

1.3 FRACTURE IN THE DOCTRINE

Organizations, Geneva 2nd- May 3rd June and 4th July-5th August, Statement of Germany, pg. 65

[104] Statement of Italy, A/C.6/60/SR.12, para. 13

[105] ILC Report, A/C.6/60/SR.11, Discussion of the 6th Committee, 24th October 2005, Statement of Austria, para. 54; see Chapter 4.3 on the Défaut de Vigilance

[106] Statement of Belarus, A/C.6/60/SR.12, para. 52

[107] INTERPOL Letter of January 2006, not yet published

As already anticipated, scholars have held different opinions on the point. Along with those who *tout court* do not recognize international organizations as endowed with international legal personality, therefore assessing the exclusive responsibility of the member States[108], other opinions are present and need to be enlightened.

A first category comprises those who consider the member States responsible when the organization fails to comply with its obligation to make reparation for an internationally wrongful act[109].

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[108] Seidl-Hohenveldern, I., "Die völkerrechtliche Haftung für Handlungen Internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten", supra note 55, p. 497, at pp. 502-505; Stein, T., "Kosovo and the international community: the attribution of possible internationally wrongful Acts: responsibility of NATO or of its member States", supra note 55, p. 181, at pg. 192

[109] Adam, H.-T., "Les Organismes Internationaux Spécialisés", Librairie Générale de Droit et de Jurisprudence, Paris, 1965, pg. 130; Ginther, K., " Die Völkerrechtliche Verantwortlichkeit Internationaler Organisationen Gegenüber Drittstaaten", Springer-Verlag (ed.), Vienna/New York, 1969, pp. 177-179 and 184; Hoffmann, G., "Der Durchgriff auf die Mitgliedstaaten Internationaler Organisationen für deren Schulden", Neue Juristiche Wochenschrift, vol. 41, 1988, p. 585, at pg. 586; Pitschas, C., "Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten", Dunckler & Humblot (eds.), Berlin, 2001, pp. 92-96; Sadurska, R. and Chinkin, C.M., "The collapse of the International Tin Council: a Case of State responsibility?", Virginia Journal of International Law, vol. 30, 1990, p. 845, at pp. 887- 890; Schermers, Henry G., "Liability of International Organizations", Leiden Journal of International Law, vol. 1, 1988, p. 3 at pg. 9; Wenckstern, M., "Die Haftung der Mitgliedstaaten für internationale Organisationen", Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 61, 1997, p. 93, at pp. 108-109; Brownlie, I., "Principles of Public International Law", supra note 13

In opposition to such opinion other authors affirm that member States do not incur in any subsidiary responsibility, given the separate legal personality of the organization[110].

The latter opinion, assessing the absence of a general principle imposing a subsidiary responsibility on the member States of an organization due only to their membership, finds support also in article 6 (a) of the 1995 Resolution of the IDI[111]. According to such article,

> "*save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an IO of which they are members*."

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[110] Hartwig, Matthias, " Die Haftug der Mitgliedstaaten für Internationale Organisationen", Springer (ed.), Berlin/Heidelberg, 1993, pp. 290-296; Pellet, A. "L'Imputabilité d'Eventuels Actes Illicites - Responsabilité de l'OTAN ou des États Membres?", in Ch. Tomuschat (ed.), Kosovo and the International Community - A Legal Assesment, Kluwer, The Hague, 2002, p. 193, at pp. 198 and 201; Pernice, I., "Die Haftung internationaler Organisationen und ihrer Mitarbeiter — dargestellt am 'Fall' des internationalen Zinnrates", Archiv des Völkerrechts, vol. 26, 1988, p. 406, at pp. 419-420; Ritter, J.-P. "La Protection Diplomatique à l'égard d'une Organisation Internationale", Annuaire Français de Droit international, vol. 8, 1962, p. 427, at pp. 444-445.

[111] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52

It is as well convenient to recall the full text of Article 5 in order to give the necessary elements for the full understanding of its scope of application:

> *"(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.*
>
> *(b) In particular circumstances, members of an IO may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights.*
>
> *(c) In addition, a member State may incur liability to a third party (i) through undertakings by the State, or (ii) if the IO has acted as the agent of the State, in law or in fact."*

1.4 HYPOTHESIZED EXCEPTIONS OF A SUBSIDIARY RESPONSIBILITY

Even if the exclusion of the responsibility of the member States for internationally wrongful acts of IOs is seen from the majority of

scholars as the imperative, there are, nevertheless, two exceptional cases in which a subsidiary responsibility of the member States has been hypothesized. Moreover the possibility of derogating such general rule in "*certain exceptional circumstances*[112]" is corroborated by the position taken by various States in the drafting of the articles on the responsibility of international organizations[113].

Before the analysis of the two hypothesis, it has to be noted that their application does not necessarily imply the responsibility of all the member States of the IO, ie. "*should acceptance of subsidiary responsibility have been made only by certain member States, responsibility could be held to exist only for those States*[114]".

Moreover, the determination of the responsibility results particularly controversial when it arises as a consequence of a decision taken by one of the organs of the IO. In such case "*the fact that the decision in question was taken with the votes of some member States only does not imply that only those States would incur responsibility*[115]".

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[112] Statement of Italy, A/C.6/60/SR.12, para. 13

[113] Statement of Italy, A/C.6/60/SR.12, para. 13; ILC Report, A/C.6/60/SR.11, supra note 105, para. 54; Statement of Spain, A/C.6/60/SR.113, para. 53; Statement of Belarus, A/C.6/60/SR.12, para. 52

[114] ILC, A/CN.4/564/add.2, supra note 74, para. 93 at pg. 13

[115] ILC, A/CN.4/564/add.2, supra note 74, para. 93 at pg. 13

Attention must be paid in the adoption, as a solution, of the criterion of the distinction between States that vote in favour, against the decision or that abstain from voting, due to the potential negative effects on the decision-making process of the IO. The risk to incur in responsibility could determine a precautionary abstention or negative vote of the member States, impeding in such way the reaching of consensus.

1.4.1 ACCEPTANCE OF THE RESPONSIBILITY

The first case in which the States are held to be exceptionally responsible results tautological: when they accept to be responsible. In fact, even among the authors which support the absence of a member State responsibility due to the separate legal personality of the IO, some accept that responsibility can nevertheless be present in exceptional cases, especially "*when member States accept that they could be held responsible for an internationally wrongful act of the organization*[116]". The necessity of such intention of the member State appears central in the thoughts of M. Herdegen. In his dissertation, membership by itself is not sufficient, without the presence of a clear intention of the member State, for an extension of the liabilities and

[116] ILC, A/CN.4/564/add.2, supra note 74, para. 88 at pg. 11

the sharing of the organization's obligations and rights[117]. As was brilliantly noticed by Giorgio Gaja "*acceptance generally implies only a subsidiary responsibility in the event that the organization fails to comply with its obligations towards a non-member State[118]"*.

It is important now to focus on the *moyen* through which such acceptance may, or has, to be expressed. Central for the purpose is, once more, the role given to the constitutive act of the IO. The acceptance of the responsibility can be referred to the constituent document. Clear on the point is Lord Ralph Gibson: "*Where the contract has been made by the organization as a separate legal personality, then, in my view, international law would not impose such liability upon the members, simply by reason of their membership, unless upon a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability has been assumed by the members*[119]".

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[117] Herdegen, M., "The Insolvency of International Organizations and the Legal Position of Creditors: some Observations in the Light of the International Tin Council Crisis", Netherlands International Law Review, vol. 35, 1988, p. 135 at p. 141

[118] ILC, A/CN.4/564/add.2, supra note 74, para. 91, pg. 12

[119] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, supra note 95, pg. 172

The special *rapporteur* Giorgio Gaja, moreover, has affirmed that even if acceptance can also be expressed through instruments other than the constituent act "*however… member States would incur responsibility in international law only if their acceptance of responsibility produced legal effects in their relations with the injured non-member State*[120]". In any case it has to be stressed that, being the constitutive instrument not binding in the relations between the member and non-member States, such legal effects are more likely to be produced through a provision of a treaty that conferrers rights on third States, rather than "*simply on the basis of the constituent instrument*[121]".

In order to detect such acceptance, part of doctrine makes general reference to the relevant provisions and circumstances, which should all be taken in account[122]. In relation to international companies it has been held that "*[a]ll relevant provisions and circumstances must be studied to ascertain what was intended by the*

[120] ILC, A/CN.4/564/add.2, supra note 74, para. 91, pg. 12

[121] ILC, A/CN.4/564/add.2, supra note 74, para. 91, pg. 12

[122] Seidl-Hohenveldern, I., "Liability of member States for acts or omissions of an international organization", in S. Schlemmer-Schulte and Ko-Yung Tung (eds.), Liber Amicorum Ibrahim F.I. Shihata, The Hague: Kluwer Law International, 2001, p. 727, at pg. 739

parties in this respect and the extent to which their intention was made known to third parties dealing with the enterprise[123]".

1.4.2 CONDUCT OF THE MEMBER STATE

The retrieval of the elements which fund the subsidiary responsibility of the member States in relation to their conduct results immediately to be more tortuous. Nevertheless, the two of them are headed towards a similar solution. The ILC located such situation "*when member States, by their conduct, cause a non-member State to rely, in its dealings with the organization, on the subsidiary responsibility of the member States of that organization*[124]". Also Philip Klein considers the conduct of the member States to be relevant in order to involve their guarantee towards the other contracting parties for the obligations rising on the organization[125].

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[123] Shihata, I.F.I., "Role of Law in Economic Development: the Legal Problems of International Public Ventures", Revue Égyptienne de Droit International, vol. 25, 1969, p. 119 at p. 125

[124] ILC, A/CN.4/564/add.2, supra note 74, para 92, pg 12

[125] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pp. 509-510

Attention must be paid as well to the position of Professor Amerasinghe. This eminent scholar suggested, more on political than on juridical grounds, that "*the presumption of non-liability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability, even without an express or implied intention to that effect in the constituent instrument*[126]", in this way recalling the value of the general principle of good faith.

On the reliance on the subsidiary responsibility of member States, a statement made in the arbitral award in the *Westland Helicopters case* appears relevant. The tribunal referred to the "*trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States*[127]". It is therefore necessary to detect the various factors which could be relevant in order to determine whether a non-member State had a legitimate motive to rely on the member States' subsidiary responsibility, i.e. "*international organizations with limited*

[126] Amerasinghe, C.F., "Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent", International and Comparative Law Quarterly, vol. 40 , 1991, p. 259, at p. 280

[127] Higgins, R., "The Legal Consequences for Member States of Non-fulfilment by International Organizations of their Obligations towards Third Parties: Provisional Report", supra note 90, at p. 373, at p. 393.

resources and a small membership, where each member State had a high level of control over the organization's activity", as was stated by Belarus[128]. In any case the member States' responsibility is not *per se* inferable from the mere presence of those factors.

1.4.3 POLICY REASONS

The acceptance of the general exclusion of States' responsibility for the international wrongful acts of the IOs to which they are members relies on two main policy reasons, excellently summarized by Giorgio Gaja.

Firstly, the "*relations of IOs with non-member States would be negatively affected, because they would find difficulties in acting autonomously*[129]".

The second motivation, closely connected to the first one, regards the potential consequence that subsidiary responsibility of the member States could have on their behaviour: "*if members know that they are potentially liable for contractual damages or tortuous*

[128] Statement of Belarus, A/C.6/60/SR.12, para. 52.

[129] ILC, A/CN.4/564/add.2, supra note 74, para. 94, pg 13

harm caused by the acts of an IO, they will necessarily intervene in virtually all decision-making by IOs[130]".

The two suggested exceptions, by creating a causal link between the responsibility of the member States and their conduct, also rest on policy considerations. In fact, once a member State has accepted its responsibility or has led a non-member State to rely on it, it appears just and fair that such State should face the consequences of its own conduct.

1.4.4 ARTICLE 61 OF THE DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

The ILC in the IO Draft Articles analysed a series of residual hypothesis of State responsibility in connection with acts committed within the IO. In particular, proposed article 61, titled "*Responsibility of a State member of an international organization for the internationally wrongful act of that organization*", in its last drafting of 2009[131], dealt with the two exceptions previously seen:

Article 61

[130] Higgins, R., "The Legal Consequences for Member States of Non-fulfilment by International Organizations of their Obligations towards Third Parties: Provisional Report", supra note 90, at pg. 419

[131] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

1. Without prejudice to articles 57 to 60, 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; or

(b) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

The analysis of the text, based on the Commentary, of the article, appears more than useful, since it does not have an equivalent in the draft articles of State responsibility. Firstly it has to be noted that, through the reference done in the saving clause to article 57 and 60, it is unequivocally bared in mind that the member States of an IO may in any case be held responsible in accordance with the previous draft articles. Like for the other articles, article 61 does not contain a negative rule referring to those cases in which the responsibility of the member State does not arise in connection to the act of an IO. This nevertheless does not constitute an impediment from deriving such rules *a contrario* through the interpretation of the text.

Lastly, in light of the narrow field of application of the two exceptions, "*it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended*[132]".

SECTION II

2 RULES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

The ILC has concentrated the last years, precisely from 2002, in elaborating, through a codification process, a series of Draft Articles on the Responsibility of IOs[133]. Even if probably the IO Draft Articles

[132] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

[133] ILC, A/CN.4/532, supra note 58; ILC, A/CN/4/541, Second Report of Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, 2004; ILC, A/CN.4/553, Third Report of the Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, 2005; ILC, A/CN.4/564, Fourth Report of the Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, 2006; ILC, A/CN.4/564/Add.1, First Addendum to the Fourth Report of the Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, 2006; ILC, A/CN.4/564/add.2, supra note 74; ILC Report, A/CN.4/545, supra note 102; ILC Report, A/56/10, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Fifty-third Session in 2001; ILC Report, A/62/10, Fifty-ninth Session, 7 May-5 June and 9 July-10 August 2007; ILC Report, A/61/10, Fifty-eighth Session, 1 May-9 June and 3 July-11

will not be formally adopted in a treaty, nevertheless their implementation, as for the Articles on State Responsibility [hereinafter ASR], as a soft law instrument adopted by the UNGA, will still be an important achievement for evolution and clarification of such field.

The work of the ILC has an incredibly broad ambit, as results from article 1, in its last drafting:

> "*1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.*
>
> *2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.*[134]"

It is clear that these articles apply not only to intergovernmental organizations, but to all international organizations. As already assessed in the Introduction, the term "*intergovernmental organization*", does not limit the field of

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August 2006; ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

[134] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, article 1

application of the IO Draft Articles. Furthermore this expression results to be inappropriate in a series of cases, such as the ones when State organs other than governments have established the IO, or when among the members of the organization are non-State entities[135].

Moreover, always for the sake of the application of such articles, it is irrelevant both the instrument used in establishing the IO, whether "*a treaty or other instrument governed by international law*[136]", than the presence upon the IO's members of non-State parties[137]. Furthermore, the articles intend to sanction every unlawful act independently from the form of its manifestation, both actions than omissions, as clearly stated in article 4.

