THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS COMMITTED WITHIN THE FRAMEWORK OF INTERNATIONAL ORGANIZATIONS

Anna J Begemann
Lincoln College
University of Oxford

Thesis submitted for the degree of
Doctor of Philosophy in Law

Supervisor: Professor Dan Sarooshi

Trinity Term 2016

ABSTRACT

This thesis investigates the often-voiced concern that the expanding activities of international organizations lead to an 'accountability gap' in the sense that if potentially harmful activities are carried out through an international organization, neither the organization nor its member States can effectively be held to account. Many international organizations are only beginning to establish procedural remedies through which the lawfulness of their activities can be reviewed. In the absence of a direct remedy against the organization, third parties often try to hold the member States responsible in relation to the organization's activities. This thesis investigates under what circumstances member States can be held responsible for wrongful conduct taken within the framework of an international organization. It deals comprehensively with the attribution of conduct in multilateral contexts, with complicity as a ground of member State responsibility, with reparation for injuries committed by multiple responsible parties and with the judicial enforcement of member State responsibility. In doing so, it demonstrates how with the transposition of the rules on international responsibility to the context of international organizations, certain rules of State responsibility, well-established in an exclusively inter-State context, have been opened up to fundamental questions. The separate legal personality of international organizations can in fact be seen as creating an 'institutional veil' which makes it more difficult to 'see through' and hold States responsible for their conduct *qua* members. This thesis argues that the possibility of holding member States responsible for unlawful conduct taken within the framework of international organizations not only counters the risk that States could use them as vehicles to carry out unlawful acts, but that it also serves as an incentive for member States to create better procedural remedies against their international organizations.

WORD COUNT: 97'831

ACKNOWLEDGMENTS

This thesis would not have been completed without the encouragement and support of others.

First of all, I would like to thank my thesis supervisor, Professor Dan Sarooshi, for his support and patience in helping me find my approach to the topic. I am immensely grateful to him for his excellent feedback, his continued support and for always reminding me to see the bigger picture.

Professors Dapo Akande and Antonios Tzanakopoulos read parts of this thesis at different stages of drafting and always had an open ear for my questions. I would like to thank them for their invaluable advice and for supporting me at the more difficult stages of this thesis. I would not have been able to complete this thesis without their help.

I benefited immensely from regular debates and discussions with fellow researchers in Oxford. I am particularly indebted to Miles Jackson, who took the time to read and comment on a full draft of the thesis. Fellow doctoral students Bríd Ní Ghráinne, Thomas Liefländer, and Michalis Risvas were a constant source of support and inspiration. I would like to thank them for their kind advice and friendship. I am also grateful to the participants of the Wednesday morning Research Seminar at All Souls College - the best institution any international law research student could hope for.

With Adrian Brändli, Vladislava Chalei, Maria Kallionpää, Tonya Müller, and Anna Willi I lived through daily challenges and adventures. I would like to thank them for making my time in Oxford such an unforgettable experience. Elise Pithouse was the perfect host in London and a very welcome source of occasional distraction.

My wonderful team at the Directorate of International Law of the Federal Department of Foreign Affairs deserves particular mention: Brigitte Benoit Landale, Maëva Cherpillod, Sylvie Hofer-Carbonnier, Caroline Kraege, and Karin Müller. I would like to thank them for their support and understanding, in particular during the final stages of this thesis.

Most importantly, I would like to thank my family: my parents, Esther and Christian Begemann; Boris, Fabienne, and Nina Begemann; as well as my grandmother Lisa Begemann. Without their kind encouragement and support I would never have started this project. Thank you to Simon Figura, who helped me with the final editorial work, general motivation, and much more.

This thesis was generously supported by the Berrow Foundation and Lincoln College. I would like to thank them for their support and their warm welcome into a wonderful community where I have found many friends.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AB	Appellate Body
ACIL	Amsterdam Center for International Law
ACHPR	African Court on Human and Peoples' Rights
ACmHPR	African Commission on Human and Peoples' Rights
AFDI	Annuaire Français de Droit International
AJIL	American Journal of International Law
AIDI	Annuaire de l'Institut de droit international
ARIO	Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts
ARS	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL	American Society of International Law
AU	African Union
BGE	Bundesgerichtsentscheid
BIICL	British Institute of International and Comparative Law
BYIL	British Yearbook of International Law
Cardozo L Rev	Cardozo Law Review
CFI	EU Court of First Instance (now General Court)
CJEU	Court of Justice of the European Union
CJIL	Chinese Journal of International Law
CLJ	Cambridge Law Journal
CUP	Cambridge University Press
CSDP	Common Security and Defence Policy of the European Union
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECJ	European Court of Justice (now CJEU)
ECmHR	European Commission of Human Rights
ECOWAS	Economic Community of West African States

ECSI	European Convention on State Immunity
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ESIL	European Society of International Law
EU	European Union
EWHC	High Court of England and Wales
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
GC	Grand Chamber
HKCFAR	Hong Kong Court of Final Appeal
HILJ	Harvard International Law Journal
HRAP	Human Rights Advisory Panel (UNMIK)
HRC	United Nations Human Rights Committee
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILSA JICL	International Law Students Association Journal of International and Comparative Law
IDI	Institut de droit international
IJIL	Indian Journal of International Law
ILA	International Law Association
ILC	International Law Commission

ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
ILRM	Irish Law Reports Monthly
IMF	International Monetary Fund
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
ISAF	International Security Assistance Force
IOLR	International Organizations Law Review
ITC	International Tin Council
ITLOS	International Tribunal for the Law of the Sea
JIDS	Journal of International Dispute Settlement
JDI	Journal du Droit International
LJIL	Leiden Journal of International Law
Mich J Int'l Law	Michigan Journal of International Law
MINUSTAH	United Nations Stabilization Mission in Haiti
MPEPIL	Max Planck Encyclopedia of Public International Law
NATO	North Atlantic Treaty Organization
NILR	Netherlands International Law Review
Nord JIL	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
OAS	Organization of American States
OPCW	Organisation for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Co-operation in Europe
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PYIL	Polish Yearbook of International Law
QIL	Questions of International Law
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours de l'Académie de la Haye

RGDIP	Revue Générale de Droit International Public
RHDI	Revue Héllenique de Droit International
RIAA	Reports of International Arbitral Awards
RPC	Reports of Patent Cases
RS	Recueil systématique du droit fédéral suisse
RSDIE	Revue Suisse de Droit International et Européen
SFDI	Société Française de Droit International
SR	Special Rapporteur
TFEU	Treaty on the Functioning of the European Union
UNAMIR	United Nations Assistance Mission for Rwanda
UNC	United Nations Charter
UNCJIS	United Nations Conventions on the Jurisdictional Immunities of States and their Property
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNJY	United Nations Juridical Yearbook
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UNSG	Secretary-General of the United Nations
UNTS	United Nations Treaty Series
Va J Int'l L	Virginia Journal of International Law
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
WHO	World Health Organization
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

TABLE OF CASES

INTERNATIONAL COURTS AND TRIBUNALS

Permanent Court of International Justice

International Court of Justice

Human Rights Committee

UNMIK Human Rights Advisory Panel

International Tribunal for the Law of the Sea

WTO Dispute Resolution Mechanisms

Iran - US Claims Tribunal

International Criminal Tribunal for the former Yugoslavia

Court of Justice (formerly European Court of Justice) and General Court (formerly Court of First Instance) of the European Union

European Court and Commission of Human Rights

European Commission on Human Rights

European Court of Human Rights

African Court and Commission on Human and Peoples' Rights

Permanent Court of Arbitration

Other Inter-State Arbitration

Arbitration Involving International Organizations

ICSID Cases

Word Bank Inspection Panel

DOMESTIC CASES

Austria

Belgium

Bosnia and Herzegovina

Canada

China

Germany

Ireland

Italy

The Netherlands

Switzerland

Turkey

United Kingdom

United States

TABLE OF INSTRUMENTS

TREATIES

RESOLUTIONS

OTHER UN DOCUMENTS

ILC Outcome Documents

ILC Reports

Reports by ILC Special Rapporteurs

Other ILC Documents

UN Reports

INTRODUCTION

1. Introduction

On 23 March 1999, NATO Secretary-General Javier Solana issued a press statement informing the public that he had given the orders to initiate air operations in what was then the Federal Republic of Yugoslavia with NATO, as a collective, standing 'united behind this course of action'.[1] Against the background of escalating ethnic tensions in Kosovo, serious human rights violations and the failure of the peace negotiations at Rambouillet, Operation Allied Force was intended to bring President Milosević to end the violence against Kosovo Albanians, to ensure the withdrawal of all forces from Kosovo, to agree to an international military presence in Kosovo, to ensure the return of refugees and to work towards a political settlement.[2] However, as the use of force had not been authorized by the UN Security Council, many considered it to fall on this side of 'a thin red line separating it from international legality'.[3] After seventy-seven days of aerial campaign, Serbia agreed to the deployment of international civil and security presences under UN auspices and began to withdraw its forces from Kosovo. Operation Allied Force not only marked the more active role regional organizations like NATO had begun to play in international relations since the end of the Cold War, but also the beginning of a judicial engagement with the responsibility of international organizations and their members under international law. Roughly one month before its withdrawal from Kosovo, Serbia initiated parallel proceedings against ten NATO member States before the ICJ claiming that they had violated the duty not to use force and various other international obligations in the course of Operational Allied Force. It subsequently extended its claims to alleged violations committed by the same States in the course of their participation in KFOR, the NATO-led international security presence authorised by the UNSC on 10 June 1999.[4] For reasons jurisdictional, it

---

[1] Javier Solana, 'Press Statement' (NATO, 23 March 1999) <http://www.nato.int/docu/pr/1999/p99-040e.htm> accessed 19 September 2016. The Federal Republic of Yugoslavia officially changed its name to 'Serbia and Montenegro' in February 2003. In May 2006, Montenegro became independent. For reasons of simplicity, and because this thesis does not deal with questions of legal succession of States, the name 'Serbia' will be used throughout this thesis for the current Republic of Serbia, the predecessor State of Serbia and Montenegro and for the 'Federal Republic of Yugoslavia', except where different expressions are included in case names before a tribunal.

[2] Lord Robertson of Port Ellen, *Kosovo One Year On: Achievement and Challenge* (NATO, 2000) 11.

[3] Bruno Simma, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 EJIL 1 22; similarly Independent International Commission on Kosovo, *The Kosovo Report: Conflict; International Response; Lessons learned* (OUP 2000) 4.

[4] *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Application Instituting Proceedings) 29 April 1999 and nine others, all available <http://www.icj-cij.org/docket/index.php?p1=3> accessed 16 August 2016. Serbia sought to extend its claims substantively and temporarily with identical memorials on preliminary objections filed in all parallel proceedings: *Legality of Use of Force (Serbia and Montenegro v France)* (Preliminary Objections) Memorial of the FRY June 2000 201 *et seq*. The same facts were also at the centre of proceedings before the ECtHR: *Banković and*

was soon clear that the cases before the ICJ had little chance of success.[5] Nevertheless, the incident placed the spotlight on a legal problem that had previously remained relatively unexplored, and which has gained importance ever since. Namely, to what extent the increased importance of international organizations as actors on the international scene can be accommodated with the law of international responsibility, which developed in a traditional inter-State context. A number of respondent States argued in the preliminary objections phase before the Court that any responsibility for the operation would be exclusively NATO's, or, after it had authorized an international presence, the UN's, and that in any case, Serbia had not been able to point out what conduct was attributable to each individual State.[6] Serbia argued that any wrongful act taken during the operations would be the responsibility of each and every individual Member State.[7] Any other solution, it suggested, would allow States to avoid responsibility for wrongful acts simply by acting through an international organization. As Ian Brownlie provocatively put it as counsel for Serbia, it would be 'quite remarkable that States who have publicly associated themselves with a multilateral NATO

Others v Belgium and 16 Other Contracting States (App no 52207/99) (2001) [GC] ECHR 2001-XII (in relation to Operation Allied Force) and *Behrami and Saramati v France, Germany and Norway* (App nos 71412/01, 78166/01) (2007) [GC] 45 EHRR 10 (in relation to KFOR and UNMIK).

[5] Serbia primarily invoked the *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) as a basis for jurisdiction, which meant that claims had to be formulated accordingly. Additionally, it invoked Article 36(2) ICJ Statute in relation to those respondent States that had accepted it. However, in *Legality of Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (Order of 2 June 1999) [1999] ICJ Rep 124 135 the Court found that it lacked *prima facie* jurisdiction under Article 36 (2) of the *Statute of the International Court of Justice, annexed to the Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi (ICJ Statute) because of the temporal limitation introduced by Serbia. The Court removed two cases in 1999 for manifest lack of jurisdiction and all others in 2004 in the preliminary objections phase: *Legality of Use of Force (Yugoslavia v Spain)* (Order of 2 June 1999) [1999] ICJ Rep 761; *Legality of Use of Force (Yugoslavia v USA)* (Order of 2 June 1999) [1999] ICJ Rep 916; *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279; *Legality of Use of Force (Serbia and Montenegro v Canada)* (Preliminary Objections) [2004] ICJ Rep 429; *Legality of Use of Force (Serbia and Montenegro v France)* (Preliminary Objections) [2004] ICJ Rep 575; *Legality of Use of Force (Serbia and Montenegro v Germany)* (Preliminary Objections) [2004] ICJ Rep 720; *Legality of Use of Force (Serbia and Montenegro v Italy)* (Preliminary Objections) [2004] ICJ Rep 865; *Legality of Use of Force (Serbia and Montenegro v Netherlands)* (Preliminary Objections) [2004] ICJ Rep 1011; *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections) [2004] ICJ Rep 1160; *Legality of Use of Force (Serbia and Montenegro v UK)* (Preliminary Objections) [2004] ICJ Rep 1307.

[6] In this sense *Legality of the Use of Force (Serbia and Montenegro v Portugal)* Preliminary Objections of Portugal 5 July 2000 38-42, in particular [136]; *Legality of Use of Force (Serbia and Montenegro v France)* Preliminary Objections of France 5 July 2000 28-29 [23]-[26]; and in relation to the failure to demonstrate that conduct was attributable to the respondents: *Legality of the Use of Force (Serbia and Montenegro v Canada)* Preliminary Objections of Canada, July 2000 7 [25]-[26]; Legality of the Use of Force (Serbia and Montenegro v the Netherlands) Preliminary Objections of the Netherlands, July 2000 51 [7.1]; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* Preliminary Objections of Belgium 5 July 2000 157 [475]. In *Banković* (n 4) [32], France argued that '[t]the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States'. In a political sense, this view was common: when the Chinese embassy was accidentally bombed, China claimed that 'NATO must assume all responsibility for this', UNSC, *Verbatim Record (8 May 1999)* (UN Doc SPV/4000, 1999) 3.

[7] *Legality (Preliminary Objections) Memorial FRY* (n 4) 327.

campaign of coercion should (...) seek to avoid the legal responsibility involved'.[8]

2. Purpose and structure of the thesis

This thesis investigates the often-voiced concern that the expanding activities of international organizations lead to an 'accountability gap' in the sense that if potentially harmful activities are carried out through an international organization, neither the organization nor its member States can effectively be held to account. Even though most international organizations were established around the mid-20th century, many of them are only beginning to establish procedural remedies through which the lawfulness of their activities can be reviewed. It is therefore not surprising that third parties affected by the activities of international organizations almost invariably try to turn to the member States for a remedy. This thesis investigates on what grounds member States can be held responsible for wrongful conduct taken within the framework of an international organization. Chapter 2 of this thesis discusses under what circumstances conduct taken within the framework of an international organization is attributable to the State and may as such give rise to an internationally wrongful act of the State. International organizations are by their very nature dependent on the support and cooperation of their members. Chapter 3 discusses under what circumstances the support of a member State for the activities of an international organization can give rise to responsibility for complicity. Both chapters critically discuss the ILC draft articles on the responsibility of international organizations adopted in 2011 as a follow-up project to the ILC draft articles on State responsibility adopted in 2001. The difficulty with these articles is that they can be interpreted as displacing the ordinary grounds of State responsibility, or as at least creating additional obstacles for the engagement of State responsibility in the context of international organizations. This is explained in Chapter 1, which deals with the so-called 'institutional veil' of international organizations. The separate legal personality of international organizations is sometimes seen as creating a 'veil' which makes it more difficult to 'see through' and hold States responsible for their conduct *qua* members. Chapter 1 critically assesses such claims and the interpretative framework they suggest. It argues that the possibility of holding member States responsible for their own unlawful conduct taken within the framework of an international organization not only counters the risk that States could use international organizations as

[8] Serbia and Montenegro v Canada ICJ Oral Proceedings, 12 May 1999, CR 1999/25 16.

vehicles to carry out unlawful acts, but that it also serves as an incentive for member States to create better procedural remedies against their international organizations. Chapter 1 thereby provides the conceptual background for the analysis of case law and practice carried out throughout the rest of the thesis.

Chapters 4 and 5 turn to the implementation of responsibility for wrongful acts taken within the framework of an international organization. In accordance with the overall approach of the thesis, they assess whether an injured party faces additional obstacles in obtaining a remedy which are particular to this context, lending support to concerns of an 'accountability gap'. Because member States are not responsible for the wrongful acts of an international organization but rather for their own wrongful contributions, injured parties will often be confronted with a fragmented picture of multiple parallel wrongful acts of the organization and individual member States. As far as substantive remedies for wrongful acts are concerned, this plurality of wrongful acts leads to additional difficulties. Originally conceived as a bilateral relationship between the injuring and the injured State, the duty to make reparation is based on a link of causation between the wrongful act and the resulting injury. Establishing a link of causation can be difficult where multiple States contribute to a collective harmful outcome, as it makes it necessary to disentangle the various contributions of individual members. Additional difficulties might also arise at the level of enforcement of responsibility. The current underdevelopment of procedural remedies against international organizations means that in many situations where an arguable case for the concurrent responsibility of the organization and one or several of its members could be made, injured parties will turn against the member States *only*. They will try to challenge ancillary conduct attributable to the individual State, thereby explicitly dissociating it from the overall conduct of the organization. Still, an assessment of the lawfulness of an individual member State's contribution will often require an implicit, and sometimes even an explicit assessment of the lawfulness of the organization's activities. This raises the question whether the - often unavoidable - absence of the organization from the proceedings prevents courts from adjudicating a case of member State responsibility. The thesis starts from the premise that the manner in which the rules on the engagement and enforcement of international responsibility apply in the context of international organizations is currently contested. It seeks to delimit the area of contestation and establish to what extent concerns about an 'accountability gap' are justified where the applicable law is relatively clear. Where the applicable law is contested and has been interpreted

in different ways, it contrasts different interpretations to establish whether they effectively address concerns about an 'accountability gap' created by the expanding activities of international organizations.

CHAPTER 1: LOCATING THE 'ACCOUNTABILITY GAP'

1. Introduction

The concern that the growing importance of international organizations as actors on the international scene leads to an 'accountability gap'[9] runs like a red thread through much of the recent literature on international organizations.[10] It has become such a predominant concern that the very image of international organizations, largely positive throughout most of the 20th century, appears to be changing. Klabbers has traced the 'transformation' of the image of international organizations in legal literature. He concludes that while most international lawyers throughout the 20th century tended to see international organizations in a positive light as impartial tools to constrain the harmful unilateralism of sovereign States, they are now slowly realising that '[t]here is something rather implausible about suggesting that the very states that are so bad nonetheless establish creatures that that are inherently good'.[11] One of the reasons why the image of international organizations is changing, he suggests, is the realisation that 'the law of international organizations is unable to provide a remedy in cases where third parties suffer damage from the organization's exploits'.[12] After giving a definition of international organizations and briefly addressing the question of their separate legal personality, this chapter locates the 'accountability gap'

---

[9] The term 'accountability' is often used to refer to a broad, public-law oriented notion of responsiveness. While this thesis acknowledges that the conferral of sovereign functions on international organizations raises important concerns such as the appropriate inclusion of stake-holders in decision-making processes, the focus of this thesis is on legal responsibility for breaches of international law. As will become clear in the course of this chapter, the term 'accountability gap' is used here to refer to 'gaps' in the establishment and enforcement of international responsibility. For a discussion of the broader concept of accountability and its possible application to international organizations, see Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuse of Power in World Politics' (2005) 99 Am Polit Sci Rev 29; Ige F. Dekker, 'Making Sense of Accountability in International Institutional Law ' (2005) 36 NYIL 83. For an application of the term in the sense of this thesis: August Reinisch, 'To What Extent Can and Should National Courts 'Fill the Accountability Gap'?' (2013) 10 IOLR 572.

[10] Among many, Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Nijhoff 1995) 169; August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131; ILA, *Berlin Conference, Accountability of International Organizations, Final Report* (2004) 18; José E. Alvarez, 'International Organizations: Accountability or Responsibility?' in *Legitimacy and Accountability in International Law, Proceedings of the 33rd Annual Conference of the Canadian Council on International Law* (2005) 121.

[11] Jan Klabbers, 'The Transformation of International Organizations Law' (2015) 26 EJIL 9 29. Klabbers has published extensively on the 'changing image' of international organizations, further Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 Nord JIL 287; Jan Klabbers, 'Contending Approaches to International Organizations' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011). The classic work on the international law discipline's approach to international institutions in the early 20th century is David Kennedy, 'The Move to Institutions' (1987) 8 Cardozo L Rev 841.

[12] Klabbers, 'Transformation' (n 11) 64.

allegedly caused by the rise of international organizations in the underdevelopment of remedies against international organizations on the one hand, and the 'hidden role' of member States on the other hand.

2. The definition of international organizations

International organizations can be defined as 'association[s] of States, established by agreement among [their] members and possessing a permanent system or set of organs, whose task it is to pursue objectives of common interest by means of cooperation among its members'.[13] This definition will be accepted for the purposes of this thesis, with the specification that not only States, but also international organizations can create or join international organizations. What is decisive is not so much the 'inter-*state* nature of the establishing act', but rather the fact that the organization was created 'under international law', be it on the basis of a treaty or a resolution of another international organization.[14] This being said, this thesis will focus on the responsibility of member *States* of international organizations, and even though their situation will mostly be analogous, the situation of member *international organizations* is not specifically addressed.

In order to be considered a 'subject' of international law, an international organization must possess international legal personality, which, according to the definition put forward by the ICJ in the *Reparation* opinion, means being 'capable of possessing rights and obligations under international law'.[15] International legal personality is a controversial subject, and it falls outside the scope of this thesis to deal with it

---

[13] Michel Virally, 'Definition and Classification of International Organizations: A Legal Approach' in Georges Abi-Saab (ed), The Concept of International Organization (UNESCO 1981) 51.

[14] Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 17. Their basis in international law distinguishes international organizations from quasi-intergovernmental entities established under national law, which can, in terms of privileges and immunities, be granted a comparable status (see eg the Geneva International Centre for Humanitarian Demining, a foundation established under Swiss law, which has concluded the *Accord entre le Conseil fédéral suisse et le Centre International de Déminage Humanitaire - Genève relatif au statut du Centre en Suisse* (concluded and entered into force 25 February 2003) RS 0.192.122.53) and so-called 'établissements publics internationaux', which are institutions incorporated under the domestic law of one State, but whose establishment has been agreed by several States under a treaty: Maurice Mendelson, 'The Definition of 'International Organization' in the International Law Commission's Current Project on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *International Responsibility Today Essays in Memory of Oscar Schachter* (Nijhoff 2005) 377.

[15] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 179. International legal personality is to be distinguished from the domestic legal personality of international organizations, which is determined by domestic law. For an application: Geoffrey Marston, 'The Arab Monetary Fund: Legal Person or Creature from Outer Space?' (1991) 50 CLJ 218.

comprehensively.[16] The ILC, as well as most commentators, is of the view that most international organizations are independent international legal persons.[17] As one of the very few exceptions, the OSCE is often cited, which, as a former conference, does not have its legal status regulated in a treaty or in any other binding international document and cannot conclude international agreements in its own name.[18] More controversially, it is sometimes suggested that international organizations that take decisions by unanimous vote of its members cannot be considered to be independent international legal persons, because they lack the necessary autonomy from their members.[19] Such statements reveal a fundamental doctrinal disagreement over the question under what circumstances an international organization can be considered to enjoy international legal personality, which appears to be at odds with the generally held view that most international organizations do nevertheless possess such separate personality.

As far as the 'acquisition' of international legal personality by international organizations is concerned, three different approaches can be distinguished. For proponents of the 'objective' legal personality approach originally put forward by Finn Seyersted, the possession of separate legal personality requires the fulfilment of certain objective criteria defined by international law.[20] 'Autonomy' from the member States or the possession of a *volonté distincte* - a will distinct from the will of its members - is considered to be the most important criterion.[21] For proponents of the 'subjective' approach to legal personality, members are generally free to grant international legal personality to an international organization they create, either explicitly in the constitutive instrument or implicitly by conferring on it powers that require such legal

---

[16] For an overview of the different contending theories see, in the context of international organizations, Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd rev. edn, CUP 2005) 77 *et seq*; Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, CUP 2015) 46 *et seq*; in general, Roland Portmann, *Legal Personality in International Law* (CUP 2010).

[17] ILC, Draft Articles on the Responsibility of International Organizations, with Commentaries (to be published in ILC Yb 2011 Vol II(2), 2011) Article 2(a); Henry G. Schermers and Niels Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Nijhoff 2011)991 [1569]; James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 157.

[18] Schermers and Blokker, *International Institutional Law* (n 17) 30 [30]; 991-92 [1569].

[19] In relation to NATO, Joe Verhoeven, *Droit international public* (Larcier 2000) 613; Tarcisio Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)' (2001) 12 EJIL 391 424-25. In practice, NATO concludes treaties in its own name: eg *Agreement between the North Atlantic Treaty Organisation and the Government of New Zealand on the Security of Information* (concluded 3 October 2007, entered into force 8 October 2007) 2592 UNTS 53 .

[20] Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?* (Krohns Bogtrykkeri 1963); Finn Seyersted, 'Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non-Members?' (1964) 4 IJIL 233.

[21] Seyersted, *Objective International Personality* (n 20) 47; Brölmann, *Institutional Veil* (n 14) 76; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011) 60-62.

personality.[22] No particular objective criteria must be fulfilled. However, whereas for proponents of the 'objective' approach, legal personality is 'a matter of objective reality'[23], many proponents of the 'subjective' approach hold that member States do not have the right to unilaterally impose an organization's separate legal personality on third parties.[24] Accordingly, an organization's separate legal personality is only opposable to third States if these States have recognised it.[25] Still others take a highly pragmatic approach to legal personality. For Klabbers, 'presumptive personality' is the approach that best captures actual practice in that it relies on evidence that an international organization actually possesses separate rights and obligations: 'as soon as an organization performs acts which can only be explained on the basis of international legal personality, such an organization will be presumed to be in possession of international legal personality'.[26] In other words, if an international organization does enter into rights and obligations under international law, it is *a priori* an international legal person.[27]

As far as the purposes of this thesis are concerned, it is not necessary to resolve the - largely academic[28] - controversy about the modalities of acquisition of separate international personality by international organizations. As explained below, this thesis is concerned with the question whether there are normative implications - a 'veil effect' - that flow from the possession of separate international personality as far as the responsibility of the organization's members are concerned. In this sense, it is concerned with the

---

[22] Werner Meng, 'Internationale Organisationen im völkerrechtlichen Deliktsrecht' (1985) 45 ZaöRV 324 326-27; Tarcisio Gazzini, 'Personality of International Organizations' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 34.

[23] Rosalyn Higgins, *Problems and Process : International Law and How We Use It* (Clarendon Press 1994) 47.

[24] In this sense Ignaz Seidl-Hohenveldern, 'Der Rückgriff auf die Mitgliedstaaten in internationalen Organisationen' in Rudolf Bernhardt (ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte : Festschrift für Hermann Mosler* (Springer 1983) 888-89; Karl Zemanek, 'The Legal Foundations of the International System' (1997) 266 RdC 9 89; Meng, 'Internationale Organisationen' (n 22) 326f; Mendelson, 'Definition' in (n 14) 380f; Albane Geslin, 'Réflexions sur la répartition de la responsabilité entre l'organisation internationale et ses Etats membres' (2005) 3 RGDIP 539 563f.

[25] Meng, 'Internationale Organisationen' (n 22) 327; Mendelson, 'Definition' in (n 14) 387.

[26] Klabbers, *Introduction* (n 16) 49; further Jan Klabbers, 'Presumptive Personality: The European Union in International Law' in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998).

[27] The circularity inherent in this understanding of international legal personality has been duly noted: Andrew Clapham, 'The Subject of Subjects and the Attribution of Attribution' in Laurence Boisson de Chazournes and Marcelo G. Kohen (eds), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowland-Debbas* (Brill 2010) 48. Portmann takes this view to its logical conclusion, submitting that 'personality in international law (...) is a strict *a posteriori* concept: an international person simply represents those international rights, duties and capacities directed at it', Portmann, *Legal Personality* (n 16) 272.

[28] As noted by Portmann, *Legal Personality* (n 16) 19, the concept of legal personality 'often looms in the background of legal argument and is rarely addressed in legal practice'.

anterior question of whether we should even care, as far as the responsibility of member States is concerned, about whether or not an international organization possesses separate legal personality. For the purposes of this thesis, it is therefore sufficient to assume that most international organizations - in particular those that do indeed possess obligations under international law and can therefore incur responsibility in their own name - possess separate legal personality under international law. It is only once it has been established that a 'veil effect' exists that it becomes necessary to investigate whether the separate personality of an international organization can be challenged, either on the basis of its lack of autonomy, as proponents of the 'objective' approach hold, or on the basis of a lack of recognition by the concerned third State, as proponents of the 'subjective' approach suggest.

3. The difficult enforcement of the international responsibility of international organizations

It is a well-known fact that international organizations are today participating in almost every conceivable activity undertaken by States. They are involved in areas such as the facilitation of trade and investments, the protection of human rights, the regulation of air traffic, the prevention of the spread of diseases, cooperation in response to climate change: indeed 'there is hardly a human activity which is not, to some extent, governed by the work of an international organization'.[29] What is perhaps less often noted is the fact that international organizations are by far not only involved in norm-setting or adjudicatory activities, but that at least since the end of the Cold War, they have been increasingly involved in operational activities as well.[30] Not only the UN, but also the OAS, the EU[31], ECOWAS, and the AU have been involved in peacekeeping operations. UNHCR is actively involved in the administration of refugee camps. Most recently, NATO decided to cooperate with FRONTEX, an instrumentality of the EU, in the monitoring of migration in the Mediterranean by deploying naval patrols.[32] With the expansion of the activities of international organizations, it has become more likely that the rights and interests of third

---

[29] Klabbers, *Introduction* (n 16) 23; similarly already René-Jean Dupuy, ' Le droit des relations entre les organisations internationales' (1960) 100 RdC 457 461-62.
[30] Verdirame, *UN and HR* (n 21) 12.
[31] Note on terminology: unless a different designation is used in a case name, this thesis will use 'European Union' or 'EU' to refer to the former European Communities or the former European (Economic) Community as a constitutive part thereof.
[32] Ewen MacAskill, 'Nato sends patrol to eastern Med to combat people smuggling' (*The Guardian*, 11 February 2016), <https://www.theguardian.com/world/2016/feb/11/nato-tasks-naval-patrol-with-combatting-people-smuggling-in-the-mediterranean> last accessed 16 August 2016.

parties - both non-member States or organizations and private persons - are affected. The challenge is to ensure that 'the transfer of state tasks to international organizations in the name of efficiency does not lead to a sacrifice of accountability'.[33]

To the extent that international organizations possess obligations under international law, they can also incur international responsibility for breaches of these obligations. It has long been accepted that the *Chorzów* principle, according to which 'the breach of an engagement involves an obligation to make reparation in an adequate form',[34] applies to international organizations, too.[35] Any internationally wrongful act of an international organization triggers its obligation to make reparation to the injured party. In practice, however, things are more complicated. On the one hand, the international organization may not be bound by the same substantive obligations as its member States or organizations.[36] On the other hand, 'international organizations do not properly fit into the total spectrum of international dispute settlement mechanisms'.[37] Judicial remedies that are traditionally available against States, including recourse to domestic, regional, or international courts, are often unavailable against international organizations. Non-judicial remedies, in particular lawful countermeasures, can be important in this context, but they are in any case not open to all potentially injured parties.[38] The relative difficulties of enforcing the responsibility of international organizations, in particular in court, leaves the impression that

---

[33] Reinisch, 'Accountability of International Organizations' (n 10) 143.

[34] *Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Series A No 9 21; similarly: 'responsibility is the necessary corollary of a right', *Spanish Zone of Morocco Claims* (Spain v GB) (1925) II RIAA 615, 641 (*per Arbitrator Huber*).