In reality even the title chosen by the Commission appears to be misleading, apparently restricting the issues being treated. In fact as we will later see[138], among all of the articles, some are dedicated

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[135] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to Article 2; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations with Commentaries, 1986, supra note 2, art. 2, para. 1, letter i

[136]ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, article 1

[137] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

[138] See Chapter 4 on the Member State's Participation to an Unlawful Act Of The International Organization

to "*the responsibility of States in connection with acts that they commit within the IO's*[139]", namely articles 57 to 62[140], material that should have fallen in the ASR[141].

2.1 THE RISK OF ANALOGY

In the drafting process, nuisances have arisen in reference to the limits and, in general, the applicability of the rules of State responsibility to IOs. It is out of any doubt that, having personified IOs different features and characteristics from the ones of States, a mirror extension of the rules on the responsibility of States to IOs is implausible.

Nevertheless these differences on the other hand, do not by themselves legitimate the International Community to ignore situations of control over the IO by the member States, especially if seen from the perspective "*of the collective conduct underlying the wrongful act*"[142]. In fact, if on the one hand an extension of a number

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[139] Alvarez, J.E., "Memo: ILC's Draft Articles on the Responsibility of International Organizations", 2010, pg. 1

[140] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

[141] ILC Report, A/56/10, supra note 133

[142] D'Aspremont, Jean, "Abuse of the Legal Personality of International

of concepts related to State responsibility, such as the one of coercion, appears admissible, on the other, the creation of new exceptions to the principle of the exclusive responsibility of IOs, such as the exercise by member States of an overwhelming control over the decision-making process of the organization[143], appears necessary.

2.1.1 COMPARISON BETWEEN THE ARTICLES ON STATE RESPONSIBILITY AND THE ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

In the IO Draft Articles, few are the exceptions in which no clear counterparts to the ASR can be sought; i.e. basically articles 1-3, 16-17, 39, 51, 60-61.

Moving on to the analysis of some of the most important articles:

A: elements of an internationally wrongful act

Organizations and the Responsibility of Member States", supra note 15, at pg. 103

[143] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 103

Firstly it can be easily noticed the equivalence between article 2 of the ASR and article 4 of the IO Draft Articles, dealing with the two elements of an internationally wrongful act:

> "*There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:*
>
> *(a) Is attributable to the international organization under international law; and*
>
> *(b) Constitutes a breach of an international obligation of that international organization*".

Even article 2 of the ASR individuates both the attribution element than the breach of an obligation under international law as necessary elements for an internationally wrongful act to occur. Such breach, in reference to IOs, as splendidly summarized by the ICJ, may regard all "*obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties*[144]". In the commentary to art.4 of the IO Draft Articles, another analogy with the ASR is underlined: the irrelevance of damage as an element of IO's international responsibility.

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[144] ICJ Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 20th December 1980, para. 37

B: Attribution of conduct

Another important parallelism between the ASR and the IO Draft Articles, involving a series of articles, regards the attribution of conduct. To its discipline are dedicated, in both codifications, chapters II. The same commentary to the most recent version of the IO Draft article, in posing once more such analogousness, reminds nevertheless the difference existing between attribution of conduct and attribution of responsibility.

Moreover it is not possible to exclude, a priori a "*multiple attribution of conduct*[145]" or, in other words, the possibility for the same conduct to be attributed both to the State than to the IO or even simultaneously to two or more IOs, i.e. "*for instance when they establish a joint organ and act through that organ*[146]".

Another feature common to the two drafts is the provision only of positive criteria of attribution. On the question of attribution of the conduct of organs put under the disposal of the organization we will return later on[147], with special reference to the possibility to attribute

[145] ILC Report, A/64/10, supra note 4, Commentary to chapter II

[146] ILC Report, A/64/10, supra note 4, Commentary to chapter II

[147] See Chapter 4.1.1 on the Responsibility for Wrongful Acts Committed by Member State's Organs put under the Disposal of the Organization

the conduct of military forces of States or IOs to the UN in the context of peace-keeping operations[148].

Two articles present in the ASR, nevertheless are not found in the IO Draft Articles, art. 9, titled "*conduct carried out in the absence or default of the official authorities*", and art. 10, titled "*conduct of an insurrectional or other movement*". These hypotheses, in fact, presuppose an element which is absent nearly in all international organizations: the exercise of control over the territory by the entity to which the conduct is attributed. In the few cases of, nevertheless, IOs administering territories, nothing opposes to an analogical application of the pertinent rule applicable to States, as theorized by the same ILC[149].

C: Breach of an international obligation

The second element necessary for an internationally wrongful act of an IO to arise is that the same conduct, attributed to the IO, "*constitutes a breach of an international obligation of that*

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[148] See Chapter 4.1.3 on the Unlawful Acts Committed by the UN Peace-Keeping Forces

[149] ILC Report, A/64/10, supra note 4, Commentary to chapter II

organization[150]". Even in this case, the definition given by article 9 of the IO Draft Articles on the existence of such breach fully reflects, in the first paragraph, article 12 of the ASR.

In reference to the sources, such obligations, as written in the commentary to article 12 of the ASR, "*may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order*[151]". In fact the expression "*regardless of its origins*", used both in article 12 of the ASR, than in article 9 of the IO Draft Articles, "*refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law*[152]". Nevertheless in paragraph two of article 9 it is specified that "*[P]aragraph 1 includes the breach of an international obligation that may arise under the rules of the organization*[153]". *Repetita iuvant*, such rules include "*the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization*[154]".

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[150] ILC Report, A/64/10, supra note 4, article 4 let b

[151] ILC Report, A/56/10, supra note 133, Commentary to article 12, para. 3

[152] ILC Report, A/56/10, supra note 133, Commentary to article 12, para. 3

[153] ILC Report, A/64/10, supra note 4, article 9 para. 2

[154] ILC Report, A/64/10, supra note 4, article 2 letter b

The intent of paragraph two is to dispel any doubt that may arise in considering the obligations arising from the rules of the organizations covered by the present article, as much as the ones arising from the constitutive instruments or binding acts based on these last.

There has been, in fact, a question raised: whether such obligations should be considered international obligations. The legal nature of such rule, as demonstrated by opposing doctrinal views, is controversial. Along with those who consider "*the rules of treaty-based organizations [are] part of international law*[155]", other authors have denied the internationality of such norms once the organization has come to life[156].

Interesting is the new view, which finds support both in practice and in the opinions shared by several members of the Commission: "*that international organizations that have a high degree of*

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[155] ILC Report, A/64/10, supra note 4, Commentary to article 9; see also: Decleva, Matteo, "Il Diritto Interno delle Unioni Internazionali", Cedam (ed.), Padova, 1962; Balladore Pallieri, G., "Le Droit Interne des Organisations Internationales", Recueil des Cours de l'Académie de Droit International de La Haye, vol. 127, 1969-II, pg. 1

[156] Focsaneanu, L., "Le droit Interne de l'Organisation des Nations Unies", Annuaire Français de Droit International, vol. 3, 1957, pg. 315; Cahier, P., "Le Droit Interne des Organisations Internationales", Revue Générale de Droit International Public, Vol. 67, 1963, pg. 563; Barberis, Julio A., "Nouvelles Questions concernant la Personnalité Juridique Internationale", Recueil des Cours de l'Académie de Droit International de La Haye, vol. 179, 1983-I, pg. 145 and pp. 222-225

integration are a special case[157]". Such is, as an example, the case of the EC. Important on this regard are the words spent by the ECJ in a famous case:

> "*By contrast with ordinary treaties, the EEC Treaty has created its own legal system which… became an integral part of the legal systems of the member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves*.[158]"

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[157] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 9, para. 5

[158] ECJ, Costa v. ENEL, Case 6/64, 15th July 1964, available in ECJ Reports (1964), p. 1127 at pp. 1158-1159

A distinction may be drawn on the basis of sources and subject matter, among the rules of the organization which are of international character, i.e. administrative regulations.

D: Circumstances precluding wrongfulness

Chapter V of the IO Draft Articles proposes the extensive application of the "*circumstances precluding wrongfulness*" on the internationally wrongful act, contained in articles 20 to 27 or the ASR. No time is given to analyse each and every article. Nevertheless it is of extreme importance to stress the intention of the drafters. In absence of relevant IO practice, the latter was "*not to imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States*[159]". On the contrary, even if some of the circumstances "*are unlikely to occur in relation to some, or even most, international organizations*[160]", nothing should nevertheless exclude their relevance also for IOs in analogous situations.

[159] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to Chapter V, para. 93

[160] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to Chapter V, para. 93

E: Content of the responsibility

Identical are even Part Three of the IO Draft Articles and Part Two of the ASR, dealing with the content of international responsibility. In particular, matching are: the articles on the general principles, 27-32 of the IO Draft Articles and 28-33 of the ASR; those on *Reparation for injury,* 33-9 of the IO Draft Articles and 34-9 of the ASR, with the only exception of article 39 of the first, and those on the "*serious breaches under peremptory norms of general international law*", 40-1 of both drafts.

Having no time to dedicate on the single articles, interesting in any case is a rushed view to article 39, which states:

> *"The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter."*

Such article "*does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are*

members[161]", a part from what stated in articles 17, 60 and 61. The intent of such article, confirmed by the views expressed by various delegations and by practice both of States than of IOs, is to deny the existence of a subsidiary responsibility of the member States of an IO towards a third injured party on the basis of the impossibility of the responsible IO to make reparation[162]. The only doubt that remains, which finds expression in the words of the Argentinean and Belarusian delegation, regards the possibility to derogate to such principle in specific cases, on the basis of particular features of the organization and of its rules, or on considerations of justice and equity[163]; i.e. "*where the work of the organization was connected with the exploitation of dangerous resources*[164]" .

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[161] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 39, para. 123

[162] Statement of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), in A/C.6/61/SR.13, para. 32; Statement of Belgium, A/C.6/61/SR.14, paras. 41-42; Statement of Spain, A/C.6/61/SR.14, paras. 52-53; Statement of France A/C.6/61/SR.14, para. 63; Statement of Italy, A/C.6/61/SR.14, para. 66; Statement of the United States of America , A/C.6/61/SR.14, para. 83; Statement of Switzerland, A/C.6/61/SR.15, para. 5; Statement of Cuba, A/C.6/61/SR.16, para. 13; Statement of Romania, A/C.6/61/SR.19, para. 60; Statement of Argentina, A/C.6/61/SR.13, para. 49; Statement of the International Monetary Fund, in A/CN.4/582, sect. II.U.1; Statement of the Organization for the Prohibition of Chemical Weapons, A/CN.4/582, sect. II.U.1

[163] Statement of Argentina, A/C.6/61/SR.13, para. 49; Statement of Belarus, A/C.6/61/SR.14, para. 100

[164] Statement of Belarus, A/C.6/61/SR.14, para. 100

F: Implementation of the international responsibility

Equality clearly comes into sight even when confronting part Four of the IO Draft Articles and Part Three of the ASR, both in the first chapter, from articles 42 to 49 of the IO Draft Articles and 42 to 48 of the ASR, related to the "*invocation of the responsibility*", than to the second, articles 50 to 56 of the IO Draft Articles and 49 to 58 of the ASR, related to "*countermeasures*". Only two articles, in the present case, do not find counterpart in the ASR, more precisely article 49, on the scope of the Part, and article 51, on the "*countermeasures by members of an international organization*".

G: Lex Specialis

Finally, special mention must be made to article 63 of the IO Draft Articles, which introduces a "*lex specialis*":

> *"[T]hese 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 a State for an internationally wrongful act of an international*

organization, are governed by special rules of international law, including rules of the organization applicable to the relations between the international organization and its members[165]*".*

Clear is the article in hypothesizing the replacement of the general rules on international responsibility with special ones, concerning, as an example, "*the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations*[166]" or cases of State responsibility in connection with the acts of the IO, addressed in part V of the same IO Draft Articles.

On the other side it is impossible to identify *a priori* such special rules and their scope of application. On the point, interesting are the words of the Commission relatively to the attribution to the EU of the conduct of its member State, which affirms that such special rule could apply to "*other potentially similar organizations*[167]".

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[165] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

[166] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 63, para. 1

[167] Statement of the EU Commission, A/C.56/SR.21, para. 18; see also Kuijper, P.J., and Paasivirta, E. "Further Exploring International Responsibility: The EC and the ILC's Project on Responsibility of International Organizations", International Organizations Law Review, vol. 1, 2004, p. 111 at pg. 127; Talmon, S., "Responsibility of International Organizations: Does the EC Require Special

Furthermore, the relevance given to the rules of the organization, in particular of the EU, "*encapsulates the idea that the rules…itself are a direct expression of the specificity of the Union as a regional economic integration organization*[168]"

In conclusion it is interesting to notice the specific reference, added at the end of art. 63, to the rules of the organization, which are likely to gain significant importance in regards to international responsibility in the relations with its members. Such rules may govern partially various aspects of the present Draft Articles, in 'particular in relation to breaches of international law committed by an IO injuring its member State or international organization[169].

Being this not the central topic, nevertheless time advises us to move on to the next issue.

Treatment", M. Ragazzi (ed.), International Responsibility Today, Essays in memory of Oscar Schachter, Nijoff, Leiden/Boston, 2005, p. 405 at pp. 412-414

[168] Hoffmeister, Frank, "Litigating against the European Union and Its Member Strates- Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", supra note 50, at pp.739-740; see also Statement of EU Presidency on the ILC Report 2003, New York, 27th October 2003

[169]ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 63, para. 7

2.1.1 PROBLEMATIC FEATURES OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY

A copy-paste operation from the ASR to the IO Draft Articles on IO responsibility, "…*who replicate in structure and often in wording, the earlier provisions for States, sometimes merely replacing the word 'State' for 'IO'*[170]", as results from the latest version of the latter faces, *de facto*, different inconveniences.

J.E. Alvarez, in particular, has been the *artifex* of a deeper study of such issue[171], detecting five mayor ones:

> *"1. Lack of evident State practice."*
>
> *"2. Lack of clarity as to status of an IO's internal rules or procedures."*
>
> *"3. The assumption that all IO's are equal and subject to the same general rules of responsibility."*
>
> *"4. The assumption that IOs are presumptively responsible for their acts."*

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[170] Alvarez, J.E., "Misadventures in Subjecthood", supra note 1, at pg. 3

[171] Alvarez, J.E., "Memo: ILC's Draft Articles on the Responsibility of International Organizations", 2010; Alvarez, José E., working paper for the "35th Annual Conference on Responsibility of Individuals, States and Organizations International Organizations: Accountability or Responsibility?", supra note 54

"5. The assumption that States are presumptively responsible for their IO acts."

No more will be said in relation to the first issue, being the lack of State practice self-evident[172], and on the last two.

In reference to the second problem, Alvarez stressed the ILC's failure to address with clarity the status and significance of IO's internal rules or procedures. The ILC, in article 31, *"Irrelevance of the rules of the organization***",** did face such issue, posing a wording very similar to the one adopted in article 32 of the ASR:

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

Notwithstanding the replacement of the term "*State*" with "*IO*" and of the reference to internal law of the State with the rules of the IO, little has changed in regards to the ASR. It must be noted that "*in*

[172] ILC Report, A/CN.4/556, supra note 103 ,Statement of the German Government, at pg.46

the relations between the IO and a non-member State or IO, it seems clear that the rule of the former organization cannot 'per se' affect the obligations that arise as a consequence of an internationally wrongful act[173]".