[35] Among many, Clyde Eagleton, 'International Organization and the Law of Responsibility' (1950-I) 76 RdC 319 325; Francisco V Garcia - Amador, 'La responsabilité internationale de l'état, la responsabilité des Organisations internationales' (1956) 34 Rev' d DIP 146; Konrad Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Springer-Verlag 1969) 172; Meng, 'Internationale Organisationen' (n 22) 324; Hirsch, *Responsibility of International Organizations* (n 10) 9; Pierre Klein, *La responsabilité des organisations internationales: dans les ordres juridiques internes et en droit des gens* (Editions Bruylant 1998) 312; ILC, *ARIO with commentaries* (n 17) Article 3.

[36] According to the majority view, international organizations do not 'succeed' their members in their respective treaty obligations: see (n 49) and accompanying text.

[37] Kirsten Schmalenbach, 'Dispute settlement' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 255.

[38] Countermeasures are available only to injured States or international organizations: ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (ILC Yb 2001 Vol II(2), 2001) Articles 49 *et seq* and 22 ARS; ILC, *ARIO with commentaries* (n 17) Articles 51 *et seq* and 21. The ILC furthermore proposes to restrict, in Article 52 ARIO, the ability of *member* States or organizations to resort to lawful countermeasures against 'their' international organizations. For a discussion and criticism, Antonios Tzanakopoulos, 'The Countermeasure of Disobedience' in Maurizio Ragazzi (ed), *The Responsibility of International Organizations* (Martinus Nijhoff 2013) 368; Simone Vezzani, 'Countermeasures by Member States against International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Martinus Nijhoff 2013) 383-84.

even though they incur responsibility for breaches of international law in theory, this responsibility remains without consequences or precise contours - an impression which is conspicuously confirmed by the scarcity of relevant practice.[39] The EU is one of the very few international organizations that have extensive practice in the settlement of international law disputes.[40] When invited by the ILC to provide documentation of practice relating to their international responsibility, organizations including the WTO, the IMF, the IAEA, the OPCW, the UNDP, the WHO, and the OAS affirmed to never have been confronted with formal claims of violations of international law in the past.[41] Without attempting to be exhaustive, this section will indicate why the enforcement, in particular the judicial enforcement, of the responsibility of most international organizations is currently difficult. It will look at the possibilities of invoking the responsibility of international organizations before international courts, before national courts, and through alternative, often quasi-judicial, internal remedies.

3.1 International courts

At the time when most international courts and treaty bodies were established, States did not consider it desirable to allow international organizations to have standing in contentious proceedings. Most international courts have statutorial limitations that prevent them from exercising jurisdiction over international organizations.[42] The ICJ, just like the PCIJ, only has jurisdiction in contentious proceedings

[39] The lack of practice is one of the main points of criticism raised against the ARIO: José E. Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility ' (2011) 105 ASIL Proceedings 344; Gerhard Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks' in Ulricht Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011); relativising the problem, Pierre Klein, 'Les articles sur la responsabilité des organisations internationales: Quel bilan tirer des travaux de la CDI?' (2012) LVVIII AFDI 1 5. The criticism has been acknowledged in ILC, *ARIO with commentaries* (n 17) 2 [5] and by the SR, the latter indicating in private capacity that some organizations were reluctant to share relevant practice, Giorgio Gaja, 'Note introductive' (2013) 47 RBDI 9 13-14.

[40] There is extensive case law involving the EU before the WTO Dispute Settlement Mechanism, see (nn 251, 272, 268) and accompanying texts. Chile has brought a case against the (then) EC before ITLOS: *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks (No 7) (Chile / EC)* (Order of 20 December 2000) ITLOS Rep 148 and the EU was involved in the advisory proceedings in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (No 21)* (Advisory Opinion, 2 April 2015).

[41] ILC, 'Comments International Organizations' (2004) UN Doc A/CN.4/545 34 (IMF); 36 (OAS, OPCW, UNDP, WHO, WTO); also ILC, 'Comments Governments and International Organizations' (2005) UN Doc A/CN.4/556 33 (WTO).

[42] ITLOS being one notable exception: international organizations can become parties to the *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS) in accordance with Article 305(1)(f); and as such also parties in contentious proceedings before ITLOS (Article 1(2)(2) in connection with Article 291(1)). See further (n 40).

involving States parties.[43] International organizations have 'limited standing' in advisory proceedings before the ICJ.[44] Organizations that are empowered to request advisory opinions may submit a dispute in the form of a legal question to the ICJ and accept, together with the other involved party, the result as binding.[45] Such 'binding advisory opinions' are a frequently envisaged way of resolving disputes under an international organization's headquarters agreement or under other treaties dealing with an organization's privileges and immunities.[46] In such cases, 'advisory proceedings take the place of contentious proceedings which would not be possible under the Statute of the Court'.[47] However, binding advisory proceedings are rare in practice. As the decision to submit the question must be made by the organization, binding advisory proceedings are furthermore an effective remedy only if the organization agrees to participate in the proceedings, there being 'no equality as to access to the Court'.[48]

Where an international court or treaty body has specialised subject-matter jurisdiction in relation to a treaty, it is not only necessary that the court's statute allows cases to be brought against international organizations, but also that the particular organization is bound by the treaty in question. This is because the *pacta tertiis* rule, according to which treaties do not create obligations for non-participating third parties, is in principle applicable to international organizations.[49] To date, no international organization is party to

---

[43] Article 34(1) ICJ Statute (n 5).

[44] Article 65(1) ibid in connection with Article 96 of the *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi (UNC)

[45] See Roberto Ago, '"Binding" Advisory Proceedings of the International Court of Justice' (1991) 85 AJIL 439 439 *et seq*; Christian Dominicé, 'Request of Advisory Opinions in Contentious Cases?' in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement* (Transnational Publishers 2002).

[46] Eg *Convention on the Privileges and Immunities of the United Nations* (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention) Article VIII Section 30; *Convention on the Privileges and Immunities of the Specialized Agencies* (adopted 21 November 1947, entered info force 2 December 1948) 33 UNTS 261(Specialized Agencies Convention) Article IX Section 32; further examples: Ago, 'Binding Advisory Proceedings' (n 45) 439.

[47] *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO* (Advisory Opinion) [1953] ICJ Rep 77 85.

[48] Dominicé, 'Advisory Opinions' in (n 45) 101; this inequality of access was an issue in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10 (see in particular the Declaration of Judge Greenwood).

[49] *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (adopted 21 March 1986, not entered into force) (VCLTIO) Article 34; ILC, *Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, with Commentaries* (ILC Yb 1982, Vol II(2), 1982) 42. Some propose that international organizations could be considered to 'succeed' in the treaty obligations of their member States, Henry G Schermers, 'Succession of States and International Organizations' (1975) 6 NYIL 103 113, but there is little practical support for this contention; Hirsch, *Responsibility of International Organizations* (n 10) 43; Mathias Forteau, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des

a multilateral human rights convention. The ECtHR and the former ECmHR have consistently rejected claims brought against international organizations as falling outside their scope of personal jurisdiction.[50] The ACtHPR found that it did not have jurisdiction in a case brought against the African Union,[51] and the UN Human Rights Committee declared an application inadmissible because it concerned 'the recruitment policies of an international organization'.[52] In order to allow private persons to challenge the acts of international organizations before these bodies, States would need to modify the relevant statutes to make complaints against entities other than States admissible. In addition, the concerned organization would need to become a party to the human rights convention establishing the court's jurisdiction. Politically, both steps can be difficult to achieve even if all of the organization's members are already party to the treaty, as is illustrated by recent attempts of the EU to accede to the ECHR.[53] For a universal organization, acceding to a regional human rights instrument and accepting the jurisdiction of a regional court would arguably be even more difficult still.

3.2 National courts

National courts have become important fora for the implementation of international law, in particular for the invocation of the international responsibility of the Forum State.[54] Before domestic courts, complaints against international organizations are often inadmissible due to the fact that they enjoy immunity from

---

organisations internationales' in SFDI (ed), *La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (Pedone 2009) 26-28.

[50] Among many: *CFDT v the EC and their Member States* (App no 8030/77) (1978) 13 DR 231 235 [3]; *Dufay c les Communautés européennes et leurs Etats membres* (App no 13539/88) ECmHR 19 January 1989 ; *Stephens v Cyprus, Turkey and the UN* (App no 45267/06) (2008) ECHR 11 December 2008 7; *Lechouritou et al c contre l'Allemagne et 26 autres Etats membres de l'Union européenne* (App no 37937/07) (2012) ECHR 3 April 2012.

[51] *Femi Falana v the AU* (App no 001/2011) (2012) AfCHPR 26 June 2012. Only States can be contracting parties to the Charter and its Protocole: *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) Article 63(1).

[52] *H v d P v the Netherlands* (1986) UN Doc A/42/40 185 [3.2].

[53] According to the former Article 59(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), the ECHR could only be ratified by members of the Council of Europe. With *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention* (adopted 13 Mai 2004, entered into force 1 June 2010) 2677 UNTS 3 (Protocole 14) the EU may now accede to the Convention. In 2013, the Council of Europe and the European Commission agreed on a draft agreement on accession of the EU to the ECHR: CoE, *Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Doc No 47+1(2013)008, 2013). However, in December 2014, the CJEU ruled that the draft accession agreement was unconstitutional, because it failed to preserve the specific characteristics of the EU legal order: Opinion 2/13 (Full Court) *Accession of the EU to the ECHR* [2014] (not yet published) CJEU 18 December 2014 [258]. To date the EU is therefore not a party to the ECHR, even though Article 6(2) of the Treaty of the European Union provides that the EU shall accede to the ECHR.

[54] See André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 AJIL 760 760.

jurisdiction and enforcement on the basis of their constituent treaty, the headquarters agreement, or a special agreement on privileges and immunities. As far as the jurisdictional immunities of foreign States are concerned, the 'traditional', absolute approach to immunity has, in most jurisdictions, been abandoned in favour of the so-called 'relative' approach, which limits immunity to sovereign acts of States.[55] In relation to the immunities of international organizations, efforts to limit or restrict their immunity are often advocated in the literature, but have so far been less successful in practice. The prevailing view is still that an international organization can rely on its immunity from jurisdiction irrespective of whether the underlying dispute is of a 'private' or a 'public' law nature, or of whether it involves alleged breaches of contractual duties or international obligations.[56]

There appear to be two main reasons for this differential treatment. At a conceptual level, reference can be made to the different rationale for the granting of immunities.[57] The immunity of States 'derives from the principle of sovereign equality of States'.[58] International organizations, on the other hand, are conferred immunities because they are considered necessary for them to function independently and effectively. International organizations do not have their own territories and rely on the cooperation of States to be able to carry out their functions. Without immunity, so the prevailing view,[59] international organizations could not exercise their functions in full independence, as there would be a risk of domestic courts unilaterally imposing conditions on their exercise. The ECtHR has consistently accepted that 'the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments'.[60] The second difference between States and international organizations relates to the source of their

---

[55] The relative approach to State immunity is *inter alia* reflected in the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (adopted 2 December 2004, not yet in force) UN Doc A/59/508 (UNCJIS) and the *European Convention on State Immunity* (adopted 16 May 1972, entered into force 11 June 1976) Council of Europe ETS No 74 (ECSI). China is one of the few States that continues to uphold the absolute immunity of foreign States. For a recent application: *DRC and FG Hemisphere Associates LLC* [2011] 14 HKCFAR 95 .

[56] Sam Muller, *International Organizations and Their Host States* (Brill 1995) 153; Niels Blokker, 'International Organizations: the Untouchables? ' (2014) 10 IOLR; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 581-82.

[57] See Christian Dominicé, 'L'immunité de juridiction et d'exécution des organisations internationales' (1984) 187 RdC 161; Emmanuel Gaillard and Isabelle Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or Bypass' (2002) 51 ICLQ 1 4-5; Blokker, 'Untouchables' (n 56).

[58] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99 123 [57]; [54].

[59] For a criticism of the 'functional immunity' discourse: Klabbers, 'Transformation' (n 11).

[60] *Waite and Kennedy v Germany* (App no 26083/94) (1999) ECHR 1999-I [63].

respective immunities, which may make the evolution of a restrictive approach to immunity more difficult in the case of international organizations. Whereas States enjoy immunity under customary international law,[61] the immunities of international organizations are largely conventional.[62] Many of the treaties conferring privileges and immunities on international organizations confer unqualified immunity, or leave the decision to waive immunity in the hands of the organization.[63] Unless a restrictive approach to immunity is already included in the relevant treaties or can be justified on the basis of some other legal argumentation,[64] States would accordingly need to modify the treaties conferring immunities to introduce a similarly restrictive approach. There is a legitimate concern that the immunities of international organizations can in specific cases interfere with the rights of private parties to have access to a judge, in particular if there are no comparable alternative mechanisms through which claims can be submitted.[65] Restricting the jurisdictional immunities of international organizations to cases where non-private law activities are at stake or where there are alternative remedies would provide access to a court in more situations. However, it also risks putting the State in breach of its treaty obligations vis-à-vis the organization or the other member States if the instrument conferring immunities does not allow for such

[61] *Jurisdictional Immunities* (n 58) 123 [56].
[62] In this sense Michael Singer, 'Jurisdictional Immunity of International Organizations' (1995) 36 Va J Int'l L 53 98-99; Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts' (2010) 7 IOLR 121 124-25; Fox and Webb, *The Law of State Immunity* (n 56) 572; Michael Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013) 10 IOLR 287 317.
[63] Eg General Convention (n 46) Article II Section 2; Specialized Agencies Convention (n 46) Article III Section 4; *Agreement on the Privileges and Immunities of the International Criminal Court* (adopted 9 September 2002, entered into force 22 July 2004) 2217 UNTS 3 Article 6(1). The common formulation 'immunity from every form of legal process' is 'generally interpret[ed] as absolute immunity', Jan Wouters and Pierre Schmitt, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs, and Officials' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (OUP 2010) 88-89.
[64] In relation to the General Convention (n 46) the argument has been made that organization's obligation to provide alternative mechanisms for the resolution of private law disputes is the necessary corollary to its immunity, without which no immunity must be upheld, albeit so far unsuccessfully: *M v United Nations and Belgium (Minister of Foreign Affairs)* (1966) 45 ILR 446 (Civil Tribunal of Brussels) [3] and *M v United Nations and Belgium* (Minister of Foreign Affairs) (1969) 69 ILR 139 (Court of Appeals Brussels); *Delama Georges et al v the United Nations et al* (2015) 84 F Supp 3d 246 (US District Court SDNY) and *Delama Georges et al v the United Nations et al* (2016) (not yet reported) 2016 Westlaw 4395351 (US Court of Appeals, 2nd Circuit); this argument is also made by Riccardo Pavoni, 'Choleric notes on the Haiti Cholera Case' (2015) 19 QIL 19.
[65] Reinisch, 'Accountability Gap' (n 9) 573; similarly, among many, Gaillard and Pingel-Lenuzza, 'Restrict or Bypass' (n 57); A Reinisch and U A Weber, 'In the Shadow of Waite and Kennedy' (2004) 1 IOLR 59.

a reading.[66] By and large, not only domestic courts, but also the ECtHR, have been reluctant to uphold such arguments.[67]

3.3 Alternative remedies

As a counterweight to these immunities, host State agreements and other treaties conferring privileges and immunities on international organizations typically provide that the organization must establish its own mechanisms for the settlement of private law disputes.[68] In the implementation of this obligation, the UN, its subsidiary organs and specialized agencies 'make provision in [their] commercial agreements (contracts and lease agreements) for recourse to arbitration in the event of disputes that cannot be settled by direct negotiations'.[69] Arbitration can be an effective means of dispute resolution in commercial disputes involving international organizations, at least if the contractual partner is a larger commercial entity.[70] However, it is often only an effective mechanism for the resolution of contractual disputes among 'equal players'.[71] Other 'private law' disputes, such as employment disputes or tortious claims connected to the activities of international organizations, are usually not resolved by arbitration. The manner in which such

---

[66] Dominicé, 'Immunités organisations internationales' (n 57) 180, 216; Nicolas Angelet and Alexandra Weerts, 'Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme ' (2007) 134 JDI 1 [35] *et seq*.

[67] The ECtHR held in *Stichting Mothers of Srebrenica v the Netherlands* (App no 65542/12) (2013) ECHR 11 June 2013 [163] that at least as far as the UN was concerned, a contracting State was justified in upholding the organization's absolute immunity from jurisdiction even if no alternative judicial mechanisms were available to claimants. For a rare case in which an international organization's immunity was denied because its internal claims procedure was 'manifestly deficient': *SUEPO v EPO* (2015) Case 200.141.812-01 (Court of Appeal of The Hague).

[68] Eg General Convention (n 46) Article VIII Section 29; Specialized Agencies Convention (n 46) Article IX Section 31; *Accord entre la Confédération suisse et l'Organization mondiale du commerce en vue de déterminer le statut juridique de l'Organization en Suisse (concluded 2 June 1995, entered into force 2 June 1995)* SR 0.192.122.632 (WTO Host State Agreement) Article 44.

[69] UNGA 'Report of the Secretary-General on the Implementation of Art VIII Section 29' (1995) UN Doc A/C.5/49/65 2[3]; UN Secretariat, *Supplementary Study on Practice Concerning Privileges and Immunities* (ILC Yb 1985 Vol II(1), 1985) 156 [VII].

[70] Only few arbitral awards arising from commercial disputes involving international organizations are published: see eg *Starways Limited v United Nations* (1969) UNJY 233; *Balakhany Ltd v FAO* (Award) (1972) UNJY 206; *Westland Helicopters Ltd v the Arab Organization for Industrialization and others* (Interim Award) (1984) 23(5) ILM 1071. In *Groupement d'Entreprises Fougerolle et consorts c CERN* (1992) BGE 118 Ib 562 (Swiss Federal Tribunal) 568 [2b], the court found that by agreeing to an arbitral procedure, the CERN had complied with its obligation to offer alternative mechanisms to resolve private law disputes. For individuals, this may be too costly, as noted by Philippa Webb, 'Should the 2004 UN State Immunity Convention serve as a model/starting point for a future un Convention on the Immunity of International Organizations?' (2014) 10 IOLR 319 337.

[71] Schmalenbach, 'Dispute settlement' in (n 37) 267-7. One of the major shortcomings of the UN's system for the resolution of work-related disputes is that it is only available to staff-members. Persons that perform staff-type work such as individual contractors could in principle rely on arbitration, but current arbitral remedies, which often foresee arbitration in New York, are 'too complex and difficult to use, especially for low-level non-staff personnel in the field', UNGA, 'Report of the International Justice Council on Administration of Justice at the UN' (2016) UN Doc A/71/158 [133].

disputes are resolved varies across organizations. Many international organizations have established some sort of internal judicial or quasi-judicial mechanism to resolve employment disputes with their staff members.[72] Mechanisms for the settlement of other 'private law' disputes tend to be less institutionalised. The UN largely settles such disputes on its own, which is evidenced by the fact that it has unilaterally established limits to its liability to third parties for tort claims arising from injuries incurred in the headquarters district and for liabilities arising from peacekeeping operations.[73] 'Private law claims' arising from peacekeeping operations are settled through local claims review boards, which assess claims and make recommendations on payments to be made.[74] Local claims review boards 'leave[] the investigation, processing and final adjudication of the claims entirely in the hands of the Organization'.[75] They are the UN's internal alternative to formally independent standing claims commissions whose creation is foreseen in the Status of Forces Agreements concluded between the UN and host countries of peacekeeping missions, but which have never been put in place.[76]

Given the nature of activities currently undertaken by international organizations, there should of course also be mechanisms to settle what could be called 'public law' claims against international organizations as a counterweight to their immunities. The UN considers itself under the obligation to resolve 'private law disputes', which has in the past been understood relatively broadly as covering contractual disputes with private parties, but also 'claims for compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations

---

[72] By UNGA Res 63/253 (2008) UN Doc A/RES/63/253, as amended by UNGA Res 69/203 (2014) UN Doc A/RES/69/203, the UN established the UN Dispute Tribunal and the UN Appeals Tribunal to resolve disputes with staff members, thereby abolishing the previous system of the UN Administrative Tribunal. Generally on internal administrative tribunals as a 'corollary' to immunities before domestic courts: August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals' (2008) 7 CJIL 285.

[73] UNGA Res 41/210 (1986) UN Doc A/RES/41/210 and UNGA Res 52/247 (1998) UN Doc A/RES/52/247; generally, the UN however accepts that 'the fact that funds have not been appropriated to pay legal obligations is not an excuse for failing to pay these obligations', UN Secretariat, 'Payment of settlement claims' (2011) UNJY 381 385 [16]. The UN's practice in matters of compensation is further discussed at (nn 706 *et seq*).

[74] UN Model Status of Forces Agreement Article VII [51]; reproduced in UNGA 'Report of the Secretary-General on Comprehensive Review of Peacekeeping' (1990) UN Doc A/45/594; further UNGA 'Report of the Secretary-General on the Financing of Peacekeeping' (1996) UN Doc A/51/389 11 [47].

[75] UNSG Report on the Financing of Peacekeeping (n 74) 7 [22].

[76] ibid 7 [22]-[25]. The UN has refused the establishment of Claims Commissions even where this was explicitly requested by the host State: UN, *Letter dated 25 November 2014 by Assistant Secretary-General Pedro Medrano* (2014) available at <https://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_(3.2014).pdf> accessed 16 August 2016 [91]; cited by Pavoni, 'Haiti Cholera Case' (n 64).

peace-keeping operation within the "mission area" concerned'.[77] The focus on 'private law' disputes however leaves open the question whether a third party may bring claims relating to the UN's exercise of official functions. The UN recently pointed out that in its practice, 'disputes of a private law character have been understood to be disputes of the type that arise between two private parties'.[78] The difficulties with this approach are illustrated by the manner in which the UN has handled claims relating to the 2010 Cholera outbreak in Haiti, where there were strong indications that the particular strain of the disease had been introduced into the country by members of MINUSTAH, the UN Stabilization Mission in Haiti.[79] The UN found death and personal injury related claims to be not receivable, as they 'raised broad issues of policy that arose out of the functions of the United Nations as an international organization', and could therefore not 'form the basis of a claim of a private law character'.[80] For the same reasons, the UN refused to assess third party claims relating to the UN's role during the genocide in Srebrenica and during the genocide in Rwanda.[81] The UN's position has rightly been criticized, as the simultaneous invocation of immunity before domestic courts left injured parties with no remedy.[82]

In response to growing concerns about their accountability and legitimacy, a number of international organizations have started to develop internal complaint mechanisms with broader jurisdiction to review their activities. Again, the form and jurisdiction of such internal review mechanisms vary considerably across international organizations. As an illustration, the World Bank Inspection Panel, the UN's Office of the Ombudsperson, and the UNMIK Human Rights Advisory Panel will be contrasted. The World Bank Inspection Panel was established as a functionally independent body in 1993, against the background of public concerns that projects financed by the World Bank could have adverse effects on the environment

---

[77] UNSG Report 49/65 (n 69) [15].
[78] UN, *Letter Medrano* (n 76) [87].
[79] The origins of the cholera outbreak were investigated by an independent panel, whose conclusions lend support to the claim that the cholera strain had been imported by members of the Nepalese peacekeeping contingent: Alejandro Cravioto and others, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (2011) available at <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> accessed 16 August 2016, 29. The UN's position in relation to claims for compensation is set out in response to a letter by three UN Special Rapporteurs and one independent expert: UN, *Letter Medrano* (n 76).
[80] UN, *Letter Medrano* (n 76) [97]. Complainants brought a case against the UN before domestic courts in the US. In *Georges v UN (DC)* (n 64), the UN's absolute immunity was upheld. This judgment was confirmed on appeal: *Georges v UN (CA)* (n 64).
[81] UN, *Letter Medrano* (n 76) [91]-[92].
[82] For an excellent analysis and critique see Pavoni, 'Haiti Cholera Case' (n 64).

and on communities in borrowing States.[83] It is competent to receive requests for inspections by community groups or NGOs based in the Borrower State whose

> rights or interests have been or are likely to be directly affected by an action of omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (...) provided in all cases that such failure has had, or threatens to have, a material adverse effect.[84]

The Bank's Board of Executive Directors decides, upon recommendation of the panel, whether an investigation should be opened.[85] The findings of panel investigations are presented in a non-binding report.[86] The panel cannot make recommendations and it cannot review the World Bank's policies for compliance with norms of international law,[87] but its reports are still not without impact. In the years since its establishment, they have 'influence[d] the development of the applicable law, by providing significant guidelines on the interpretation and implementation of, and compliance with, Bank environmental safeguard policies and procedures'.[88]

The UNMIK Human Rights Advisory Panel was established by UNMIK Regulation 2006/12, replacing the Ombudsperson Institution previously competent to review the conduct of UNMIK, the UN interim administration in Kosovo, and which had been criticized as inefficient.[89] The Human Rights Advisory Panel is competent to 'examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of (...) human rights' set forth in eight international instruments including the ECHR, the ICCPR and the ICESCR.[90] This broad substantive jurisdiction must be seen against the

---

[83] A Gowlland Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel' (2001) BYIL 213 213.
[84] IBRD Resolution 93-IO and IDA Resolution 93-6, The World Bank Inspection Panel, 22 September 1993, 34 ILM (1995) 520 [12].
[85] ibid [18]-[20].
[86] ibid [22].
[87] According to The Inspection at the World Bank 'Operating Procedures' (April 2014) available at <www.worldbank.org> accessed 16 August 2016, 6 [1.2], the Panel 'does not provide recommendations for remedial actions to be taken (...)'.
[88] Gowlland Gualtieri, 'Inspection Panel' (n 83) 250; with the same assessment DD Bradlow and AN Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation ' (2013) 10 IOLR 3.
[89] Pierre Klein, 'Le panel consultatif des droits de l'homme (Human Rights Advisory Panel) de la MINUK' in Marcelo Kohen, Robert Kolb and Djacoba Liva Tehindrazanarivelo (eds), *Perspectives of International Law in the 21st Century (Liber Amicorum Christian Dominicé)* (Martinus Nijhoff 2012) 229-30.
[90] UNMIK Regulation 2006/12 on the Establishment of the Human Rights Advisory Panel (23 March 2006) UNMIK/REG/2006/12 Section 1 [1.2]. UNMIK Regulation 1999/24 on the Law Applicable in Kosovo (12 December 1999) UNMIK/REG/1999/24 [1.3] provided that '[i]n exercising their functions, all persons undertaking

particular background within which UNMIK operated. On the basis of UNSC Resolution 1244, UNMIK was established as the 'international civilian presence' entrusted to provide an interim administration for Kosovo.[91] As such, UNMIK was given extensive powers to perform 'basic civilian administrative functions' including legislative, executive and judicial functions.[92] It goes without saying that such extensive powers entail a risk of human rights violations, and that there should be mechanisms to review human rights and other public law related claims. The Advisory Panel has temporal jurisdiction over complaints relating to alleged violations that occurred after 23 April 2005,[93] but complaints could only be filed until 31 May 2010.[94] The Panel is composed of three independent experts appointed by the UN Special Representative of the Secretary-General in Kosovo upon recommendation of the president of the ECtHR.[95] It can make recommendations to the UN Special Representative on the basis of its findings.[96] Both the decisions and opinions of the Advisory Panel and the decisions of the Special Representative are made public. In practice, the Panel is both highly independent and efficient, which, as Klein suggests, could be one reason why UNMIK sought to limit its powers in 2009 by making the criteria for the admissibility of complaints more restrictive.[97] After Kosovo's declaration of independence in 2007, many of UNMIK's activities were handed over to the Kosovar authorities. UNMIK maintains a significantly reduced presence whose priority it is 'to promote security, stability and respect for human rights in Kosovo and in the region'.[98] Some of its functions have been taken over by EULEX, which has established a Human Rights Panel with very similar substantive jurisdiction.[99]

---

public duties or holding public office in Kosovo shall observe internationally recognized human rights standards', as reflected in these instruments.

[91] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 [10].

[92] UNMIK Regulation 1999/1 on the Authority of the Interim Administration (25 July 1999) UNMIK/REG/1999/1 Section 1; Verdirame, *UN and HR* (n 21) 257.

[93] UNMIK Reg 2006/12 (n 90) Section 2.

[94] UNMIK Administrative Direction 2009/1 (12 October 2009) UNMIK/DIR/2009/1 Section 5.

[95] UNMIK Reg 2006/12 (n 90) Section 5(1).

[96] ibid Section 1(3).

[97] Klein, 'Panel consultatif' in (n 89) 242. According to UNMIK Reg 2006/12 (n 90) Section 3(1), the exhaustion of local remedies is a criterion for the admissibility of individual complaints against UNMIK before the Human Rights Advisory Panel. In 2009, UNMIK decided that 'any complaint that is or may become in the future the subject of the UN Third Party Claims Process (...) shall be deemed inadmissible' under that provision', UNMIK/DIR/2009/1 (n 94) Section 2(2). In one case, the Panel first found the case to be inadmissible, then allowed its reopening once the third-party settlement procedure had been closed and eventually found several violations by UNMIK: *Balaj and others v UNMIK* (2015) Case No 04/07 (HRAP).

[98] UNSC 'Report of the Secretary-General on UNMIK' (2015) UN Doc S/3015/303 [2].

[99] The decision of the EU establishing the panel (of 20 November 2009) is unpublished, see European Commission for Democracy Through Law, *Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of*

The last example of an internal review mechanism with review competence that goes beyond mere 'private law' disputes is the Office of the Ombudsperson to the ISIL and the Al-Qaida Sanctions Committee. Article 41 UNC gives the UNSC the power, upon the determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression, to oblige members to apply 'measures not involving the use of armed force'.[100] As is well known, the UNSC has since the late 1990s increasingly used this power to impose 'targeted sanctions' against listed groups or individuals, which oblige UN member States to, *inter alia,* freeze assets of designated individuals and impose travel bans.[101] One reason why the UNSC turned to sanctions targeting individual persons or groups, rather than States, was that economic sanctions imposed on States proved to have extremely harmful consequences for local civilian populations, while leaving the leaders of the State responsible for the threat to peace relatively unaffected.[102] At the same time, the 'strategic shift' to targeted sanctions was not accompanied by the development of procedural mechanisms allowing listed individuals to challenge their inclusion or the accurateness of the underlying information.[103] The practice of the UNSC Sanctions Committees therefore provided an unprecedented illustration of the capacity of international organizations to interfere with rights of individuals. In 2008, the ECJ handed down its famous decision in the *Kadi* case, in which it quashed the EU implementing legislation precisely because it was 'adopted without furnishing any guarantee enabling him to put his case to the competent authorities (...)'.[104] Against the background of this and similar legal challenges, the Office of the Ombudsperson was created in 2009 to 'assist' the UNSC Sanctions Committee when considering

---

Acts by UNMIK and EULEX in Kosovo (CDL-AD(2010)051, 2010) [53]. The panel's mandate and composition is described at <http://hrrp.eu/about.php> accessed 19 September 2016.

[100] UNC (n 44) Article 41.

[101] As of July 2016, there were 13 UNSC sanctions regimes administered by separate Sanctions Committees mandated to oversee the implementation of the regime and designate individuals and groups that meet the criteria for listing. What is currently known as the ISIL (Da'esh) & Al-Qaida Sanctions Committee was originally established by UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 [6], modified by UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989 and UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253 .

[102] Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-making* (OUP 2016) 11-12.

[103] ibid 11-12.