The rules of the organization may, therefore, residually affect the application of the rules set out in Part Two of the Draft Articles between the IO and its member States and, under Part Three, the responsibility for an unlawful act of the IO towards its member States, with the exception of the violation of peremptory norms, as their breach affects the international community as a whole[174].

A similar approach, moreover, is traceable in article 27 paragraph 2 of the 1986 Vienna Convention on the Law of Treaties between States and IOs and between IOs "*[a]n IO party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty*".

In relation to the third issue the author pointed out the wrongful presumption of a sufficient level of similarity, if not of juridical equality, among IOs, "*again because of the reliance on the*

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[173] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 31

[174] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 31

misleading State analogy[175]". Such presumption is linked to a second one: that all relationships between IOs' institutions and member States is the same. On this point it has to be agreed that no equality may exist between member-driven organizations. In fact, their actions find legitimation on the unanimous consensus of their members and other organizations. Examples of the latter are the International Monetary Fund and the World Bank, that are essentially trustees for members' funds; i.e. "*a member's quota in the IMF—in addition to providing the primary source of financing of the IMF—determines its capital subscription, its voting power, its allocations of SDRs, and also forms the basis for decisions on its access to IMF financing*[176]".

The same international organizations have, in more than one occasion pointed out the necessity of distinguishing the different types of organizations is relation to the applicable responsibility regime[177]. For the latter the classical principal-agent theory does not seem to be applicable[178].

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[175] Alvarez, J.E., "Misadventures in Subjecthood", supra note 1, at pg. 4

[176] Status of IMF's Members', Consents to Increase in Quotas Under the Eleventh General Review, Last updated: 20th August 2010

[177] ILC Report, A/CN.4/609, Responsibility of International Organizations, Comments and Observations received from International Organizations, Geneva 4th May-5th June and 6th July-7th August 2009, general remarks made by the World Health Organization, chapter II (A), and general considerations of the International Maritime Organization, chapter II (B)

Furthermore, ICJ's functionally based conception of IOs' legal personality, which requires to keep into consideration the different IOs mandates, structures and powers, doesn't appear to be respected. On the contrary, it is in contrast with a series of IO Draft Articles, specifically articles 20 to 24, which attribute indifferently to all IOs the same rights to invoke self-defence, countermeasures, *force majeure*, distress and necessity. For the sake of clarity once again it must be submitted that "*the legal personhood of IOs is, unlike with respect to States, contextual*[179]".

Alvarez, as well, identified other 5 reasons, this time relating to the success of the ASR[180]:

1) the ASR are secondary rules built atop primary rules of obligation widely emerged from State practice;

2) the ASR are a codification of what actually exists;

3) the ASR secondary rules are grounded in the Vienna Convention on the Law of Treaties;

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[178] Alter, Karen J., "Agents or Trustees? International Courts in Their Political Context", European Journal of International Relations 14 (1) 2008, pp. 33-63

[179] Alvarez, José E., working paper for the "35th Annual Conference on Responsibility of Individuals, States and Organizations International Organizations: Accountability or Responsibility?", supra note 54

[180] Alvarez, José E., working paper for the "35th Annual Conference on Responsibility of Individuals, States and Organizations International Organizations: Accountability or Responsibility?", supra note 54, at pg. 25

4) the ASR could rely on the principle of sovereign equality, from which was inferable their "*same general capacities and duties vis-à-vis one another*";

5) the ASR was generally consistent with the will of the great number of States.

For the above mentioned problems the work of the ILC appears on one side premature. How can it be possible to delineate secondary rules on IO responsibility, given the scarcity State practice, the paucity of jurisprudence and the rareness "*of real world practice demonstrating the existence of primary rules for entities that cannot, for example, be parties themselves even to human rights conventions*[181]"?

[181] Alvarez, J.E., "Misadventures in Subjecthood", supra note 1, at pg. 3

2.2 RESPONSIBILITY OF MEMBER STATES ARISING OUT OF THE ESTABLISHMENT OF AN IO (THE ABUSE OF LEGAL PERSONALITY AT THE LEVEL OF ITS CREATION)

2.2.1 THE ILC AND THE IDI

The ILC, in its work, focused on a particular moment in which member State responsibility may arise: the establishment of the IO. The Commission gave a narrow definition of such phenomenon, adding another condition: "*the circumvention of international obligations by member States in the establishment of an IO*"[182]. From the text of draft article art. 28, in the 2006 version, results in fact a member State responsibility for the abuse of legal personality at the level of its creation;

> "*A State member of an IO incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act*

[182] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, pg. 103; ILC Report, A/61/10, supra note 74Draft Article art. 28, pg. 283

that, if committed by that State, would have constituted a breach of that obligation".

In other words the present article dealt with the case of a State circumventing its' own obligations through the separate legal personality of an IO of which it was member. This type of responsibility did not require any specific intention, therefore could not be avoided simply by showing the absence of an intention to circumvent the international obligation, as was made clear by the same Article 28,2, which "…*applies whether or not the act in question is internationally wrongful*".

As results from the commentary to the present article, through the use of the word circumvention were embraced not only cases "…*in which a member State may be said to be abusing its rights*…", but even cases in which they "…*have provided competence to an IO and have failed to ensure compliance with their obligations*".

In relation to the first hypothesis a comparison can be made with article 5 (b) of the 1995 Lisbon Resolution of the IDI, where is affirmed that "*in particular circumstances, members of an IO may be liable for its obligations in accordance with a relevant general principle of law, such as […] the abuse of rights*[183]".

[183] Annuaire de l'IDI, vol. 66-II (1996), pg. 445

A part from the work of various scholars[184], in reference to the second case, paradigmatic is the jurisprudence of the European Court of Human Rights [hereinafter ECtHR], which has provided a few examples of responsibility of States in cases in which they had attributed competence to an IO in particular fields. The attribution of responsibility to the member States derived here from the failure to ensure the compliance with the obligations under the European Convention of Human Rights [hereinafter ECHR][185].

2.2.2 ECtHR CASES

Waite and Kennedy v. Germany:

Useful for a full comprehension are the words of the ECtHR in one of its leading cases, *Waite and Kennedy v. Germany*[186]. In the

[184] Di Blase, Antonietta, "Sulla Responsabilità Internazionale per Attività dell'ONU", Rivista di Diritto internazionale, vol. 57, 1974, pg. 270; Hirsch, M., "the Responsibility of International Organizations Toward Third Parties: Some Basic Principles", Nijhoff (ed.), Dordrecht/London, 1995, pg. 179; Sarooshi, D., "International Organizations and their Exercise of Sovereign Powers", Oxford, Oxford University Press, 2005, pg. 64

[185] ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland Case, application no 45036/98, 30 June 2005; European Court of Human Rights, Waite and Kennedy v. Germany, application no 26083/94; ECtHR, Emilio GASPARINI against Italy and Belgium, Case n° 10750/03, 12th May 2009

[186] European Court of Human Rights, Waite and Kennedy v. Germany Case, application no 26083/94, 18th February 1999

present case, the issue in front of the Court was whether the recognition of immunity by Germany to the European Space Agency [hereinafter ESA], of which it was member, unduly impaired the right to access to justice in relation to employment claims.

Waite and Kennedy were German employers of foreign companies put at the disposal of a ESA centre in Darmstadt. As their contracts were not renewed, the employer decided to bring their claim against the ESA before the German Labour Court, arguing that they had acquired, in conformity with German Law, the status of employees. The Labour Court declared, nevertheless, their actions inadmissible, as section 20 (2) of the Courts Act provided immunity from jurisdiction when accorded by international agreements, as in the present case[187]. For the same reason the following appeal was rejected by the Federal Constitutional Court.

The applicants subsequently applied to the ECTHR, contending that Germany's recognition of ESA's immunity, unduly obstacled the exercise of their right, alleging the violation of article 6.1 of the ECHR.

[187] Convention for the Establishment of a European Space Agency, approved by the Conference of Plenipotentiaries on the 30th May 1975 and entered into force on 30th October 1980

The ECtHR reiterated the principle that Article 6(1) embodies the "*right to a court*", *of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only*[188]".

Secondly, the Court concentrated on the immunity issue, agreeing with the reasoning of the German labour courts and finding no arbitrariness in their judgements, which effect to such immunity. Moreover the ECtHR found that the immunity granted by Germany to the ESA had a legitimate objective, being essential for the scope of ensuring the autonomous and proper functioning to the latter, freeing it from potential unilateral interferences by national governments.

Relatively to the issue of proportionality, the Court said that :

> "*[W]here States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention,*

[188] European Court of Human Rights, Waite and Kennedy v. Germany Case, supra note 186

however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[189]*"*

In opinion of the Court central was the proof of a material factor: the availability, for the applicants, of "*reasonable alternative means to protect effectively their rights under the Convention*"[190]. In the present case the Court identified such means in the possibility granted to the employees to have a recourse to the ESA Appeals Board. The latter was, in fact, "*independent of the Agency*", and had jurisdiction "*to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member*[191]".

[189] European Court of Human Rights, Waite and Kennedy v. Germany Case, supra note 186

[190] European Court of Human Rights, Waite and Kennedy v. Germany Case, supra note 186

[191] ESA Staff Regulations 33 to 41, annexed to 1976 Statute, Chapter VIII

Bosphorus case:

Of particular interest is, as well, the *Bosphorus Hava Yollari Turizm v. Ireland* case[192], concerning the application brought by an airline charter company registered in Turkey, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi [hereinafter Bosphorus Airways].

In May 1993 an aircraft leased by Bosphorus Airways from Yugoslav Airlines [hereinafter JAT] was seized by the Irish authorities, when this last was at Dublin for maintenance. Ireland did in this way apply the EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro), and in particular resolution 820/1993. This last called upon member States to impound all aircrafts in their territories "*in which a majority of controlling interest is held by a person or undertaking in or operating from the FRA*[193]".

The applicant challenged with success the impoundment in front of the High Court, which found article 8 of the regulation non applicable and the decision of the Irish Authorities *ultra vires*. The Irish Supreme Court, in appeal, referred the issue to the ECJ for a

[192] ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland Case, supra note 185

[193] UNSC resolution S/Res/820 of the 17th of April 1993, para 24

preliminary ruling under article 234 of the TEC, on whether the aircraft was covered by Regulation 990/93. This last held that the regulation did apply. Bosphorus Airways' challenge, in front of the High Court, to the retention of the aircraft was initially successful. In fact, the Court held in June 1994 that Regulation 990/93 was not applicable to the aircraft.

However, in appeal, the Supreme Court referred a question under Article 177 of the EEC Treaty to the ECJ. The ECJ found that it was applicable therefore, in its judgment of November 1996, the Supreme Court applied the decision of the ECJ and allowed the State's appeal.

In the meanwhile, as both the Bosphorus Airways' lease on the aircraft than the sanctions regime against the Federal Republic of Yugoslavia had expired, the Irish authorities returned the aircraft directly to JAT, with the consequent loss by Bosphorus Airways of approximately three of its four-year lease. The applicant therefore submitted the issue to the ECtHR, assessing the unlawfulness of implementation of the sanctions regime by the Irish authorities. In particular, such conduct tantamounted to a violation of Article 1 of the Convention[194] and of Article 1 of Protocol No. 1[195], as it consisted

[194] European Convention on Human Rights, signed the 4th November 1950 in Rome

in a reviewable exercise of discretion, which *de facto* had caused an impoverishment of the Airline's property right.

Central results, therefore, the "*extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty*.[196]"

Preliminarily the ECtHR assessed that "*the complaint about that act fulfilled the jurisdictional prerequisites under the Charter, including ratione loci, personae and materiae*[197]". In reference to article 1, it has to be noted that it was not disputed that the implementation was done by the Irish authorities, on Irish territory, following a decision by the Irish Minister for Transport, therefore falling within the jurisdiction of the Irish State.

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[195] European Convention on Human Rights on the Enforcement of certain Rights and Freedoms not included in Section I of the Convention, First Protocol, signed in Paris the 20th March 1952

[196] ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland Case, supra note 185, para. 154

[197] Schorkopf, Frank, " The European Court of Human Rights' Judgment in the Case of Bosphorus Hava Yollari Turizm v. Ireland", German Law Journal no. 09, 2006, pg. 1260

Relatively to the violation of article 1 of Protocol one, the Court started by stressing that the EC Regulation 990/93[198] "*was generally applicable and binding in its entirety (pursuant to Article 189, now Article 249, of the EC Treaty), so that it applied to all member States, none of which could lawfully depart from any of its provisions*[199]". Moreover, always in the Court's view, its direct applicability could not be disputed, as the Regulation had, by the time of the impoundment, already become part of Irish domestic law. The Irish authorities, therefore, rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied[200]. Furthermore the Court affirmed that the "*impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law*[201]".

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[198] Council Regulation (EEC) No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), adopted on the 26th April 1993

[199]ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland Case, supra note 185, para. 143

[200] Hoffmeister, Frank, "Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland. App. No. 45036/98", The American Journal of International Law, Vol. 100, 2006, pp.442-449

[201] ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland Case, supra note 185, para. 148

Lastly, the Court found the protection of fundamental rights by Community law to be equivalent to that of the Convention system, therefore "*consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC*[202]".

On the point it is useful to recall the concurring opinion of Judge Ress, which, even if agreeing on the result that there was no violation of article 1 of Protocol one, in any case criticized the reasoning of the Court. In his opinion, the idea of a presumption of Convention compliance should not exclude a ECtHR's case by case review.

2.2.3 FORMER ARTICLE 28 OF THE IO DRAFT ARTICLES AND NEW ARTICLE 60

Returning back to the analysis of art. 28, two elements appear, *prima facie*, necessary for international responsibility of the member State: firstly the State must have provided the IO with the competence to circumvent the obligation, through the transfer of State functions or the establishment of functions that the same State may not have; secondly the IO must have committed an act that, if

[202] ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland Case, supra note 185, para. 155

committed directly by the State, would have constituted a breach of that obligation.

In reference to the second requisite it must be noted that the mere fact that the obligation is not binding for the organization itself appears to be alone insufficient for the rise of international responsibility. Moreover the act must constitute a breach of the obligation, without the requisite for the State to have caused the organization to commit such act.

Concluding the analysis of this article, with particular reference to paragraph 2, it must be noted that the mere fact that it does not require the wrongfulness of such act for the IO itself, does not necessarily exclude an international responsibility of the member State in case of the existence of such an obligation upon the organization.

In the latest version of the IO Draft Articles, the specific situation dealt with article 28 has been envisaged in article 60[203], titled the "*Responsibility of a member State seeking to avoid compliance*". It is stated that:

> *1. A State member of an international organization incurs international responsibility if it seeks to*

[203] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

The situation described mirrors the one considered in article 16, "*Decisions, authorizations and recommendations addressed to member States and international organizations*", which assesses the responsibility of an IO "*when 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*[204]."

As for former article 28, even article 60 does not require a specific intention of circumvention, as this last "*may easily be inferred*

[204] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 60, para.1

from the circumstances[205]". Moreover, the field of application of article 60, uniformly with article 5 of the Lisbon Resolution, comprises not only "*cases in which the member States may be said to be abusing its rights*[206]".

Article 60 introduces a third condition: the existence of a "*significant link between the conduct of the member State seeking to avoid compliance and that of the IO*[207]".

Lastly it has to be stressed that this same principle may be invoked generally, despite the fact that the present context regards uniquely human rights[208], and was theorized both in regards to the UN and of IOs in general[209].

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[205] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 60, para.7

[206] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 60, para.2

[207] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 60, para.7

[208] Brownlie, I., "The Responsibility of States for the Acts of International Organizations", M. Ragazzi (ed.), International Responsibility Today. Essays in memory of Oscar Schachter, Leiden/Boston: Nijhoff, 2005, p. 355 at pg. 361

[209] Di Blase, Antonietta "Sulla Responsabilità Internazionale per Attività dell'ONU", Rivista di Diritto Internazionale, vol. 57, 1974, p. 270 at pp. 275-276; Sarooshi, D., "International Organizations and their Exercise of Sovereign Powers", Oxford University Press, Oxford, 2005, pg. 64

3. RESPONSIBILITY OF MEMBER STATES FOR THE VIOLATION OF TREATY OBLIGATIONS

As it was clearly stressed out in the previous chapter, the question whether member States may be held liable for the internationally wrongful acts of IOs has been the cause of a wider research among scholars having the aim of finding such exceptions and hypothesis among the generally accepted rule of the exclusive responsibility of IOs. As the legal scenario appears abundant of IO's practice in the treaty domain, a preliminary division appears to be necessary between obligations contracted only by the IOs themselves and those binding their member States as well.

1 VIOLATION AF A TREATY CONCLUDED BETWEEN THE INTERNATIONAL ORGANIZATION AND A THIRD PARTY

International law generally denies the existence of any direct responsibility of member States towards third parties for the infringement of the obligations directly contracted by the IO towards

them. On the other hand the necessity to grant a protection to third parties has in recent times mobilized doctrine in search of any potential effect on member States arising from such obligations taken by the IO[210].

1.1 THE WORK OF THE INSTITUT DE DROIT INTERNATIONAL

It is important, preliminarily, to give the coordinates of our quest. For this purpose it is essential the use of the Lisbon Resolution, which focused on such topic. First of all it is necessary to have a clear view over the definition of third parties. Article 2 letter A of the Lisbon resolution precisely defines them as:

> *"… persons other than the organization itself, whether they are private parties, States or organizations…include[ing] States members of an organization acting in a capacity other than as an organ or as a member of an organ of the organization*".

[210] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, Preamble

In the Resolution it is as well clearly affirmed that, given the fact that any IO's obligation towards third parties arises "*under international law (including the rules of the organization) or under the law of a particular State*", there is "*no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an IO of which they are members*[211]".

Nevertheless this was not the vision of the Institut in the provisional project to the Resolution. Manifest are the words of article 10: "*un accord conclu lègalement par une organisation internationale engage juridiquement tous ses membres*". Main source of such a conviction is the work for the IDI of R.J. Dupuy on "*l'application des régles du droit international gènèral des traités aux accords conclus par les organisations internationales*[212]". In particular, Dupuy affirmed that an agreement undertaken by an IO legally bound all of its' member States as a consequence of the fact that "*les Etats members sont atteints par l'accord en tant que parties intègrantes de*

[211] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, Art. 4 letter A

[212] Dupuy, Renè-Jean, "L'Application des Règles du Droit International Général des Traites aux Accords Conclus par les Organisations Internationales", supra note 213, at pp. 214-415

l'organisations[213]", denying the existence of an hypothesis of "*stipulation pour autrui*[214]".

Numerous members of the IDI firmly objected to this hypothesis, reducing it to a consequence only of specific dispositions of the constitutive act of the organization or of member States' case by case acceptance of such conventional regime[215]. This brought the rapporteur to change its convictions, returning to the classical rules of *relativité* and *consensualisme* of treaties, as results from its final text and from article 10 of the final project.

1.2 THE WORK OF THE ILC

This same topic was moreover object of the work of the ILC on the Law of Treaties between States and IOs. Of extreme relevance for the elaboration of this question was the Sixth Report of the special reporter professor Paul Reuter, containing the project of article 36

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[213] Dupuy, Renè-Jean, "L'Application des Règles du Droit International Général des Traites aux Accords Conclus par les Organisations Internationales", Rapport Provisoire et Rapport Définitif), A.I.D.I., vol.55, 1973, pp. 312-312

[214] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 440

[215] Observations formulées par J. Salmon, A.I.D.I.,1973, vol.55, pg.337; J.Zourek, ibid., pg. 342 ; F. Seyersted, ibid, pg. 353 and pg. 405

bis, entitled "*effets d'un traitè auquel une organisation internationale est partie à l'ègard des Etats members de cette organisation*".

In the first paragraph of this same article, it is affirmed that the rights and obligations of the member States, provided by a treaty concluded by an IO to which they are members, simply arises from the fact that the constitutive act of the IO expressly gives such effects[216].

The funding reasoning which brought to those words was, on one side, the impossibility to consider the member States as third parties to the agreements concluded by the IO itself, and, on the other, the essential necessity to grant juridical security to third contracting parties. To pursue this double objective, the second paragraph of article 36 bis presumed the members States' acceptance of rights and obligation, "*sauf manifestation contraire de sa volontè*".

In the terms of such project the consent of the member State could arise both from the prior adhesion to the constitutive act of the organization and in the same moment of the conclusion of an external agreement by the IO. This initial project was nevertheless criticized

[216] Sixth Report of Reporter Paul Reuter to the International Law Commission on the proposed Art.36 bis of the Vienna Convention on the Law of Treaties between States and International Organizations, available in A.C.D.I., vol. II- first part, 1977, pg. 137

because it *de facto* could apply only to the EC, being this the only organization who's constitutive act expressly contained a rule aiming to ensure the respect by its' member States of the international treaties concluded with third parties[217]. Moreover the same centrality assigned in Reuter's Report to art 228 of the Rome Treaty[218] was condemned being a serious and possible threat to the autonomy of IOs[219]. These critics were fundamental for the final drafting of article 36 bis, titled "*Obligations and rights arising for States members of an IO from a treaty to which it is a party":*

> "*Obligations and rights arise for States members of an IO from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and*

[217] Report of the International Law Commission on the Vienna Convention on the Law of Treaties between States and International Organizations, Travaux de la Trentième Session, available at A.C.D.I., 1978, vol. II, Second Part, Commentary on article 36 bis, pg. 150; ILC report, A/CN.4/SR.1525, Extrait de l'Annuaire de la Commission du droit international 1978, vol. I , observations of M. Ouchakov

[218] Treaty establishing the European Economic Community (EEC), signed in Rome on the 25th March 1957 and entered into force on the 1st January 1958, art. 228

[219] Manin, Philippe, "The European Communities and the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations", Common Market Law Report, 1987, pg. 470

if: (a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.[220]"

This new drafting, through a more restrictive formulation, affirmed the insufficiency of the mere presence in the constitutive act of a disposition providing that the treaties concluded by the organizations were binding for its' member States. As results manifestly from the Commentary to the Draft Articles, the "*Commission's intention [wa]s to lay down the rule to the effect that the creation of an obligation for a third party require[d], in addition to the consent of all the parties to the basic treaty, the consent of the States on whom the obligation [wa]s to be imposed, and that such consent must be express*[221]".

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[220] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations,1986, supra note 2, art. 36 bis

[221] ILC Commentary to the Draft articles on the Law of Treaties between States and International Organizations or between International Organizations with

Therefore three conditions appeared necessary to create rights and obligations upon the member States.

The first condition consisted in the presence of an express consent, not a mere intention, of the States and the organizations parties to the treaty, specifically defining the conditions and the effects of the rights and obligations being created.

Secondly there was the necessity of the consent all the States members to the organization, which could be expressed in any form, but had to be related to the provisions of the constitutive act of the IO which created their obligations and rights.

Lastly there was the requirement of bringing the consent of the member States to the knowledge of States and organizations which had participated to the negotiation. The subject that had to furnish such information, being not specified, could have been the member State, the organization or both. From this last condition resulted clear the main objective of such article: "*to afford the parties concerned the widest possibilities and choice, on the sole condition that they keep one another informed, that they make known exactly what they wish to do and each bring it to the aten*[222]".

Commentaries, Thirty-fourth Session, 1982, Yearbook of the International Law Commission, 1982, vol. II, Part Two

[222] Commentary to article 36 bis of the Draft Articles on the Law of Treaties between States and IOs or between IOs with Commentaries, supra note 221

In any case the article was rejected *tout court* in the Vienna Conference due to the will both of the represented States and of the IOs, which found it on the one side too theoretical and on the other excessively rigid, as it required unanimity[223].

Both the IDI than the ILC failed in their search of a general principle of international law binding systematically the member States of an organization to external agreements contracted by the latter, as results from article 74 para. 3: "*the provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an IO under a treaty to which that organization is a party*"[224].

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[223] Manin, Philippe, "The European Communities and the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations", supra note 219, at pg. 471; Gaja, Giorgio, "A new Vienna Convention on Treaties between States and International Organizations or between International Organizations: a Critical Commentary", British Yearbook of International Law, 1987, pg.264

[224] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, supra note 2, art.74, para. 3

1.3 THE CASE OF THE EUROPEAN UNION

As was afore mentioned, the TEC is *de facto* the only constitutive act of an IO which contains an express provision regarding the effects of a treaty concluded by the organization. In fact article 228 para.2, former article 228 para.7 after the entry into force of the Maastricht treaty[225] and article 300 para.7 after the amendments made by the treaty of Athens[226], seems to fund the responsibility for the non-execution of the agreement, vis-à-vis third parties, of the member States, along with the organization. The treaty of Lisbon, furthermore, did not effect such discipline, simply identifying the EC with the EU.

Moreover, this is forecasted despite the wording of the first paragraph of the same article, which *prima facie* recalls only the EC as formally part to the treaties. Taking into consideration the particularity of the EC, which exercises in its domains competences that have been transferred by the member States, this provision

[225] Treaty of Maastricht, or treaty of the European Union (TEU), supra note 43

[226] Treaty of Athens amending the Treaty on European Union and the TEC, signed on the 16th April 2003

appears as a due consequence which ensures the juridical security of third parties[227].

In this way, by derogating the principle of the relativity of treaty effects, member States are bound despite the fact that they are not nominally parties to them. Therefore these last can be found internationally responsible for violation of such agreements[228].

Confirm of this comes even from the jurisprudence of the ECJ, especially in the *Kupferberg* judgement, in which the Court affirmed the existence of direct legal links between the member States of the EC and third parties of a treaty concluded by the Community itself[229]. The Court particularly emphasized the existence among the member States of the obligation of the good execution of the agreement both towards thirds parties than towards the EC itself. There is, therefore, first of all an obligation of the member State to collaborate with the Community in such execution.

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[227] Ganshof van der Meersch, Walter, " l'Ordre Juridique des Communautés Européennes et le Droit International", Recueil des Cours de l'Academie de Droit International, 1975-V, vol. 148, pp. 96-97

[228] Hahn, Michaël J. et Schuster, Gunnar, "Le Droit des Etats Membres de se Prévaloir en Justice d'un Accord Liant la Communauté" , Revue Générale de Droit International Public, 1995, pg. 337

[229] ECJ, Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A, Case 104/81, 26th October 1982

In such light, the same article 228 para. 2 may be seen as a specification of the principle of Communitarian solidarity enounced in article 5, which affirms that:

> "*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objections of this Treaty*[230]*".*

The Court in any case didn't clarify whether only the Community should be considered responsible on an international level[231]. In favour of such hypothesis, which has more than mere similarities with the one of treaties concluded by IOs, a consistent part of doctrine affirmed that article 228 para. 2, in reality, was only the source of a strictly communitarian obligation, interpreting the disposition as a mere reminder of the obligation of the member

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[230] Treaty establishing the European Economic Community (EEC), signed in Rome on the 25th March 1957 and entered into force on the 1st January 1958, art. 5

[231] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 448

States to respect and eventually cooperate for the compliance of the obligations deriving from external agreements signed by the Community. Source for the rise of such member States' obligation is their being part of the same EC's juridical order[232].

A lexical analysis of the article confirms such cogitation. The text clearly refers both to member States than to the Institutions of the EC. Being the latter obviously lacking of international legal personality, they cannot be found internationally responsible for the breach of the obligations towards third parties[233].

Moreover, as was brilliantly noticed by professor Ph. Manin, even if it was to be recognized to article 228 para. 2 an external effect, in any case the disposition could not be invoked by third contracting parties, being a *res inter alios acta*.[234]

Third parties find, in any case, tutelage in the possibility given to the Commission to act against the non-compliance of the member

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[232] Zuleeg, Manfred, "La Répartition des Compétences entre la Communauté et ses Etats Membres", in La Communauté et ses Etats Membres, Actes du 6° colloque de l'Institut d'Etudes Juridiques Européennes sur les Communautés Européennes, Liège, Janvier 1973, Liège/La Haye, Faculté de droit ULg/Nijhoff, 1973, pg. 50 ; Held, Charles-Edouard, "Les Accords Internationaux Conclus par la CEE", Thèse de la Faculté de Droit de l'Université de Lausanne, Saüberlin & Pfeiffer (eds.), Vevey, 1977, pg.183

[233] Hartwig, Matthias, "Die Haftug der Mitgliedstaaten für Internationale Organisationen", Springer (ed.), Berlin/Heidelberg, 1993, pg.165

[234] Manin, Philippe, "L'article 228 para. 2 du traité CEE", in Etudes de Droit des Communautés Européennes –Mélanges offerts à Pierre-Henri Teitgen, Pedone (ed.), Paris, 1984, pg. 301

States with the obligations, indirectly imposed on them by article 228 para. 2, through the procedure ex article 169 of the TEU[235]. Several commentators stressed out even how giving such external effects would cause a substantial loss of the Community's autonomy, reducing it to a mere "*moyen d'action collectif de ses membres*[236]".

In favour of an internal effect of article 228 para. 2 appears to be the same ECJ in a relatively recent controversy between France and the Commission[237]. In this infringement procedure, the French government affirmed the non-conformity of the Agreement signed on 23 September 1991 by the Commission of the European Communities and the Government of the United States of America regarding the application of competition laws. Of particular importance results a passage in the reasoning of the Court, on which it asserted that "*it is the Community alone, having legal personality pursuant to Article 210 of the Treaty, which has the capacity to bind itself by concluding*

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[235] Jacot-Guillarmod, Olivier, "Droit Communautaire et Droit International Public – Etude des Sources Internationales de l'Ordre Juridique des Communautés Européennes", Librairie de l'Université/Georg et Cie, Genève, 1979, pg.79

[236] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 450 ; see also Giardina, Andrea, "Commentaries sur l'Intervention de P. Pescatore, in Les Relations Extérieures de la Communauté Européenne Unifiée, Actes du 3e Colloque sur la Fusion des Communautés", Liège, Octobre 1967, Institut d'Etudes Juridiques Européennes, Liège, 1969, pg. 134

[237] ECJ, French Republic v Commission of the European Communities, Case C-327/91, 9th August 1994, available in Reports of Cases before the Court of Justice and the Court of First Instance (1994), pp. I-364

agreements with a non-member country or an IO", and continuing, " *[T]here is no doubt, therefore, that the Agreement is binding on the European Communities […] In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level*."[238]

The Court did not refer to member States as responsible, on an international level, jointly with the Community. This would have been a logical consequence of the attribution of external effects to article 228 para. 2. Therefore not even article 228 para. 2 can be seen as a derogatory disposition to the general principle of the relativity of international law.