[104] Joined Cases C-402/05 P and C-415/05 P Joined Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v EU Council and Commission* [2008] ECR I-6351 [369]. The CJEU found that despite the improvements made to the sanctions regime, including the creation of the Office of the Ombudsperson, the delisting procedure does not provide listed persons the guarantee of effective judicial protection: *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission v Kadi and Council and UK v Commission* (GC) [2013] CJEU 18 July 2013 [133].

delisting requests.[105] Its mandate was renewed and strengthened in 2011.[106] The Office today not only has the right to receive and investigate delisting requests, it can also make non-binding recommendations to the Sanctions Committee. In 2011, a so-called process of 'reverse consensus' was introduced.[107] If the Office recommends the delisting of a listed group or person in its report to the Sanctions Committee, member States are no longer under the obligation to implement the sanctions as far as that individual or group is concerned, unless the Sanctions Committee decides within sixty day by consensus that the measures shall remain in place.[108] A person will effectively be delisted unless the delisting is either opposed by all 15 members of the Committee, or if the question is referred to the UNSC for a decision. In practice, this procedure has proved to be relatively effective, with a large percentage of the delisting requests received by the Office resulting in the elimination of the names from the sanctions list.[109] But there are also important shortcomings: most importantly, the Office is open to individuals listed on the ISIL and the Al-Qaida Sanctions Committee list, but not to persons listed under comparable sanctions regimes.[110] Furthermore, the Office of the Ombudsperson cannot take binding decisions. This also means that unlike a court, it cannot annul and thereby retroactively remove an unjustified listing, which, given the negative reputational effect, can be of considerable importance to concerned individuals.[111]

3.4 A relative unavailability of procedural remedies

While this brief overview of some of the judicial remedies available against certain international organizations is by no means exhaustive, it nevertheless reveals why the increased powers of international organizations can be problematic from an accountability perspective. To the extent that international organizations exercise functions that were previously exercised by the State, they are rightly expected to be

---

[105] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 [20].
[106] UNSC Res 1989 (n 101) [21]-[22] and annex II.
[107] Kimberly Prost, 'Remarks to the 49th meeting of the Committee of Legal Advisors on Public International Law of the Council of Europe' (Strasbourg, 20 March 2015) 3.
[108] UNSC Res 1989 (n 101) [23]. If no consensus exists, the question whether the group or person shall be delisted may be submitted, upon request of a committee member, to the UNSC for a decision.
[109] Prost, 'Remarks' (n 107) 2.
[110] Persons under other sanctions regimes may submit delisting requests to the 'Focal Point', a subsidiary organ of the UNSC created by UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730, whose powers are much more limited.
[111] The importance, in terms of effective judicial protection, of the ability to obtain an *ex tunc* annulment of a contested measure and a declaration of illegality was underlined in Case C-239/12P *Abdulrahim v Council of the EU and European Commission* (GC) [2013] CJEU 28 May 2013 [71]-[72], [68] and *Kadi II (CJEU)* (n 104) [134]. Further on this point: (n 689) and accompanying text.

subjected to the - at least substantively[112] - same mechanisms of control through which the lawfulness and legitimacy of their actions can be assured. The relative scarcity of remedies is problematic from the perspective of individuals placed under the authority of international organizations. As Sarooshi notes,

> In most States this value [the value of accountability] has come to be regarded as being inextricably linked with the exercise of sovereign powers at the domestic level through a long and arduous process of contestation, and the value is often reflected in constitutional and other public law constraints on the exercise of such powers. The conferrals by States of their powers on international organizations free from the normative limitations that constrain the exercise of these powers at the national level is to dispense with, by the stroke of a pen, the limitations on governmental tyranny that peoples have fought hard to win within the domestic polity.[113]

While there have been important developments over the past decade in the establishment of accountability mechanisms to control the activities of international organizations, by and large these mechanisms do not yet offer a protection that is 'equivalent' to the mechanisms generally available against States.[114] This is problematic from a public or a domestic constitutional law perspective, but also from an international law perspective. Individuals directly affected by the activities of international organizations may find it difficult to raise allegations of violations of international law, in particular human rights law, before an appropriate forum. For third States, the relative unavailability of procedural remedies against international organizations can be detrimental too. Surprisingly, respondent States acknowledged this fact in the proceedings instituted by Serbia against several NATO member States before the ICJ.[115]

---

[112] Hovell argues 'procedural fairness is not [a] 'one-size-fits-all' universally applicable concept', and that the development of a due process framework for UNSC sanctions therefore cannot mean that procedural safeguards developed in domestic systems can simply mean transplanted: Hovell, *Due Process* (n 102) 162-65. This contrasts with the more formalist view often defended in the literature, as well as in the case law of the CJEU, that review of sanctions decision-making should be made by an independent body with the power to take binding decisions: eg Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights. Study Commissioned by the UN Office of Legal Affairs)' [2006] 3 IOLR 437 481 [12.12].

[113] Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2005) 14 (references omitted). Similarly, ILA, *Final Report* (n 10) 5. This is also one of the central claims of the 'Global Administrative Law' school: Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2004-2005) 68 Law & Contemp' Problems 17, an area of law defined as 'comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies'.

[114] The very question of what should be considered 'equivalent' is of course contested, see (n 112). The ECtHR has noted that it considers the EU to offer such 'equivalent protection', but probably not the UN: *Bosphorus Hava Yollari Turizm v Ireland* (App no 45036/98) (2005) [GC] ECHR 2005-VI 107; *Al-Dulimi and Montana Management Inc v Switzerland* (App no 5809/08) (2016) [GC] ECHR 21 June 2016 (see in particular the separate opinion of Judge Keller); further on this (n 647).

[115] See (n 4). One State went so far as to note: 'In (...) referring to States solely in their capacity as Members of NATO, Yugoslavia's aim is (...) deliberately to circumvent the difficulty posed by NATO's lack of capacity to appear before the Court. But that obstacle cannot be overcome by clumsy verbal artifice: they, the States, are not responsible for events resulting from acts of the Organization of which they are Members, and no organization can

4. The 'institutional veil' and the 'hidden' role of member States

Given the difficulties of invoking the responsibility of international organizations, even where such responsibility could *a priori* be established, it is not surprising that parties allegedly injured by their activities have attempted to turn to their members instead. In a political sense, member States are present whenever an international organization acts. They collectively determine its policies through the participation of their representatives in decision-making organs, they elect executive officials, they approve the organization's budget, and they disburse funding. Since international organizations neither possess territories nor populations, they typically also rely on the cooperation of their member States for the implementation of projects and decisions. Where an international organization engages in operational activities, member States typically contribute personnel and logistical resources to the operation. Importantly, member States also determine collectively under what circumstances claims can be brought against an international organization, in the first instance by setting out mechanisms of dispute settlement in its constitutive instrument or by imposing the obligation to create such mechanisms on the organization.[116] It is therefore safe to say that 'without members, there would be no international organizations'.[117]

In legal terms, the question to what extent, and under what conditions, member States can be held responsible for the activities of international organizations is far from clear. In early case law, the question whether member States are liable on a subsidiary basis for the obligations of international organizations received a lot of attention. More recently, the focus has shifted from the mere fact of membership to the various activities member States undertake within the framework of international organizations. Third parties increasingly seek to hold members responsible not for the wrongful acts of international organizations, but rather for their own wrongful involvement in the activities of international organizations. This section will address the two scenarios in turns. It will then explain in what sense there

---

be a party to proceedings before the Court', *Legality of the Use of Force (Serbia and Montenegro v Italy)*; Preliminary Objections of Italy, 5 July 2000 19.

[116] Technically speaking, of course, 'members only exist from the moment that the organization has been established': Niels Blokker, 'International Organizations and their Members' (2004) 1 IOLR 140 140. On their obligation to provide mechanisms for the settlement of (private law) disputes: see (n 68).

[117] ibid 141.

may be an 'institutional veil' hiding the responsibility of member States for their own wrongful conduct taken within the framework of an international organization. Whether there is indeed such an 'institutional veil' is the question this thesis seeks to address, as explained in the last section of this chapter.

4.1 Subsidiary liability of member States for the obligations of international organizations

For a long time, legal discourse on the responsibility of international organizations was focused almost exclusively on the question whether there is a subsidiary liability of member States. If an international organization enters into an international agreement in its own name, it may incur international responsibility for a breach of the obligations contained therein. This leads to the question whether its member States or member international organizations are under an obligation to step in, at least on a subsidiary basis,[118] if the organization fails to honour its obligations or to bear the consequences of a breach thereof. It has been duly noted that there is nothing inherent in the concept of corporate legal personality that would preclude such a subsidiary liability[119] of members.[120] It is certainly possible to conceive of a form of corporate legal personality with an attendant subsidiary liability of the members for the liabilities of the body corporate. However, the question is whether such a rule of subsidiary liability presently exists under customary international law as far as the members of international organizations are concerned. Almost thirty years of academic debate, as well as the absence of relevant case law, practice and *opinio juris*, point towards the absence of such a rule under general international law. Because the question of a possible subsidiary liability of members has already received extensive treatment in the literature, it will suffice to summarise the debate here.[121]

---

[118] Direct liability is usually referred to as 'concurrent liability', whereas the terms 'secondary' or 'subsidiary liability' are used to designate a liability that arises only once the organization failed to remedy its breach, see Andrew Stumer, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' (2007) 48 Harv Int'l LJ 553 556.

[119] Such a rule would be one of 'liability' rather than 'responsibility', because it is generally not suggested that member States would become bound by the obligation and commit themselves an internationally wrongful act attributable to them, but rather that they bear the consequences of the organization's wrongful act. In international law, the term liability is usually used to denote an obligation to bear the financial consequences of certain acts, such as to pay compensation for harmful activities, whereas the term responsibility is reserved for the consequences of internationally wrongful acts: Alan E Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?' (1990) 39 ICLQ 1 3.

[120] Hirsch, *Responsibility of International Organizations* (n 10) 135-36.

[121] For an excellent overview see Stumer, 'Member State Liability' (n 118), and in the context of the ITC: Romana Sadurska and Christine M. Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?' (1990) 30 Va J Int'l L 845. The most comprehensive work on the question is Matthias Hartwig, *Die Haftung der Mitgliedstaaten für internationale Organisationen* (Springer 1993).

The question first arose in the context of the collapse of the International Tin Council, an intergovernmental commodity organization headquartered in London. The ITC had been established in 1956 and included both tin producing and tin consuming countries as its members. One of its purposes was to prevent excessive fluctuations of the international tin price by maintaining a buffer stock. For this purpose, the ITC entered into private law contracts to buy and sell tin, financing purchases worth several hundred million pounds.[122] The ITC collapsed in 1985 after unsuccessfully trying to defend the falling tin price, leaving private creditors with significant losses. It was in this domestic context that the question whether member States are liable, either directly or once remedies against the organization have been exhausted, for outstanding debts of 'their' organizations was first litigated. The question was not whether member States had become bound by the contractual obligations of the ITC, either because the organization did not exist as a legal person or because the organization had acted as an agent in law, contracting on behalf of its members. These points were argued separately.[123] Neither was the question whether the members had breached a duty of vigilance or led others to rely on their financial liability. The question that is of interest here, and which was argued extensively before English courts, was whether, as a matter of customary international law, member States incurred liability where an international organization breached one of its obligations, irrespective of whether that obligation arose under international or domestic law.[124]

It was uncontroversial that a rule of secondary liability could be included in the constituent treaty of an international organization or in a separate agreement. But since no such rule could be identified as far as the ITC was concerned, the question turned on whether a rule of secondary liability existed under general

---

[122] Sadurska and Chinkin, 'Collapse of the ITC' (n 121) 850.

[123] Both arguments were rejected: *Maclaine Watson and Co Ltd v International Tin Council* [1989] Ch 253 (CA, Civ), [1988] 3 All ER 257 173 (per *Kerr LJ*) and 226 (per *Gibson LJ*) on legal personality; and 190 (per *Kerr LJ*) and 249 (*per Gibson LJ*) on 'constitutional' agency. For a discussion: Sadurska and Chinkin, 'Collapse of the ITC' (n 121); C.F. Amerasinghe, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent' (1991) 85 AJIL 259. Similar arguments, also related to contractual obligations, were upheld at a preliminary stage in *Westland (Interim Award)* (n 70) 26; but the award was successfully challenged before Swiss courts: *Arab Organization for Industrialization and Others v Westland Helicopters Ltd and Others (1987) 80 ILR 625 (Geneva Court of Justice)* 177; *Arab Organization for Industrialization and Others v Westland Helicopters Ltd and Others* (1988) 80 ILR 652 (Swiss Federal Tribunal) [I.3.b]. The case was eventually settled in 1991 by an (unpublished) partial award: see IDI, 'Provisional Report by Rapporteur Rosalyn Higgins' (1995) 66 AIDI 373 393-94.

[124] See in particular *Maclaine Watson v ITC (CA)* (n 123); *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry sub nom Maclaine Watson and Co Ltd v International Tin Council* [1990] 2 AC 418 (HL), [1989] 3 All ER 523.

international law. Nourse J in the Court of Appeals was of the view that there exists such a rule. He found that 'in international law the attribution of legal personality to an international organization does not necessarily free its members from liability for its obligations' and that 'it is impossible for the members of an international organization to exclude or limit their liability for its obligations'.[125] But this view was rejected by the majority of the Court. Instead, the Court held per Ralph Gibson LJ that

> [w]here the contract has been made by the organization as a separate legal personality (...) 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.[126]

The judgment was upheld by the House of Lords, albeit with the reasoning that the ITC's international legal personality, as opposed to its legal personality under domestic law, could in any case not be relied on before English courts under the particular circumstances.[127] The Courts thus accepted that the contractual obligations of the ITC were solely its own and that the member States did not incur a subsidiary liability for its debts. If it hadn't been for a political settlement, the private parties would accordingly have been unable to recover their assets.[128]

Today there is still little case law or practice supporting the existence of a rule of subsidiary liability for an international organization's debts or obligations.[129] There are only few treaties, such as the ones on liability in outer space, providing that States incur liability for damage caused by an international organization by reason of their membership.[130] The lack of practice supporting such a rule was one of the main reasons

---

[125] *Maclaine Watson v ITC (CA)* (n 123) 218 (*per Nourse J*).
[126] ibid 245 (*per Ralph Gibson LJ*).
[127] *JH Rayner Ltd v Department of Trade and Industry (HL)* (n 124); for a critique Christopher Greenwood, 'The Tin Council Litigation in the House of Lords' (1990) 49 CLJ 8.
[128] A political settlement was reached in December 1989, which provided for the payment of 128.5 million to creditors see Sadurska and Chinkin, 'Collapse of the ITC' (n 121) 856. Contributions were made by all member States and the ITC.
[129] Beyond the domestic private law context, the responsibility of States on the basis of their membership has notably been invoked before the ECmHR and the ECtHR, albeit unsuccessfully: among many, *CFDT v EC* (n 50); *Senator Lines GmbH v Austria and others* (App no 56672/00) (2004) [GC] ECHR 2004-IV; *Boivin v 34 State Members of the Council of Europe* (App No 73250/01) (2008) ECHR 9 September 2008; *Biret et al v 15 EC Member States* (App no 13762/04) (2008) ECHR 9 December 2008.
[130] Article XXII(3) of the *Convention on the International Liability for Damage Caused by Space Objects* (concluded 29 March 1972, entered into force 1 September 1972) 961 UNTS 187 (Space Liability Convention) provides for the liability of international organizations and their members; similarly Article VI of the T*reaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (concluded 27 January 1967,

why the *Institut de Droit International* concluded in an influential resolution adopted under SR Rosalyn Higgins in 1995 that '[t]here is no rule of international law whereby states members are *per se* liable, concurrently or secondarily, for the obligations of an international organization of which they are a member'.[131] Policy considerations, in particular the need to protect the independent functioning of international organizations, appear to have been taken into account as well. As Higgins noted in her preliminary exposé:

> (..) if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership.[132]

Following the conclusions of the *Institut* on the liability of member States, the ILC rejected a rule of subsidiary member State 'responsibility' in its 2011 draft articles on the responsibility of international organizations.[133] ILC Special Rapporteur Gaja initially suggested the introduction of a draft article according to which 'a State that is a member of an international organization is not responsible for an internationally wrongful act of that organization unless (...) it has accepted with regard to the injured third party that it could be held responsible; or (...) it has led the injured third party to rely on its responsibility'.[134] This 'negative' rule against a subsidiary member State responsibility was not retained, but it is clearly implied in the draft articles as adopted on second reading.[135] While the rule was supported by most States in their comments to the ILC,[136] it has been criticized in the literature on principled

---

entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty). For a discussion, Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (n 35) 151 *et seq*.

[131] IDI, 'Draft Resolution' (1995) 66 AIDI 465 466.

[132] Rosalyn Higgins, 'Preliminary Exposé' (1995) 66 Annuaire de l'DI 251 289. Such policy considerations have been criticized by Stumer, 'Member State Liability' (n 118) 575-78, who notes that members already bear an indirect liability vis-à-vis the organization to cover its cost.

[133] ILC, *ARIO with commentaries* (n 17) 64-65 [2]; Giorgio Gaja, *Fourth Report on Responsibility of International Organizations, Addendum 2* (UN Doc A/CN4/564/Add2, 2006) 12 [90]. These conclusions are also supported by ILA, *Final Report* (n 10) 26 and ILA, *Study Group on the Responsibility of International Organizations* (Sofia Conference, 2012) 35-37.

[134] Gaja, *Fourth Report, Add 2* (n 133) 14 (draft Article 29). The inclusion of this provision was controversial. During the discussions in the ILC, Ian Brownlie stressed that the responsibility of member States could not be excluded, whereas Alain Pellet was of the opinion that it was not normally entailed: ILC, 'Summary Record 2892nd Meeting' (2007) UN Doc A/CN.4/SR.2892 ; ILC, 'Summary Record 2893rd Meeting' (2006) UN Doc A/CN.4/SR.2893.

[135] See ILC, *ARIO with commentaries* (n 17) Article 62 and commentary.

[136] UNGA 'Summary of the Discussion in the Sixth Committee on the 2006 ILC Report' (2007) UN Doc A/CN.4/577 15-16 [41]-[43].

grounds.[137] Realising that a lack of subsidiary 'responsibility' might lead to a situation in which third parties injured by wrongful acts of international organizations remain without a remedy, the ILC proposed an additional rule according to which 'members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations [to make reparation]'.[138] However, this rule is merely of an 'expository' character.[139] It does not change the fact that third parties allegedly harmed by the activities of an international organization generally do not have a claim against States simply on the basis of their membership.

4.2 Responsibility of member States for their wrongful acts taken within the framework of an international organization

In recent years, challenges against member States of international organizations in relation to the organizations' activities were both more frequent and they tended to be formulated differently. Rather than invoking the responsibility or liability of a State on the basis of its membership, third parties claimed that member States incurred responsibility for their own wrongful conduct taken within the framework of an international organization. As aptly put by Murray, rather than standing outside the corporate personality of the organization and 'trying to find ways to peer in', such attempts begin from behind the corporate personality and attempt to 'peer out'.[140] *Inter alia*, third parties invoked the responsibility of States on the basis of their transfer of functions to an international organization[141]; on the basis of their control of the organization[142]; their vote within a decision-making organ[143]; their cooperation with the

---

[137] See Alexander Orakhelashvili, 'Division of Reparation Between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 662 and Sienho Yee, 'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 332, who notes that this solution is 'at best is an immature one as it opens up a gap in the international legal system (...)'; see also Sienho Yee, 'The Responsibility of States Members of an International Organization for Its Conduct As a Result of Membership or Their Normal Conduct Associated With Membership' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005), where a similar view is defended.

[138] ILC, *ARIO with commentaries* (n 17) 65 [4].

[139] ibid (n 17) 65 [4].

[140] Odette Murray, 'Piercing the Corporate Veil' (2011) 8 IOLR 291 298.

[141] *Gasparini c l'Italie et la Belgique* (App no 10750/03) (2009) ECHR 12 May 2009; but similarly questions were already raised in *X v Germany* (App no 235/56) (1958) 2 Ybk 256.

[142] *Legality (Preliminary Objections) Memorial FRY* (n 4) 327.

organization[144]; their participation in the organization's operational activities[145]; their implementation of the organization's acts[146]; their upholding of the organization's immunity[147] or simply on the basis of their failure to intervene or ensure a certain outcome[148]. *A priori*, this appears to be a more promising way to obtain a remedy than trying to establish the existence of a rule of customary international law on subsidiary member State liability, as it is not so different from holding States responsible for wrongful conduct taken outside of the framework of an international organization. What is necessary is to demonstrate that conduct taken by the State in relation to the organization's activities was wrongful. Yet, as this last section of the chapter tries to demonstrate, establishing member State responsibility in such situations is complicated by the phenomenon of the 'institutional veil'.[149] There is a strong tendency by States, international organizations and parts of the doctrine to stress the separate responsibility of international organizations and to resist attempts to hold member States responsible for their involvement in the activities of international organizations. Its essence is captured by the following statement: '[t]he existence of legal personality creates a strong presumption that the organization alone is responsible for its

---

[143] *Case Concerning the Application of Article 11, Paragraph 1, of the Interim Accord of 13 September 1995 (FYROM v Greece)* (Memorial of the FYRM) 20 July 2009; Case 2 BvR 2660/06 (2013) (German Federal Constitutional Court) (the Varvarin case).

[144] *Milosević v the Netherlands* (App no 77631/01) (2001) ECHR 20 December 2001; *Djokaba Lambi Longa v the Netherlands* (App no 33917/12) (2012) ECHR 9 October 2012; *Rukundo c Office fédéral de justice* (2001) 1A130/2001/viz (Swiss Federal Tribunal).

[145] Before domestic courts in Austria: *NK v Austria* (1979) 77 ILR 470 (Superior Provinical Court Vienna); the UK: *Attorney General v Nissan* [1970] AC 179 (HL) [1969] 1 All ER 629; *Bici and Bici v Ministry of Defense* [2004] EWHC 786 (QB), [2004] All ER (D) 137 (Apr), (2004) 145 ILR 529; in Belgium: *Mukeshimana-Ngulinzira et autres c Belgique et autres* (2010) Cases no 04/4807/A and 07/15547/A (Court of First Instance Brussels); in Germany: *Case 26 K 5534/10* (2012) (Administrative Court Cologne); *Case 1 O 460/11* (2013) (Provincial Court Bonn); Case 7 U 4/14 (2015) (Higher Provincial Court Cologne); *Case 25 K 4280/09* (2011) (Administrative Court Cologne); in the Netherlands: *Tijsterman et al v the Netherlands* (2004) Case KG 99/735 (Court of Appeal of The Hague) ; *Danikovic et al v the Netherlands* (2002) Case C01/027HR 35 NJ 2003 (Supreme Court of the Netherlands); *The Netherlands v Nuhanović* (2013) Case no 12/03324 (Supreme Court of the Netherlands); *The Netherlands v Mustafić* (2013) Case no 12/03329 (Supreme Court of the Netherlands); in Turkey: *USS Saratoga v TCG Muavenet Case, Akan and ors v Turkish Ministry of Defence* (1995) No E 1993/1009, No K 1995/1095, ILDC 1731 (TR 1995) (Supreme Military Administrative Court Turkey). Before the ECtHR: *Banković* (n 4); *Behrami* (n 4); *Al-Jedda v the UK* (App no 27021/08) (2011) [GC] 53 EHRR 23.

[146] Among many, *Case T-727-08 Abdelrazik v Canada* (2009) 2009 FC 580 (Federal Court Canada); *HM Treasury v Ahmed and Others* [2010] UKSC 2, [2010] 2 AC 534; *M & Co v Germany* (App no 13258/87) (1990) 64 DR 138 ; *Bosphorus* (n 114); *Nada v Switzerland* (App no 10583/08) (2012) [GC] ECHR 12 September 2012; *Michaud v France* (App no 12323/11) (2012) ECHR 6 December 2012; *Al-Dulimi (GC)* (n 114).

[147] *M v UN and Belgium* (n 64); *Waite and Kennedy* (n 60); *Chapman v Belgium* (App no 39619/06) (2013) ECHR 5 March 2013; *Mothers of Srebrenica* (n 67).

[148] Eg *Djokaba v Netherlands* (n 144) [66] (of the Netherlands, in relation to the ICC); *Milorad Bilbija et al* (2008) No AP-953/05 (Constitutional Court of Bosnia and Herzegovina) [72] (of Bosnia and Herzegovina, in relation to the UN High Representative); Canada v Miller (2001) 2001 SCC 12 ILDC 179 (Canada 2011) (Supreme Court of Canada) [9] (of Canada, in relation to the ICAO).

[149] The term 'institutional veil' is coined and discussed, albeit in the context of the law of treaties, by Brölmann, *Institutional Veil* (n 14). For an application of the analysis to the law of responsibility, see Catherine Brölmann, 'Member States and International Legal Responsibility' (2015) 12 IOLR 358 and section 4.2 below.

acts, something which is difficult to rebut by lifting the "corporate veil" in order to establish a separate responsibility for the member States of the organization'.[150]

4.2.1 General rules for the establishment of State responsibility

The ILC's draft articles on the responsibility of States are the starting point for any question of State responsibility. Entrusted with 'the promotion of the progressive development of international law and its codification',[151] the ILC dedicated almost fifty years of work to the topic of State responsibility. In 2001, under the guidance of its fifth SR on State responsibility, James Crawford, it adopted a set of 59 draft articles on second reading. The articles deal with the definition of State responsibility, its content and its implementation. They do not purport to codify any substantive obligations of States under international law. In accordance with the distinction between 'primary' and 'secondary' rules introduced by the second SR, Roberto Ago, the draft articles merely codify the 'secondary rules' dealing with 'the general and necessarily uniform aspects of state responsibility'.[152] The draft articles on State responsibility are widely considered to be 'one of the pillars of the Commission's work and probably its "masterpiece" (...)'.[153] Thanks not least to the meticulous research of the various special rapporteurs, the ILC could rely on an extensive body of international case law and commentary for reference. Already during the course of the ILC's work, the ICJ repeatedly referred to key articles of the draft and confirmed that they are indeed an accurate reflection of customary international law.[154] Even provisions that were relatively contested or considered to pertain to the field of 'progressive development' of international law at the time of their adoption have been consolidated over time. As Caron remarked in a seminal article on the topic, the relationship between the non-binding form of the draft articles and their normative influence is

---

[150] Esa Paasivirta, 'The Responsibility of Member States of International Organizations?' (2015) 12 IOLR 448 454.
[151] Article 1(1) of the Statute of the ILC; UNGA Res 174 (II) (1947) UN Doc A/519, 105 as amended by UNGA Resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. Even though a clear distinction between codification on the one hand, and progressive development on the other hand was to be maintained (Article 15), this decision was soon abandoned in practice: SD Murphy, 'Codification, Progressive Development, or Scholarly Analysis?' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Nijhoff 2013).
[152] Roberto Ago, *Working Paper on State Responsibility* (ILC Yb 1963 Vol II 1963) 253; ILC, *ARS with commentaries* (n 38) 31 [1].
[153] ILC, *Recommendation of the Working-Group on the Long-term Programme of Work* (UN Doc A/55/10, 2000) 135.
[154] *Gabcikovo-Nagymaros Project (Hungary / Slovakia)* [1997] ICJ Rep 7 39-41 [50]-[53]; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 87 [62].

'paradoxical'.[155] Formally, ILC draft articles do not constitute a source of law. But because they were drafted in a treaty-like form by a UN body composed of eminent jurists entrusted with the task to, at least in part, codify customary international law, they are surrounded by an 'aura of authority'.[156] Courts, both international and domestic, often refer to the draft articles and thereby corroborate the status of the rules proposed therein.[157]

4.2.2 Transposition *mutatis mutandis* to international organizations

In 2002, the ILC decided to include the topic of the responsibility of international organizations in its work programme. According to the working group on the ILC's long-term programme of work who proposed the inclusion, the topic reflected 'the needs of States', was 'entirely concrete' and 'sufficiently advanced in stage in terms of State practice'. Most importantly, it reflected 'the logical and probably necessary counterpart of that of State responsibility'.[158] It soon became clear that at least as far as the availability of practice was concerned, this assessment was overly optimistic. As mentioned above, the ILC had very little practice, in particular judicial practice, to rely on when drafting the articles. In response to criticism, the ILC SR on the responsibility of international organizations, Giorgio Gaja, explained that '[p]ractice concerning the responsibility of international organizations indeed appears to be limited, in particular because of the reluctance of most organizations to submit their disputes with States or other organizations to third-party settlement'.[159] Rather than extracting general rules from existing practice, the ILC therefore relied heavily on what had been stated in the draft articles on State responsibility. SR Gaja described the ILC's approach as follows:

> The need for coherency in the Commission's work requires that a change, in respect of international organizations, in the approach and even the wording of what has been said with

---

[155] David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857.
[156] ibid 867. Gaja notes that this was seemingly encouraged by the UNGA, who annexed the draft articles to UNGA Res 56/83 (2002) UN Doc A/RES/56/83 and recommended them to the attention of Governments: Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 BYIL 10.
[157] Systematic compilations of decisions of international courts, tribunals and other bodies referring to the ARS were established by the UNSG: see UNGA 'Report of the Secretary-General 62/62' (2007) UN Doc A/62/62; UNGA 'Report of the Secretary-General 65/76' (2010) UN Doc A/65/76; UNGA 'Report of the Secretary-General 62/62' (2013) UN Doc A/68/72; UNGA 'Report of the Secretary-General 71/80' (2016) UN Doc A/71/80 ; as well as Simon Olleson, *State Responsibility before International and Domestic Courts: The Impact and Influence of the ILC Articles* (OUP 2016 (forthcoming)).
[158] ILC, *Working Group Recommendation* (n 153) 135-36.
[159] Giorgio Gaja, *Eighth Report on Responsibility of International Organizations* (UN Doc A/CN4/640, 2011) 6 [6].

> regard to States needs to find justification in differences concerning the relevant practice or objective distinctions in nature.[160]

In other words, there was a presumption for the transposition of the rules as codified in the context of States. As a result, most rules were transposed *mutatis mutandis,* with the general remark, included in the commentary on the particular article, that there was 'no reason for distinguishing between the situation of States and that of international organizations'.[161] Only where the ILC considered that there was 'no identity or similarity between the questions covered by the two sets of articles' did it introduce slight modifications.[162] When adopting the articles, the ILC made sure to point out that '[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter'.[163]

One area in which the ILC did introduce some modifications was the responsibility of member States. The draft articles on State responsibility contain a savings clause according to which the articles 'are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'.[164] Excluded from the scope of the ARS are

> issues of the responsibility of a State for the acts of an international organization, ie those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization.[165]

It was therefore clear that the ARIO would have to deal, in some way or another, with the position of member States. The draft articles on the responsibility of international organizations adopted in 2011 propose four grounds on which member States may be held responsible 'in connection with the conduct of an international organization': on the basis of their 'aid and assistance' in the commission of an internationally wrongful act by the organization, on the basis of their 'direction and control' over the

---

[160] Giorgio Gaja, *Second Report on Responsibility of International Organizations* (UN Doc A/CN4/541, 2004) 3 [5].
[161] Eg ILC, *ARIO with commentaries* (n 17) 55 [4] Article 29.
[162] T Scovazzi, 'Within and Beyond *Mutatis Mutandis*' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Nijhoff 2013) 130.
[163] ILC, *ARIO with commentaries* (n 17) 2 [5].
[164] ILC, *ARS with commentaries* (n 38)Article 57.
[165] ibid 142 [4].

commission of an internationally wrongful act by the organization, on the basis of their 'coercion' of the organization, as well as on the basis of the fact that they circumvent their obligations by taking advantage of the existence of an international organization.[166] Beyond this, States are as discussed not 'responsible' for the internationally wrongful acts of international organizations of which they are members, unless they have accepted such responsibility or have led a third party to rely on it.[167]

4.2.3 State responsibility vs *member* State responsibility

Not explicitly addressed by the ILC was the question under what circumstances member States may incur responsibility for their own wrongful conduct taken within the framework of an international organization; in other words if conduct attributable to them is in violation of one of their international obligations. Strictly speaking, these are not cases of State responsibility 'for the conduct of an international organization', but rather for the State's own conduct. *A priori*, the rules on the engagement and enforcement of State responsibility could apply. At the same time, an international organization 'appears primarily as a closed legal entity' in its external relations.[168] The role of States as members of international organizations can therefore be seen as a matter that is internal to the organizations and in this sense covered by its 'institutional veil'. State responsibility for wrongful conduct taken within the framework of an international organization 'falls somewhat in a gap between the articles on State responsibility and the articles on the responsibility of international organizations'.[169] There is a potential overlap between the rules on the responsibility of member States and the responsibility of international organizations simply because it is often unclear 'where the organization begins and where its member states end'.[170] If one considers that 'when states act on behalf of the organization, and in the organization's name, as a matter of law these are acts of the organization',[171] then the distinction between responsibility for the organization's acts and responsibility for the State's own acts collapses. By holding a member State responsible for its conduct taken within the framework of an organization, is one 'piercing the veil' of the

---

[166] ILC, *ARIO with commentaries* (n 17) Articles 58-61.
[167] See (n 135).
[168] Brölmann, *Institutional Veil* (n 14) 263.
[169] Dan Sarooshi, 'International Organizations and State Responsibility' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Nijhoff 2013) 87.
[170] Klabbers, *Introduction* (n 16) 310.
[171] Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12 ILSA JICL 395 402.

organization, or is one rather holding the member State responsible for its own conduct? Courts have given the most varied answers to such questions over the past years, almost always by reference to the ILC's work on the responsibility of international organizations.

As the following four chapters of this thesis will evidence, there is an ongoing contestation about whether, and to what extent, the rules on the engagement and the implementation of the responsibility of *member* States differ from the normal rules on the engagement and implementation of State responsibility.[172] In various forms and contexts, the same legal questions resurface: Is there a presumption against member State responsibility due to the separate legal personality of the international organization? Can States 'by establishing an international organization, reduce the scope of the burden which they otherwise would have had to shoulder under the rules of general international law'?[173] To paraphrase what Allott observed generally in regard to responsibility as an intermediary category between wrongdoing and liability, framing member State responsibility as a distinct category leaves 'room for argument in every conceivable case of potential responsibility'.[174] With the transposition of responsibility rules to international organizations, certain rules of State responsibility, well-established in an exclusively inter-State context, appear to have been opened up to fundamental questions. Nothing provides a better illustration of the fact that the law in this area is open to interpretation and contestation than the very workings of the ILC, which, due to the scarcity of practice and case law, considered intensively the views of States, international organizations, and academic commentators on all legal questions relating to the responsibility of international organizations and their members. Whether the often-voiced concern that international organizations provide their members with 'opportunities for shielding the collective action of States behind the organizational veil, or separate legal personality of the organization'[175] holds true is therefore, to a large a

---

[172] As noted by Niels Blokker, 'Member State Responsibility for Wrongdoings of International Organizations' (2015) [12] 2 IOLR 319 323, who is however favourable of the ILC's approach, 'without the ARIO, these [national and international] courts would only have the State responsibility articles as a legal framework applicable to the conduct of States for *their own* conduct, not for their conduct as member states of an international organization nor for the conduct of the organization itself'.

[173] Christian Tomuschat, 'General Conclusions' in Christian Tomuschat (ed), *Kosovo and the International Community* (Kluwer Law 2002) 334.

[174] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 Harv Int'l LJ 1 14.

[175] Cedric Ryngaert and Holly Buchanan, 'Member State Responsibility for the Acts of International Organizations' (2011) 7 Utrecht L Rev 131 131; similarly Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 IOLR 91, Jean d'Aspremont, *The Law of International Responsibility and Multilayered Institutional Veils: the Case of Authorized Regional Peace-Enforcement Operations* (SHARES

extent, dependent on how one interprets the applicable rules in this context.

5. The 'institutional veil' as an interpretative metaphor

Perhaps even more so than in other areas of law, policy considerations have traditionally taken an important place in legal argumentation about the law of international organizations.[176] The need to enable international organizations to exercise their functions effectively and independently, and the value of inter-State cooperation more generally, are often seen as important concerns that should influence the manner in which we think about the powers or immunities of international organizations. This is also true for questions of member State responsibility, where these considerations usually translate into arguments that holding member States responsible might either discourage States from participating in international organizations or induce them to interfere unduly with their independence.[177] As noted by Brölmann, the 'institutional veil' exists not least 'in the mind of lawyers and policymakers whenever there is room for discretion, discussion, theorization or a normative agenda on the division of legal responsibility between organizations and their member States'.[178]

While this thesis recognizes the value of protecting the independence of international organizations, it argues that the concern that the expanding activities of international organizations lead to an 'accountability gap' should not be underestimated. Accordingly, the aim of this thesis is to delimit as far as possible the area of contestation of the applicable rules and determine, where the law is relatively clear,

---

Research Paper 24 ACIL 2013-10, 2013). Arguably, this view also underlies Article 61 ARIO on responsibility for 'circumvention': see further (n 453). By contrast, for Prosper Weil, 'Le droit international en quête de son identité: cours général de droit international public' (1992) 237 RdC 11 104 '*nul effort n'est nécessaire pour apercevoir la nudité des Etats derrière ce voile immatériel*'.

[176] For a critique of the theory of functionalism, which he connects to the basic idea that 'international organizations are functional entities, set up to perform specific tasks for the greater good of mankind and, as such, in need of legal protection' as an interpretative lens in international institutional law, see Klabbers, 'Transformation' (n 11) 11.

[177] Sometimes such considerations of effectiveness are directly expressed by Courts. A striking example is the case of *Behrami* [146]-[149], where the Court noted that 'since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to maintain peace and security and since they rely for their effectiveness on support from their member states, the Convention cannot be interpreted in a manner which would subject to acts and omissions of Contracting Parties (...) to the scrutiny of the Court'. Further in this sense eg IDI, 'Provisional' (n 123) 419; Gaja, *Fourth Report, Add 2* (n 133) 13 [94]; for a discussion Wilde, 'Enhancing Accountability' (n 171) and Stumer, 'Member State Liability' (n 118).

[178] Brölmann, 'Member States & Responsibility' (n 118) 380.

whether concerns about an 'accountability gap' are justified.[179] Where the law is contested and conflicting interpretations have been advanced, it evaluates whether the concerns about an 'accountability gap' could be effectively addressed within the four corners of the existing law. It is submitted that an overly narrow reading of member State responsibility in the interest of protecting the independence of international organizations would come at a high cost. The function of the law of international responsibility is not, or at least no longer,[180] simply remedial in the sense of providing compensation for damage caused to injured States or private persons. Because it sets out the general conditions for internationally wrongful acts of States, as well as their consequences irrespective of any invocation by the injured State, the law of State responsibility today expresses a broader notion of legality under international law.[181] Domestic courts increasingly rely on the rules of State responsibility as a benchmark to assess the lawfulness of the conduct of the Forum State in international relations.[182] If the role of member States were simply 'hidden' behind the organization's 'veil', then this would mean that international law does not regulate the manner in which they carry out their role as members of international organizations. This would be true irrespective of the nature of the functions entrusted to the organization by its members. Combined with the fact that the organization itself incurs responsibility often more in theory than in practice, there would indeed be an accompanying risk that States could use international organizations as 'vehicles' to carry out activities they could not otherwise undertake without incurring legal responsibility. Holding States effectively responsible for their wrongful involvement in the activities of an international organization is furthermore less detrimental, in terms of their possible interference with the organization's independence, than holding them responsible solely on the basis of their membership. For the more actively a State intervenes in the activities of an international organization, the more it will be exposed to a possible responsibility on the

---

[179] The applicable norms and rules are here understood as 'clear' to the extent that there is absence of dispute over their meaning: on this point see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 46-47.

[180] The 'traditional view' of State responsibility as a 'bilateral' relationship between the injuring State and the injured State, defined as the holder of a subjective right, as well as the strong focus on reparation as the content of responsibility is often attributed to Anzilotti, Dionisio Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 13 RGDIP 5, for an appraisal Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13 EJIL 1083.

[181] In this sense Helmut Philipp Aust, 'The Normative Environment for Peace' in Georg Nolte (ed), *Peace through International Law* (Springer 2011) 32; André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615 624; Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, et al (ed), *The Law of International Responsibility* (OUP 2010).

[182] Aust, 'Normative Environment' in (n 181) 32.

basis of its own unlawful acts if things go wrong.

Finally, recent practice demonstrates that the possibility of incurring responsibility for conduct taken within the framework of international organizations can serve as a political incentive for member States to push for the creation of better procedural remedies against international organizations.[183] By creating procedural remedies available against the organization, member States may be able to reduce the likelihood of procedures against themselves for their involvement in collective conduct. As will be shown throughout the thesis, turning to the member States instead of the organization is cumbersome because it requires claimants to demonstrate that the members' contributions to the organization's activities are in themselves wrongful. At the remedial stage, it further requires claimants to show that the individual wrongful contribution of one State *caused* the resulting harm, which may be difficult if the contribution amounted to mere support or assistance. If only for reasons of simplicity and procedural efficiency, an injured party might in principle find it preferable to turn against the organization itself, but only if satisfactory mechanisms of dispute settlement exist. While the long-term goal is certainly a better integration of international organizations into the system of international dispute settlement, recognizing the possibility of member State responsibility might be a necessary preliminary step.

[183] In relation to the *Kadi I* judgment, Prost, 'Remarks' (n 107); generally in this sense Vaios Koutroulis, 'Entre la non-interférence et le contrôle judiciaire: l'équilibrisme des juridictions nationales face aux actes des organisations internationales' in Dan Sarooshi (ed), *Remedies and Responsibility for the Actions of International Organizations* (Brill 2013); Cedric Ryngaert, 'The Responsibility of Member States of International Organizations' (2015) 12 IOLR 502 503.

CHAPTER 2: ATTRIBUTION OF CONDUCT

1. Introduction

One of the main difficulties for the establishment of member State responsibility is the attribution of conduct. International responsibility is based on two cumulative criteria: non-compliance with an international obligation and attribution of conduct.[184] As abstract legal entities, neither States nor international organizations can act 'by themselves', but 'only by and through their agents and representatives'.[185] The rules on attribution define what can be considered conduct of a State or of an international organization in law; in other words, under what conditions the acts or omissions of individuals can be attached to them. The difficulties raised by international organizations when it comes to the attribution of conduct can be explained in relatively simple terms. Traditionally, the rules on attribution are based on some form of control between the State and the person or entity carrying out conduct.[186] This control may be formal, as in the case of organs that are part of the structure of the State,[187] or informal, as in the case of private persons acting pursuant to a State's instructions or under its 'effective control' in a particular situation.[188] States may further exercise control by delegating functions to persons that exercise authority on their behalf.[189] By their very nature, international organizations interfere with such links of control. Through the adoption of normative acts of varying degrees of binding force, international organizations allow States to determine conduct collectively. As the body issuing the binding decision, the organization can be seen as acting 'through' its members. It exercises 'normative control'[190] over the implementing State, who loses control over its own acts to the extent that it is bound to honour the terms of the collective decision. At the same time, the organization is completely dependent on the participation of its members. Not only does its ability to adopt the decision depend on the decision of its

---

[184] ILC, *ARS with commentaries* (n 38) Article 2; ILC, *ARIO with commentaries* (n 17) Article 4.
[185] *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Series B No 6 22.
[186] See already Eagleton, 'International Organization' (n 35) 385; also Kirsten Boon, 'The Slippage Problem in Attribution Doctrines' (2014) 15 Melb JIL 330 331, 342 *et seq*.
[187] ILC, *ARS with commentaries* (n 38) Article 4.
[188] ibid Article 8.
[189] ibid Article 5.
[190] The term 'normative control' is used eg by Frank Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 EJIL 723 727; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) 39 *et seq*.

members as a collective; it generally will also rely on its members to implement the decision.[191] As a result, it becomes difficult to determine which entity is in charge and who should ultimately bear responsibility. As Tzanakopoulos notes, the 'chain of delegation' from member States to the international organization and back 'has the effect of weakening attribution links: a State can claim, as it so often does, that responsibility rests with the IO, while the organization can hide behind the fact that the conduct of State organs will usually be attributable solely to the State'.[192]

This chapter argues that there are two principled ways in which the ILC could have dealt with these difficulties when transposing the rules on attribution to the context of international organizations. On the one hand, the rules on attribution could be interpreted as allocating conduct to the one entity that exercises 'predominant' control. Following this approach, one would need to investigate whether it is the organization, or rather the State, that 'actually' controls conduct, and should accordingly bear responsibility if that conduct is unlawful. On the other hand, the rules on attribution could be interpreted as setting a threshold which must be reached so as to attribute conduct to the State or the international organization. Here one would investigate with respect to the State and the organization individually whether each entity exercises sufficient control over conduct to be identified as its author. Accordingly, the general rules on attribution of conduct to the State, which are well-established in a purely inter-State context, must not necessarily be modified or displaced. Whether one chooses an approach that *allocates* conduct to one entity or an approach that *identifies* who can in law be considered the author of that conduct has important consequences as far as a possible 'accountability gap' is concerned. If conduct is allocated to an international organization instead of the State, because the links of attribution to the State are indeed 'weakened', States could avoid responsibility for what would otherwise be 'their' actions. For if conduct can no longer be identified as the State's when it is taken within the framework of an international organization, one of the two criteria for the establishment of international responsibility is not met. In accordance with the general approach of the thesis, this chapter will investigate to what extent

[191] One rare exception to this is Article 105 TFEU, which gives the EU Commission the competence to enforce the provisions on competition law, including by imposing fines; see Christian Tomuschat, 'Attribution of International Responsibility' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union* (Hart Publishing 2013) 9. However, the enforcement of such fines falls back on the competent authorities in member States, which was precisely one of the issues in question in *Senator Lines* (n 129).
[192] Tzanakopoulos, *Disobeying the Security Council* (n 190) 51-2 (Fn omitted).

such concerns about an 'accountability gap' are justified as far as the customary rules on attribution are concerned. Where the law is uncertain, it will contrast different interpretations in order to establish whether a satisfactory solution could be found within the four corners of the existing law. The first part of this chapter discusses the general rules on attribution of conduct to the State, as far as they are relevant, as well as their proposed transposition to international organizations. The second part of this chapter investigates to what extent the conduct of member State organs can be attributed to an international organization, and, most controversially, what implications this has for a possible concurrent attribution of conduct to the State.

2. General rules for the identification of conduct of States and international organizations

The first step in this analysis will be a brief presentation of the established grounds for attribution of conduct, as far as they are of potential relevance in the context of international organizations:[193] attribution of conduct on the basis of a formal link, a functional link, a factual link, and the acknowledgment and adoption of specific conduct. An initial presentation of these 'ordinary' grounds for attribution is necessary in order to be able to investigate, at a later time, whether they continue to apply where a State acts through an international organization.

2.1 Establishing a formal link: the conduct of organs

2.1.1 Organs of the State

According to a well-established rule of customary international law,[194] the conduct of State organs is attributable to the State under international law. Article 4 ARS provides:

> 1. 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.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[195]

---

[193] ILC, *ARS with commentaries* (n 38) Articles 9-10, which deal with the attribution of conduct of carried out in the absence or default of the official authorities, and the conduct of insurrectional movements, respectively, are of limited relevance in this context.
[194] *Immunity from Process* (n 154) 87-88 [62]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 202 [385].
[195] ILC, *ARS with commentaries* (n 38) Article 4.

This rule, once termed 'the basic pillar of state responsibility'[196], covers the core cases of attribution. The only condition for the attribution of the conduct of its organs to the State is that the person in question acts in an official capacity, or at least under the 'colour of authority', and not in a purely private capacity.[197] The conduct of a State organ is considered the State's irrespective of the position of that organ or the nature of its functions.[198] The conduct of all branches of government and of all levels, including regional and local authorities, is attributable to the State under international law. So is the conduct of the armed forces of a State, as well as the conduct of individual soldiers.[199] Representatives of States also act 'as the State' when representing it within organs of international organizations. It has been argued that 'when member states perform certain acts as part of the structure of the international organization (...) as a matter of law these acts are not state acts at all, but rather form part of the process of the organization, for which the organization is responsible'.[200] It is true that in what can be seen as a *'dédoublement fonctionnel'*, certain representatives, such as the president of an organ or committee of the organization, may perform both tasks of the organization and of their sending State.[201] However, it is well-established in case law and practice that the conduct of State representatives remains conduct of the State even when taken within organs of international organizations. Greece argued before the ICJ in the *FYROM* case that its conduct within the NATO Council leading up to a collective decision could not be 'individualised' because of the

---

[196] Tomuschat, 'Attribution' in (n 191) 7.

[197] As the French/Mexican Claims Commission noted in the *Caire Case*, this would be the case only where 'the act had no connexion with the official function and was, in fact, merely the act of a private individual', as cited in ILC, *ARS with commentaries* (n 38) 42 [13]. The ICJ does not easily accept that abusive conduct was taken in an exclusively private capacity: *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (Merits) [2005] ICJ Rep 168 242 [214].

[198] See already *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Series A No 7 19; *Immunity from Process* (n 154) 87-88 [62]. Two or more States can create joint organs: see *The Channel Tunnel Group Ltd and France-Manche SA v v Secretary of Transport of the UK and Secretary of Transport of France* PCA (2007) (Partial Award) 132 ILR 1 [179]; *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 284 (Separate Opinion Judge Shahabuddeen); ILC, *ARS with commentaries* (n 38) 44 [3].

[199] *DRC v Uganda* (n 197) 242 [213].

[200] Wilde, 'Enhancing Accountability' (n 171) 402; similarly, Hartwig, *Die Haftung der Mitgliedstaaten für internationale Organisationen* (n 121) 275; Christian Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Duncker & Humblot 2001) 51; Murray, 'Piercing the Corporate Veil' (n 140) 310.

[201] In this sense IDI, 'Provisional' (n 123) 388; Blokker, 'IOs and Members' (n 116) 147. The theory of dédoublement fonctionnel was developed by Scelle, who does not appear to have deduced any conclusions regarding the attribution of conduct: Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in Walter Schätzel and Hans Jörgen Schlochauer (eds), Rechtsfragen der internationalen Organisation : Festschrift für Hans Wehberg zu seinem 70 Geburtstag (1956) 331.

'veil effect';[202] that is ie that the veil of the organization could not be 'pierced' so as to attribute responsibility to Greece. The ICJ quickly dismissed this objection, stating that the object of the challenge was 'solely the conduct' of Greece leading up to the decision and not the collective decision itself.[203] This confirms what the PCIJ noted already in 1925, namely that organs of international organizations are 'composed of representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage'.[204]

As regards the qualification of an entity as a State organ, international law does not solely rely on the entity's formal status under the State's domestic law. It provides an independent test to assess whether an entity that lacks the status of an organ under internal law must nevertheless be considered an organ of the State for the purposes of international law.[205] This is reflected in Article 4(2) ARS, according to which an organ merely *includes* any person or entity which has that status in accordance with the State's internal law. Case law indicates that a person or entity is considered a *de facto* organ if it is under 'complete dependence' of the State.[206] The attribution of the conduct of such an entity to the State ensures that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'.[207] Similar considerations of effectiveness underlie Article 7 ARS, according to which the conduct of an organ is attributable to the State even if its acts were taken *ultra vires* - contrary to or in excess of formal instructions.[208] A State must arrange its internal structure in a way that allows it to comply with international law and cannot plead a failure to do so as an excuse for a breach of

---

[202] Case Concerning the Application of Article 11(1) of the Interim Accord of 13 September 1995 (FYROM v Greece) (Counter-Memorial of Greece) 19 January 2010 117.
[203] *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* (Merits) [2011] ICJ Rep 644 18 [42].
[204] *Article 3, Paragraph 2 of the Treaty of Lausanne* (Advisory Opinion) [1925] PCIJ Series B No 12 29. In this sense also Ewa Butkiewicz, 'The Premisses of International Responsibility of Inter-Governmental Organizations' (1981-1982) 11 PYIL 117 126; Theodor Schilling, 'Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats' (2004) 64 ZaöRV 343 345; Paolo Palchetti, 'Sulla responsabilità di uno stato per il voto espresso in seno ad un'organizzazione internazionale' (2012) 95 Riv Dir Intern 352
[205] Roberto Ago, *Third Report on State Responsibility* (UN Doc A/CN4/246, 1971) 233 [106] noted that 'attribution to the State as a subject of international law can take place only on the basis of international law itself [and] is thus completely distinct from and independent of the attribution of the same act to the State as a subject of municipal law (...)'.
[206] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 62 [109]; *Genocide Convention Case* (n 194) 204-05 [391]-[92]; generally, Gregory Townsend, 'State Responsibility for Acts of *de facto* Agents' (1997) 14 Ariz J Int'l & Comp L 635 638.
[207] ILC, *ARS with commentaries* (n 38) 42 [11].
[208] ibid Article 7; *DRC v Uganda* (n 197) 242 [213]-[214]; 251-252 [243]-[246].

its obligations.[209] It is expected to exercise control over its organs and incurs responsibility if a lack of oversight leads to the commission of a wrongful act: 'a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected'.[210] This rule is particularly important in military contexts, where harmful acts are often the result of a lack of sufficient control. As discussed below, it is important to ensure that this fundamental principle is not undermined when States place their military contingents 'at the disposal' of an international organization.

2.1.2 Organs and agents of international organizations

While practice regarding the attribution of conduct to an international organization is generally not abundant, the attribution of conduct of organs and agents to the organization is well supported.[211] According to Article 6 ARIO,

> the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.[212]

Unlike in the context of States, the ILC's definition of an 'organ' fully defers to the status of the entity under the 'rules of the organization'.[213] This suggests that there are no *de facto* organs of international organizations. This omission is partly compensated by the fact that Article 6 ARIO not only deals with the attribution of the conduct of 'organs,' but also of 'agents' of the organization. The ILC endorsed the definition of an 'agent' of an international organization put forward by the ICJ in the 1949 *Reparation for Injuries* opinion, which is relatively broad.[214] Namely, an '"agent of an international organization" means an

---

[209] ILC, *ARS with commentaries* (n 38) 45 [2].
[210] *Ilascu and Others v Moldova and Russia* (App no 48787/99) (2004) [GC] ECHR 2004-VII [319], referring to Article 7 ARS and further case law.
[211] *Effect of Awards of Compensation Made by the UN Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47 53 and *Immunity from Process* (n 154) 88 [66]; Decision of the Swiss Federal Council of 30 October 1996, as translated and cited in ILC, *Report of the International Law Commission on the Work of its 56th session* (UN Doc A/59/10, 2004) 106 [4]. The transposition of this rule also finds overwhelming support in the literature, see Gaja, *Second Report* (n 160) 9-10 Fn 28 and the many references cited therein.
[212] ILC, ARIO with commentaries (n 18) Article 6.
[213] See Article 2(c) ARIO; Gaja, *Eighth Report* (n 159) [14]-[25]. The 'rules of the organization' include the constituent instrument, internal acts and established practice: Article 2(b) ARIO.
[214] The originally even broader definition of an 'agent' was restricted on second reading due to criticism: ILC, 'Statement of the Chairman of the Drafting Committee' (2011) available at <http://legal.un.org/ilc/guide/9_11shtml> (accessed 28 August 2016) 5-6; ILC, 'Comments International

official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.[215] Perhaps this definition could encompass a person being under the 'complete dependence' of an international organization, which is the test applied to *de facto* organs of States.[216] The person or entity in question would accordingly qualify as an 'agent' of the organization in the sense of Article 6 ARIO, and as such its conduct would be attributable to the organization. The conduct of an organ or agent is attributable to the organization 'even if the conduct exceeds the authority of that organ or agent or contravenes instructions', provided it is taken 'in an official capacity'.[217] This is in line with what the ICJ noted in *Immunity from Legal Process*, namely that 'it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations'.[218]

2.2 Establishing a functional link: the conduct of persons entities empowered to exercise functions of the State or the organization

The conduct of entities that cannot be considered *de jure* or *de facto* organs of the State is, according to Article 5 ARS, attributed to the State if the person or entity is 'empowered by the law of that State to exercise elements of the governmental authority (…) [and] is acting in that capacity in the particular instance'.[219] This rule takes 'account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions'.[220] What is important for this category is the nature of the functions exercised by the entity; it is not necessary to

---

Organizations, Addendum' (2006) UN Doc A/CN.4/568/Add.1 9-12 (comments ILO and UNESCO); Klein, 'Bilan' (n 39) 13-14.

[215] ILC, *ARIO with commentaries* (n 17) Article 2(d); *Reparation for Injuries* (n 15) 177.

[216] *Genocide Convention Case* (n 194) 205 [392]. Possibly applying this principle, the Human Rights Advisory Panel found in *Spahiu v UNMIK* (2010) Case no 02/08 (HRAP) [28]-[30] that the conduct of a Commission set up by UNMIK and over which it held legislative powers was attributable to UNMIK for the purpose of a human rights claim.

[217] ILC, *ARIO with commentaries* (n 17) Article 8.

[218] *Immunity from Process* (n 154) [66]. The UN in principle accepts responsibility for *ultra vires acts* of peacekeepers, but see (nn 350 *et seq*) and accompanying text.

[219] ILC, *ARS with commentaries* (n 38) Article 5.

[220] ibid 42 [1].

show that the specific 'conduct was in fact carried out under the control of the State'.[221] Naturally, the determination of what should be considered 'elements of governmental authority' is not always easy. There are certain core activities of the State that are widely considered to pertain to the exercise of governmental authority, such as the running of prisons or the control of immigration.[222] Where private entities were entrusted with the exercise of certain supervisory or regulatory functions, tribunals have also found it established that this amounted to an exercise of 'governmental authority'.[223] While the ARIO do not explicitly transpose this provision, the ILC's broad definition of an 'agent' encompasses persons or entities charged by the organization 'with carrying out, or helping to carry out, one of its functions (...)'.[224] If an international organization mandates a person or entity, such as an individual contractor or a consultant, to carry out some of its functions on its behalf, conduct would accordingly be attributable to it.[225]

2.3 Establishing a factual link: conduct directed and controlled by a State or organization

A State is further considered to 'act' if it either instructs or factually controls the conduct of a private group or person that is not a *de jure* or *de facto* organ of the State. Article 8 ARS stipulates that conduct is attributable to the State 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[226] Control in this context means 'effective control'. It must 'be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not

---

[221] ibid 43 [7].
[222] ibid 43 [2].
[223] Conduct was considered the State's in *Emilio Agustín Maffezini v Spain* Case No ARB/97/7 (Decision on Objections to Jurisdiction) (2002) 5 ICSID Rep 396 [86]-[89] (in relation to SODIGA, a company entrusted with the promotion of regional industrial development of the Autonomous Region of Galicia); *Noble Ventures, Inc v Romania* (Award) (2005) ICSID Case no ARB/01/11 [79]-[80] (in relation to the Romanian State Ownership Fund); *Jan de Nul NV and Dredging International NV v Egypt* (Decision on Jurisdiction) (2006) ICSID Case no ARB/04/13 [166] (the Suez Canal Authority). In the WTO context, see eg WTO, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* AB Report (11 March 2011) WT/DS379/AB/R [355] (China's State Owned Commercial Banks) and WTO, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* AB Report (13 October 1999) WT/DS103/AB/R, WT/DS113/AB/R [100] (Canada's provincial milk marketing boards).
[224] ILC, *ARIO with commentaries* (n 17) Article 2(d).
[225] Critically, however, ILC, 'Comments International Organizations, Addendum' (2011) UN Doc A/CN.4/637/Add.1 9 [12] (UN) and ILC, 'Comments International Organizations' (2011) UN Doc A/CN.4/637 17 [2] (ILO).
[226] ILC, *ARS with commentaries* (n 38) 47. This rule reflects custom: *Nicaragua (Merits)* (n 206) 64-65 [115]; *Genocide Convention Case* (n 194) 207-09 [398], [401].

generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[227] Article 8 ARS sets a notoriously high threshold for attribution. Financial support of or global control over a group or its operations are not sufficient, but it must be evidenced that the State exercised 'effective control' over the specific wrongful act or specifically instructed the persons to act in this way.[228] The test of 'effective control' has been criticized for being overly restrictive, in particular when applied to private groups that are structured in a hierarchical, military-like fashion.[229] Rejecting this criticism, the ICJ reiterated in the *Genocide Convention* case that under custom, conduct is indeed only attributable to the State 'where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed'.[230] The ARIO do not explicitly transpose Article 8 ARS to the context of international organizations.[231] For the ILC, the definition of an 'agent of an international organization' is broad enough to attribute wrongful conduct of private persons taken pursuant to the instructions or under the 'effective control' of an international organization to the organization under Article 6 ARIO.[232]

2.4 Acknowledgment and adoption of conduct

The fourth relevant basis for attribution, codified in Article 11 ARS, is the 'acknowledgement and adoption' of conduct as the State's own. The ICJ recognized this basis for attribution in the *Tehran Hostages* case, which dealt with the 1979 seizure of the US embassy in Tehran.[233] The Court distinguished between two phases regarding the occupation of the US embassy. There was a first phase in which militia not acting on behalf of the Iranian State seized the US embassy in Tehran and took US diplomats hostage;

---

[227] *Genocide Convention Case* (n 194) 208 [400].
[228] ibid 208 [400]; also ILC, *ARS with commentaries* (n 38) 48 [7].
[229] The ICTY famously applied the test of 'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations' instead, *Prosecutor v Tadić* (Appeals Chamber Judgment) ICTY-94-1A (15 July 1999) [120]-[146]. For a defence of this position, Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' 18 EJIL 649 654.
[230] *Genocide Convention Case* (n 194) 210 [406].
[231] Critical of this approach, given the importance of the rule in the inter-State context: Tomuschat, 'Attribution' in (n 191) 15-16.
[232] ILC, *ARIO with commentaries* (n 17) 19 [11]; Giorgio Gaja, *Seventh Report on Responsibility of International Organizations* (UN Doc A/CN4/610, 2009) 8 [22].
[233] The ILC's reading of this case, as well as the customary status of the rule codified in Article 11 ARS, is questioned by Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford (ed), *Responsibility* (2010) 231-32.

and a second phase in which the Iranian State adopted a decree expressly approving and maintaining the situation. As the Court noted, only '[t]he approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State'.[234] In other words, the formal endorsement and perpetuation by State authorities transformed the acts from mere private acts to acts of the State. The commentary on Article 11 ARS makes it clear that the terms acknowledgment and adoption must be read cumulatively.[235] Mere statements of support are not sufficient.

Article 9 ARIO mirrors Article 11 ARS, stipulating that conduct is attributable 'if and to the extent that the organization acknowledges and adopts the conduct in question as its own'.[236] The ILC found that 'no policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption'.[237] The ICTY indeed applied this attribution rule to international organizations in the case of *Prosecutor v Dragan Nikolić*. The accused challenged the propriety of the exercise of jurisdiction by the ICTY on the basis that he had allegedly been unlawfully abducted from the territory of Serbia and handed over to the multinational force SFOR, who then delivered him to the tribunal.[238] He argued that the conduct of the unidentified individuals that apprehended him was attributable to SFOR and to the ICTY under international law because they had 'accepted and ratified' it.[239] He submitted that if the unlawful acts were attributable to SFOR or to the ICTY, the tribunal would be 'barred from exercising jurisdiction over the accused'.[240] Relying on the draft rule proposed by the ILC in the State context as 'general legal guidance', the ICTY Chamber found that the conduct of the individuals was neither attributable to the ICTY nor to SFOR, as they were mere 'passive beneficiaries' of the accused's rendition and had not in fact acknowledged and adopted it.[241]

---

234 *Case Concerning United States Diplomates and Consular Staff in Tehran* (USA v Iran) (Merits) [1980] ICJ Rep 3 35 [74].
235 ILC, *ARS with commentaries* (n 38) 53 [6].
236 ILC, *ARIO with commentaries* (n 17) Article 9.
237 ibid 40 [5].
238 *Prosecutor v Nikolić* (Decision on Defence Motion Challenging Jurisdiction) ICTY-94-2 (9 October 2002) [24].
239 ibid [25], [29].
240 ibid [29].
241 ibid [61], [66]-[69].

3. The attribution of member State conduct to an international organization

Having briefly set out the relevant grounds for the attribution of conduct, largely the same for States and for international organizations, this second part of the chapter now turns to the question under what circumstances the conduct of organs or agents of member States can be attributed to an international organization, and what implications this has for the State. This question is important since 'organizations cannot accomplish most of what they do (...) without the resources and the participation of member States'.[242] Through the adoption of normative acts of varying degrees of binding force, international organizations allow States to determine conduct collectively. As shown below, the ILC resisted the attribution of the conduct of member State organs to the organization where the organization merely exercises 'normative control'. One reason for this appears to be that the attribution of conduct to an international organization was seen as tantamount to non-attribution of the same conduct to the State. And, if conduct of member State organs is attributed to the organization *in lieu* of the State, this gives rise to concerns about accountability, as it is generally far more cumbersome to bring a case against an international organization than against a State.[243]

3.1 Member State organs or agents acting as organs or agents of the international organization

3.1.1 Attribution to the international organization

It will be recalled that the ILC endorsed a fairly broad definition of the term 'agent' of an international organization, including any 'person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions (...).[244] Given this broad definition, it would *a priori* be possible to attribute the conduct of member State organs to the organization if they are charged with carrying out its decisions.[245] The organization's decision, ie the normative act itself, is clearly

---

[242] Orakhelashvili, 'Division of Reparation between Responsible Entities' in (n 137) 653.
[243] For the difficulties of enforcing the responsibility of international organizations, see (nn 37 *et seq*).
[244] ILC, *ARIO with commentaries* (n 17) Article 2(d).
[245] The attribution of implementing conduct to the organization finds support in the literature: Klein, *Responsabilité des organisations internationales* (n 35) 384-86; Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 412; Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (2008) 223; Pierre Klein, 'The Attribution of Acts to International Organizations' in James Crawford (ed), *The Law of International Responsibility* (OUP 2010) 300; Tzanakopoulos, *Disobeying the Security Council* (n 190) 34-37; Franciso Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 76.

attributable to the organization, as it emanates from one of its organs. Whether the implementing conduct of member State organs is also attributable to the organization has mainly been discussed in relation to the EU, in particular for matters falling within its exclusive competence,[246] and in relation to the UN, for the implementation of non-forcible sanctions imposed by Security Council under Article 41 UNC.[247]

In one of its statements to the ILC, the European Commission explained:

> The fact that the implementation of Community law, even in areas of its exclusive competence, is normally carried out by the member States and their authorities, poses the question as to whether or when the EC as such is responsible not only for acts committed by its organs, but also for actions of the member States and their authorities.[248]

It defended the position that the conduct of national authorities implementing EU law should be considered conduct of the EU under international law, at least in areas where the EU has exclusive competence.[249] Only if such conduct is attributed exclusively to the EU, it submitted, can it be ensured that the response to possible challenges of the lawfulness of that conduct is provided by the correct entity. This corresponds to the position the EU defends in international proceedings, in particular in the WTO context.[250] Before a WTO Panel in *Selected Customs Matters*, it argued that 'when they administer EC customs law, the EC member States act as the organs of the EC'.[251] The Panel apparently accepted that argument holding that

> the authorities in the member States – including customs authorities designated for that purpose by the member States and independent bodies, such as a judicial authority or an equivalent specialized

---

[246] In relation to the EU, such arguments have been advanced by Manuel Perez Gonzalez, 'Les organisations internationales et le droit de la responsabilité' (1988) 92 RGDIP 63 89; Pieter Jan Kuijper and Esa Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 IOLR 111 123 *et seq*; Talmon, 'EU Special Treatment' in (n 245); Hoffmeister, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?'; Messineo, '*Attribution*' in (n 245) 73-76.