This same position was even taken by the Government of Germany, relatively to article 300 para. 7 of the TEC, in a declaration, on which more will be said later on: "*the article solely forms a basis for obligations under community law vis-à-vis the EC and does not permit third parties to assert direct claims against the States members of the EC*[239]".

Confirmation of the fact that, on the basis of the constituent instrument, an EC member States' responsibility, deriving from the

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[238] ECJ, French Republic v Commission of the European Communities, Case C-327/91, 9th August 1994, para. 24-25

[239] ILC Report, A/CN.4/556,supra note 103, Declaration of Germany on article 300 para. of the TEC, pg. 50

breaching by the EC of its treaty obligations, cannot be assumed, derives even from Article 300, paragraph 7, of the TEC. In fact, such article does not intend to create obligations for member States towards non-member States, as it reads as follows: "*[A]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States*." The ECJ pointed out that this provision does not imply that member States are bound towards non-member States and thus may incur responsibility under international law[240].

In conformity with this point of view, provisions that may be contained in status-of-forces agreements, concerning the distribution of liability between a State providing forces to an IO and that organization, cannot be regarded, under international law, as *per se* relevant in the relations with third States[241].

In conclusion it appears pacific from State's and IO's practice and the position taken by the majority of doctrine and jurisprudence, that only IOs are bound by treaties concluded *en leur proper nom* with third parties, both States than organizations.

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[240] ECJ, French Republic v Commission of the European Communities, Case C-327/91, 9th August 1994, pp. I-364

[241] Schmalenbach, K. "Die Haftung Internationaler Organisationen", Peter Lang (ed.), Frankfurt am Main, 2004, pp. 556-564 and 573-575; See also ILC Report, A/CN.4/556,supra note 103, pp. 51-53

2 VIOLATION OF A TREATY CONCLUDED BY BOTH THE IO THAN OF THE MEMBER STATES AND A THIRD PARTY

Different is the perspective in the case of treaties concluded between both the IO that its member States and third parties.

2.1 MIXED AGREEMENTS OF THE EUROPEAN UNION

It is necessary, before indicating the fields in which member States and the EU are conjointly parties to treaties with third parties, to establish which are the rules of law applicable for the conclusion of external agreements by the EU in which it has an exclusive competence, apparently limited to the fields of exclusive competence assigned to the Union.

In particular the *AETR case*[242] was essential in clarifying such idea. In such affaire, the Commission requested the annulment of the Council's proceedings regarding the negotiation and conclusion, by

[242] CJEC, Commission of the European Communities v Council of the European Communities concerning the European Agreement on Road Transportation, Case 22/70, 31st of March 1971, available in Reports of Cases before the Court, 1971

the Community's Member States, of the European Agreement concerning the work of crews of vehicles engaged in international road transport [hereinafter AETR]. The ECJ, in a famous passage of the judgement, cleared out from any doubts "*that in its external relations the Community enjoys the capacity to establish contractual links with third Countries*[243]".

Moreover the Court stressed out that the Community's authority in the fields of its' exclusive competence "*arises not only from an express conferment by the Treaty* […] *but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions*[244]". As a due consequence "*each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting*

[243] CJEC, Commission of the European Communities v Council of the European Communities concerning the European Agreement on Road Transportation, supra note 242, para. 14

[244] CJEC, Commission of the European Communities v Council of the European Communities concerning the European Agreement on Road Transportation, supra note 242, para. 16

individually or even collectively, to undertake obligations with third countries which affect those rules[245]".

Under Article 3 (e) and article 5 "*the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty*…[246]". Member States, therefore, do not have powers concurrent to the ones of the Community "*since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law*[247]".

There are nevertheless numerous cases in which the treaty's content regards both fields of exclusive competence of the Community than of the competence of the member States. In such

[245] CJEC, Commission of the European Communities v Council of the European Communities concerning the European Agreement on Road Transportation, supra note 242, para. 17

[246] CJEC, Commission of the European Communities v Council of the European Communities concerning the European Agreement on Road Transportation, supra note 242, para. 21

[247] CJEC, Commission of the European Communities v Council of the European Communities concerning the European Agreement on Road Transportation, supra note 242, para. 31

cases the Community and the member States participate jointly to the conventional regime, each in their exclusive domains[248].

It is for this reason that mixed agreements, originally not provided by the Rome Treaty, were instituted and have flourished in an abundant practice[249], as for the General Agreement on Tariffs and Trades[250]. Thanks to this new instrument the member States, which have become parties to an agreement concluded together with the Community, are responsible jointly with the organization vis-à-vis third parties. The situation, furthermore, was not modified subsequently to the entry into force of the Lisbon Treaty[251]. The same article 6 (2) TEU contains a constitutional duty in such sense, as both the Union than the member States are now parts to the ECHR.

In order for the third party to be able to identify the holder of the specific obligations, and to grant their execution, it appears to be of central importance the information on the repartition of

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[248] Louis, Jean-Victor et Steenbergen, Jacques, "La Repartition des Competences entre les Communautés Européennes et leurs Etats Membres en Matière de Relations Internationals", Revue Belge de Droit International, 1983, pg. 360

[249] Cremona, Marise, "The Doctrine of Exclusivity and the Position of Mixed Agreements in The External Relations Of The EC", Oxford Journal of Legal Studies, 1982, pp. 411-412

[250] General Agreement on Tariffs and Trades, concluded the 15th April 1994 and entered into force the 1st January 1995

[251] Hoffmeister, Frank, "Litigating against the European Union and Its Member Strates- Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", supra note 50, at pg. 724

competences among the Community and its' member States[252]. In the first agreements nevertheless there was no indication of such repartition. The Community and its State members presented themselves to the co-contractors as "*un ensemble indivis de compétences*[253]". Clear example of such agreements is the 1974 Convention for the Prevention of Marine Pollution[254].

The only way of granting juridical security to the third contracting party remains to consider the Community and its member States as conjointly responsible for the execution of the entire agreement[255]. The Community, same as for the member States, may,

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[252] Reuter, Paul, "La Conférence de Vienne sur les Traits des Organisations Internationaux et la Sécurité des Engagements Conventionnelles", in Liber Amicorum Pierre Pescatore, Baden-Baden (ed.), Nomos, 1987, pp. 551-2 ; Gaja, Giorgio, "The EC's Rights and Obligations under Mixed Agreements", in O'Keefe, David et Schermers, Henry G. (Eds.), Mixed Agreements, Deventer, Kluwer, 1983, pg.135

[253] Kovar, Robert, "La Participation des Communautées Européennes aux Conventions Multilatérales", Annuaire Français de Droit International, volume 21, 1975, pg. 916

[254] Convention for the Prevention of Marine Pollution from Land-based Sources and Annexes, concluded at Paris on the 4th June 1974, amended by the Protocol of 26th March 1986 ; see also Kovar, Robert, "La Participation des Communautées Européennes aux Conventions Multilatérales", supra note 254, at pg. 916

[255] Gaja, Giorgio, "The EC's Rights and Obligations under Mixed Agreements", supra note 252, at pg.137; Louis, Jean-Victor et Steenbergen, Jacques, "La Repartition des Competences entre les Communautés Européennes et leurs Etats Membres en Matière de Relations Internationals", supra note 248, at pg. 368 ; Petersmann, Ernst-Ulrich, "Participation of the European Communities in the GATT : International law and community law aspects", in Schermers, Henry G. et O'Keefe, David (Eds.), Deventer, Kluwer, 1983, p. 174, at pg. 189 ; Groux, Jean et Manin,

in absence of a notification to the third parties of a precise division of competence, be found responsible for the illicit breach committed by one of its' member States in the fields of its' exclusive competence[256].

Professor Giorgio Gaja specified his opinion on this particular aspect: when it is the same treaty that clearly provides different and distinct obligations on the Community and on its' member States, each one of them responds for the respect and execution of its own obligations[257]. In theory this appears conform to the fact that both the Community and the single member States result bound from the Treaty and concurrently responsible, as it does not contrast with the principle of relativity of treaties[258].

It has to be noted that, in any case, being the non-execution of the mixed agreement a violation *ipso facto* of Communitarian law, the Commission could, and should, react through the procedure ex article

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Philippe, "Les Communautés Européennes dans l'Ordre International", Office des Publications Officielles des Communautés Européennes, Bruxelles-Luxembourg, 1984, pg. 150

[256] Steenbergen, Jacques, "the Status of GATT in Community Law", Journal of World Trade Law, London, 1981, pg. 344; Petersmann, Ernst-Ulrich, "Participation of the European Communities in the GATT : International law and community law aspects", supra note 256, at pg. 174

[257] Gaja, Giorgio, "The EC's Rights and Obligations under Mixed Agreements", supra note 252, at pg.140

[258] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 456

169 obliging the negligent State to uniform to his conventional, now Communitarian, obligations[259].

In a second moment the necessity of a clear division of competences became central, as results in the negotiations for the opening to IOs of the UN Convention on the Law of the Sea[260]. The necessity, indispensable for the other contracting parties, to know upon which subjects would fall the responsibility for the non-execution of the obligations deriving from the Convention, was finally taken into consideration by the Community, which, for the first time, faced the situation of negotiating with a large number of States with whom generally it did not have habitual relations[261]. In particular, in the wording of articles 5 para. 1st and 6 2nd of the IX Annex to the 1982 Convention, results not only the necessity of a "*declaration*

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[259] Gaja, Giorgio, "The EC's Rights and Obligations under Mixed Agreements", supra note 252, at pg.140

[260] Council Decision on the Ratification by the EC of the Agreement for the Implementing of the Provisions of the United Nations Convention on the Law of the Sea of the 10th December 1982 relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks, adopted on the 8th June 1998

[261] Simmonds, Kenneth R., "The EC and the New Law of the Sea", Recueil des Cours de l'Academie de Droit International, vol. 218 1989-V , pg. 108 et s.; Simmonds, Kenneth R., "The Community's Participation in the United Nations Law of the Sea Convention", in Schermers, Henry G. et O'Keefe, David (Eds.), Essays in European Law and Integration, Deventer, Kluwer, 1982, pp. 188-189; Gaja, Giorgio, "The European Community's Participation in the Law of the Sea Convention: Some Incoherencies in a Compromise Solution", Irish Yearbook of International Law, 1980-1, pg. 113

specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention[262]", but even the possibility given, in every concrete case to each State party to the Convention, to ask "*an IO or its member States which are States Parties for information as to who has responsibility* […][263]" and, furthermore, joint and concurrent responsibility in case of failure of such communication.

The same rules results to be applicable to the participation of IOs to the Agreement for the Implementation of the Provisions of the Montego bay Convention on the Law of the Sea, in particular *ex* article 47 para. 1[264]. Nevertheless such concurrent responsibility sanctions concern only the hypothesis of the default of information, meanwhile in all the other cases Community and Member States are

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[262] United Nations Convention on the Law of the Sea, 1982, supra note 29, Annex IX, Art. 5 para. 1

[263] United Nations Convention on the Law of the Sea, 1982, supra note 29, , Annex IX to the 1982, Art. 6, para 2

[264] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of the 10th December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, signed the 8th September 1995, entered into force the 11th December 2001

found responsible for the non-execution of the obligations of their own competence, as reported in their declaration.

The UN Convention on the Law of the Sea was followed by many other treaties having the same dispositions relatively to the declaration of competences and the consequent responsibility, imposing on the Community and on its member States the further obligation to inform third contracting parties of eventual mutations in their repartition of competences[265].

2.2 THE INTERNATIONAL ORGANIZATION AS A STATE AGENT

Outside the specific context of treaties, it has even been affirmed the liability of member States towards third parties, when the IO has acted as a State agent, in law or in fact[266]. The

[265] Vienna Convention for the Protection of the Ozone Layer, signed the 22nd march 1985 and entered into force on the 14th October 1988, Art. 13 para. 2; Convention sur les Etudes d'Impact Environnemental dans un Contexte Transfrontalier, signée à Espoo le 25 Février 1991, article 17, texte in Y.I.E.L., 1991, pg. 697; Convention sur la Protection et l'Utilisation des Cours d'Eau et des Lac Internationaux, signée à Helsinki le 17 mars 1992, doc. E/ECE/1267, texte in Y.I.E.L., 1992, pg. 703; Convention sur les Effets Transfrontières des Accidents Industriel, signée à Helsinki le 17 mars 1992, article 29, texte in Y.I.E.L., 1992, pg. 722

[266] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties,

international legal scenario has tried to fund the responsibility of State members for the non-execution of the obligations contracted by the organization on the identification of this last as an agent, a *mandataire*, of its member States, these last seen as "*Etats représentés institutionnellement*[267]".

In this light treaties are seen as "*le simple résultat de l'activité collective des Etats membres*" and the organization as "*un organe commun dont tous les actes sont imputables aux sujets pour lesquels il agit*"[268]. Necessary now is to find a legal basis for this representation. With a particular attention to article 228 para. 2 of the Rome Treaty, part of doctrine has found such basis in the IO's constitutive act, affirming therefore that "*c'est ce constitutional abstract consent de la part des représentés qui contitue le fondement du rapport de représentation en cause*"[269].

1995, supra note 52, Art. 5; Report of R. Higgins to the IDI, in 66-I Yearbook of the Institute de Droit International, 1995. pg. 372-420

[267] Braud, Philippe, " Recherches sur l'Etat Tiers en Droit International Public" , R.G.D.I.P., 1968, pp. 40-41

[268] Geiser, Hans Jorg, "Les Effets des Accords Conclus par les Organisations Internationales : Etude en Droit des Traités des Organisations Internationales à la Lumière de la Convention de Vienne de 1969 ", H. Lang (ed.), Berne, 1977, pp. 188 and 177

[269] Geiser, Hans Jorg, "Les Effets des Accords Conclus par les Organisations Internationales : Etude en Droit des Traités des Organisations Internationales à la Lumière de la Convention de Vienne de 1969 ", supra note 268, at pg.186

In this view the member States result to be the real addressees of the obligations contracted by the IO, theirs is even the responsibility in case of non-execution. As was brilliantly pointed out by another part of doctrine, this ancestral theory must not be accepted. Moreover, it results as well incompatible with the same concept of IO[270].

It has to be noted that representation in international law must fund itself on a specific capacity and that the existence of a delegation of powers to engage the member States vis-à-vis third parties may not be simply inferred. On the opposite " […] *if the instrument of act creating the organ does not indicate that it is authorized on behalf of the Member States, the presumption must normally be that its acts commit only the organization*[271]".

Only in presence of a specific juridical link of representation a direct responsibility of the Member States may be envisaged[272]. This

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[270] Seyersted, Finn, "Applicable Law in Relations between Intergovernmental Organizations and Private Parties", Recueil des Cours de l'Academie de Droit International, vol. 2 1967-III, pg. 122 and pg. 458; Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 462

[271] Seyersted, Finn, "International Personality of Intergovernmental Organizations – Its Scope and its validity Vis-À-Vis Non-Members. Does the Capacity Really Depend upon the Constitution?", supra note 26, at, pg.36

[272] Amerasinghe, C.F., "Principles of the Institutional Law of International Organizations", supra note 60, at pg. 262; Accord entre EUROCONTROL et la Belgique, signés à Bruxelles le 8 septembre 1970, available in R.T.N.U., vol.830, pg. 45 ; Accord entre EUROCONTROL et le Royaume-Uni, signés à Bruxelles le 8

same conclusion would be, in other cases, impossible due to the different international legal personalities of the IO and of its member States.