[247] In relation to the UN, see eg *Nada v Switzerland* (n 146) 34 [109] (statement of France); rejecting this argument: *Kadi (ECJ)* (n 104) [314]. In the literature, attribution based on 'normative control' is in principle accepted in the UN context by Hirsch, *Responsibility of International Organizations* (n 10) 82; Tzanakopoulos, *Disobeying the Security Council* (n 190) 34.

[248] ILC, Comments IOs (2004) (n 41) 29 [3].

[249] ibid 29-30; also Giorgio Gaja, 'The 'Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR' (2013) 2 ESIL-Reflections 1 2.

[250] The European Commission explained its position on attribution, as defended in WTO proceedings, in ILC, Comments IOs (2004) (n 41) 19-20; further on that position Kuijper and Paasivirta, 'Further Exploring'; Piet Eeckhout, 'The EU and its Member States in the WTO - Issues of Responsibility' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 453-56.

[251] WTO, *EC – Selected Customs Matters* Panel Report (16 June 2006) WT/DS315/R [4.228], [4.708].

> body – act as organs of the European Communities when they review and correct administrative action taken pursuant to EC customs law.[252]

In the case of the UN, it does not seem possible to identify areas of 'exclusive' competence of the organization. Still, it has been argued that conduct should be attributed to the UN where implementing conduct was taken under its strict 'normative control', meaning if member States have 'absolutely no freedom as to the measures they will take' in compliance with the binding decision.[253]

The ILC rejected the attribution of implementing conduct to the organization even under such limited circumstances. Only if special rules on attribution apply between the parties, as it can for example be the case in relation to disputes between two EU member States, would the implementing conduct of member States be attributable to the organization.[254] Given the considerable importance the ARIO give to internal rules for matters of attribution, this resistance seems surprising. For to the extent that implementing authorities of member States have been entrusted with carrying out functions of the organization under the latter's internal law, there would have been room for considering them agents or organs under Article 6 ARIO.[255] In the context of States, a departure from domestic law for the assessment of whether a person acts as an organ or agent of the State is warranted whenever the status of a *de facto* organ or agent is not reflected in domestic law.[256] The reverse situation, in which a State claims on the basis of domestic law that a person acts on its behalf, but where conduct would nevertheless not be considered its conduct, is

---

[252] ibid [7.553]. Similarly, WTO, *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* Panel Report (15 March 2005) WT/DS174/R [7.98].

[253] Tzanakopoulos, *Disobeying the Security Council* (n 190) 41; similarly Klein, 'Attribution of Acts' in (n 245) 300; Klein, *Responsabilité des organisations internationales* (n 35) 385. Of course, whether or not States have 'absolutely no freedom' in the implementation of a normative act, is again to some extent a question of interpretation, see (nn 647 - 649) and accompanying text.

[254] Practice relating to the implementation of EU decisions within its areas of competence are now discussed under ILC, *ARIO with commentaries* (n 17) Article 67 (*lex specialis*), which stipulates that the ARIO 'do not apply if and to the extent that the conditions for the existence of an internationally wrongful act (...) are governed by special rules of international law'. In one recent investor-State arbitration between two EU member States, the tribunal accepted that the member State's implementation of a EU decision would be attributable only to the EU for the purpose of the dispute: *Electrabel SAv Hungary* (Award) (2015) ICSID Case no ARB/07/19 [6.74]-[6.76]. In *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (No 21) (Advisory Opinion, 2 April 2015) [168], considerations of internal competence were also taken into account, because the treaty obligation assumed by the EU was formulated accordingly.

[255] Talmon, 'EU Special Treatment' in (n 245) 412; Messineo, '*Attribution*' in (n 245) 76.

[256] See (n 206) and accompanying text.

hardly conceivable.[257]

3.1.2 Attribution to the Member State

Underlying this reluctance appears to have been the view that attribution of conduct to an international organization *precludes* attribution of that conduct to the State, and vice-versa. The EU submitted that conduct of member State organs should be attributed *exclusively* to it if it was taken in a subject area where competences have been 'wholly transferred to it'.[258] This was probably one reason why SR Gaja pointed out that attributing implementing conduct to the organization would 'conflict with the rule that conduct taken by any one of State organs is attributed to the State'.[259] There is indeed ample case law confirming that conduct of State organs remains attributable to the State in accordance with the general rules even if it was taken in the implementation of a binding decision of an international organization. As the ECmHR observed in *M&Co*, States 'are responsible for all acts and omissions of their domestic organs (...) regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations'.[260] This is so even if the implementing State enjoys no, or only very little, 'margin of manoeuvre' in the implementation of a binding decision of an international organization.[261] The ICJ judgment in *Belgium v Senegal* further supports this conclusion. In that case, Senegal was bound by an apparently conflicting decision of the ECOWAS Court of Justice, but this did not affect its 'duty to comply with its obligations under the Convention [against Torture]'.[262] Senegal's responsibility for non-compliance with its obligations was engaged, which presupposes that conduct was attributable to it despite of the conflicting obligation emanating from the binding decision of an international court.[263] However, the ILC could in principle have proposed that conduct can be

---

[257] This is because conduct that is explicitly acknowledged and adopted by the State as its own would already be attributable to it under Article 11 ARS, see (n 233).
[258] ILC, Comments IOs (2004) (n 41) 26 [4].
[259] Gaja, *Seventh Report* (n 232) 13 [33]. See also Gaja, *Second Report* (n 160) 6 [11]; Giorgio Gaja, *Third Report on Responsibility of International Organizations* (UN Doc A/CN4/553, 2005) 5 [13]; also Giorgio Gaja, 'Some Reflections on the European Community's International Responsibility' in Henry G Schermers, Ton Heukels and Philip Mead (eds), *Non-contractual Liability of the European Communities* (Martinus Nijhoff 1988) 171.
[260] *M & Co v Germany*; similarly, among many, *Michaud* (n 146) [102].
[261] For a recent confirmation of this, see the latest in a series of human rights cases challenging the UNSC's targeted sanctions regime: *Nada v Switzerland* (n 146) [120]-[22]; *Al-Dulimi et Montana Management Inc c Suisse* (App no 5809/08) (2013) ECHR 26 November 2013 [90]-[92]; *Al-Dulimi (GC)* (n 114) but also *Bosphorus* (n 114); *Sayadi and Vinck v Belgium* (2008) UN Doc CCPR/C/94/D/1472/2006.
[262] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 [111].
[263] ibid [121].

attributed concurrently to *both* entities: to the international organization because it imposed the obligation to act in a certain manner on the State, and to the State because it carried out the required conduct through its organs.

Since the adoption of the ILC draft articles in 2011, the EU has continued to refine its position on questions of attribution of conduct. It currently accepts that implementing conduct of member States, even if mandated by a binding decision, is not generally attributable to the international organization. This is reflected in the most recent legislative proposals for the EU's accession to the ECHR.[264] By contrast, the EU continues to insist that cases relating to conduct taken in areas where the EU has exclusive competence must be directed against it. In the context of investor-state disputes under investment treaties to which both the EU and its members are parties, it defends the view that '[i]nternational responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States'.[265] It is also a fact that the EU bears responsibility for acts of its member States in the WTO context and represents them in WTO proceedings.[266] It is not clear why this should be the case if implementing conduct is not attributable to the organization. A wrongful act requires, by the ILC's definition, the attribution of the impugned conduct to the responsible entity. SR Gaja proposed a different explanation of the WTO case law. He suggested focusing on the content of the obligation rather than on the attribution of conduct. Namely, under the WTO agreements, the EU could be considered be under a positive obligation to achieve a certain result or to ensure that member States adopt certain conduct.[267] It

---

[264] CoE, *Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms* 19 [23]; also Giorgio Gaja, *The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations* (SHARES Research Paper 25, 2013) 3-4. The draft agreement will however need to be revised as the CJEU found it to be incompatible with the EU law, as the EU's competences as defined in the Treaties would be affected: *Opinion 2/13* (n 53).

[265] European Parliament and Council Regulation (EU) 912/2014 of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257 121 [3]. Chapter 2 (Article 3(1)(c)) on the apportionment of financial responsibility provides that the EU shall 'bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law'. In one recent arbitration between two EU member States under the Energy Charter Treaty, the tribunal accepted that the member State's implementation of a EU decision would be attributable only to the EU for the purpose of the dispute: *Electrabel (Award)* (n 254) [6.74]-[6.76].

[266] See (nn 250 and 252).

[267] Gaja, *Third Report* (n 259) 5 [13]. Interestingly, this argument resembles early discussions in the ILC on the attribution of conduct of subordinate organs to the State, where some authors argued that 'the State cannot be held responsible for an act by a minor organ unless (...) the superior organs have omitted to take the necessary preventive measures or refused to punish the guilty party (...)', work cited in Ago, *Third Report* (n 205) 249 [151].

would accordingly be the wrongful *omission* that is attributable to the organization.[268]

3.2 Member State conduct acknowledged and adopted by an international organization

3.2.1 Attribution to the international organization

Another way of explaining the WTO case law would be to consider the EU as having 'acknowledged and adopted' the conduct of member State organs,[269] for the EU is certainly 'eager to take up responsibility'[270] in this context. Some of the EU's statements to the effect that it bears responsibility for the conduct of member State organs in areas of exclusive EU competence can be read as statements of 'acknowledgment and adoption' in the sense of Article 9 ARIO. According to an unpublished document cited by the ILC, the EU stated in the WTO case of *Customs Qualification of Certain Computer Equipment* that 'it was ready to *assume* the entire responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States'.[271] WTO panels have repeatedly accepted such statements and found the EU to be the correct respondent in proceedings, even though the impugned conduct had been taken by the authorities of member States. For example, in the *Biotech* dispute, the WTO Panel noted that

> even though the member State safeguard measures were introduced by the relevant member States and are applicable only in the territory of the member States concerned, the European Communities as a whole is the responding party in respect of the member State safeguard measures. (...) The European Communities never contested that, for the purposes of this dispute, the challenged Member State measures are attributable to it under international law and hence can be considered EC measures.[272]

---

[268] For Eeckhout, 'The EU and its Member States in the WTO - Issues of Responsibility' in 464, 'this approach would seem to cover most cases' in the WTO context. However, obligations of result and obligations to prevent are specific types of obligation and it cannot be assumed, without further analysis, that all obligations imposed under the WTO agreements are of such a kind. See ILC, *Texts and commentaries of the Draft Articles on State Responsibility adopted by the Commission on First Reading* (1997) 139 *et seq* (former draft Articles 21 and 23), as well as James Crawford, *Second Report on State Responsibility* (UN A/CN4/498, 1999) 23, who suggested the deletion of the reference to this distinction between types of obligations in the draft articles, noting that 'such a classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose' 35 [77]. The distinctions were omitted from the ARS on second reading.

[269] Kuijper and Paasivirta, 'Further Exploring' (n 246) 124.

[270] Eeckhout, 'The EU and its Member States in the WTO - Issues of Responsibility' in (n 250) 456.

[271] Unpublished document, cited in ILC, *ARIO with commentaries* (n 17) 29-30 [3] (*emphasis added*). For the ILC, it is not clear 'whether what is involved by the acknowledgment is attribution of conduct or responsibility': ibid 29 [3].

[272] WTO, *EC – Measures Affecting the Approval and Marketing of Biotech Products* Panel Report (29 September 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R [7.101]; similarly *EC Trademarks (Panel)* [7.725]. Both cases are mentioned in Gaja, *Seventh Report* (n 232) 12.

The ILC saw the attribution of implementing conduct by acknowledgment and adoption as an exceptional case.[273] It seems that it thereby underestimated the relevance of this ground of attribution as a way of dealing with the particular challenges raised by international organizations. By acknowledging and adopting member State conduct as its own, an international organization can assume responsibility for conduct that was collectively determined or falls within the exclusive competence of the organization, and thereby ensure a unified response to challenges of its lawfulness.

2.2.2 Attribution of conduct to the State

Even if conduct can be attributed to the organization on the basis of its acknowledgment and adoption, the concurrent attribution of conduct to the State does not appear to be precluded. Even in the WTO context, where practice indicates that the EU can assume responsibility for conduct of its members, the theoretical possibility of parallel proceedings is not ruled out. In *Large Civil Aircraft,* the panel dealt precisely with the question whether a claim could be brought only against the EU, or whether parallel cases against the EU and its members were in principle possible. The dispute related to alleged subsidies provided by the governments of France, Germany, the UK and Spain to Airbus. The EU claimed that the alleged violations fell within its area of responsibility and that it therefore was 'the only proper respondent'.[274] The Panel did not accept this argument but found that '[w]hatever responsibility the European Communities bears for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relations between the European Communities and its member States'.[275] SR Gaja also noted that the 'rule is not intended to imply "a transfer of responsibility" which could "adversely affect the position of the injured State'.[276] The attribution of conduct to the organization based on acknowledgment and adoption is thus neutral as far as the possible attribution of the same conduct to the Member State is concerned.

---

[273] Gaja, *Seventh Report (*n 232) 14.

[274] WTO, *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* Panel Report (30 June 2010) WT/DS316/R [7.172].

[275] ibid [7.175]. The Appellate Body affirmed the relevant parts of the panel's findings but recommended the DSB to request 'the European Union to bring *its measures*, found (...) to be inconsistent with the SCM Agreement, into conformity with its obligations under that Agreement'; WTO, *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* AB Report (18 May 2011) WT/DS316/AB/R [1418] (*emphasis added*), as pointed out by Lorand Bartels, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) 4 JIDS 343 353.

[276] Gaja, *Seventh Report* (n 232) 14 [Fn 61].

3.3 Conduct of member State organs 'placed at the disposal' of an international organization

By far the most controversial questions surround the attribution of conduct of member State organs that are placed 'at the disposal' of an international organization. The most frequently discussed practical application of this scenario is UN peacekeeping. UN peacekeeping operations are created on the basis of a UNSC or, exceptionally, a UNGA resolution.[277] Since the UN does not possess its own standing forces, peacekeeping forces are composed of military contingents of troop contributing States.[278] National peacekeeping contingents typically act under the authority of the UNSC and under the direction of the UN Head of Mission and the UN Force Commander appointed by Secretary-General. [279] They must act in the UN's interest and may not seek instructions from their national government.[280] Their conduct can therefore in some sense be seen as 'the organization's'. But as it is the case with the implementation of decisions of international organizations, there is much debate on what degree of control an organization must exercise over the conduct of such organs to be considered its author under international law. The problem that arises in practice is that member States retain important sources of control when placing their organs 'at the disposal' of an international organization. Troop-contributing States always retain 'full command' over their armed forces, meaning that they retain strategic command over the deployment and possible withdrawal of their troops.[281] Even if operational command - the authority to implement the strategic objectives of the operation - is delegated to a commander appointed by the organization,

---

[277] On the 'Uniting for Peace' resolution, by which the UNGA established the UN Emergency Force in 1956, and its subsequent invocation see, Dominik Zaum, 'The Security Council, the General Assembly, and War: the Uniting for Peace Resolution' in Vaughan Lowe and others (eds), *The UN Security Council and War* (OUP 2008).

[278] Article 43 UNC (n 44) provides that UN Member States should conclude agreements with the UN obliging them to provide forces to the UN; in practice, however, such agreements were never conclude and the UN instead delegates the competence to carry out enforcement actions to the member States: Dan Sarooshi, *The United Nations and the Development of Collective Security* (Clarendon 1999) 142 *et seq*.

[279] The practical aspects of command and control arrangements in place during peacekeeping operations have been discussed in detail elsewhere: See *inter alia* Michael Bothe, *Streitkräfte internationaler Organisationen* (Heymann 1968); Robert C Siekmann, *National Contingents in United Nations Peace-keeping Forces* (Martinus Nijhoff 1991); Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005); Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct ' (2009) 10 Melb JIL 346; Terry D Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011) 42 NYIL 37.

[280] As stated in the Department of Peacekeeping Operations' 2008 *Generic Guidelines for Troop Contributing Countries Deploying Military Units to UN Peacekeeping Missions* [133], <http://repository.un.org/handle/11176/387419> (accessed 28 August 2016).

[281] Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' 46; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability' (2010) 51 Harv Int'l LJ 113 146.

disciplinary, criminal and administrative authority over the contingents is retained by the State.[282] Since the UN does not employ the members of national contingents as individuals, their training, payment of salaries and future career decisions fall within the control of the State.[283] The structures of internal hierarchy and command of national contingents remain furthermore unchanged.[284] Similar principles apply where operational activities are carried out by other international organizations. Organizations other than the UN are involved in peacekeeping.[285] The EU is currently involved in 17 military operations and civilian missions in third States within the framework of the Common Security and Defence Policy.[286] The question whether claims arising from the EU's security and defence operations should be addressed to the EU, who holds operational command, or to the contributing States has already arisen in practice.[287] NATO's involvement in military operations has also led to claims both against the organization and its members.[288] Having clarity about the applicable rules for the attribution of conduct is therefore of paramount importance.

3.3.1 Attribution of conduct to the international organization

---

[282] This being one reason why the UN found it difficult to react to allegations of sexual abuse committed by peacekeeping soldiers. See Article 7ter, Article 7quarter and Article 7quinquies of the UNGA 'Revised Model MoU between the UN and Participating States' (2009) UN Doc A/C.5/63/18 161 and UNGA 'Report of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (2016) UN Doc A/70/729 [21], [57], [64]. The same is true for KFOR personnel. By virtue of UNMIK Regulation 2000/47, 18 August 2000, UNMIK/REG/2000/47 [2.4] it is 'immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo (...) [and] subject to the exclusive jurisdiction of their respective sending States'.

[283] Davis Brown, 'The Role of The United Nations in Peacekeeping and Truce-Monitoring' (1994) 2 RBDI 558 574.

[284] Dannenbaum, 'Standard of Effective Control' (n 281) 145.

[285] For example, UNAMID, the African Union/United Nations Hybrid Operation in Darfur, was established by UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769 and is considered a joint subsidiary organ by the UN and the African Union: ILC, 'Comments Governments, Addendum' (2011) UN Doc A/CN.4/636/Add.1 10.

[286] CSDP operations are established by the Council of the EU and carried out by personnel placed under the command and control of Operations and Force Commanders, who act under the political control of an EU body: Frederik Naert, 'The International Responsibility of the European Union in the Context of its CSDP Opertions' in Malcolm D Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union* (Hart 2013) 335. Another 16 missions have already been completed: EU External Action, Security and Defense, Ongoing Missions and Operations, <http://www.eeas.europa.eu/csdp/missions-and-operations/> (last accessed 19 September 2016).

[287] In the *Case 25 K 4280/09* [24] (n 145), Germany argued that claims relating to the participation of a German military contingent in the EU-NAVAL-FORCE (EUNAVFOR) deployed to combat pirates off the coast of Somalia should be addressed to the EU, as operational command, supervision and the ultimate decision-making capacity were held by the EU. The Court did not find it necessary to address the question.

[288] Claims brought against NATO member States include, in relation to *Operation Allied Force*, the cases before the ICJ and *Banković* (n 4) as well as, before Dutch courts, *Danikovic v Netherlands* (n 145) and *Tijsterman v Netherlands* (n 145). Claims brought against NATO include, in relation to *Operation Unified Protector* in Libya, *El Hamidi & Chlih v NATO* (2012) Case n 11/9647/A (Court of First Instance Brussels) and *Jefara v NATO* (2013) Case no 12/966/C (Court of First Instance of Brussels). Further on NATO's claims settlement practice: (n 336).

3.3.1.1 The criterion of 'effective control'

According to the ILC, conduct of 'transferred' organs is attributable to the international organization if it exercises 'effective control' over the wrongful conduct. According to Article 7 ARIO

> 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 of the latter organization if the organization exercises effective control over that conduct.[289]

Article 7 ARIO resembles two rules of the ARS. On the one hand, it resembles Article 8 ARS, which deals with the attribution of private conduct to the State, 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[290] As explained above, conduct is attributable to the State if it was directed by it or if '"effective control" was exercised (...) in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[291] The rationale for the attribution of conduct according to Article 8 ARS is the strong *factual* control exercised by the State over an act. Article 7 ARIO further mirrors Article 6 ARS, which deals with an even more exceptional case.[292] If a State organ is placed at the disposal of another State, then its conduct 'shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'.[293] This rule was considered part of the 'progressive development' of the law when drafted by SR Ago in 1971[294] and it was interpreted restrictively in recent practice.[295] Article 7 ARIO transposes the rationale of Article 6 ARS,

---

[289] ILC, *ARIO with commentaries* (n 17) Article 7.
[290] ILC, *ARS with commentaries* (n 38) Article 8.
[291] *Genocide Convention Case* (n 194) 208 [400].
[292] ILC, *ARS with commentaries* (n 38) 44.
[293] ibid 43-44.
[294] Ago, *Third Report* (n 205) 272 [203], [209], [214].
[295] The ICJ left it open whether Article 6 ARS reflected custom: *Genocide Convention Case* (n 194) 204 [389]; 215 [414]. The two main cases adduced in support are *Chevreau Case (France v UK)* (1932) II RIAA 1113 and *Drozd and Janousek v France and Spain* (App no 12747/87) (1992) Series A no 240. Recent ECtHR case law indicates that if the rule is at all applicable, and to the extent that attribution of conduct to the receiving State *precludes* attribution to the sending State, it is interpreted restrictively: *Al-Saadoon and Mufdhi v the UK* (Admissibility) (App no 61498/08) (2009) ECHR 30 June 2009 [79], [89], where the Court of Appeal had by contrast held (*per Laws LJ*) that the impugned acts did not give rise to the UK's responsibility as it 'had merely been acting as agent for the Iraqi court': *R (on the application of Al-Saadoon and another) v Secretary of State for Defence* [2009] EWCA Civ 7, [2010] QB 486; also *Jaloud v the Netherlands* (App no 47708/08) (2014) [GC] ECHR 20 November 2014 [143]-[151], where the Court found that 'the fact of executing a decision or an order given by an authority of a foreign State is not in itself sufficient to relieve a Contracting State of the obligations which it has taken upon itself under the Convention (...). The respondent Party is therefore not

namely that the wrongful conduct of a 'lent' organ should give rise to the responsibility of the receiving organization. Yet, it also transposes the wording of Article 8 ARS: the wrongful conduct of the lent organ is attributable to the receiving organization only if the latter exercises 'effective control' over it. The wording of draft Article 7 ARIO as originally proposed by SR Gaja was changed in this sense during the drafting process: while it initially stated that conduct is attributable to the organization 'to the extent that the organization exercises effective control over the conduct of the organ', it now provides that attribution follows only 'if the organization exercises effective control *over that conduct*', meaning the allegedly wrongful act.[296] Applied to the peacekeeping context, this suggests that the organization is required to exercise effective control over the conduct of the forces perpetrating the wrongful acts 'in perpetrating those acts'.[297]

3.3.1.2 'Ultimate authority and control'

According to the ILC, a wrongful act is thus attributable to an international organization if it exercises effective *factual* control over its commission.[298] Contrary to this, the ECtHR found in the well-known cases of *Behrami and Saramati*, that the conduct of KFOR soldiers was attributable to the UN because the UNSC exercised 'ultimate authority and control' over it,[299] which come close to finding conduct attributable to the UN simply because it provided a legal basis for it. Controversially, the Court thereby found that the conduct of soldiers participating in a peace enforcement operation, not carried out under UN operational command and control, was attributable to the UN. In order to understand the Court's reasoning, it is important to briefly recall the factual background of the cases. In the aftermath of the NATO intervention in Kosovo in 1999, the UNSC decided on the deployment of international civil and security presences in Kosovo. With Resolution 1244 (1999), it authorised UN member States and relevant

---

divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of MND (SE) [Multinational Division, South-East], a United Kingdom officer'.

[296] Compare Gaja, *Second Report* (n 160) 23 [50] with the wording of Article 7 ARIO (*emphasis added*). The decision to limit the criterion in this sense was a conscious one. As noted in the report of the drafting committee, '"effective control" criterion should (...) apply to specific conduct and not the general conduct of an organ or an agent', ILC, 'Summary Record 2810th Meeting' (2004) UN Doc A/CN.4/SR.2810 [15]. In fact, '[m]ost of the questions raised had concerned United Nations peacekeeping operations and particularly the question of whether operations under the general control of the United Nations met the "effective control" criterion (...)', ibid [14].

[297] In this sense also Dannenbaum, 'Standard of Effective Control' (n 281) 140.

[298] ILC, *ARIO with commentaries* (n 17) 20 [4].

[299] *Behrami* (n 4). The fact that the ECtHR's approach was novel is illustrated by the fact that in an earlier domestic case involving very similar factual circumstances, attribution was not even discussed: *Bici v Ministry of Defense* (n 145).

international organizations to 'establish the international security presence in Kosovo (...)'.[300] The terms of the authorization stipulated that the international security presence had to be 'deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo (...)'.[301] On the basis of this resolution, NATO established KFOR, a multinational force operating under its unified command. UNMIK, the civilian interim administration for Kosovo, was established as a subsidiary organ of the UN under the authority of the UNSG.[302]

Whereas the *Behrami* case was, at least according to the Court, more directly concerned with the conduct of UNMIK, Saramati claimed to have been injured by members of KFOR. A resident of Kosovo, he was arrested in 2001 on the orders of KFOR commanders and detained for several months on security grounds. He claimed that his detention was contrary to Article 5 ECHR and brought a case against France and Norway, the countries of nationality of the KFOR commanders involved. As a preliminary step to assessing the claims against the two contracting States, the Court established whether conduct could be attributed to the UN. It observed that the conduct of KFOR would be attributable to the UN if the UNSC had lawfully delegated its powers under Article 42 UNC, so that KFOR could be considered to have acted as an agent of the UN. For the delegation of power to be lawful, the UNSC needed to retain 'ultimate authority and control' over the conduct so that the delegation was 'sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter (...)'.[303] The Court found that indeed

> (...) the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO. (...) In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN (...).[304]

The UN was not directly involved in the operational activities of KFOR. Beyond the initial authorisation to establish the multinational force, the UNSC's role was limited. As the UN pointed out, in such situations the UNSC's 'role following the authorization of the operation is limited to receiving periodic

---

[300] UNSC Res 1244 (n 91) [5].
[301] *Behrami* (n 4) [42] (Annex II to UNSC Res 1244 (n 91) [4]).
[302] *Behrami* (n 4) [123]-[27].
[303] ibid [132].
[304] ibid [140]-[141].

reports through the lead nation or organization conducting the operation'.[305] Rather than assessing whether the UN exercised effective factual control over Saramati's detention, the Court thus apparently investigated whose 'authority' the troops were exercising. In effect, the Court therefore did not apply the 'effective control' test proposed by the ILC, even though it mentioned it in passing.[306]

The 'ultimate authority and control' test appears to reflect a 'functional' rather than a 'factual' link between the organization and the persons in question.[307] It determines on whose authority the forces are acting rather than under whose direct control. As seen above, both the 'functional' and the 'factual' links of attribution are well-established in the State context. In accordance with Article 5 ARS, conduct of a private entity is attributable to the State if the former has been 'empowered (...) to exercise elements of the governmental authority' of that State. If it were otherwise, a State could simply avoid responsibility by relying on independent persons to carry out its functions. This specific rule of attribution exists to ensure that '[a] State cannot by delegation (...) avoid responsibility for breaches of its duties under international law'.[308] Seen in this light, it could be argued that the UN should not be able to 'avoid' responsibility for the implementation of its objectives by relying on individual member States.

At the same time, a realistic assessment of past collective security operations makes it evident that member State contingents are not simply, or at least not only, 'agents' of the Security Council or the UN.[309] They are not private persons, but organs of States who retain important sources of control over them: the very decision to participate in the operation; depending on the design of the operation, military

---

[305] ILC, Comments 2011, Addendum (n 225) 11.

[306] *Behrami* (n 4) [30]. Rather, the Court relied on the work of Sarooshi, who had argued that '[t]he acts of forces authorized by the Council are attributable to the UN, since the forces are acting under UN authority to establish an objective stated by the Council', Sarooshi, *UN and Collective Security* (n 278) 164-65; referenced in *Behrami* (n 4) [132]. For Sarooshi, the 'primary responsibility' of the UN for the manner in which delegated enforcement powers are exercised is accompanied by a 'secondary responsibility' of the troop contributing States, Sarooshi, *UN and Collective Security* (n 278) 163 [Fn 84].

[307] Such a 'functional' test along the lines of Article 5 ARS is suggested by Sarooshi, *UN and Collective Security* (n 278) 164-65 as well as by Butkiewicz, 'The Premisses of International Responsibility of Inter-Governmental Organizations' 124. Marko Milanović and Tatjana Papić, 'As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267 284-5 note that the Article 5 ARS may have influenced the ECtHR's 'ultimate authority and control test', but argue strongly that the rationale 'cannot apply to the context of international organizations delegating their functions to States'.

[308] Ian Brownlie, 'State Responsibility: The Problem of Delegation' in Konrad Ginther and others (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität* (Duncker & Humblot 1994) 300.

[309] Milanović and Papić, 'As Bad as It Gets' (n 307) 285.

command over their troops; as well as disciplinary control over individual soldiers. The control held by the UN during collective security operations not carried out under its command and control is arguably insufficient to attribute conduct the UN, even if the maintenance of international peace and security is one of the primary objectives of the UN. This is in any case the view of the UN, the ILC and large parts of the literature.[310] The most problematic aspect of the Court's judgment is however that the impugned conduct was attributed *exclusively* to the UN.[311] The ECtHR did not investigate whether conduct could be attributed concurrently to the respondent State, apparently accepting that attribution to the UN would preclude attribution to the State.

Despite this criticism, the ECtHR applied the 'ultimate authority and control' test in a number of subsequent cases.[312] It was only two years later, in the case of *Al-Jedda*, that a Grand Chamber of the ECtHR was given the opportunity to clarify its jurisprudence and to respond to the overwhelming criticism directed against the *Behrami* judgment. It used this opportunity not only to restrict the 'ultimate authority and control' test to make it more compatible with the ILC's position, but also to open the door, even if only slightly, to the possibility of concurrent attribution. After the invasion of Iraq in March 2003 by the US-led coalition of States, the UNSC authorised a multinational force in October 2003 'to take all necessary measures to contribute to the maintenance of security and stability in Iraq.[313] This authorization was extended several times after the end of the occupation in June 2004. Al Jedda, a dual Iraqi and British national at the time, was captured by US forces in October 2004 and held in a British-run detention facility in Iraq until December 2007. Having been detained without trial, he argued that his rights under

---

[310] The UN pointed out that 'the responsibility of the United Nations cannot be entailed by acts or omissions of those not subject to its command and control', ILC, Comments 2011, Addendum (n 225) 12 [9]-[10]. In this sense Gaja, *Seventh Report* (n 232) 10 [26]; ILC, *ARIO with commentaries* (n 17) 23 [10]; further, among many, Milanović and Papić, 'As Bad as It Gets' (n 307) 128.

[311] This view is shared by a large part of the literature: see only Kjetil Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control ' Test' (2008) 19 EJIL 509 517; *Milanović and Papić, 'As Bad as It Gets'* (n 307) 289; Francesco Messineo, 'Things Could Only Get Better: Al-Jedda beyond Behrami' (2011) 50 Mil L & L War Rev 321 338-39.

[312] *Kasumaj v Greece* (App no 6974/05) (2007) ECHR 5 July 2007 (in relation to KFOR). It referred to the test in *Galić v the Netherlands* (App no 22617/07) (2009) ECHR 9 June 2009 [35] and *Blagojević v the Netherlands* (App no 49032/07) (2009) ECHR 9 June 2009 [35], but found the ICTY's conduct attributable to the UN as conduct of a subsidiary organ. In *Berić and others v Bosnia and Herzegovina* (App no 36357/04) (2007) ECHR 16 October 2007 [27], it applied the test of 'effective overall control' and found the conduct of the High Representative for Bosnia and Herzegovina attributable to the UN.

[313] UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511 [13]; confirmed in UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546 [10].

Article 5 ECHR had been violated by the UK. There were certain factual differences between the situation in Kosovo in 1999 and the situation in Iraq in 2004-2007 which led both the House of Lords and the ECtHR to conclude that conduct was not attributable to the UN. As Lord Bingham held in the House of Lords,

> [t]he international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN [whereas] [t]he multi-national force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN.[314]

Similarly, the ECtHR put heavy reliance on the fact that in Iraq, the UN authorization was given *ex post facto*, without altering the 'unified command structure over the force, established from the start of the invasion by the United States and United Kingdom'.[315] It did 'not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations'.[316] The formulation chosen by the ECtHR at least does not rule out the possibility that conduct could be attributed to the UN and the Member State - and has therefore been interpreted as an implicit acknowledgment of the possibility of concurrent attribution.[317] As far as the test for attribution to the UN was concerned, the ECtHR found that the conduct of the UK force in question was not attributable to the UN because the UNSC 'had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force'.[318] Given the definition of the 'ultimate authority and control' test put forward in *Behrami*, however, it is questionable whether the factual differences between the situations in Kosovo and in Iraq should have been decisive. Just like in *Behrami*, there was an authorization addressed to member States to carry out a collective security operation under Article 42 UNC. Just like in *Behrami*, there was a duty to report to the

---

[314] *Al-Jedda* (n 145) [24].
[315] ibid [80].
[316] ibid [80] (*emphasis added*).
[317] In this sense eg Messineo, 'Get Better' (n 311) 338; Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 EJIL 121 136; Misa Zgonec-Rozej, '*Al-Jedda v United Kingdom* ' (2012) 106 AJIL 830 834. However, this interpretation may be overly optimistic, as the Court did not include passages referring to the possibility of concurrent attribution when citing the relevant ILC material: *Al-Jedda* (n 145) [55]-[56].
[318] *Al-Jedda* (n 145) [84].

UNSC about the activities of the force.[319] In both cases, operational command over the force was centralised, but not held by the UN. Unlike in *Behrami*, the ECtHR found in *Al Jedda* that conduct was not attributable to the UN because the UNSC 'did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority'.[320] Whether such 'degree of control over the force' existed was however not considered a relevant factor in *Behrami*. It appears therefore that the ECtHR abandoned the 'ultimate authority and control criterion' in all but wording when it found that conduct was not attributable to the UN because the UNSC 'had neither effective control nor ultimate authority and control'.[321]

The trend towards a more restrictive interpretation of the criteria for attribution of conduct to the UN is also reflected in domestic case law dealing with certain consequences of the multinational military operation in Afghanistan. After the US-led intervention in Afghanistan following the 11 September 2001 attacks, the UNSC authorized the creation of the International Security Assistance Force under unified NATO command.[322] The German parliament decided two days later that German forces would participate in the operation. In September 2009, a group of Taliban fighters appropriated two trucks transporting fuel. One of the drivers was killed; the other was forced to drive one of the trucks to a different location. When attempting to cross the river Kunduz, the truck got stuck in a sandbank. While waiting for support, the Taliban requested the assistance of the local population to fill the fuel in canisters and transport it away. The same night, German air forces dropped two bombs on the site, destroying the two trucks and killing an unidentified number of people. The driver that had been taken hostage by the Taliban survived the attack and initiated proceedings in Germany, claiming that the attack had been unlawful under international law. German courts were accordingly asked to adjudicate whether the conduct of the German ISAF forces was attributable to the UN. Relying on *Behrami and Saramati*, the Administrative Court of Cologne found in a decision of 9 February 2012 that this was the case: because it was subject to the NATO's ISAF command structure, the conduct of the German forces in Afghanistan

[319] ibid [80].
[320] ibid [80].
[321] In this sense also Messineo, 'Get Better' (n 311) 334; Milanovic, 'Al-Skeini and Al-Jedda' (n 317) 136.
[322] UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386 [1]; extended in UNSC Res 1890 (8 October 2009) UN Doc S/RES/1890 [1].

was attributable to the UN.[323] However, in parallel proceedings relating to state liability for the same acts, the Provincial Court of Bonn concluded that the impugned acts had been taken in the exercise of German public authority, even if they did not create an individual entitlement to compensation, thereby explicitly criticizing the Cologne court's reasoning.[324] The latter decision was affirmed by the Higher Provincial Court of Cologne in 2015, which found that the impugned acts were not attributable to the UN, who had merely 'created the legal basis' for the ISAF mandate.[325]

An English High Court applied a combination of the 'effective control' and the 'ultimate authority and control' tests in the case of *Serdar Mohammed*. British forces participated in ISAF since 2001. On 7 April 2010, Mohammed was captured by UK armed forces in northern Helmand. He was imprisoned on British military bases in Afghanistan for more than three months, before being transferred to the custody of the Afghan authorities.[326] He initiated proceedings against the British Ministry of Defence claiming *inter alia* that his detention had been unlawful. The High Court dealt with the question whether conduct of the ISAF force was attributable to the UN in considerable detail.[327] It discussed the cases of *Behrami and Saramati* and *Al-Jedda*, respectively, to find that even though the cases were difficult to distinguish in terms of the ECtHR's test, there was one critical difference. In Kosovo, the Court 'was able to identify a clear chain of command from the UN Security Council through NATO to COMKFOR, the commander of KFOR, who authorised the detention of the applicant (...)'. In Iraq, on the other hand, 'there never was established a clear or effective chain of command from the Security Council to the MNF'.[328] Just like KFOR in Kosovo, it continued, ISAF in Afghanistan had been newly established on the basis of a UNSC resolution and possessed its own command structure. Upon the request of the UN and the Afghan government, overall operational command of ISAF was vested in NATO since August 2003. Because 'the chain of delegation of command for ISAF is essentially similar to the chain of delegation and command

[323] *Case no 26 K 5534/10* (n 145) [72]. This judgment was final, but see the parallel proceedings on state liability: (n 145).
[324] *Case no 1 O 460/11* (n 145) [39].
[325] *Case no 7 U 4/14* (n 145) [18], [23], [37].
[326] *Mohammed v Ministry of Defense* [2014] EWHC 1369 (QB), [2014] All ER (D) 70 (May) (*per Justice Leggatt*) [1].
[327] ibid [158] *et seq*.
[328] ibid [174].

for KFOR',[329] the Court found that 'the UN Security Council has "effective control" (and "ultimate authority and control") over ISAF in the sense required to enable conduct of ISAF to be attributed to the UN'.[330] However, as far as detentions were concerned, the UK had its own policy in Afghanistan, which was notably different from ISAF's policy and permitted the detention of an individual for more than 96 hours after the initial arrest.[331] Based on this fact, the Court concluded that the detention of the claimant was attributable to the UK, and that it was 'equally clear that the acts involved in the detention of SM are not attributable to ISAF or the UN'.[332] Accordingly, the Court had regard to the specific wrongful conduct rather than the overall operation when deciding the question of attribution. As a result, the Court applied the test of 'effective control over conduct' rather than of 'ultimate authority and control over the operation', even if it did not explicitly state so. This finding was affirmed on appeal.[333] *Serdar Mohammed* is thus one of a series of domestic cases in which conduct taken during collective security operations authorised by the UNSC was not considered attributable to the UN under international law, thereby departing from the 'ultimate authority and control' test applied by the ECtHR.

3.3.1.3 Operational command and control

It is not surprising that the UN rejects the 'ultimate authority and control' test for attribution of conduct of member State organs as too broad,[334] as it would extend its responsibility from wrongful conduct taken during peacekeeping operations established under its control to conduct taken during peace enforcement operations merely authorized by it. However, given the fact that UN practice in relation to peacekeeping operations was considered extensively by the ILC, it is surprising to note that for the UN, the 'effective control' criterion is too narrow.[335] In NATO's practice relating to the settlement of claims, the 'effective control' criterion does not appear to be decisive either.[336] Reflecting what has once been termed 'the

---

[329] ibid [177].
[330] ibid [178].
[331] ibid [38] *et seq*.
[332] ibid [187].
[333] *Mohammed and others v Secretary of State for Defence; Rahmatullah and another v Ministry of Defence and another* [2015] EWCA Civ 843, [2016] 2 WLR 247 [65], [72]. The case is currently pending before the UKSC.
[334] See ILC, Comments 2011, Addendum (n 225) 12 [9]-[10].
[335] ILC, Comments IOs (2004) (n 41) 28; ILC, Comments 2011, Addendum (n 225) 9-14. On the UN's position see also Luigi Condorelli, 'De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix' (2014) 1 QIL 3 7.
[336] NATO's practice is however difficult to classify because it varies according to the specific arrangements concluded with host States. During the IFOR and SFOR operations in the former Yugoslavia, claims could be

prevailing view in the legal literature',[337] the UN in principle accepts responsibility for wrongful acts taken by peacekeepers under its *operational command and control*.[338] This is because peacekeeping operations established under its operational command and control are subsidiary organs of the UN.[339] In the 1960s, Belgium and a number of other countries exercised diplomatic protection on behalf of their nationals negatively affected by the UN peacekeeping operation in the Congo.[340] The UN entered into agreements accepting that it 'would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties' and settled the claims through lump-sum payments.[341] Claims raised by US, French and British citizens were settled through direct payments negotiated by these governments.[342] In more recent practice, the UN has settled 'private law claims' internally in accordance with the same principles.[343] For the UN,

---

submitted through the authorities of the participating States to a designated claims commission; but costs were borne by the national governments: see Appendices B to Annex 1A to the Agreements between NATO and Bosnia and Herzegovina / between NATO and Croatia / between NATO and the FRY Concerning the Status of NATO and its Personnel, Articles 15, reproduced at <http://www.nato.int/ifor/gfa/gfa-ap1a.htm> (last accessed 19 September 2016) and Marc Guillaume, 'La réparation des dommages causés par les contingents français en ex-Yougoslavie et en Albanie' (1997) XLIII AFDI 151 153 *et seq*. In the case of KFOR, *UNMIK Reg 2000/47* (n 282) [7] provided for the establishment of a claims commission to deal with '[t]hird party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from "operational necessity" of either international presence'. In the case of ISAF, NATO concluded a Military Technical Agreement with Afghanistan that excludes NATO's liability for damage caused to property in the execution of the mission, but payments are sometimes made *ex gratia*: Sonia Vichneveskaia, 'ISAF Claims Process in a Nutshell' (2008) 16 NATO Legal Gazette 2.

[337] Larsen, '*Attribution of Conduct* ' (n 311) 513; also Condorelli, 'Responsabilité ONU / État d'envoi ' (n 335) 11-12; this view is defended eg in ILA, *Final Report* (n 10) 28.

[338] UNSG Report on the Financing of Peacekeeping (n 74) 4 [7], 6 [18]-[19]; Zwanenburg, *Peace Support Operations* 89; Kirsten Schmalenbach, 'Third Party Liability of International Organizations' in Harvey Langholtz, Boris Kondoch and Alan Wells (eds), *International Peacekeeping*, vol 10 (Koninklijke Brill 2006) 36-37.

[339] ILC, Comments 2011, Addendum (n 225) 10 [2].

[340] UN Secretariat, 'Responsibility of the UN for Activities Conducted in the Territory of a State' (1975) UNJY 153 153-155.

[341] Exchange of letters constituting an Agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, New York, 20 February 1965, reproduced in UNJY 1965, 39. Similar agreements were concluded with Greece, Luxembourg, Italy and Switzerland, reproduced in UNJY 1966, 39 (Greece, Luxembourg); UNJY 1967, 77 (Italy); 564 UNTS 193 (Switzerland). The agreement with Zambia is unpublished and the conclusion of a global settlement agreement with the Republic of the Congo was refused: Kirsten Schmalenbach, *Die Haftung internationaler Organisationen: Im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Lang 2004) 315 and 323. On the lump-sum agreements, Jean Salmon, 'Les accords Spaak -U Thant du 20 février 1965' (1965) 11 AFDI 468; Paul De Visscher, 'Travaux préparatoires: Opérations militaires des Nations Unies' (1971) 54 AIDI 52-55. By contrast, and still in accordance with the criterion of 'operational command and control', the UN has refused to take responsibility for injurious acts taken in connection with UN operations, but not carried out under its command. It declined responsibility for harmful acts committed during the military operation in Korea in the 1950s, which was carried out in its name, but under the unified command of the US: Finn Seyersted, 'United Nations Forces - Some Legal Problems' (1961) 37 BYIL 351 411, 423; ILC, Comments 2011, Addendum (n 225) 11 [5].

[342] The material relating to the settlement of these claims is unpublished and was until recently subject to archival restrictions, see Schmalenbach, *Haftung internationaler Organisationen* (n 341) 318-21. The British government also supported a claim brought by Stairways Ltd, a subcontractor of Sabena later owned by a British company, which had

> It has been a long-established position (...) that forces placed at the disposal of the United Nations are 'transformed' into a United Nations subsidiary organ regardless of whether the control exercised over all aspects of the operation was, in fact, "effective". In the practice of the United Nations, therefore, the test of "effective control" within the meaning of draft article 6 [now Article 7 ARIO] has never been used to determine the division of responsibilities for damage caused in the course of any given operation between the United Nations and any of its troop-contributing States.[344]

The UN relies on the 'effective control' criterion during operations for which command is shared between the UN and a member State, but not during peacekeeping operations carried out under its exclusive operational command.[345] During peacekeeping operations under its command and control, the UN does not consider it necessary that an individual wrongful act was 'effectively controlled' by it in order to be considered its act. For the ILC, by contrast, what applies to joint military operations 'should also apply to peacekeeping operations, insofar as it is possible to distinguish areas of effective control' of the UN and contributing States.[346] The ILC did not accept the UN's contrary position and noted that it was upheld notably for 'political' reasons.[347] However, unlike joint military operations, peacekeeping operations under UN command and control are established as subsidiary organs of the UN. According to Article 6 ARIO, their conduct should therefore be attributed to the UN regardless of whether effective control was exercised or not.[348] International organizations, just like States, are responsible for the selection and discipline of their organs. They 'cannot shelter behind their inability to ensure that [their will] is

---

suffered material damage on a UN chartered plane due to armed activities at the airport of Kamina, see *Starways* (n 70).

[343] The UN settles such third-party claims through Local Claims Review Boards, in accordance with UNGA Res 41/210(n 73). It applies the 'command and control' criterion for attribution: UNSG Report on the Financing of Peacekeeping (n 74) [17]. The UN does not currently settle 'public law' claims: (n 78).

[344] ILC, Comments 2011, Addendum (n 225) 13 [3] (*emphasis added*).

[345] UNSG Report on the Financing of Peacekeeping (n 74) 6 [18]; ILC, Comments 2011, Addendum (n 225) 10 [3]. As noted in the report, operations with shared command included the operation in Somalia where the Quick Reaction and the US Rangers were provided in support of UNOSOM II, and the operation in the former Yugoslavia where the Rapid Reaction Force was provided in support of UNPROFOR.

[346] ILC, *ARIO with commentaries* (n 17) 22-23 [9]. Similarly Dannenbaum, 'Standard of Effective Control' (n 281) 151, who is critical of the UN's approach and argues for the application of a particular interpretation of the effective control criterion, see (n 374).

[347] ILC, *ARIO with commentaries* (n 17) 21 [6].

[348] In this sense Aurel Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9 IOLR 77 80. The ILC distinguishes between 'fully seconded' and 'not fully seconded' organs in this regard, only the former falling under Article 6 ARIO: ILC, *ARIO with commentaries* (n 17) 19-20 [1].

respected'.[349] Indeed it is often precisely the failure to exercise 'effective control' that is the basis of responsibility.[350]

This reveals some general difficulties with the 'effective control' criterion when applied in the peacekeeping context. If, as suggested by Article 7 ARIO, it must be evidenced that the organization exercised 'effective control' over the *specific wrongful* act, a claimant would face considerable difficulties when trying to invoke the UN's responsibility for *ultra vires* acts of peacekeepers.[351] This is, in any case, if 'effective control' is given a similar interpretation as in Article 8 ARS.[352] In the State context, the official acts of *de jure* or *de facto* organs are at all times attributable to the State, no evidence of 'effective control' over conduct being necessary. This is why the ICJ demands such a high threshold, the one of 'complete dependence'[353], for evidencing that a particular entity is a *de facto* organ of the State.[354] Allowing international organizations the defence that they do not effectively control acts of their organs, in whichever manner they are constituted, breaks with the rationale underlying this ground for attribution in the State context. It thereby amounts to a more fundamental challenge of the transposition of this rule to international organizations.[355] The only plausible explanation is, again, that the ILC considered the attribution of conduct to the organization to have an incidence on the question of attribution to the State, by either 'removing' conduct from the sphere of responsibility of the State or by making attribution to the State more difficult. If attribution to the organization is seen as tantamount to non-attribution of conduct

---

[349] *Ilascu* (n 210) [319].
[350] ILC 'Summary Record 2803rd Meeting' (2004) UN Doc A/CN.4/SR.2803 [21], [36].
[351] Curiously, the ILC does go on to state that *ultra vires* acts of peacekeepers are attributable to the UN: ILC, *ARIO with commentaries* (n 17) 28 [9]. In practice the UN is willing to bear responsibility for ultra vires acts of peacekeepers: R. Simmonds, *Legal Problems Arising from the United Nations Military Operations In the Congo* (Nijhoff 1968) 233; Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out By UN Peace-Keeping Forces' (1976) 32 Rev Egypt DI 57 63; Zwanenburg, *Peace Support Operations* 105; Schmalenbach, 'Third Party Liability of International Organizations' in 39.
[352] As suggested eg by Larsen, '*Attribution of Conduct* ' (n 311) 514-15 and Leck, 'Responsibility in Peacekeeping Operations' 348. For Tom Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61 ICLQ 713 723 by contrast, 'there is good reason to think that the concept of "effective control" ought to be applied differently in the context of peacekeeping and in the circumstances envisaged by Article 8 ARS.
[353] See (n 206).
[354] The question of *vires* is at the heart of the difference drawn by the ICJ between the attribution of conduct of de facto organs and attribution of specific wrongful acts carried out under the State's 'effective control', *Genocide Convention Case* (n 194) 208 [400]; Marko Milanovic, 'State Responsibility for Acts of Non-State Actors' (2009) 22 LJIL 307 314.
[355] It is true that to the extent that disciplinary jurisdiction is retained by member States, it is difficult for the UN to react to abuses: UNGA, 'Report of the Secretary-General on Measures to Strengthen Accountability' (2005) UN Doc A/60/312 15 [48].

to the State, a narrow interpretation of the criteria for attribution to an international organization can be a way of avoiding the risk of an 'accountability gap'. A broad test for attribution such as the 'ultimate authority and control' test applied in *Behrami* by contrast sends a 'staggering (...) message of unaccountability'.[356]

3.3.2 Attribution of conduct to the Member State

While the ILC thus put forward a narrow interpretation of the grounds for attribution of conduct to an international organization in a laudable effort to avoid an 'accountability gap', it is not evident why this was necessary. Article 7 ARIO formally only deals with attribution of conduct to an international organization. All it states is that if a State organ is placed at its disposal, and if the organization exercises 'effective control' over the impugned conduct, this conduct will be considered an act of the organization. The ARIO are generally quite explicit in that they only deal with questions of attribution to international organizations, leaving questions regarding attribution to the State to the ARS.[357] As conduct of a State organ, the conduct of national peacekeeping contingents could in principle be attributed to the State according to Article 4 ARS. Still, the commentary on Article 7 ARIO suggests otherwise. It provides that the 'effective control' criterion 'does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather *to which entity* - the contributing State or organization or the receiving organization - conduct has to be attributed.'[358] In fact, given their lack of jurisdiction over international organizations, courts have so far applied Article 7 ARIO *only* to assess whether the conduct of national contingents is attributable to the State. Unfortunately, the ILC does not spell out clearly what it considers the correct test for attribution of conduct to a State to be in this context, and the literature cited reveals a highly fragmented picture.[359] Within the framework set out by the ILC, at least three

---

[356] Milanović and Papić, 'As Bad as It Gets' (n 307) 28; similarly, among many, A Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations' (2009) 11 Int C L Rev 155; Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012) 154.

[357] ILC, *ARIO with commentaries* (n 17) 89-90 [2]; Gaja, *Eighth Report* (n 159) 13 [32]; but Gaja, *Seventh Report* (n 232) 12-13 [33].

[358] ILC, *ARIO with commentaries* (n 17) 21 [5] (*emphasis added*); similarly Gaja, *Second Report* (n 160) 15 [31].

[359] Cf only Luigi Condorelli, 'Le statut des forces de l'ONU et le droit international humanitaire' (1995) 78 Riv Dir Intern 881 897 (the conduct of peacekeepers is attributable to both States and the UN because they are under joint authority and exercise public powers of both entities); Jean-Pierre Ritter, 'La protection diplomatique à l'égard d'une organisation internationale' (1962) 8 AFDI 427 444 (attribution of conduct to the organization is justified if the agent is placed under its exclusive authority); Amrallah, 'International Responsibility' (n 351) 66 (attribution depends on

different interpretations are possible, each of which finds some confirmation in recent case law.

3.3.2.1 Exercise of effective control by the organization as the decisive criterion

First, by exercising 'effective control' over the wrongful conduct, the organization could be considered to have 'usurped' responsibility.[360] According to that view, if conduct can be attributed to the organization, it is no longer considered conduct of the State. This is the approach the ECtHR appears to have adopted in *Behrami* and in a number of subsequent decisions,[361] albeit applying the test of 'ultimate authority and control' rather than of 'effective control'. Having found that 'the impugned action and inaction are, in principle, attributable to the UN', the Court, somewhat paradoxically, stated that 'the Convention cannot be interpreted in a manner which would subject the *acts and omissions of Contracting Parties* which are covered by UNSC Resolutions (...) to the scrutiny of the Court'.[362] Then it went on to find that 'the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States',[363] and declared the case inadmissible. The Court seems to have leaped from the conclusion that conduct was attributable to the UN to the conclusion that conduct was not attributable to the contributing States. This has rightly been criticized as unconvincing in principled terms.[364] It is also not fully in line with the ILC's commentary on the draft articles, which provides that the 'attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State'.[365] However, the ILC's approach is not without ambiguity. As explained above, Article 7 ARIO is modelled after Article 6 ARS,[366] which has in the past been interpreted as a 'rule on the transfer of attribution'.[367]

---

the 'amount of operational control or authority exercised'); Dannenbaum, 'Standard of Effective Control' (n 281) 157 (effective control 'is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question'). Full list of references in ILC, *ARIO with commentaries* (n 17) 22 Fn107.

[360] Dannenbaum, 'Killings at Srebrenica' (n 352) 721.

[361] *Galić* (n 312); *Berić* (n 312); *Blagojević* (n 312). A similar approach was adopted by the Superior Provincial Court of Vienna in *NK v Austria* (n 145) 474, where the Court found that a member of AUSBATT, the Austrian contingent participating in the UN Disengagement Observer Force was, according to the Austrian theory on the liability of State organs, 'acting as an organ of the United Nations and not of the Republic of Austria when he caused the damage at issue'. See further (n 405).

[362] *Behrami* (n 4) [144], [149] (*emphasis added*).

[363] ibid [151].

[364] Among many, Francesco Messineo, 'The House of Lords in Al-Jedda and Public International Law' (2009) LVI NILR 35 40; Larsen, '*Attribution of Conduct* '(n 311) 524; Milanović and Papić, 'As Bad as It Gets' (n 307) 289.

[365] ILC, *ARIO with commentaries* (n 17) 16 [4].

[366] ibid (n 17) 21 [5]; similarly Gaja, *Second Report* (n 160) 15 [31].

[367] Messineo, '*Attribution*' in (n 245) 84; in a similar sense ILC, *ARS with commentaries* (n 38) 44; Ago, *Third Report* (n 205) 268-69 [202]; Talmon, 'Plurality' in (n 245) 198. This rule, or at least the claim that conduct is no longer attributable to the State, has been interpret restrictively in the inter-State context: *Al-Saadoon (Admissibility)* (n 295).

Accordingly, it is not implausible to interpret Article 7 ARIO in a similar manner, even if this was apparently not the ILC's intention.[368] The ILC commentary explains that the 'effective control' criterion determines 'to which entity - the contributing State or organization *or* the receiving organization - conduct has to be attributed'.[369] It thus to some extent allows a reading to the effect that the attribution of such conduct to the international organization, in accordance with the preferred test of 'effective control', precludes the attribution of the same conduct to the State.

3.3.2.2 Effective control as a comparative criterion allocating conduct

According to a second possible interpretation, the 'effective control' criterion not only determines attribution of conduct to an international organization, but also attribution of conduct to the State. This interpretation, often advanced in relation to Article 7 ARIO,[370] actually goes back to earlier proposals. Hirsch argued in his seminal study published in 1995 that 'the entity which exercises effective control over the individual who commits the wrongful act—either the organization or the contributing state—will be held internationally responsible'.[371] Similarly, de Visscher noted in his report to the IDI, in 1971, that

> when the men or objects whose activity or presence is at the origin of injury caused by an internationally wrongful act can, *prima facie*, be attributed to two different legal persons, responsibility will, in principle, need to be attributed to the person that exercised preponderant or exclusive control over the harmful act in question.[372]

In line with this, Dannenbaum proposes a 'new liability framework (...) [that] better realizes the fundamental goal of attributing liability to the entity most responsible for the wrongdoing (...)'.[373]

---

[368] The Drafting Committee started from the premise that 'the only function of the article was to provide criteria for the attribution of conduct to an international organization', ILC, 'Summary Record 2810th Meeting' (2004) UN Doc A/CN.4/SR.2810 [14]-[15].

[369] ILC, *ARIO with commentaries* (n 17) 21 [5] (*emphasis added*); similarly Gaja, *Second Report* (n 160) 15 [31].

[370] For Sari, 'Missing Link' 84, 'Article 7 ARIO requires a separate assessment of where effective control over a national contingent lies in each individual case involving wrongful acts committed by UN peacekeeping operations'. According to Yifeng Chen, 'Attribution, Causation and Responsibility of International Organizations' in Dan Sarooshi (ed), *Remedies and Responsibility for the Actions of International Organizations* (Hague Academy of International Law 2014) 60, the ILC appears to 'treat[] Article 7 as a rule of conflict, which is to settle, when attribution to different entities is possible, to which entity the act is to be attributed'.

[371] Hirsch, *Responsibility of International Organizations* (n 10) 64. Similarly, Butkiewicz describes the 'competing functional links' and notes that 'attribution to the organization (...) must be determined what function (and in whose interest) the person involved is performing (...)' Butkiewicz, 'The Premisses of International Responsibility of Inter-Governmental Organizations' 124.

[372] Paul De Visscher, 'Opérations des Nations Unies: Rapport préliminaire' (1971) 54 AIDI 49 (translation by the author).

[373] Dannenbaum, 'Standard of Effective Control' (n 281) 114.

According to this liability scheme, '"effective control," for the purposes of apportioning liability (...) is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question'.[374] This interpretation suggests that the effective control should not be seen as a quantitative criterion stipulating a threshold for attribution.[375] Rather, it is seen as a 'fundamentally comparative'[376] criterion that serves to allocate conduct to the entity that exercises predominant control over the impugned conduct.

Such an approach is arguably compatible with the findings of the Court of First Instance of Brussels in *Mukeshimana-Ngulinzira v Belgium*. The question put before the Court was whether Belgium incurred responsibility for wrongful omission when members of the Belgian contingent of the UN peacekeeping operation for Rwanda (UNAMIR) abandoned a school in which refugees had sought shelter. During the genocide that was committed in 1994, the refugees had sought the protection offered by the presence of Belgian soldiers and were targeted soon after they had left. The Court found that the decision to evacuate the school had been taken by a Belgian UNAMIR commander on the orders of the Belgian State and without consultation with the UN. It was exclusively an act of Belgium. According to the Court

> il paraît suffisamment significatif au tribunal qu'à aucun moment, dans la décision concrète d'évacuer l'ETO, qui était particulièrement lourde de conséquences, il n'a été question de la moindre concertation entre le Colonel MARCHAL [the Belgian commander who had taken the decision to evacuate] et le général Dallaire [the commander of the military division of UNAMIR], alors qu'il ressort par contre des éléments produits que la concertation était permanente entre ce dernier et l'état-major de l'armée belge, qui n'hésitait pas par ailleurs de passer outre l'avis de la MINUAR. Il y a lieu de considérer dès lors que la décision d'évacuer l'ETO est une décision prise sous l'égide de la Belgique et non de la MINUAR.[377]

Under the circumstances identified by the Court, it was clear that Belgium 'effectively controlled' the impugned the conduct and not the UN, who had been left out of the decision-making process. Belgium

---

[374] ibid 157. Dannenbaum accepts the possibility of concurrent attribution if the UN and the sending State exercise the same degree of control. According to Dannenbaum, this is the case where the UN instructs contingents to engage in conduct that would amount to a war crime, or where it accords the member State contingent room for manoeuvre, as such harmful conduct occurs under the joint 'effective control' of the organization and the sending State and both are well-placed to prevent its occurrence: Dannenbaum, 'Standard of Effective Control' (n 281) 165-75.

[375] According to Boon, 'The Slippage Problem in Attribution Doctrines' (n 186) 354, 'there is no minimum quantitative threshold required to satisfy the effective control test' (...) 'effective control is part of a comparative inquiry: assuming states and IOs are both involved, which entity (or both) exercises effective control?'.

[376] Dannenbaum, 'Standard of Effective Control' (n 281) 155.

[377] *Mukeshimana-Ngulinzira* (n 145) [38].

had 'cut across' the UN command structure, thereby undermining the control held by the UN over the operation.[378]

In circumstances that are less clear-cut, a 'comparative approach' to attribution runs into difficulties. To the extent that it seeks to identify the entity 'best placed' to have ensured a different outcome, this benefits the other entity that might have been less well-placed, but still able to influence outcomes. If conduct is exclusively attributed to the organization, this leaves the injured party in many cases with no effective avenue of redress. What is more, it is notoriously difficult to determine who is 'actually' in control in the context of international organizations. Even if an international organization exercises preponderant control over specific conduct, one can always go a step further back and say that it was the individual members that allowed it to exercises this control in the first place.[379] From a more practical point, a 'comparative approach' to attribution entails the difficulty that a claimant would need to determine which entity most likely exercised predominant control over conduct in order to decide what would be an appropriate forum to bring the claim. Given the technical nature of command and control arrangements and the often complex situations during military operations, it is unlikely that complainants possess sufficient information prior to the commencement of proceedings in order to make such a determination.

3.3.2.3 Effective control as a threshold criterion identifying the author

The ILC points out in its commentary that '[a]ttribution 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 in relevant respects'.[380] A third possible interpretation is to regard 'effective control' as a threshold criterion to establish attribution to the State (and the organization). As such, the criterion has an absolute and not a relative content. Conduct of organs placed at an organization's disposal would be attributed concurrently to the organization and to the State if both exercise *sufficient* control over it. In other words, wrongful acts of contingent members are 'only attributed

---

[378] The Court's conclusion appears to be in line with the UN's approach, which maintains that the 'residual control' retained by troop contributing States 'is of no relevance for the purpose of attribution', 'as long as such residual control does not interfere with the United Nations operational control', ILC, Comments 2011, Addendum (n 225) 14 [4].
[379] On the similar problem of 'double evasion', Tzanakopoulos, *Disobeying the Security Council* (n 190) 51.
[380] ILC, *ARIO with commentaries* (n 17) 21 [7].

to states in circumstances under which they actually exercised control over their troops'.[381] By stipulating a threshold for attribution, this approach has the advantage of allowing the possibility of concurrent attribution to both the organization and the State. It is therefore not necessary to adopt an overly restrictive approach towards the attribution of conduct to the international organization in order to prevent letting States 'off the hook'. At the same time, it is clear that the threshold cannot be construed in a way that neither entity exercises sufficient control to be considered the author of the impugned act. Such an outcome would be inconsistent with the logic of Article 7 ARIO, which is an exceptional rule that displaces the general rule on attribution according to which the conduct of military contingents is attributable to the State as the conduct of one of its organs.[382] As far as the State is concerned, the 'effective control' criterion can therefore only be applied to establish whether conduct is attributable to the State if it is already clear that conduct is attributable to the organization. If it is not, there is no reason not to apply the established rule of Article 4 ARS, according to which the conduct of State organs is attributable to the State.