It is as well possible to arrive to the conclusion of the absence of a representative relation between an organization and its member States from an internal law perspective[273]. On this point clarifying are the words of the English Court of Appeals in the *Maclaine Watson v Dpt og Trade and Industry case*, denying the existence of a representation of the member States by the International Tin Council[274]. The Court, remembering the necessity for the creation of a mandate of the consent of the two parties, affirmed "*that there was no intention on the part of the member States to authorize the ITC as an agent in making tin contracts or the loan contracts, and no intention on the part of the ITC to act as such*[275]". The same difficulty

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septembre 1970, available in R.T.N.U., vol. 834, pg.110; Accord entre l'ONU et le Gouvernement Tanganykais concernent la Fourniture d'une Assistance Technique au Titre du Programme OPEX, en application de l'Accord du 1er juin 1962, signé a Dar Es-Salam le 31 juillet 1963 et à New York le 30 septembre 1963, available in R.T.N.U., vol 480, pg. 15

[273] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 464

[274] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, supra note 95, at pg. 110

[275] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, Judgement of the 27 April 1988, words of judge Gibson L.J., I.L.R., vol. 89, pg.178

encountered in international law results even in national law: the material demonstration of the existence of a juridical link between the organization and its' member States[276].

In conclusion it has to be assessed that obligations taken by an IO *en son nom proper* do not create links between its member States and third contracting parties.

4. MEMBER STATE'S PARTICIPATION TO AN UNLAWFUL ACT OF THE IO

The ILC, in its work on State responsibility, investigated on a series of situations, other than the ones treated above, in which such responsibility derives from the participation of the member States to the overcoming of the IO's unlawful act.

In the light of our scope, three are in particular the situations in which an individual State responsibility appears to be funded on the violation of international obligations set on the same member States: the situation of co-authors (A), aid or assistance to the

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[276] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 466

commission of a wrongful act by the IO (B), and le *défaut de vigilance* (C).

1 THE SITUATION OF CO-AUTHORS

Activities that involve both the IO and its member States may originate a concurrent responsibility. This appears to be both the premise and the conclusion[277].

Different are the situations, included in such hypothesis, such as the responsibility for wrongful acts committed by member States' organs put under the disposal of the organization[278] or for the unlawful acts committed by the UN peace-keeping forces in reference to their nationality[279].

1.1 RESPONSIBILITY FOR WRONGFUL ACTS COMMITTED BY MEMBER STATE'S ORGANS PUT UNDER THE DISPOSAL OF THE ORGANIZATION

[277] David, Eric, "Droit des Organisations Internationales", P.U.B. (ed.), Bruxelles, 1996-97, pg. 313-314

[278] Amrallah, Borhan, "The International Responsibility of the United Nations for Activities carried out by U.N. Peace-keeping Forces", Revue Égyptienne de Droit International, Volume 32, 1976, pg. 68

[279] Condorelli, Luigi, "Le Statut des Forces de l'ONU et le Droit International Humanitaire ", Rivista di Diritto Internazionale, 1995, pg. 897

In relation to the first situation reference must be made to article 5 of the draft articles elaborated by the ILC, in which it is affirmed that:

> "1*. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization*[280]".

Article 5 is the correspondent version of article 4 in the ASR:

> "*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".*

[280] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

Article 4 states, in the first paragraph, "*[t]he principle of attribution for the purposes of State responsibility in international law that the conduct of an organ of the State is attributable to that State*".

In reference to States, such article "*[c]overs all the individual or collective entities which make up the organization of the State and act on its behalf…*", including even organs "*[…] of any territorial governmental entity within the State on the same basis as the central governmental organs of that State*[281]". Therefore, based on the principle of the unity of the State, all acts or omissions of its organs "*are to be regarded as acts or omissions of the State for the purposes of international responsibility*[282]".

In reference to the specific IO's legal system, a similar reasoning to the extent of excluding the relevance of the terminology used in the internal law of a State in order to define an organ. Moreover, the ICJ, both in the *Reparation* case, and in Its Advisory Opinion on the Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the UN, stuck to a liberal interpretation of the word "*agents*", affirming that "*the essence*

[281] ILC Report, A/56/10, supra note 133, Commentary to article 4

[282] ILC Report, A/56/10, supra note 133, Commentary to article 4

of the matter lies not in their administrative position but in the nature of their mission[283]".

The ICJ, in a subsequent advisory opinion, newly addressed the issue of attribution of conduct sustaining that: "*the United Nations may be required to bear responsibility for the damage arising from such acts*[284]", without making any distinction between principal and subsidiary organs.

Furthermore It included that the conduct of the UN was made up of "*acts or omission of its agents*[285]", both officials than persons acting on behalf of the UN "*on the basis of functions conferred by an organ of the organization*[286]".

The reasoning of the Court has a general value, therefore it can be applied to all organizations. On this point, relevant are the words chosen by the Swiss Federal Council in one of Its decisions: "*[En]*

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[283] ICJ Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the UN, 15 December 1989, para. 47; see also ICJ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, 11th April 1949, pg. 177

[284] ICJ Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 29 April 1999, para. 66

[285] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 5, para. 60

[286] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 5, para. 60

règle générale, sont imputables à une organisation internationale les actes et omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences[287]".

Passing on to the comparison of article 5, paragraph 2, of the IO Draft Articles, and article 4 of the ASR, it is clear that, notwithstanding the reference to the rules of the organization, in exceptional cases "*functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization*[288]", or pursuant to them.

Central for the attribution of the conduct results to be the criterion of effective control over the conduct, stated in article 6 of the IO Draft Articles, titled **"***Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization":*

> "*The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act*

[287] Swiss Federal Council decision VPB 61.75, of the 30 October 1996

[288] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 5, para. 61

of the latter organization if the organization exercises effective control over that conduct".

There is nonetheless nothing which interferes with an eventual will of the lending State or organization to conclude an agreement specifically regulating the eventual responsibility for an internationally wrongful act committed by the lent organ[289]. For example, the model contribution agreement relating to military contingents placed at the disposal of the UN by one of its member States, provides, on one side, the liability of the UN towards third parties and, on the other, the right of recovery of the UN from the contributing State in circumstances of "*loss, damage, death or injury from gross negligence or wilful misconduct of the personnel provided by the Government*[290]".

It must be nevertheless noted, firstly, that such agreements deal only with the distribution of responsibility, rather than with the attribution of conduct, and, secondly, that in any case third States, under the general rules are not deprived of their rights towards the State or the organization whose responsibility is asserted.

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[289] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 6, para. 62

[290] Model Contribution Agreement of the United Nations, A/50/995, Annex, art. 9; Model Contribution Agreement of the United Nations,A/51/967, Annex, art. 9

More will be said on such criterion in reference both to the attributions of the unlawful acts committed by military contingents that States put under the disposal of the UN, than to the case of responsibility of both member States and third States for the exercise of direction and control over the commission of an international wrongful act by an IO [291].

1.2 EXCESS OF AUTHORITY

Article 7 of the IO Draft Articles deals with the *ultra vires* conduct of organs or agents of an IO, stating that:

> "*[T]he conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions*".

[291] See Chapter 4.1.2 on the Unlawful Acts Committed by the UN Peace-Keeping Forces; see also Chapter 4.2.2 on the Responsibility of both Member States and Third States for the Exercise of Direction and Control over the Commission of an International Wrongful Act By an International Organization

Important is to identify the cases in which "*the conduct exceeds the authority*". This is likely to happen when the conduct of the organization goes beyond its competence or when, even if it doesn't do so, nevertheless is transcends the authority of the organ or agent.

In reading the present article in the light of article 5, the rules of the organization appear relevant in order to attribute the conduct to the IO. Same dissertation can be made in reference to the instructions of the IO, even if limited to the case in which they bind the organ or the agent.

The ICJ[292] itself affirmed the existence of such rule, specifying the requirement that the organ or agent has to act "*in that capacity*". This condition, present even in article 7 of the ASR, is well explicated in the Commentary to the ASR: "*the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State*[293]".

Moreover such interpretation result conform to the same IO practice, finding exemplification in the following statement of the

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[292] ICJ Advisory Opinion on Certain Expenses of the United Nations, 20th of July 1962, para. 168

[293] ILC Report, A/56/10, supra note 133, Commentary to art. 7, para. 8

General Counsel of the IMF: "*Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization*[294]."

1.3 UNLAWFUL ACTS COMMITTED BY THE UN PEACE-KEEPING FORCES

1.3.1 EFFECTIVENESS OF CONTROL

The attribution of conduct of the military contingents put under the disposal of the UN in the context of peace-keeping operations, has become through time a controversial issue[295]. The UN, in principle, assume to have an exclusive control on such organs: "*[A]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international*

[294] ILC Report, A/CN.4/545, supra note 102, pg.27

[295] District Court of the Hague Judgment in the incidental proceedings, Association of Citizens Mothers of Srebrenica vs the State of the Netherlands and the United Nations, Case no. 295247, 10th July 2008

responsibility of the Organization and its liability in compensation[296]".
This last statement, made by the UN Legal Counsel, sums up the UN practice in the peacekeeping operations, with special reference to the United Nations Operation in the Congo (ONUC) and the United Nations Peacekeeping Force in Cyprus (UNFICYP).

In such operations the control that the State retains over disciplinary and criminal matters is of central significance in relation to the attribution of conduct. In fact, "*attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses on the relevant respect*[297]."

The UN have denied the idea that the conduct of military forces of State or of IO could be attributed to them on the basis simply of the authorization of the UN Security Council [hereinafter UNSC] to take necessary measures *dehors* the chain of command binding them to the UN. This point was made clear in a letter between the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the UN and the Permanent Representative of Belgium to the UN: "*UNITAF troops were not under*

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[296] ILC Report, A/CN.4/545, supra note 102; Letter by the United Nations Legal Counsel to the Director of the Codification Division, 3rd February 2004, in A/CN.4/545, sect. II.G

[297] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4, Commentary to article 6, para. 65

the command of the United Nations and the Organization has constantly declined liability for any claims made in respect of incidents involving those troops. [298]"

Central results one again the criterion of the effectiveness of such control, as confirmed by the works of a number of mainstream scholars[299]. Moreover, the degree of effective control, or "*operational control*[300]" as some scholars denominated it, results central not only in peacekeeping operations, but even with regard to joint operations.

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[298] Exchange of Letter between the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the UN and the Permanent Representative of Belgium to the UN, 25th June 1998, unpublished, see ILC Report, A/64/10

[299] Amrallah, Borhan, "the International Responsibility of the United Nations for Activities carried out by U.N. Peace-keeping Forces", supra note 278, at pg.57, 62-63 and 73-9; Ritter, J.-P. "La Protection Diplomatique à l'égard d'une Organisation Internationale", Annuaire Français de Droit international, vol. 8, 1962, pp. 427-442; Simmonds, R., "Legal Problems Arising from the United Nations Military Operations", Nijoff (ed.), the Hague, 1968, pg. 229; Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pp. 379-380; Hirsch, M., "the Responsibility of International Organizations Toward Third Parties: Some Basic Principles", supra note 184, at pp. 64-67; Gonzáles, Pérez M., "Organisations Internationales et le Droit de la Responsabilité ", Revue Générale de Droit International Public, vol. 99, 1988, pp. 63-83

[300] Bothe, Michael, "Streitkräfte internationaler Organisationen", Max Pläck Institut für Ausländisches öffentliches Recht und Völkerrecht, Carl Heymans Verlag, KG Köln/Berlin, 1968 , pg. 87

In the latter case "*international responsibility for the conduct of the troops lies where operational command and control is vested*[301]". Even in this occasion, two are the alternatives: an agreement "*establishing the modalities of cooperation between the State or States providing the troops and the United Nations*[302]" or, in absence, with a case by case approach, based on the application of the degree of effective control, as sustained by the UN Secretary General [hereinafter UNSG].

1.3.2 BEHRAMI AND SARAMATI CASES

Specific reference deserves in particular the attribution of conduct of the unlawful acts committed by the peace-keeping forces of the UN in the *Behrami case*[303] and in the *Saramati case*[304]. Central issue challenging the Court was the inquiry over the presence of such

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[301] Administrative and Budgetary Aspects of the financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations, Report of the Secretary General, UN Doc. A/51/389, 20 September 1996, paras. 17-18, pg. 6

[302] Administrative and Budgetary Aspects of the financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations, supra note 301, paras. 17-18, pg. 6

[303] ECtHR Grand Chamber Decision, Agim Behrami and Bekir Behrami adgainst France, Application No. 71412/01, 2nd May 2007

[304] ECtHR Grand Chamber Decision, Agim Behrami and Bekir Behrami against France, supra note 303

effective control of the National State over the military troops put under the disposal of the international peace-keeping operation.

In the *Behrami case* the applicants affirmed the violation by the French State of article 2 of ECHR, based on the asserted exercise by this State of an effective control over its troops in the specific territory where the violations took place. On the other hand the French government sustained the absence of such control being the KFOR a multinational entity. In the *Saramati case* the applicants affirmed the violation of articles 5 and 6 of the ECHR[305]. In both hypothesis the Court excluded any State responsibility, affirming that the conduct of the military forces had to be attributed to the UN.

The reasoning of the Court is characterized by two main passages. In reference to the asserted negligence of the French troops in clearing the mine-fields, the Court affirmed that such operation was of the competence of the transitory administration of the UN, not of the KFOR[306]. *In secundis,* in deciding weather the conducts were attributable to the member States or to the UN, the Court concluded in favour of the latter, therefore declaring the claims inadmissible.

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[305] European Convention on Human Rights, supra note 194

[306] ECtHR Grand Chamber Decision, Saramati v. France, Germany And Norway, Application No. 78166/01, 2nd May 2007, para. 64

In particular the Court based its assertion on the convincement that it was the UNSC which "*retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO*[307]". Such reasoning generates more than a doubt, especially in relation to the reconstruction of the distribution of competences.

Several authors pointed out an application of the criterion different from that envisaged from the Community[308]. In relation to the division of competences, the creation of the UNMAC did not relieve the KFOR fro its' responsibilities, as results from both the

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[307] ECtHR Grand Chamber Decision, Agim Behrami and Bekir Behrami against France, supra note 303; ECtHR Grand Chamber Decision, Saramati v. France, Germany And Norway, supra note 305, at para. 60

[308] Klein, Pierre, "Responsabilité pour les Faits commis dans le Cadre d'Opérations de Paix et étendue du Pouvoir de Contrôle de la Cour e Européenne des Droits de l'Homme: Quelques Considérations Critiques sur l'Arrêt Behrami et Saramati", Annuaire Français de Droit International, vol. 53, 2007, pp.43-55 ; Lagrange, Ph., "Responsabilité des Etats pour Actes accomplis en Application du Chapitre VII de la Charte des Nations Unies", Revue Générale de Droit International Public, vol. 112, 2008 , pp.85-95; Larsen, K.M., "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", European Journal of International Law, vol. 19, 2008, p. 509 at pp. 521-522 ; Papangelopoulou, Elena, "Introductory Note to European Court of Human Rights (ECHR) Grand Chamber: Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland", International Legal Materials Vol. 45, No. 1, January 2006, pg. 133 ; Milanović, M., and Papić, T., "As Bad as It Gets: The European Court of Human Rights Behrami and Saramati Decision and General International Law", International and Comparative Law Quarterly, vol. 58, 2009, pg. 267 and pp. 283-286

military agreement between the Security Forces and Serbia[309] and from the UNGA resolution 1244/1999 of the 10th of June 1999, which invests the KFOR with the authority to take all appropriate measures "*to establish a safe environment in Kosovo*[310]".