The Court of Appeal in The Hague appears to have applied 'effective control' as a threshold criterion in the parallel cases of *Nuhanović* and *Mustafić*. These decisions were confirmed on appeal by the Dutch Supreme Court,[383] and relied on in the first instance decision of a similar case.[384] The factual background of the cases was the role of the Dutch contingent of the UN peacekeeping operation UNPROFOR (Dutchbat) during the genocide in Srebrenica, Bosnia. It is well known that the Dutchbat failed in their mission to protect the UN 'safe area' of Srebrenica when the Bosnian Serb Army attacked the city in July 1995. They withdrew to the UN compound in Potočari, at the outskirts of the city, triggering an outflow of thousands of refugees from Srebrenica to Potočari. The claimants had both worked for the UN and

---

[381] Bérénice Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping' (2012) 25 LJIL 521 534; a similar approach is accepted as the 'minimalist' solution by *Condorelli, 'Responsabilité ONU / État d'envoi '* (n 335) 12-13. Orakhelashvili, 'Division of Reparation Between Responsible Entities' in (n 137) 654 notes that even if contingents are under the 'formal jurisdiction' of the organization, 'the responsibility of State(s) exercising a substantial degree of factual control is not excluded'.

[382] Pierre d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) 1 QIL 17 26.

[383] *Mustafić (SC)* (n 145).

[384] *Stichting Mothers of Srebrenica et al v the Netherlands* (2014) Case C/09/295247 / HA ZA 07-2973 (District Court of the Hague).

were admitted into the UN compound with their families. They were among the last remaining families when most refugees had already been transported away. By that time, the Dutchbat had received several signals that the Bosnian Serb Army were committing serious crimes against the civilian population, in particular the male refugees.[385] Nevertheless, Mustafić and Nuhanović's parents and younger brother were forced to leave the compound and were subsequently killed. The main point of controversy in the proceedings before the Dutch courts was whether the evictions carried out by Dutchbat soldiers could be considered acts of the Netherlands under international law. A District Court had ruled in 2008 that conduct was attributable to the UN exclusively.[386] It had held that operational command and control had been transferred to the UN and that the Dutchbat were executing 'powers that are no longer the State's'.[387] For the District Court, attribution to the State would only have ensued if the State 'cut across UN command structure', thereby violating 'the factual basis on which attribution to the UN rests'.[388] The Court of Appeal rejected this approach. It found that

> the generally accepted opinion is that if a State places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed, depends on the question which of both parties has 'effective control' over the relevant conduct. (...) Although strictly speaking this provision [Article 7 ARIO] only mentions 'effective control' in relation to attribution to the 'hiring' international organization, it is assumed that the same criterion applies to the question whether the conduct of troops should be attributed to the State who places these troops at the disposal of that other international organization.[389]

Importantly, the Court noted that 'the possibility that more than one party has "effective control" is generally accepted, which means it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party'.[390] Accordingly, it found it necessary 'to examine if the State exercised "effective control" over the alleged conduct', but not to 'answer the question whether the UN also had "effective control".'[391] This aspect of the Court of Appeal's decision has rightly been criticized. It is of course true that the possibility of concurrent attribution should not be discarded. This is

---

[385] *Mustafić v the Netherlands* (2011) Case 200:020:173/01 (LJN: BR5386) (Court of Appeal in The Hague) [2.27].
[386] M v the Netherlands (2008) Case 265618/HA ZA 06-1672 (LJN: BF0182) (District Court in The Hague) [4.10]-[4.17] and the almost identical reasoning in HN v the Netherlands (2008) Case 265615 / HA ZA 06-1671 (LJN:BF0181) (District Court in The Hague) .
[387] *Mustafić (DC)* [4.14.1].
[388] ibid [4.16.1].
[389] *Mustafić (CA)* (n 385) [5.8]; see also the parallel case *Nuhanović v the Netherlands* (2011) Case 200:020:174/01 (LJN:BR0133) (Court of Appeal in The Hague).
[390] *Mustafić (CA)* [5.9].
[391] ibid [5.9].

indeed a necessary implication of the rejection of an 'either-or' approach to attribution. However, the court here assumed that the general rule on attribution codified in Article 4 ARS is displaced even if conduct is not attributable to the international organization.[392] As such, it in principle opens the possibility of a finding that conduct is neither attributable to the organization nor the State, because neither entity exercises sufficient control over conduct.[393]

Leaving this inconsistency aside, the difference between the approach adopted by the District Court and the Appeals Court is clear: while the lower instance assessed whether conduct was attributable to the UN, implying that conduct could not simultaneously be attributed to the State, the Appeals Court investigated whether the Netherlands had sufficient control over the impugned acts to be considered their author. It found that in establishing whether the State exercised effective control,

> significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned.[394]

The Court recalled that the UN and the Dutch government took the joint decision to evacuate the Dutchbat and the refugees after the fall of Srebrenica. It was agreed that the Dutchbat would completely withdraw from Bosnia-Herzegovina soon after. In this transition period, the Court held, the Dutchbat were under the shared control of the UN and the Netherlands.[395] The Dutch government had been 'closely involved in the evacuation and the preparations thereof and (...) would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time'.[396] If it had given the instruction not to evict the concerned persons, 'such an instruction would have been executed'.[397] Moreover, the Court held, the soldiers had not followed UN instructions to protect the refugees, and any

---

[392] For d'Argent, 'State Organs' (n 382) 26, it 'is clear (...) from the text and logic of Article 7 ARIO (...) that, in the absence of effective control by the organization over the conduct of the State organ placed at its disposal, such conduct must be considered as an act of that State, and of that State only'.
[393] Such an outcome would be inconsistent with the stated aim of Article 7 ARIO, according to which 'effective control' 'does not concern the issue whether a certain conduct is attributable at all to a State or an international organization (...)', ILC, *ARIO with commentaries* (n 17) 21 [5].
[394] *Mustafić (CA)* (n 385) [5.9].
[395] ibid [5.18].
[396] ibid.
[397] ibid.

disciplinary power to sanction such conduct rested with the State.[398] However, the Dutchbat had also acted contrary to the instructions of the Dutch government to prevent the separate treatment of the male refugees.[399]

For the Court, conduct was attributable to the Netherlands because firstly, the Dutch government had been directly involved in the operation and secondly, it could have prevented the specific conduct had it been aware of it. An interpretation of the effective control criterion along the lines developed by the ICJ in the *Genocide Convention* and *Nicaragua* cases was thus clearly rejected. This would have required that the specific wrongful conduct originated in the instructions or control of a State organ, which was clearly not the case.[400] The Court's equation of attribution with the State's 'power to prevent' conduct by contrast sets a very low quantitative threshold, suggesting that conduct of national contingents is almost by definition attributable to the State. For 'a troop-contributing state always has the possibility to send orders or instructions to its nationals who serve in a UN operation, if this is necessary to make them act in a certain way or to prevent them from acting in a certain way'.[401]

3.3.2.4 A return to Article 4 ARS?

In effect, this approach therefore comes close to a fourth approach proposed in the literature, namely that attribution of conduct to the State and/or the organization are entirely separate questions. Accordingly, whether conduct is attributable to the member State would at all times need to be determined in accordance with the general rules on attribution codified in the ARS. In other words, the conduct of national peacekeeping contingents remains attributable to the State as conduct of one of its organs, in accordance with Article 4 ARS. This is the approach proposed by Condorelli, according to whom such contingents generally act as 'double agents':

---

[398] ibid.
[399] ibid [5.19].
[400] *Genocide Convention Case* (n 194) 207 [397].
[401] André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 JICJ 1143 1148; similarly d'Argent, 'State Organs' (n 382) 25.

> les casques bleus sont et restent à tous les effets des organes des États d'envoi. Leur lien organique avec l'État national n'est nullement coupé ou mis en sommeil pendant la durée de leur engagement au service de l'O.N.U.: ils ne sont pas livrés à l'Organisation et soustraits à l'emprise de leur État.[402]

This approach finds some support in the early practice of domestic courts; even though it is not always clear whether these courts can be considered to apply the international rules on the attribution of conduct rather than to simply rely on domestic law on State liability. In the case of *Nissan v Attorney General*, the House of Lords rejected the view that the conduct of British troops forming part of the UN Peacekeeping Force in Cyprus was attributable exclusively to the UN.[403] It held per Lord Morris of Borth-y-Gest that

> though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national states in respect of any criminal offences committed by them in Cyprus.[404]

Similar judgments were handed down by the Austrian Supreme Court. In civil liability proceedings brought against an officer of the Austrian armed forces who was deployed as a member of the AUSBATT battalion in the Golan Heights, the court found that the battalion remained an organ of the Austrian State exercising Austrian public authority.[405] A similar judgment was handed down in 2001, in a case relating to a traffic incident caused by an Austrian member of the UN Guards Contingent in Iraq.[406] Turkish courts repeatedly found the Turkish State to be liable for damage caused to members of its military in the course

---

[402] Condorelli, 'Responsabilité ONU / État d'envoi ' (n 381) 13, 14; also Condorelli, 'Statut des forces ' (n 359) 897.
[403] The peacekeeping operation was created on the basis of UNSC Res 186 (4 March 1964) UN Doc S/RES/186 The British Government argued during the proceedings initiated by the British owner of hotel occupied by the forces that 'from and after March 27, 1964 (...), the British forces in Cyprus were contingents of the United Nations Force and no action could lie against the Crown in respect of any act of that force', *Nissan v Attorney General* [1966 N No 330] - [1968] 1 QB 286 (QB), [1967] 2 All ER 200 287. Reviewing the command and control arrangements in place, the Court concluded that 'on and after March 27, 1964, the British troops derived their authority to occupy the hotel no longer from Her Majesty but from the United Nations and occupied it as agents of the United Nations exclusively (...) British troops took and occupied the hotel in the Queen's name; they continued to occupy it in the name of the United Nations (...)', *Nissan v AG (QBD)* 314-15 *(per Stephenson J*); in the same vein *Nissan v Attorney General* [1966 N No 330] - [1968] 1 QB 286, 327 (CA), [1967] 2 All ER 1238 341 (*per Lord Denning*).
[404] *AG v Nissan (HL)* (n 145) 222. In *Bici v Ministry of Defense* (n 145), the attribution question was not even raised.
[405] *Decision 1Ob1/96* (1996) (Austrian Supreme Court). AUSBATT was a part of the UN Disengagement Observer Force created on the basis of UNSC Res 350 (31 May 1974) UN Doc S/RES/350 to maintain the ceasefire between Syria and Israel and supervise the areas of separation. The officer in question had caused a traffic accident while on duty, thereby seriously injuring the private plaintiff who had been on board the vehicle. Whether or not the claim was admissible depended on whether the officer's harmful was attributable to the Austrian State, so that it could be considered to have been taken in the exercise of public authority. According to Austrian law, claims for damages were excluded against State organs acting in that capacity. The plaintiff had unsuccessfully argued that the conduct was attributable exclusively to the UN, as the officer was exercising functions on behalf of that organization. This contrasts with an earlier case handed down by the Superior Provincial Court of Vienna, *NK v Austria* (n 145) 474, for a discussion see (n 361).
[406] Decision 1Ob54/01z (2001) (Austrian Supreme Court).

of UN- and NATO-led operations, without assessing command and control arrangements.[407] Clearly, this is the alternative that best counters the risk of 'accountability gap', because the general rules on attribution of conduct to the State are neither modified nor displaced in the context of international organizations. Courts would not be obliged to address attribution to the international organization as a preliminary question, but could simply establish whether conduct can be attributed to the State in accordance with the rules on attribution of conduct codified in the ARS.

4. Conclusions on attribution of conduct

Two main conclusions can be drawn from the widely conflicting case law and literature on the attribution of conduct in the context of international organizations. First, there is a tendency, spearheaded by the ILC in the ARIO, to interpret the grounds for the attribution of conduct to an international organization restrictively if conduct could be concurrently attributed to a member State. This tendency leads to the perplexing fact that several organizations including the UN and the EU consider themselves responsible for conduct that would not normally be attributable to them under the ARIO. This is the case for implementing acts of member States taken within areas of exclusive EU competence, as well as for certain acts of peacekeeping contingents that stand under the operational command and control of the UN. Second, there is an equally clear tendency post-*Behrami* to interpret the rules on the attribution of conduct to member States in a ways that do not let them 'off the hook' simply because they are involved in a multinational operation created by an international organization. While the reasonings adopted for this conclusion vary considerably and are difficult to categorise in conceptual terms, the outcome is clear: the rules are interpreted in ways that reduce the risk of an 'accountability gap'. Given these two tendencies, the most coherent approach to attribution of conduct would involve abandoning the view that 'concurrent or even multiple attribution of conduct' does 'not occur frequently'[408], which in retrospect appears more like a conceptual straightjacket imposed by the ILC's approach. While for reasons of jurisdiction, courts have not yet been required to decide in a particular case whether conduct could be attributed to the State and

---

[407] *USS Saratoga v TCG Muavenet Case* (n 145), including the analysis by Kemal Baslar [A3]-[A4] (with further references to case law).
[408] ILC, *ARIO with commentaries* (n 17) 16 [4].

the organization; there have been statements to the effect that concurrent attribution is indeed possible.[409] At the same time, even if the established rules on attribution are not displaced if States act within the framework of international organizations, it evidently does not follow that member States necessarily incur responsibility if third parties are harmed. On the one hand, the attribution of conduct does not say anything about the lawfulness of the conduct in question. When it comes to determination under what circumstances member States incur responsibility for conduct taken within the framework of an international organization, the substantive obligations of States are just as relevant. On the other hand, the more the organization is able to carry out its activities independently through its own organs and agents, the less the organs of member States will be involved. In many cases, only ancillary conduct, such as a vote in a decision-making organ or the provision of financial or logistical support, may be attributable to the particular State. The next chapter addresses the question under what circumstances, if at all, such ancillary conduct can constitute a ground of member State responsibility.

[409] In particular, *Mustafić (SC)* (n 145) [3.9.4], [3.11.2]; *The State of the Netherlands v Nuhanovic* Case No 12/03324 (Supreme Court of the Netherlands, 6 September 2013) (n 145) [3.9.4], [3.11.2]; arguably also *Al-Jedda* (n 145) [80].

CHAPTER 3: COMPLICITY AS A GROUND OF MEMBER STATE RESPONSIBILITY

1. Introduction

This chapter deals with some of the substantive grounds of State responsibility for wrongful conduct taken within the framework of international organizations. In accordance with the general approach of this thesis, it seeks to establish to what extent these grounds are different in the particular context of international organizations, so that it would be more difficult to hold States responsible for their conduct carried out through a corporate entity, rather than alone. In many ways, answering this question is a difficult endeavour. States are bound by a great variety of substantive obligations that prescribe what kind of conduct is lawful for them. If the law of international responsibility were understood as comprising both those substantive obligations and the procedural obligations that set in once a substantive obligation has been breached, then the 'whole field of State responsibility (…) [would be] almost coterminous with international law'.[410] This is why the distinction between 'primary' substantive rules and 'secondary' procedural rules of responsibility, introduced by the second SR on State responsibility, Roberto Ago, was crucial in allowing the ILC to limit the scope of its work on State responsibility and to avoid proceeding to what would essentially be a codification of international law as a whole. The aim of the ILC draft articles is not to codify the various primary obligations incumbent on States, but to categorise the secondary rules dealing with 'the general and necessarily uniform aspects of state responsibility'.[411] In the same way, it is impossible to assess in a general manner in what ways substantive obligations constrain the behaviour of States within the framework of international organizations. The most that can be assessed within a single study is how particular conventional obligations have been interpreted in this context, which has for example been undertaken in relation to obligations under the ECHR.[412]

---

[410] As noted by Sir Fitzmaurice in ILC, *Summary Record of its 371st Meeting* (ILC Yb 1956 vol I, 1956) 233 [4].
[411] Ago, *Working paper* (n 152) 253; also Roberto Ago, *Second Report on State Responsibility* (UN Doc A/CN4/233, 1970) 179 [11]; ILC, *ARS with commentaries* (n 38) 31 [1].
[412] Daniel Frank, *Verantwortlichkeit für die Verletzung der Europäischen Menschenrechtskonvention durch internationale Organisationen* (Helbling & Lichtenhahn 1999); Kerstin Holzinger, *EMRK und internationale Organisationen : die Zulässigkeit der Übertragung von Hoheitsrechten aus Sicht der EMRK und ihre Folgen für die konventionsrechtliche Verantwortlichkeit der Mitgliedstaaten* (Nomos 2010); Nina Blum, *The European Convention on Human Rights beyond the Nation-state* (Helbling & Lichtenhahn 2015).

That being said, this chapter will limit itself to one specific ground of responsibility: complicity, or, in the terminology employed by the ILC, 'responsibility for aid and assistance in the commission of a wrongful act'.[413] Article 16 ARS and Articles 14 and 58 ARIO, the provisions dealing with complicity, do not easily fit into the distinction between primary and secondary rules. These are rules that 'define[] the scope of acceptable conduct' of States and international organizations and can therefore be regarded as a falling outside the scope of 'secondary' rules according to the ILC's distinction.[414] Still, the ILC concluded that the inclusion of Article 16 ARS in the draft articles was justified, because complicity is 'in a sense derivative' and 'may, in domestic legal systems, be classified as falling within the "general part" of the law of obligations'.[415] Whether or not that decision was justified,[416] it is clear that the prohibition on complicity set out in Article 16 ARS is today of general applicability, as it reflects customary international law.[417] Under the circumstances set out in this provision, every State incurs responsibility if it knowingly provides aid or assistance for the commission of any wrongful act by another State. As a ground of responsibility for conduct that is 'ancillary' to the primary wrongful act,[418] the prohibition on aid and assistance acts as a 'gatekeeper between lawful and unlawful forms of cooperation'.[419] It is therefore important in establishing to what extent States are constrained under international law when acting within the framework of international organizations. Of all grounds of ancillary responsibility proposed by the ILC, responsibility for wrongful aid and assistance is likely to be the most relevant in this context. International organizations enable States to pool their resources in order to carry out conduct which they could not, or would not, carry out individually. Because of the degree of interaction, the relationship between member States and international organizations may as a general matter be characterised as one of 'aid and assistance'. Where the international activities of the international organization lead to the

---

[413] ILC, *ARS with commentaries* (n 38) Article 16 and ILC, *ARIO with commentaries* (n 17) Article 58. The term 'complicity' was abandoned by the ILC because of its criminal law connotations, ILC, *Record of the 1524th Meeting* (ILC Yb 1978 Vol I 1978) 269-70 [2]-[6].

[414] Miles Jackson, *Complicity in International Law* (OUP 2015) 149; similarly James Crawford, *Second Report on State Responsibility, Addendum* (A/CN4/498/Add1, 1999) 5-6 [164].

[415] ILC, *ARS with commentaries* (n 38) 65 [7]; Crawford, *Second Report, Addendum* (n 414) 6 [165].

[416] Arguably, the main problem with the inclusion of Article 16 ARS in the draft articles was that 'the evidence adduced by the Commission for its customary status was not entirely convincing' when the articles were adopted: Jackson, *Complicity* (n 414) 152.

[417] *Genocide Convention Case* (n 194) 217 [419]-[20].

[418] The term 'ancillary' responsibility is sometimes used for what the ILC termed 'responsibility of a State in connection with the act of another State': ILC, *ARS with commentaries* (n 38) (Articles 16-18). In this sense James Crawford, *State Responsibility. The General Part* (CUP 2013) 323 *et seq*; *Genocide Convention Case* (n 194) 232 [459].

[419] Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 135.

commission of an internationally wrongful act, it is likely that the conduct of at least some member States amounts to assistance in someone else's conduct rather than perpetration of the 'primary' wrongful act.

Even though the ICJ found, in 2007, that Article 16 ARS reflects customary international law, certain elements of the prohibition on complicity are still contested. When transposing the rule to the context of international organizations, the ILC added further elements to deal with the scenario in which assistance is required by the State under the organization's internal rules. This leaves the prohibition with a fluctuating scope of application. Different interpretations of the rule will be evaluated in light of the concern that the creation of international organizations could allow member States to 'avoid responsibility' for their actions. The first part of this chapter presents the rule prohibiting aid and assistance codified by the ILC. It distinguishes complicity as a ground of responsibility from cognate concepts, before discussing the constitutive elements of complicity in the law of State responsibility. The second part of the chapter discusses the manner in which the prohibition on complicity applies to member State conduct taken within the framework of an international organization. Different scenarios of member State complicity are evaluated in light of the rules proposed by the ILC. The third part of the chapter discusses how the rule applies to member State conduct taken within the context of one particular organization - the United Nations.

2. Complicity as a ground of State responsibility

According to Article 16 ARS,

> A State which aids or assists another State 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.

In a historical sense, the prohibition on complicity in international law experienced a rapid consolidation. When SR Ago first proposed a draft of what is today Article 16 ARS in 1978, he encouraged the ILC 'to show intellectual courage' while admitting that the rule 'partook more of the progressive development of

international law than of its codification.[420] When Article 16 ARS was adopted, in a modified form, on second reading in 2001, the ILC observed somewhat reluctantly that 'State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another (...)'.[421] In 2007, the ICJ found that responsibility for wrongful aid and assistance was 'among the customary rules constituting the law of State responsibility'.[422] Since then, the rule has repeatedly been referred to in practice.[423] In this sense, Article 16 ARS is an expression of what Caron referred to as the 'paradoxical relationship' between the non-binding form of the draft articles and the considerable authority the enjoy in practice.[424]

2.1 Complicity and cognate concepts

Before embarking on the discussion of the constituent elements of responsibility for aid and assistance, it is useful to briefly distinguish complicity in conceptual terms from cognate concepts. The possible responsibility of member States 'in connection with' the acts of an international organization has received some attention in the literature as a way of 'piercing the corporate veil' of international organizations and holding member States responsible.[425] In some sense, this figure of speech is misleading in this context. Member States are, on the basis of the prohibition on complicity, not held responsible 'for' the acts of an international organization, but rather for their own conduct that amounts to unlawful assistance. Responsibility for complicity does not imply piercing or casting aside the separate legal personality of the organization, nor are States held responsible for a breach of obligations that are only incumbent on the

---

[420] ILC, *Record of the 1519th Meeting* (ILC Yb 1978 Vol I, 1978) 240 [21]; cited by Lanovoy, 'Complicity' in (n 419) 137. Some ILC members still expressed that view in ILC, *Report of the International Law Commission on the Work of its 51st Session* (UN Doc A/54/10, 1999) 71 [261].

[421] ILC, *ARS with commentaries* (n 38) 66 [7].

[422] *Genocide Convention Case* (n 194) 217 [419]-[20]. Prior to that case, Judge Schwebel had referred to the ILC's provisional draft in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392 558, 607-08 [74] (Dissenting Opinion of Judge Schwebel).

[423] The German Federal Constitutional Court accepted in a recent extradition case that Germany could be prevented from extraditing the person if it thereby aided another State in the commission of an internationally wrongful act, but found that the wrongfulness of the 'primary' act was not established: Case 2 BvR 1506/03 (2003) (German Federal Constitutional Court) [47], [55]. Article 16 ARS was also referred to by the ECtHR in *Al Nashiri v Poland* (App no 28761/11) (2014) ECHR 24 July 2014 [207]; *Husayn (Abu Zubaydah) v Poland* (App no 7511/13) (2014) ECHR 24 July 2014 [201] and *El-Masri v the FYROM* (App no 39630/09) (2012) [GC] ECHR 13 December 2012 [97]; also *Chiragov and others v Armenia* (App no 13216/05) (2015) [GC] ECHR 16 June 2015 (Dissenting Opinion of Judge Gyuluman) [2].

[424] See (n 155) similarly, Jackson, *Complicity* (n 414) 152.

[425] Eg Ryngaert and Buchanan, 'Member State Responsibility for the Acts of International Organizations' (n 175) 143.

organization. Precisely because it is less exacting than other grounds of ancillary responsibility, complicity is likely to be of relevance in the context of international organizations.

2.1.1 Complicity and co-perpetration

Responsibility for complicity is first to be distinguished from the 'co-perpetration' of parallel primary wrongful acts. Where several States or organizations carry out conduct collectively through their respective agents, or where the conduct of certain individuals can be attributed concurrently to more than one entity, each entity incurs independent 'primary' responsibility if that conduct conflicts with one of its obligations.[426] Any entity's responsibility for a 'primary' wrongful act can in principle be invoked independently.[427] Even though the distinction between responsibility for wrongful aid and assistance and responsibility for the joint perpetration of a wrongful act is clear in conceptual terms, the line between the two grounds of responsibility can be fine in practice. As Brownlie noted, where a State furnishes weapons to another State with the knowledge that they will be used in an unlawful military intervention in another State, such assistance is likely to qualify as complicity. By contrast, where a State uses its air force to participate in the attacks of the other State, the conduct attributable to it would be likely to amount to a primary wrongful act.[428] In the latter scenario, one would accordingly be in the presence of parallel wrongful acts committed by two States. Similarly, in the context of international organizations, a member State's implementation of a wrongful normative act of an international organization is likely to give rise to the member State's responsibility for a 'primary' wrongful act, not aid and assistance in the organization's wrongful act - provided of course that both entities are bound by the obligation being breached.[429] This is because the implementation of an act, which is, as seen in Chapter 2, attributable to the State, is generally too substantial to amount to a mere contribution. Accordingly, if a State were obliged to enforce a travel

---

[426] The principle of 'independent responsibility' is firmly established, and follows from the definition of a wrongful act as being composed of a) conduct attributable to a State or an international organization and b) breach of an international obligation of that State or organization (Article 2 ARS). See Crawford, *Second Report, Addendum* (n 414) 5 [162]. The important distinction between complicity and 'co-perpetration' was already noted in ILC, *Record of the 1524th Meeting* 237 [33]; in the context of international organizations see Klein, 'Attribution of Acts' in (n 245) 307.

[427] ILC, *ARS with commentaries* (n 38) Article 47; ILC, *ARIO with commentaries* (n 17) Article 48. Further on invocation of responsibility see Chapter 5.

[428] Ian Brownlie, *System of the Law of Nations: State Responsibility* (Clarendon Press 1983) 191.

[429] This is recognized in the case law of the ECtHR. 'Primary' responsibility of ECHR contracting States for their implementation of a binding decision was for example alleged, and in the second case established, in *Bosphorus* (n 114); *Nada v Switzerland* (n 146). The ICJ found in *Obligation to Prosecute or Extradite* (n 262) 35 [111] that Senegal's failure to institute proceedings against Mr. Habré, though perhaps compatible with a decision of the ECOWAS Court of Justice, amount to a primary unlawful act by that State.

ban or restrict access to private property in ways that breach the human rights of concerned private persons, the State's conduct would be likely to in itself constitute non-compliance with the primary obligation.[430]

2.1.2 Complicity and other forms of ancillary responsibility

Responsibility for complicity is only one of three grounds of responsibility 'in connection with the act of another State' proposed in the ARS.[431] A State also incurs responsibility if it 'directs and controls another State in the commission of an internationally wrongful act' or 'coerces another State to commit an act (...) [that] would, but for the coercion, be an internationally wrongful act of the coerced State'.[432] Yet, complicity is conceptually different from these other grounds of ancillary responsibility: as the wording of Article 17 and 18 ARS makes clear, on grounds of direction and control, and coercion, the State is held responsible for the act of another entity because of its preponderant influence.[433] Both provisions 'attach responsibility to the directing or coercing State in circumstances where that State is, in essence, acting through the directed or coerced State, and is indirectly committing what one might call a 'primary' wrongful act'.[434] This is also why the ILC initially used the term 'vicarious responsibility' in this context.[435] Responsibility for aid or assistance, by contrast, is non-imputational.[436] A complicit State 'is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound', not for the wrongful act itself.[437] The assisting State neither becomes a co-perpetrator of the primary wrongful act, nor are parts of the primary wrongful act attributed to it.[438] That there is no

---

[430] To the extent that such obligations are imposed by the UNSC under Article 41 UNC (n 44), they of course raise further questions relating to the effect of Article 103 UNC; see (nn 591 *et seq*).
[431] ILC, *ARS with commentaries* (n 38) (Articles 16-18).
[432] ibid Articles 17-18; in the context of international organizations, ILC, *ARIO with commentaries* (n 17) Articles 59-60.
[433] In accordance with ILC, *ARS with commentaries* (Article 17), '[a] State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act (...)'. In accordance with Article 18 ARS, [a] State which coerces another State to commit an act is internationally responsible for that act (...)'.
[434] Vaughan Lowe, 'Responsibility for the Conduct of other States' (2002) 101 Kokusaiho Gaiko Zassi 4.
[435] Special Rapporteur Ago used the term 'vicarious' or 'indirect' responsibility to denote 'cases in which the international responsibility arising out of an internationally wrongful act should devolve upon a State other than the one to which the act in question is attributed', Roberto Ago, *Eighth Report on State Responsibility* (UN Doc A/CN4/318, 1979) 4 [2]-[3]. He had in mind relations of 'de jure' dependence such as protectorates (at 5-6 [4]) and relations of 'de facto' dependence, such as military occupation (at 16-23 [23]-[39]).
[436] Lowe, 'Responsibility for the Conduct of other States' (n 434) 4; Jackson, *Complicity* (n 414) 167-8.
[437] ILC, *ARS with commentaries* (n 38) 67 [10].
[438] This has important consequences for the duty to make reparation, as a responsible State is in principle only under the secondary obligation to make reparation for any injury caused by its wrongful act (ibid Article 36): (nn 810 *et seq*).

identification between the complicit State and the primary perpetrator is further illustrated by the fact that a State must itself be bound by the primary obligation breached in order to incur responsibility for complicity.[439] Where purely bilateral obligations of a State or an organization are at stake, no responsibility for complicity can arise. In this sense, the separate legal identity of the State or organization, with its own distinct rights and obligations, is firmly respected.[440]

In cases of direction and control, it is necessary to demonstrate 'domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern'.[441] Historical examples such as international dependencies apart, it appears that a State would only be in a position to exercise 'domination' over another State in highly exceptional circumstances. That a single State would be able to 'dominate' an international organization appears to be even more exceptional, as international organizations are collective bodies whose purpose it is precisely to allow several States to determine actions conjointly. Tellingly, in one of the very few cases in which direction and control over the acts of an international organization was pleaded, this control was allegedly exercised by another international organization through the combined votes of its members.[442] The threshold required for responsibility for 'coercion' is even higher still: '[n]othing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State'.[443] The possibility of the exercise of such overwhelming control by one Member State over the acts of an international organization runs counter to the very idea of international organizations as collective bodies. Even if the possibility of such a scenario cannot be entirely discarded, direction and control, and coercion, are not grounds of responsibility that can effectively deal with the problem of an 'accountability

---

[439] ibid Article 16(b). The same is not true for coercion: ibid, Article 18.
[440] This means that complicity would not be a pertinent ground of responsibility in cases such as *JH Rayner Ltd v Department of Trade and Industry (HL)* (n 124), to the extent that the ITC possessed a separate personality and was bound by obligations that were not simultaneously incumbent on its members. On this case see further (nn 121 *et seq*) and accompanying text. For critical views of the 'double obligation' requirement see section (n 513).
[441] ILC, *ARS with commentaries* (n 38) 69 [7].
[442] In Case C-241/87 *Maclaine Watson & Company Limited v Council and Commission of the European Communities* [1990] ECR I-01797, claimants argued that the EC incurred responsibility because of the preponderant control it exercised as a 'privileged' member. At the time of the ITC's collapse, 11 of 23 ITC member States were also EC members, which meant that the EC enjoyed a 'blocking minority' over decision-making processes within the ITC. The claimants argued that 'given the number of votes it had, the Community was liable in law for the "acts and defaults" of the ITC because of the influence it possessed within that organization which it failed to exercise in the interest of the Community and so as to control the ITC's operations', Case C-241/87 *Maclaine Watson v Council and Commission* [1990] ECR I-01797, Opinion of AG Darmon [139] *et seq*. The action withdrawn before a judgment was rendered.
[443] ILC, *ARS with commentaries* (n 38) 69 [2].

gap' in the day-to-day operations of an international organization. Responsibility for complicity, by contrast, does not presuppose a particular relationship of control or dependency with the perpetrator. It is for that reason much more likely to act as a restraint on States when acting within the context of international organizations.