Relatively to the attribution of the conduct of the KFOR troops, three are the possible solutions: the UN, surely endowed with international legal personality[311]; the NATO, who's personality must be here presumed, and the national States of the military and civil troops.

In reality the UNSC, differently from what sustained by the Court, did not have the ultimate authority on the KFOR. The Council, in fact, gave only the authorization for the displacement of the multinational forces under the command of the NATO, as was brilliantly stressed out by the "*Venice Commission*"[312]. The KFOR is not, in fact, a UN peace-keeping operation, even if its' mandate was defined by a UN Resolution. Decisive on the point results the factual data of the effective control over the organs that the States put under

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[309] Military Technical Agreement between the Security Forces and Serbia, signed and entered into force the 9th of June 1999

[310] UN doc. S/Res/1244 (1999) on the deployment in Kosovo, adopted by the Security Council at its 4011th meeting, on 10th June 1999, Annex 2, point 4

[311] ICJ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, 11th April 1949, supra note 13, at pg.175

[312] European Commission For Democracy Through Law Strasbourg, 8TH October 2004, Opinion no. 280 / 2004 CDL-DI (2004)004rev, para. 14

the disposition of an IO. In the present case the UN lacked of such a control. Moreover a responsibility of the UN could have existed only in presence of a precise authorization by this last in fulfilling that specific act, as affirmed in article 16 para. 2 of the IO Draft Articles: "*an IO incurs international responsibility if it authorizes a member State or IO to commit an act that would be internationally wrongful* […]"[313]. In deciding if the conduct has to be attributed to the States or the NATO, central results the analysis of the nature of the "*unified command and control*" exercised by the NATO[314]. As results from the work of the Venezia Commission "*[T]roop contributing States have therefore not transferred "full command" over their troops[315]*", therefore maintaining a certain degree of control. It is even necessary in this occasion a case per case approach, from which results in the *Saramati case*, a responsibility of the KFOR, as the authorization for the arrest came directly from its' chief commander[316].

More complex appears to be the *Behrami case*, in which nevertheless the French commander had a certain degree of autonomy, potentially funding the responsibility of the French State.

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[313] ILC Report, A/64/10, Draft Articles on the Responsibility of International Organizations, supra note 4

[315] European Commission For Democracy Through Law Strasbourg, supra note 312, at para. 14

In reality the Court could have simply based its' decision on the principle of juridical space on geographical grounds, due to the fact that Serbia was non a contracting party to the ECHR[317]. Moreover the principle of "*monetary gold*[318]", in other words the lack of identity between the member States and the States parties to the Council of Europe, would have constituted an insurmountable obstacle to the jurisdiction of the Court.

These two cases were at the centre of a debate on the possibility to fund a State responsibility in relation to an unlawful act of the IO to which they are members. In particular, interesting results the hypothesis of a general responsibility of the member State for the actions of its' organs put under the disposal of the IO.

Following the reasoning of this thesis two are the main consequences. Firstly the jurisdiction of the Court doesn't find anymore the boundary of the competence *ratione personae*, secondly it eliminates the possibility for the member States to avoid their duties under the Convention through the institution of the IO. On the point illuminating are the words of V. Brownlie: "*[I]t is illogic to*

[317] Sossai, Mirko, "Accesso alla Corte Europea dei Diritti dell'Uomo per le Violazioni compiute dalle Forze Armate degli Stati contraenti all'Estero", 2009, pg. 215

[318] Johnson, D. H. N., "The Case of the Monetary Gold Removed from Rome in 1943", International and Comparative Law Quarterly, 4, 1955, pp. 93-115

suppose that a group of States can manufacture an immunity from responsibility toward third States by the creation of an IO[319]".

This idea results conform to the position taken by the European Court in the *Bosphorus v. Ireland case*[320]. More precisely the Court affirmed that the transfer of functions to the EC did not free its' member States from their responsibilities under the Convention.

A second theory funds the liability of the member States for the omission to watch over the actions taken by the organs put under the disposal of IO; argument which will be treated more deeply later on[321]. Important now is to remember that such positions aim to establish a concurrent responsibility of the member States based on the assertion that a certain degree of control and a general duty of vigilance was nonetheless present[322].

Confirm of this can be found in the Agreed principles for the Russian participation to the International Security Force for Kosovo, in the part in which it is granted to the sector commander or the commander of a national contingent within a sector to decline an order from the KFOR commander. In the case of an acceptance of an

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[319] Brownlie, I, "The Responsibility of States for the Acts of IOs", in M. Ragazzi (ed.), International Responsibility Today. Essays in memory of Oscar Schachter, Leiden/Boston: Nijhoff, 2005, pg. 361, see also pg. 355 et seq.

[320] ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, application no 45036/98, 30 June 2005

[321] See Chapter 4.3 on The Défaut de Vigilance

illegitimate order it could be recognized therefore the responsibility of the member State under article 25 of the IO Draft Articles [323].

Last hypothesis is that of a collective responsibility of all the member States for an international wrongful act committed by the IO to which they are members. As previously assessed, doctrine is divided between those who sustain the existence of a subsidiary responsibility of the member States and those who exclude it on the basis of the separate legal personality of the IO[324]. Briefly it is necessary to recall the conclusions of special rapporteur Giorgio Gaja, which looks at the case of a member State responsibility as an exception, admissible only in presence of the acceptance of such responsibility by the member States or if the States "*by their conduct, cause a non-member State to rely, in its dealing with the organization, on the subsidiary responsibility of the member States of the organization*"[325].

[323] ILC Report, A/61/10, supra note 74pg. 279

[324] Cfr. Chapter 2.1 Concurrent or Exclusive Responsibility

[325] ILC, A/CN.4/564/add.2, supra note 74, art. 29

2 STATE RESPONSIBILITY FOR THE AID OR ASSISTANCE TO THE COMMISSION OF A WRONGFUL ACT BY THE IO

Art. 25 of the Draft Articles affirms that:

> a "*State which aids or assists an IO in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
>
> *(a) That State does so with knowledge of the circumstances of the internationally*
>
> *wrongful act; and*
>
> *(b) The act would be internationally wrongful if committed by that State*.[326]"

Various may be the situations which concrete such responsibility. One might be putting the State's territory or instruments under the disposal of the organization with the scope or the knowledge to permit the violation of international law. Another situation generating responsibility could be the exercise of the typical activities of the member States in the functioning of the IO, such as

[326] ILC Report, A/62/10, supra note 133

the exercise of vote in the adoption of institutional acts of IOs, as will be better seen in the following paragraph[327].

2.1 RESPONSIBILITY OF MEMBER STATES FOR THE ABUSE OF LEGAL PERSONALITY OF IOS AT THE DECISION-MAKING LEVEL

It is impossible to deny that all State members exercise, to some extent, necessarily some type of control over the IO's decision-making process, with the scope of influencing the adoption of the most favourable decisions for "*their own interest, the interest of all or the interest of the organization*[328]". In highly integrated organizations it is a fact that all decisions are taken with the consensus, in its positive or negative form, of at least the majority of its member States. This does not mean that in presence of an international wrongful act of an IO, consecutively there will always be a joint or a

[327] see Chapter 4.2.1 on the Responsibility of Member States for the Abuse of Legal Personality of IOs at the Decision-Making Level

[328] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 119; see also D'Aspremont, J., "Contemporary International Rulemaking and the Public Character of International Law", NYU Global Law Working Paper, 08/06, & Institute for International Law and Justice Working Paper, 2006/12

concurrent responsibility of its member States[329]. On the other hand, the autonomous international personality of an IO cannot become a shield behind which the member States may find shelter from the responsibility deriving from such acts that, if committed by the same State, would have constituted an unlawful act.

Bearing in mind that a certain control is always present and legitimate, which are the concrete cases in which such a control illegally undermines the autonomy of an organization? In other words, when may a State member be held concurrently responsible?

Some authors have in the past sustained the existence of a general and systematic responsibility of the States exercising control over the functioning of the IOs to which they are members[330]. This theory cannot be accepted because it annihilates the autonomy of the IO towards its' creators. The presence of a control inhibiting the decisional autonomy of the organization must be found in the specific case. it cannot be generally presumed[331].

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[329] Wellens, K., "Remedies against International Organizations", supra note 73, at pg. 44; D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg.101

[330] Schermers, Henry G., "Liability of International Organizations", supra note 109, at pp. 7-9; Pescatore, Pierre, "Les Relations Extérieures des Communautés Européennes (Contribution a la Doctrine de la Personnalité des Organisations Internationales)", Recueil des Cours de l'Academie de Droit International, vol.103, 1961-II, pp. 224-225

[331] Glavinis, Panayotis, "Les Litiges Relatifs aux Contrats passés entre Organisations Internationales et Personnes Privées", L.G.D.J. (ed.), Paris, 1990, pg.55 ; Klein,

The ILC gave a narrow definition of this phenomenon, adding another element: "*the circumvention of international obligations by member States in the establishment of an IO*"[332]. In relation to the content of IO Draft Article 28, it results that for the ILC the responsibility of member States arising out of the establishment of an IO[333] cannot be avoided by showing the absence of an intention to circumvent the international obligation, due to the fact that a specific intention is not required. In any case this interpretation and the requisite of the circumvention regard uniquely the moment of the creation of the IO. Its field of application cannot, should not, be extended nor to other cases nor universally.

The ILC, as will be explained later on, has found another case from which can derive the exclusive responsibility of a member State: the exercise of direction and control over the commission of an international wrongful act by an IO[334].

Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 485

[332] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 103; ILC Report, A/61/10, supra note 74, Draft Article art. 28, at pg. 283

[333] See Chapter 2.2 on the Responsibility of Member States Arising out of the Establishment of an International Organization (The Abuse of Legal Personality at the Level of its Creation)

[334] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 103

In doctrine such a solution finds its' ground on the criterion of overwhelming and effective control exercised by the member States, but it lacks of indications, as "*the tools used in exerting such control are not always identifiable*"[335]. Difficulty in its' application and in finding an abstract definition of such principle derives from the necessity *in primis* to demonstrate the existence of the control, *in secundis* that it is overwhelming. A positive effect deriving from a "loose" criterion, not defined abstractly and therefore applicable to a great variety of factual situations, is the possibility to relate it to a wide range of IOs[336].

For an analysis of such criterion are necessary both a schematic and a case-by-case approach. This because in many cases such type of control is exercised in such a way to be "context-dependent", in other words non-observable or non-identifiable *a priori*[337]. As already anticipated a mere participation to the decision-making process cannot by itself constitute such a violation[338], unless

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[335] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 117

[336] ILC Report, A/56/10, supra note 133, Commentary of art. 8

[337] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 120

[338] ILC, A/CN.4/564/Add.1, supra note 133, at para. 5; D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 103

leading to an unlawful complicity. It can't as well be considered tantamounting to a violation when such an influence is expressly provided by the constitutive treaty of the organization, such as in the case of UNSC's subjection to the rule of "*great Power unanimity*". In fact, the UNSC's permanent members are endowed with veto power, through which they can block any Council Resolution[339].

As international practice shows, not even the mere domination of a State over the organization, due to its major influence, tantamounts to a violation of this rule. In cases such as the United States of America in the International Monetary Fund[340], in which power is divided in consideration of the size of the participation quota, even if there is a consequent influence of the United States on the policy and the decision-making process of the organization, this is legitimate.

From these examples results a necessity of a clear and irresistible influence over the decision-making process; irresistible by the organization and the member States. Control can be even circumscribed and limited in time, as in the case it was directed at the making of a single decision, but it must be decisive.

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[339] http://www.un.org/Docs/unsc/unsc_members.html

[340] Status of IMF's Members', Consents to Increase in Quotas Under the Eleventh General Review, Last updated: 20th August 2010

On the other hand another requirement needs to be matched: the existence of a causal link between the overwhelming control and the wrongful act. This does not implicitly mean that there must be an intention to commit the wrongful act. On the opposite, this is not required[341]. Same conclusion must be given if reference to the intent of prodding the organization in committing an internationally wrongful act, contrarily to the case of coercion, on which we'll subsequently return. Difficulties are encountered in the determination of the knowledge of the circumstances of the control by member States, especially to trace the subjective element of the wrongful act, equally to those met by the ICJ in determining the Serbian government's knowledge of the Bosnian Muslim genocide in the region of Srebrenica[342].

It has to be stressed out that it is not required that all member States exercise such control: responsibility therefore will regard only those member States effectively exercising such control, causing this some difficulties in the apportionment of the reparation. These States will be also concurrently responsible for the wrongful acts that are the

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[341] International Labour Organization Administrative Tribunal, Judgement on the Dismissal of the Director-General of the OPCW, Case n° 2096, 2002

[342] Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of Justice on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26th February 2007

necessary consequences of any such decisions. The wrongfulness of the IO's decision is yet not necessitated in itself. It is considered in this case to amount to "*preparatory actions*" of the wrongfulness[343].

In any case it must be noted that the participation of the State to the adoption of these preparatory acts by the organization can constitute by itself wrongful assistance or participation[344]. In particular responsibility may arise from the vote of a member State for the adoption of an unlawful decision of the IO, as it concretes assistance to the organization for the perpetration of the breach of the organizations' obligations[345]. The attribution of responsibility is independent from the fact that the vote *per se* does not constitute an unlawful act, depending on the knowledge of the unlawful consequences of adopted act. Interesting on the point results to be the position of the delegation of China expressed in the ILC:

> "*since the decisions and actions of an IO were, as a rule, under the control, or reliant on the support, of member States, those member States that voted in favour of the decision in question or implemented*

[343] ICJ Contentious Case concerning The Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 25th September 1997, para. 79

[344] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 433

[345] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg.469

the relevant decision, recommendation or authorization should incur a corresponding international responsibility[346]".

Particular difficulties have been concretely encountered in the effort to demonstrate the *de facto* presence of such control, especially in relation to the proof of the absence of the authority and autonomy of the IO, which cannot "*be inferred from the fact of the membership alone*[347]".

A distinction must be made between the attribution of conduct and attribution of responsibility. IOs cannot be considered as State organs, therefore overwhelming control has to be seen as a principle of attribution of responsibility[348]. The abuse of the international legal personality of an IO must remain alien to the existence of an international obligation on States to ensure that any organization to which they are members exercises its powers in conformity with their international obligations[349].

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[346] ILC Report, A/C.6/60/SR.11, Discussion of the 6th Committee, 24th October 2005, para. 53

[347] Court of Appeals of England, Maclaine Watson v. Dpt of Trade and Industry, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, supra note 95, at pg. 46

[348] ILC, A/CN/4/541, Second Report of Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, supra note 133, at 6-7

[349] ECtHR, Matthews v. UK, Case number 24833/94, Rec. 1999-I, 18th February 1999, paras. 31-35; European Court of First Instance, Ahmed Ali Yusuf and Al

2.2 RESPONSIBILITY OF BOTH MEMBER STATES AND THIRD STATES FOR THE EXERCISE OF DIRECTION AND CONTROL OVER THE COMMISSION OF AN INTERNATIONAL WRONGFUL ACT BY AN IO

The ILC, along with hypothesizing an exclusive responsibility of member States at a creation level, affirmed the existence of an exclusive responsibility of member States for the exercise of direction and control over the commission of an international wrongful act by an IO. In this particular case, being present "*a domination over the wrongful conduct*[350]" and not only a mere influence or participation in the decision-making process, the wrongful act is directly attributed to the member State[351].

Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Case T-306/01, 21st September 2005, para. 198; European Court of First Instance, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Case T-315/01, 21st September 2005, paras. 156-160

[350] ILC Report, A/56/10, supra note 133, Commentary to art. 17

[351] ILC, A/CN.4/564/Add.1, First Addendum to the Fourth Report of the Special Rapporteur Giorgio Gaja on the Responsibility of International Organizations, 2006, para. 5; D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 103

In the present case a joint or concurrent responsibility of the member States exercising overwhelming, effective control appears as a logical consequence. This idea is corroborated by the comparison between two inverse situations. As international law affirms the responsibility of the IO for the acts committed by its member States as mere agents of such organization, in other words acting without any discretion in the implementation, there is no real reason why the contrary may not be as well true.

Another particular feature of this principle appears to be its applicability both to member and non-member States, excluding situations in which member States exercise control on a decision-making level.

3 LE DEFAUT DE VIGILANCE

A third hypothesis of State responsibility regards the absence of vigilance of the member State on the IO which has breached its' international obligations. In concrete such *défaut*, in the relations between the organization and its' member States, may regard both

activities taking place on the territory of the member State than the violation of the so called "*due diligence*"[352].

With reference to the first case, the responsibility of the member States resides on the principle of territorial sovereignty. Clear on the point are the words of the Permanent Court of Arbitration in the *las Palmas case*:

> "*Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States […] with the rights which each State may claim for its nationals in foreign territory*[353]".

In any case the commission of an illegitimate act by an IO on the territory of one of its' member States does not automatically cause the liability of this last; on one side the establishment of a specific obligation of due diligence is required and, on the other, the effective possibility to exercise such control must be measured. The ILC was clear on the point, excluding the possibility of the extension of the responsibility to the member State based exclusively on the

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[352] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg.470

[353] Permanent Court of Arbitration, the Island of Palmas Case, United States of America v. Netherlands, 4th of April 1928

fact that the illegitimate act, even if not committed by the State, took place in territories under its' sovereign control.

Often the same agreements contain dispositions excluding the attribution of any sort of responsibility to the State for acts committed by the IO[354]. Even in this case the State will be liable not for the illicit acts of the organization but in virtue of such general rule evocable by the third State[355]. The same principle has been applied in the legal practice of the European Commission on Human Rights[356].

Eminent authors have stressed out, on the other side, that the liability of the member States could be funded on the general duty to ensure the protection of third parties in relation to the action of the organization to which they are members. Such an obligation nevertheless requires a basis.

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[354] Accord entre la Suisse et l'OMS concernant le Statut Juridique de l'OMS, approuvé par l'Assemblée Mondiale de la Santé le 17 Juillet 1948 et par le Conseil Fédéral Suisse le 21 août 1948, available in R.T.N.U., vol. 26, pg. 332 ; Accord entre le Burundi et l'OMM relatif au Bureau Régional de l'OMM pour l'Afrique dans la République du Burundi, signé à Genève le 1er Octobre 1980, art.10, available in R.T.N.U., vol. 1201, pg.165

[355] Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 471 ; see also Seyersted, Finn, "International Personality of Intergovernmental Organizations – Its Scope and its validity Vis-À-Vis Non-Members. Does the Capacity Really Depend upon the Constitution?", supra note 26, at, pg.246; Amrallah, Borhan, "The International Responsibility of the United Nations for Activities carried out by U.N. Peace-keeping Forces", supra note 278, at pg. 68

[356] European Commission on Human Rights, Case X v. RFA, n° 235/56, 10th of June 1958, available in A.C.E.D.H., VOL. 2, 1958-59, pp. 295-299

Such basis can be funded on the same constitutive act of the IO. Example of the prevision of an autonomous cause of responsibility as a sanction for the inaction of the member States is article 139 of the UN Convention on the Law of the Seas, where at para. 3 is affirmed that the "*States Parties that are members of IOs shall take appropriate measures to ensure the implementation of this article with respect to such organizations*"[357]. Such provisions are nevertheless rare and do not resolve our question on the existence of such a general duty of the member States.

[357] United Nations Convention on the Law of the Sea, 1982, supra note 29, , Article 139 para. 3; see also Göralczyk, Wojciech J., "Responsibility of States for Activities carried out in the Sea-bed Area", Thesaurus Acroasium, Thessaloniki, 1993, pg. 103

CONCLUSION:

POLITICAL CONSIDERATIONS: THE ATTRACTIVENESS FOR STATES OF THE "SHIELD" OF AN EXCLUSIVE RESPONSIBILITY OF THE IO

The liability of member States of IOs is not a topic exclusively of legal character. On the contrary, very important are as well the political considerations that have been done. Being States the principal actors on the international stage, the legal and political facets of their actions are strictly bound together.

It is convenient to commence by taking a glance to the appealing features of the State's membership in an internationally personified IO. This type of cooperation works to the State's advantage, by granting protection, through the up-mentioned exclusive responsibility of the IO, from any risk of being held responsible for the activities carried out by the IO or by the same State through the IO itself[358].

[358] Report of the Committee on the Accountability of International Organizations of the International Law Association of the Seventy-first Conference, Berlin, 16th-24th August 2004, pg. 227; D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 106-7

From this perspective the exclusive responsibility of IOs appears, therefore, as the main reason that brings States to endow an IO with international legal personality[359]. Furthermore actions through an IO enable the State to conduce low cost policies, avoiding once again individual responsibility.

Different presumptions were therefore advanced in order to legitimate and revaluate the advantages deriving from the assertion of the principle of exclusive responsibility of IOs. It has, as an example, been affirmed that an extension of the responsibility to the member States would inevitably undermine the autonomy of the organization itself. Following such perspective, the raise of consciousness by the State in reference to its' liability for such unlawful act, would have as a causal consequence, a more penetrating intervention in the decision-making process[360], or even a reluctance in joining in such forms of international cooperation. These time-increasing presuppositions have been confirmed by the *IDI:*

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[359] ILC, A/CN.4/564/add.2, supra note 74, paras. 9-10

[360] ILC, A/CN.4/564/add.2, supra note 74, para. 13; Report of R. Higgins to the IDI, in 66-I Yearbook of the Institute de Droit International, 1995, pg.419; First Report of the International Law Association Committee on Accountability of International Organizations presented to the 68th Conference of the ILA in Taipei, 24th-30th May 1998, available in ILA Report of the 68th Conference, pg. 602; Wellens, K., "Remedies against International Organizations", supra note 73, at pg. 25

> "*there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an IO of which they are* members[361]" and that "*[i]mportant considerations of policy, including support for the credibility and independent functioning of IOs and for the establishment of new IOs, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of IOs*."[362]

In reality a more pervading interference of member States in the IO's decision-making process, consequence of the extension of a concurrent or joint State responsibility, must not be seen only under such a sullen and grim light. The growing participation of the member States can even tantamount to a form of positive activism. Among the positive effects, obtainable through a more pervasive activism of member States, is surely a better internal control on the

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[361] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, art. 6 a

[362] Resolution of the IDI on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of the Obligations towards Third Parties, 1995, supra note 52, art. 8

organization. The presence of an effective internal control would contribute, moreover, to the same prevention of the commission of the unlawful act[363], therefore resolving *ab initio* the matter.

On the contrary, one of the major consequences of the inapplicability of the principle of concurrent or joint responsibility to member States, would be the endowment, on a domestic level, of an immunity both to IOs than to member States. This would constitute not only an insuperable impediment for the injured State or organization to bring the claim in front of a national jurisdictional organ, but potentially even on an international level[364].

It is a fact that such claim requires the presence of the IO in front of the tribunal, which, even if some times possible, can constitute an insurmountable difficulty in absence of a jurisdiction *ratione personae* of this last, like in the case of the ICJ[365].

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[363] Chandrasekhar, S., "Cartel in a Can: the Financial Collapse of the International Tin Council", Northwestern Journal of International Law and Business, 1989-10, pp. 310-311; S Talmon, S., "The Security Council as a World Legislature", American Journal of International Law, no. 99, 2005, pp. 175-193; Klein, Pierre, "La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents", supra note 23, at pg. 489

[364] Geslin, "Réflexions sur la Répartition de la Responsabilité entre l'Organisation Internationale et ses Etats Membres", Revue Générale de Droit International Public, 109, 2005, pg 543

[365] ICJ Contentious Case concerning the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States), 15th June 1954, para. 19; ICJ, Contentious Case concerning East Timor (Portugal v. Australia), 30th June 1995, available in ICJ Reports (1995), at 90; ICJ Contentious Case on Armed

Moreover, the restrictive concept of functional immunity[366], granted to the IOs in order to ensure their independent functioning, "*in practice turns out to be a fairly broad and almost unlimited immunity from the jurisdiction of national courts*[367]". Paradigmatic is the practice, once more, of the UN, which, *prima facie*, under article 105 of the UN Charter, "*enjoy[s] in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes*[368]". At a closer view such unqualified immunity *de facto* is meant as absolute[369].

Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports, 2005, paras. 198-204.

[366] Amerasinghe, C.F., "Principles of the Institutional Law of International Organizations", supra note 60, at pg. 370; Klabbers, Jan, "Introduction to International Institutional Law", supra note 15, atpg. 370; Klein, P. and Sands, P., "Bowett's Law of International Institutions", Sweet and Maxwell (eds.), 5th edition, London, 2001, pg.478; Third Restatement of Foreign Relations Law of the United States, 1986, para. 467, para.1

[367] Reinisch, August, and Weber, Ulf Andreas, "In The Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Rights of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", International Organizations Law Review 1, 2004, pg. 59

[368] United Nations Charter, supra note 27, art. 105

[369] UN Office of Legal Affaris, Memorandum to the Legal Adviser, UNRWA, UNJYB, 1984, p. 188; Reinisch, August, "International Organizations before National Courts", Cambridge University Press, Cambridge, 2000, pg. 158; Singer, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns", Virginia Journal of International Law, 1995, pg.53 and pg. 84

This appears as well to be the situation for a number of other IOs, such as the World Trade Organization and the Council of Europe[370]. In fact, the Statute of the latter provides that the "*[T]he Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions*[371]". It is possible to arrive the same conclusions in reference not only to constitutive acts, but even to subsidiary instruments, such as bilateral headquarters agreements or multilateral agreements[372]. National Courts, furthermore, have

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[370] Organization of American States' Charter, signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993, art. 133; World Health Organization Constitution, signed on the 22nd July 1946 and entered into force on the 7th April 1948, art. 67, letter a; Agreement Establishing the WTO, signed at Marrakech in 1994, entered into force 1st January 1995, Art. VIII, para. 2; Statute of the Council of Europe, signed in London the 5th May 1949, ETS No. 1, art. 40, letter a

[371] Statute of the Council of Europe, signed in London the 5th May 1949, ETS No. 1, art. 40, letter a

[372] Agreement between Food and Agriculture Organization of the United Nations and Italy regarding the Headquarters of the FAO, signed in Washington the 31th October 1950, registered by the FAO the 25th October 1985, Art. VIII, s.16; Headquarters Agreement between the Government of the United Kingdom and the International Tin Council, signed at London the 9th February 1972, registered by the United Kingdom of Great Britain and Northern Ireland on 27 July 1976, art. 8; General Agreement on Privileges and Immunities of the Council of Europe, signed in Paris the2nd September 1949 and entered into force the 10th of September 1952, art. 3

"*regarded such a absolute immunity of IOs as a requirement under customary international law*[373]".

It must be noted, for the sake of truth, that another trend, limiting such absoluteness is taking place, sometimes through an assimilation of IO and State immunities, other times through the express exclusion of immunity for certain unlawful acts[374].

It is necessary for the national courts, in the light of such scope, firstly to define the content of functional immunity. In doing so, the courts should always bear in mind the *ratio* pervading the conception of such immunity: "*ensuring the proper functioning of such organisations free from unilateral interference by individual governments*[375]". Secondly there is the necessity to subordinate the same granting of functional immunity to IOs to the availability of

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[373] R Reinisch, August, and Weber, Ulf Andreas, "In The Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Rights of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", supra note 367, at pg. 61

[374] Third Restatement of Foreign Relations Law of the United States, 1986; United States Foreign Sovereign Immunities Act (FSIA) 1976, 90 Stat. 2891, 28 U.S.C.A. para. 1330 et seq; United States International Organizations Immunities Act (IOIA) 1945, 59 Stat. 669, 22 U.S.C.A. para.. 288 et seq. ; Corte di Cassazione (Sezione Unite), Allied Headquarters in Southern Europe (HAFSE) v. Capocci Belmonte, Case No. 2054, 5 June 1976, para. 12

[375] European Court of Human Rights, Waite and Kennedy v. Germany Case, supra note 186, para. 63

"*adequate alternative redress mechanisms*[376]" to third parties, as confirmed by the same ICJ and by UN's practice[377]. The existence of alternative solutions as a condition to grant functional immunity, already appears to be, both among scholars and judicial organs, as a "*healthy development which serves the purpose of securing access to justice while preserving the independence of foreign States and organizations*[378]".

The various difficulties that where and will be encountered across the journey to a reasonable and adequate solution do not, in any case, have to lead undoubtedly nor to the false conclusion that

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[376] Reinisch, August, and Weber, Ulf Andreas, "In The Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Rights of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", supra note 367, at pg. 68

[377] ICJ Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, supra note 284, para. 66; Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly the 13th of February 1946, art. VIII, s. 29 (a); ICJ Advisory Opinion on the Effect of Awards of Compensation Made by The United Nations Administrative Tribunal, July 13th 1954, pg. 57

[378] Reinisch, August, and Weber, Ulf Andreas, "In The Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Rights of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", supra note 367, at pg. 72; see also Cour de Cassation Français, Annual Report of 1995, pg. 418; Ruziè, "Diversité des Juridictions Administratives Internationales et Finalité Commune. Rapport Général", Société Française pour le Droit International (ed.), Le Contentieux de la Fonction Publique International, Paris, 1996

joint or concurrent responsibility of member States is inconceivable nor that such principle has irrevocably to be jeopardized.

Eminent scholars have focused from different perspectives on the link existing between factual autonomy and independence of the organization and its responsibility.

Two are the principle outcomes of the survey on the shield of exclusive responsibility. On the one side, the presence of a corporate veil encourages growing relationships among States. On the other, the same veil might as well enliven the member States, due to the protection granted to the latter from any type of liability, to act through the IO, by exercising a overwhelming control over its decision-making process, with the aim of pursuing personal goals[379].

Omnia tempus habent[380]. Most of the difficulties encountered in finding a definition and the field of applicability of the principle of overwhelming and effective control will be finally overcome only through the contribution and the study of both jurisprudential, State and IOs' practice[381].

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[379] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 108

[380] Antico Testamento, Ecclesiaste, cap.3,1

[381] D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", supra note 15, at pg. 117