2.1.3 Complicity and responsibility for 'circumvention'

In addition to the three forms of 'ancillary responsibility' set out in the ARS, the ILC introduced, *de lege ferenda*,[444] an additional ground of responsibility for 'circumvention of international obligations of a State member of an international organization'. Article 61 ARIO states that

> 1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
>
> 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.[445]

This provision was introduced by SR Gaja in an effort to counteract the possibility that members could 'hide' behind an international organization or abuse the latter's separate legal personality to commit unlawful acts.[446] One of the perplexing features of this proposed ground of responsibility is that it is not entirely clear for what a State would be held responsible. Conceptually, it is difficult to construe responsibility for circumvention as a form of 'derivative' responsibility, as paragraph 2 of the provision makes it clear that the commission of a wrongful act by the organization is not a precondition for responsibility. As the organization must not be bound by the obligation that is being circumvented, there can be no question of the Member State being held responsible 'for' the wrongful act of the international organization. The primary 'wrong' of the State rather appears to be the very act of 'circumventing' its international obligation. As d'Argent puts it, 'responsibility for circumvention is a "for doing so"

---

[444] Gaja, *Seventh Report* (n 232) 26 [77]. The innovative character of the provision was also underlined in comments in the 6th Committee: UNGA Sixth Committee, *61st Session. Summary Record of the 13th Meeting* (A/C6/61/SR13, 2006) [71] (Denmark).
[445] ILC, *ARIO with commentaries* (n 17) Article 61.
[446] Giorgio Gaja, *Fourth Report on Responsibility of International Organizations, Addendum* (UN Doc A/CN4/564/Add1, 2006) 6-10 [64]-[74].

responsibility'.[447] As such, responsibility for circumvention, even more so than the prohibition on complicity, challenges the ILC's distinction between 'primary' and 'secondary' rules, defining the scope of lawful State conduct.[448] As with the prohibition on complicity, the main problem with this approach is the stipulation that as a ground of ancillary responsibility, responsibility for circumvention is of general applicability. Construed very broadly, 'circumvention' of an obligation could mean that any time an international organization engages in conduct that would be contrary to one of its member States' international obligations, that State incurs responsibility.[449] A State would not only incur responsibility for its 'circumvention' of, for example, the obligation to ensure access to justice to individuals within its jurisdiction,[450] but of any international obligation incumbent on it. Unlike responsibility for complicity, responsibility for circumvention would also not necessarily require participation in the primary harmful act. Unsurprisingly, ILC members and States considered such a formulation too expansive and suggested ways of limiting the scope of the prohibition.[451] Eventually, the provision was narrowed down through the introduction of the strong subjective element implied in paragraph 1. The commentary makes it clear that as it is presently formulated, the provision 'implies the existence of an *intention* to avoid compliance'.[452] No responsibility is incurred where the act of the organization is merely the 'unintended result' of the State's cooperation through an international organization. This sets such a high threshold that it has rightly been questioned whether Article 61 ARIO really sets out an additional ground of responsibility, rather than

---

[447] Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2015) 215.

[448] The justification advanced in relation to complicity, namely that it is 'in a sense derivative', would notably not apply to responsibility for circumvention. For the view that Article 61 ARIO is better seen as a primary rule: Murray, 'Piercing the Corporate Veil' (n 140) 301.

[449] This is close to the first draft proposed by the SR, namely that a member State incurs responsibility if it 'avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and (…) [t]he organization commits an act that, if taken by that State, would have implied non-compliance with that obligation', Gaja, *Fourth Report, Addendum* (n 446) 11. Similarly, the examples cited in the commentary affirm 'the possibility of States being held responsible when they fail to ensure compliance with their obligations under the European Convention on Human Rights in a field where they have attributed competence to an international organization', ILC, *ARIO with commentaries* (n 17) 94.

[450] The main inspiration for Article 61 ARIO derived from the case law of the ECtHR on the responsibility of contracting States after a transfer of powers to an international organization including *Waite and Kennedy* (n 60) and *Bosphorus* (n 114): ILC, *ARIO with commentaries* (n 17) 94-95.

[451] Gaja, *Eighth Report* (n 159) 34 [106]. Germany for example noted that responsibility should be restricted 'to cases where a State would "misuse" the organization (as a shield) in order to evade its own responsibility', ILC, 'Comments Governments' (2011) UN Doc A/CN.4/636 38 [1]; similarly Belgium at 37 [2].

[452] ILC, *ARIO with commentaries* (n 17) 93 [2] (*emphasis added*).

simply referring to the general obligation of States to honour their treaty obligations in good faith.[453] Assuming this analysis is correct, one runs into the same problem identified in the beginning of this chapter: namely, the great variety of primary obligations incumbent on States makes it impossible to set out, in a general manner, under what circumstances a State incurs responsibility for conduct taken within the framework of international organizations. What must be considered 'good faith' performance of an obligation, and therefore lack of 'circumvention', depends not least on the content of the primary obligation in question.

2.1.4 Complicity and breach of a duty to prevent

Lastly, responsibility for complicity in another entity's wrongful act is conceptually distinct from responsibility for the breach of an obligation to prevent a certain harmful outcome. There are a number of treaties which oblige States to take action to prevent the occurrence of third party acts including torture, genocide, crimes against internationally protected persons, or terrorist bombings.[454] Human rights law, and the law on the protection of foreigners, impose similar 'positive' obligations of prevention on States.[455] Under customary international law, States are under the obligation not to let their territory be used in ways that harm the rights of other States.[456] These obligations have in common that they require States to actively intervene and oppose or prevent harmful conduct by third parties without themselves being involved in its perpetration.[457] As aptly put by Hakimi, these are 'State bystander obligations'.[458] On

---

[453] Murray concludes that the idea expressed by Article 61 ARIO is already covered by the principle of good faith in the law of treaties, which is codified in Article 26 VCLT: Murray, 'Piercing the Corporate Veil' (n 140) 299. Arguably, however, Article 61 ARIO as currently formulated goes even less far, because Article 26 VCLT expresses a broader concept of good faith than the absence of subjective bad faith: Robert Kolb, La bonne foi en droit international public: contribution à l'étude des principes généraux de droit (Presses Universitaires de France 2000) 464 *et seq*; Meng, 'Internationale Organisationen' (n 22) 332, 337.

[454] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (concluded 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention against Torture) (Article 2); Genocide Convention (Article 1); *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents* (concluded 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 (Article 4); *International Convention for the Suppression of Terrorist Bombings* (concluded 15 December 1997, entered into force 23 May 2001) 2149 UNTS 284 (Article 15).

[455] Generally, Riccardo Pisillo Mazzeschi, 'Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme' (2008) 333 RdC 226 *et seq*; in the context of the ECHR, Andrew Clapham, *Human Rights Obligations of Non-state Actors* (OUP 2006) 349 *et seq*; A R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004).

[456] *Island of Palmas Case (USA v the Netherlands)* (1928) II RIAA 829 839; *Trail Smelter Case* (Canada, USA) (1941) III RIAA 1905 1965; *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4 22.

[457] Pisillo Mazzeschi, 'Obligations positives' (n 455) 228. The failure to take appropriate action - an omission - is attributable to the State and gives rise to its responsibility.

a scale of involvement in the wrongful conduct, the breach of a 'State bystander obligation' would be on the lower end, with complicity being in the centre, other forms of ancillary responsibility at the higher end and the actual commission of the wrongful act at the top of the scale.

For a number of reasons, a breach of an obligation of prevention can be easier to establish in practice than responsibility for complicity.[459] First, obligations of prevention are usually directed at the prevention of certain harmful event or conduct, but it is not necessary that the harmful event is an internationally wrongful act committed by another entity. Because it is not necessary to establish that the third party committed a wrongful act, procedural hurdles such as the *Monetary Gold* principle may be more easily overcome.[460] Second, responsibility for failure to prevent usually requires that 'the State was aware, or should normally have been aware' of the occurrence of the harmful event, whereas responsibility for complicity requires a higher threshold of 'full knowledge of the facts'.[461] According to some, complicity even requires the establishment that the assisting State intended to materially facilitate the wrongful act.[462] As complicity has stricter conditions of application than responsibility for a failure to prevent, commentators have suggested that its practical relevance is limited.[463] Corten and Klein argue on the basis of an analysis of relevant ICJ case law that most potential cases of complicity can more easily be disposed of as breaches of an obligation of prevention, with similar consequences.[464]

Yet, there are important conceptual differences between the two concepts which justify a differentiated treatment. First, in terms of the reputational effect, there is a real difference between holding someone responsible for complicity in a wrongful act and holding someone responsible for failing to prevent harmful conduct of third parties.[465] The ICJ has repeatedly found charges of complicity to be of

---

[458] Monica Hakimi, 'State Bystander Responsibility' (2010) 2 EJIL 341, who attempts to systematize the various obligations of prevention within a single framework.
[459] In this sense, Oliver Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility' in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law* (Routledge 2012).
[460] For the relevance of the *Monetary Gold* principle for cases of complicity, see Chapter 5 Section 3.2 below.
[461] *Genocide Convention Case* (n 194) 223 [432].
[462] See (nn 500 *et seq*).
[463] Corten and Klein, 'Limits of Complicity' in (n 459) 315, 331.
[464] ibid in 334.
[465] On 'fair labelling' and complicity, see Jackson, *Complicity* (n 414) 22-23.

'exceptional gravity'.[466] Secondly, and importantly for the purposes of this chapter, duties of 'due diligence' or of prevention do not necessarily enjoy the same general applicability as the prohibition on complicity. While obligations to prevent are well established in particular circumstances and in relation to particular harmful acts, these various obligations of States are not necessarily uniform or may not arise in relation to all types of harmful acts.[467] It is accordingly not possible to state with a sufficient level of generality under which circumstances a State would incur responsibility for its failure to prevent a certain harmful outcome within the context of an international organization.[468] Again, much would depend on the conventional obligations of the State; but also on the particular harmful event in question, on the place of occurrence of the harm and possibly and on the degree of influence[469] the State can exercise over the conduct of the perpetrator. The prohibition on complicity, by contrast, is a useful object of study in this context precisely because it applies in the same way to all forms of assistance in the commission of another State's or an international organization's wrongful act.

2.2 The constituent elements of complicity

2.2.1 A 'significant' contribution to the primary wrong

Unlawful aid or assistance in the commission of a wrongful act of another State can take the form of material, technical, logistical or financial support. The ILC mentions several practical examples, including 'providing means for the closing of an international waterway, facilitating the abduction of persons on

---

[466] It has found that a higher burden of proof applies: see *Corfu Channel (Merits)* (n 456) 17, where the Court found in relation to the UK's second claim, which resembled an allegation of complicity, that 'a charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here'. The same heightened standard of proof for 'charges of exceptional gravity' was required in relation to the charges of genocide and complicity in genocide, but not for failure to prevent to prevent genocide (for which 'proof at a high level of certainty appropriate to the seriousness of the allegation' was sufficient): *Genocide Convention Case* (n 194) 129-30 [209]-[210].

[467] In *Genocide Convention Case* (n 194) 220-21 [429]-[30] the Court did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law'. Hakimi, '*Bystander*' (n 458) 367 attempts to systematize the various 'bystander obligations' but is also of the view that States must not protect against any kind of harm caused, but only in relation to particular types of harm.

[468] The ILA has suggested that there is a broad obligation of 'due diligence' according to which 'Member States as members of an organ of an IO, (...) have a fundamental obligation to ensure the lawfulness of actions and decisions': ILA, *Final Report* (n 10) 15, 6. However, it does not provide any support for this obligation, while pointing out that some of its recommendations represent 'progressive development' rather than binding law. The suggested rule does not specify whether the obligation of 'due diligence' would also apply where a decision is in breach of a bilateral obligation of the organization, but not of its members.

[469] As in *Genocide Convention Case* (n 194) 221 [430].

foreign soil, or assisting in the destruction of property belonging to nationals of a third country'.[470] Many of the cases in which allegations of complicity were raised concern the provision of arms to States that are said to be involved in violations of the laws of armed conflict or human rights law.[471] There are also a growing number of domestic and regional human rights cases where the responsibility of a State for its alleged complicity in extraordinary renditions of persons was invoked.[472] In these cases, the contributions of the allegedly complicit States took the form of facilitation of the arrest of a person or of allowing their territories to be used for the establishment of detention centres. One form of 'contribution' that appears to fall outside of the scope of Article 16 ARS is the mere provision of moral support, encouragement or incitement. There is no evidence that international law prohibits 'encouragement' or 'incitement' to commit a wrongful act.[473] It therefore appears that a contribution must go beyond this threshold in order to qualify as 'assistance'.[474]

The contribution must further stand in a specific relationship with the wrongful act. According to the ILC, there '[i]s no requirement that the aid and assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act'.[475] A significant contribution 'materially facilitate[s]' the commission of the wrongful act.[476] That a contribution must not be 'essential' is uncontroversial.[477] It is implicit in the ICJ's findings in the *Genocide Convention* case, where the Court held that the conventional prohibition on complicity in genocide had to be construed 'in a sense not significantly different from that of those concepts in the general law of international responsibility'.[478]

---

[470] ILC, *ARS with commentaries* (n 38) 66 [1].
[471] Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 108 *et seq.*
[472] Eg *Al-Asad v Djibouti* (Communication No 383/10) (2014) AfCmHPR 12 May 2014 ; *Al Nashiri v Poland* (n 423) [442]; *El-Masri* (n 423).
[473] ILC, *ARS with commentaries* (n 38) 65 [9]; Jackson, *Complicity* (n 414) 154; also *Nicaragua (Merits)* (n 206) (Dissenting Opinion Judge Schwebel) at 259, 388-89 [259]; Roberto Ago, *Seventh Report on State Responsibility* (UN Doc A/CN4/307, 1978) 54-55 [62]-[63].
[474] In this sense Crawford, *Second Report, Addendum* (n 414) 10 [180]; also John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987) 57 BYIL 77 80; C. M. Chinkin, *Third Parties in International Law* (Clarendon Press 1993) 297; Lowe, 'Responsibility for the Conduct of other States' (n 434) 5; Jackson, *Complicity* (n 414) 154.
[475] ILC, *ARS with commentaries* (n 38) 66 [5].
[476] Crawford, *Second Report, Addendum* (n 414) 10 [180]. Similarly Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 1 10; Lowe, 'Responsibility for the Conduct of other States' 5; Jackson, *Complicity* (n 414) 158.
[477] See Quigley, 'Complicity' (n 474) 121-22; Lowe, 'Responsibility for the Conduct of other States' (n 434) 5.
[478] *Genocide Convention Case* (n 194) 217 [420].

According to the Court, the material element of complicity would have been established,[479] even though the aid of political, military and financial nature provided by Serbia to the Republika Srpska was not indispensable for the perpetration of the crime of genocide.[480] In that particular case, responsibility for complicity could not be established only because the subjective element was not met.[481] Accordingly, the contribution of the assisting State must not be a condition *but for* which the primary wrongful act would not have occurred - an aspect that has important implications for the duty to make reparation.[482]

The requirement that the aid or assistance should have contributed 'significantly' to the commission of the wrongful act is less clear. The ILC commentary on Article 16 ARS appears to be contradictory, as it first states that aid must have 'contributed significantly', but later on observes that it may be 'only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered'.[483] The prevailing view in the literature is that the 'substantial contribution' standard is to be preferred.[484] As Jackson notes, 'material facilitation is a standard that catches conduct with a sufficient link to another state's wrongdoing while excluding the incidental relationships that arise from virtually every state interaction'.[485] Assistance that is too minor to play any role for the principal perpetrator's acts, or which goes unnoticed and therefore produces no effects,[486] would accordingly not amount to a relevant contribution in the sense of Article 16 ARS. A related question that has received only little attention in the literature is whether assistance must be 'direct'. In other words, whether assistance accorded through an intermediary would be covered by the prohibition on complicity if it actually facilitates the commission of the wrongful act. Or, similarly, whether assistance that is accorded for purposes other than the wrongful act, but liberates resources that can be used for the commission of the

---

[479] ibid 218 [422].
[480] ibid 234 [462].
[481] The Court found Serbia responsible for its failure to prevent genocide, not for complicity, as the subjective element could not be established: ibid 237-38 [471].
[482] It is important for the establishment of a link of causation between the assistance and any injury caused by wrongful act, which will be discussed in Chapter 4 Section 3.2 Linking the wrongful act to the resulting injury.
[483] ILC, *ARS with commentaries* (n 38) 66 [5]; 67 [10]. Crawford suggests that this ambiguity has been resolved, with the ARIO, in favour of the 'substantial' contribution requirement: Crawford, *State Responsibility (2013)* (n 418) 403, 405.
[484] Quigley, 'Complicity' (n 474) 120; Lowe, 'Responsibility for the Conduct of other States' (n 434) 5; Nolte and Aust, 'Equivocal Helpers' (n 476) 12; Crawford, *State Responsibility (2013)* (n 418) 405; Jackson, *Complicity* (n 414) 158.
[485] Jackson, *Complicity* (n 414) 158.
[486] Not every contribution that goes unnoticed produces no effects. ibid 72 mentions as an example the 19th century case of *State v Tally*, (1894) 15 So 722, in which Tally, a judge, was convicted as an accomplice because of his failure to transmit a telegram that would have warned the victim of an impending attack. The attackers were unaware of Tally's actions.

wrongful act, would be covered by the prohibition. In both situations, the assisting State's contribution might materially facilitate the commission of the wrongful act, but it would do so only indirectly. Some authors appear to be of the view that 'indirect' assistance is not covered by the prohibition.[487] Quigley is of the view that at least in the case of a State 're-allocating' resources internally and using resources other than those contributed for the commission of the wrongful act, the aiding or assisting State should incur responsibility for complicity: '[o]therwise, a donee State can take resources that make it possible to carry out a wrongful act but protect the donor State from liability by using other weapons or other funds available to it'.[488] It is submitted that aid or assistance provided through a third party should also be covered by the prohibition, as the rule could otherwise be purposefully circumvented. For example, if a State provides arms to one State with the full knowledge that they will be used to support the wrongful acts of a third State, the supporting State should incur responsibility for complicity, as its assistance 'materially facilitates' the wrongful act.

Another question concerning the material element relates to whether omissions can ever amount to 'assistance' in the sense of Article 16 ARS. The ICJ seems to have ruled out this possibility when it stated, in the *Genocide Convention* case, that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide'.[489] However, as several commentators have pointed out, there is no principled reason why an omission could never 'materially facilitate' the commission of a wrongful act.[490] Practice furnishes possible examples of complicity by omission. In a 2010 joint study on global practices relating to secret detention in the context of countering terrorism, State complicity in such practices was found to include situations where the State 'has failed to take measures to identify persons or airplanes that were passing through its airports or airspace after

---

[487] Jackson is of the view that the standard of material facilitation 'excludes assistance that is indirectly (...) related to that act, ibid 158; in the same sense Lowe, 'Responsibility for the Conduct of other States' (n 434) 5; *Nolte and Aust, 'Equivocal Helpers'* (n 476) 10. The authors however do not explain their understanding of the term 'indirect'.
[488] Quigley, 'Complicity' (n 474) 122.
[489] *Genocide Convention Case* (n 194) 222-23 [432].
[490] Lowe, 'Responsibility for the Conduct of other States' (n 434) 6; *Aust, Complicity* (n 471) 230; Lanovoy, 'Complicity' in (n 420) 149; Jackson, *Complicity* (n 414) 156-57.

information of the CIA programme involving secret detention has already been revealed'.[491] Or, in *Corfu Channel*, the UK claimed that Albania had 'colluded' with Yugoslavia in the laying of mines which led to the destruction of its warships simply by 'acquiescence'.[492] A State allowing its territory to be used by an aggressor State is even one of the paradigmatic cases of State complicity, and this can be done by passive acquiescence.[493] Accordingly, the possibility of complicity by omission should not be excluded. What is clear, however, is that omissions could only give rise to responsibility for complicity in specific circumstances. There is no general obligation of States to intervene in relation to wrongful acts by other States,[494] and much less would the failure to do so amount to unlawful assistance.

2.2.2 A contribution made with knowledge of the circumstances

The distinctive feature of complicity as a ground of State responsibility is its fault element. In accordance with Article 2 ARS, international responsibility is generally 'objective'. As a matter of the secondary rules, a State incurs responsibility if it fails to comply with the standard set out by an obligation, irrespective of its intention to commit the breach or knowledge of the circumstances.[495] Responsibility for aid and assistance, by contrast, only arises if the assisting State has 'knowledge of the circumstances of the internationally wrongful act'.[496] This 'mental element' of the prohibition on complicity is the most contested and unsettled aspect of complicity and it has important consequences for the scope of the prohibition. According to the commentary on Article 16 ARS, 'the aid or assistance must be given with a

---

[491] HRC, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* (UN Doc A/HRC/13/42, 2010) 4. The passage is referred to in Al Nashiri v Romania App no 33234/12, Statement of facts [97] and might prove relevant for the outcome of the case.

[492] *Corfu Channel (Merits)* (n 456) 17. Aust, *Complicity* (n 471) 227 also discusses Corfu Channel as a possible case of 'complicity through omission'.

[493] Art 3(f) of the definition of aggression set out in UNGA Res 3314 (1974) UN Doc A/RES/3314 (XXIX) ; Jackson, *Complicity* (n 414) 157. Yet, it is also true that as noted by the same author at 172, State complicity in aggression is a 'specific' complicity rule. As such it may be broader than the general complicity rule set out in Article 16 ARS.

[494] States may of course be under the obligation to prevent specific types of wrongful acts. Whether or not a obligation to prevent was duly discharged may then depend on the State's 'capacity to effectively influence' the conduct of the perpetrators, which is itself dependent on the geographical proximity of the State to the place of occurrence of the wrongful acts: *Genocide Convention Case* (n 194) 221 [430]

[495] ILC, *ARS with commentaries* (n 38) 34 [3]; Crawford, *State Responsibility (2013)* (n 418) 60-62. According to the ILC, different primary rules of international law impose different standards, which might include fault. Generally on the role of fault in the law of state responsibility, Andrea Gattini, 'Smoking/No Smoking: Some Remarks on the Present Place of Fault in the ILC Articles on State Responsibility' (1999) 10 EJIL 397.

[496] ILC, *ARS with commentaries* (n 38) Article 16(a); *Genocide Convention Case* (n 194) 223 [432].

view to facilitating the commission of that act'.[497] As Aust notes, stipulating a strict subjective condition is one of several possible ways of narrowing down the number of cases in which States can be held responsible for wrongful assistance.[498] This can be seen in a positive light as an effort not to 'suffocate' international cooperation by making responsibility for complicity an overly broad category.[499]

The intent requirement can be construed in different ways. Lowe notes that establishing intent may not be a significant obstacle if States can be presumed to 'intend the foreseeable consequences of their acts'.[500] According to Jackson, 'where a state provides assistance to another state with the actual knowledge that the aid will be used to commit a wrongful act, the state's intent that its aid facilitates that act may be inferred'.[501] Arguably, such inference would not be permitted if the subjective element were construed more narrowly as the provision of assistance for the *purpose* of facilitating the wrongful act, which seems to be implied in the ILC's statement. For in practice, courts have been reluctant to infer bad faith on the part of a State.[502] If only the provision of aid and assistance for the purpose of facilitating the unlawful conduct were covered by the prohibition, then a State would at the very least be permitted to argue that supporting the wrongful act was not its purpose. For example, if two States have a long-standing military cooperation, which is continued even though one State carries out an unlawful military intervention for which resources furnished by the other State are used, the latter State could accordingly argue that the assistance was not provided with the purpose of facilitating the unlawful intervention. A part from the fact that it is generally difficult to establish 'wrongful intentions' of a State;[503] this seems not reflective of the stated aim of Article 16 ARS, which is to impose responsibility 'where a State voluntarily assists or aids another State

---

[497] ILC, *ARS with commentaries* (n 38) 66 [3]; Crawford, *Second Report, Addendum* (n 414) 10 [178].
[498] Aust, *Complicity* (n 471) 230-31. Also in favour of the wrongful intent standard: Nolte and Aust, 'Equivocal Helpers' (n 476) 15-16.
[499] Aust, *Complicity* (n 471) 240.
[500] Lowe, 'Responsibility for the Conduct of other States' (n 434) 8.
[501] Jackson, *Complicity* (n 414) 160; similarly Talmon, 'Plurality' in (n 245) 218-19.
[502] In this sense eg *Upper Silesia (Merits)* (n 198) 30, where the Court found that a misuse by a State of a right conferred by a treaty could not be presumed.
[503] Quigley, 'Complicity' (n 474) 111 notes that the establishment of the 'state of mind' of a State is difficult because States rarely advertise wrongful intentions, and because they act through a variety of officials who may themselves have conflicting intentions. The problems of establishing intent of course also arise where an international organization is alleged to be complicit: critically, August Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63 72.

in carrying out conduct which violates the international obligations of the latter'.[504] To the extent that the commentary sets out more restrictive criteria than the actual draft article, it should be interpreted with care, in particular as the discrepancy between the article and the commentary was apparently not discussed by the ILC.[505] Practice is furthermore inconclusive on whether mere knowledge of the commission of a wrongful act is sufficient. While there is some practice that supports a strict wrongful intent requirement in the case of complicity in genocide,[506] the purpose for which assistance was provided seems to have been considered irrelevant in other cases.[507] A number of authors rightly note that a strong knowledge requirement already goes a long way in alleviating concerns that complicity might unduly restrict cooperation.[508] In accordance with Article 16 ARS, a State only incurs responsibility if it furnishes aid or assistance in the 'full knowledge' of the other State's plans to commit a wrongful act, or while the wrongful acts are known to be ongoing.[509] This means that a complicit State must have actual, not only potential knowledge of the commission of the wrongful act. 'Full knowledge' is the standard which best succeeds in excluding cases in which the provision of assistance for a wrongful act is accidental, while covering all cases of deliberate assistance.

2.2.3 Breach of an obligation by which the assisting State is itself bound

In accordance with Article 16(b) ARS, the assisting State incurs responsibility only if 'the act would be internationally wrongful if committed by that State'. The requirement that the assisting State must be

---

[504] ILC, *ARS with commentaries* (n 38) 66 [1]. Critically of the wrongful intent requirement: Quigley, 'Complicity' (n 474) 111; Lowe, 'Responsibility for the Conduct of other States' (n 434) 8; *Andreas Felder, Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit (Schulthess 2007)* 261; Jackson, *Complicity* (n 414) 161.

[505] As noted by Gaja, 'Interpreting ILC Articles' (n 156) 11.

[506] As far as complicity in genocide is concerned, the ICJ failed to resolve the question whether the accomplice needs to share the specific wrongful intent of the perpetrator in *Genocide Convention Case* (n 194) 218 [421], stating that 'whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator'. The Swiss Federal Tribunal on the other hand found in *Spring v Swiss Confederacy* (2000) BGE 126 II 145 (Swiss Federal Tribunal) 167 [4d] that complicity (in acts of genocide) could only be established if the complicit State shared the perpetrator's subjective intent, mere knowledge not being sufficient.

[507] The ECtHR insisted on knowledge, but not wrongful intent in *Al Nashiri v Poland* (n 423) [517] and *El-Masri* (n 423) [269]. In the practical examples cited in the ILC commentary, such as the alleged supply of chemical weapons by the UK to Iraq during the Iran-Iraq War, wrongful intent appears to have been immaterial. In the latter sense also Corten and Klein, 'Limits of Complicity' in (n 459) 333; Quigley, 'Complicity' (n 474) 111, 114.

[508] In this sense Jackson, *Complicity* (n 414) 161; also in favour of a mere knowledge standard: Lowe, 'Responsibility for the Conduct of other States' (n 434) 8; Lanovoy, 'Complicity' in (n 420) 150-56; Quigley, 'Complicity' (n 474) 119.

[509] ILC, *ARS with commentaries* (n 38) 66 [4]; *Genocide Convention Case* (n 194) 223 [432].

bound by the obligation breached was introduced on the suggestion of SR Crawford.[510] It is said to flow from the general rule that 'a State is not bound by obligations of another State vis-à-vis third States'.[511] According to Crawford, if any State could be held responsible for aiding or assisting another State to breach a bilateral obligation owed to a third State, then responsibility for complicity could 'become a vehicle by which the effect of well-publicized bilateral obligations was extended to the rest of the world'.[512] The affirmation that the 'double obligation' requirement flows from the *pacta tertiis* rule has been contested on principled grounds.[513] As a matter of positive law, however, there is little that indicates that the prohibition on complicity is already so broadly defined. Article 16 ARS, which reflects custom according to the ICJ,[514] explicitly refers to the 'double obligation' requirement, and none of the cases cited by the ILC or in commentaries point in a different direction. In the context of international organizations, this means that a member State cannot be complicit in the wrongful act of an international organization if the obligation is contained in a treaty that was only ratified by the organization. For scenarios similar to the *Tin Council* or *Westland Helicopters* cases, which are often invoked in the context of member State responsibility and where compliance with purely bilateral obligations of the organization was at stake,[515] complicity is therefore not a relevant ground of member State responsibility.

3. Complicity on the basis of acts taken within the framework of international organizations

Having set out the scope of the rule prohibiting complicity in general, this section will investigate under what circumstances State conduct taken within the framework of an international organization could amount to unlawful aid and assistance in another entity's wrongful acts. Article 58 ARIO transposes the rule set out in Article 16 ARS to the context of international organizations. It provides that

---

[510] Crawford, *Second Report, Addendum* (n 414) 11 [181] et seq.
[511] ILC, *ARS with commentaries* (n 38) 66 [6]; *Vienna Convention on the Law of Treaties* (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) (Article 34-35).
[512] Crawford, *Second Report, Addendum* (n 414) 11 [181].
[513] For Jackson, the legal wrong of complicity is not contained in the primary obligation breached, but exists independently of it: Jackson, *Complicity* (n 414) 162-63 (arguing that 'a broader complicity rule would protect the international community's interest in the stability of international relations and the integrity of treaty commitments'); for a detailed discussion see Aust, *Complicity* (n 471) 250 *et seq*; Lanovoy, 'Complicity' in (n 420) 156 et seq. At odds with this approach is the fact that there are cases in which States were found to be responsible for complicity in acts that would have been wrongful for them, but not necessarily for the perpetrating State: eg *El-Masri* (n 423) 195 [517] (the US not being a contracting State of the ECHR).
[514] *Genocide Convention Case* (n 194) 217 [419]-[20].
[515] On the Tin Council and Westland Helicopter cases, which furthermore concerned private law obligations, see Sadurska and Chinkin, 'Collapse of the ITC' (n 121); Stumer, 'Member State Liability' (n 118) 558 *et seq*; also (nn 121) *et seq* and accompanying text.

> 1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) the 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.
>
> 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.[516]

Accordingly, member State conduct taken within the framework of an international organization could in principle constitute complicity in two scenarios: when it amounts to unlawful assistance in the commission of a wrongful act of another State, and when it amounts to unlawful assistance in the commission of a wrongful act by an international organization. The following three instances of member State conduct appear to be most practically relevant: participation in decision-making organs, financial contributions and the supply of material or technical support.

3.1 Participation in decision-making organs

In June 1993, in the midst of the ethnic conflicts in the former Yugoslavia, the UNSC voted on whether the arms embargo imposed by its Resolution 713 on the whole territory of the former Yugoslavia should be lifted in respect of Bosnia and Herzegovina.[517] Bosnia and Herzegovina argued that it had a right to self-defence against what it alleged to be acts of aggression attributable to Serbia and Montenegro. While the US was in favour of Bosnia's request, the UK and France opposed it, and the proposed resolution failed to secure a majority.[518] As a result, Bosnia and Herzegovina declared its intention to institute proceedings against the UK before the ICJ. It argued*, inter alia*, that the UK 'failed and refused to prevent genocide, had imposed and maintained an arms embargo in violation of Article 51 of the UN Charter and had abetted ongoing genocide by opposing the efforts of others to have the embargo lifted and that these

---

[516] ILC, *ARIO with commentaries* (n 17) Article 58. For Crawford 'there is minimal practice supporting ARIO Article 58 as a rule of customary international law. But it seems likely that such a rule should exist as a matter of principle', Crawford, *State Responsibility (2013)* (n 418) 411.

[517] On the background of the vote see Christine Gray, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Orders of Provisional Measures of 8 April 1993 and 13 September 1993' (1994) 43 ICLQ 704.

[518] ibid 706.

actions amounted to "complicity in genocide"'.[519] While the case was settled politically, Bosnia's position could draw some support from *ad hoc* Judge Elihu Lauterpacht's separate opinion to the Order of 13 September 1993 on provisional measures in the case between Bosnia and Serbia. According to Lauterpacht, by the extension of the arms embargo to Bosnia, UNSC Resolution 713 could 'be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs (...)'.[520] In general, the case raises the question of whether the exercise of a vote by a member State, either negative or positive, could ever amount to unlawful aid and assistance in an ensuing unlawful act. There are further practical examples of such allegations. Quigley notes that during the First Lebanon War, the USSR claimed that the US was complicit in Israel's alleged 'aggression' in Lebanon when it vetoed a UNSC resolution drafted by the USSR.[521] The proposed resolution would have stated that all UN member States 'should refrain from supplying Israel with any weapons and from providing it with any military aid until the full withdrawal of Israeli forces from all Lebanese territory'.[522] A third more recent example relates to the ongoing conflict in Syria. When the Arab League introduced a draft resolution to respond to the crisis in the Security Council in January 2012, the US representative urged member States to support the proposal stressing that '[w]e can stand with the people of Syria and the region or become complicit in the continuing violence there'.[523] When the draft resolution was vetoed by Russia and China, the representative of France stated that in obstructing the resolution 'in the full knowledge of the tragic consequences of their decisions', China and Russia were 'making themselves complicit in the policy of repression being implemented by the Damascus regime'.[524] While all three examples relate to alleged complicity in the unlawful acts of another State, it has

---

[519] ibid 714. Parts of Bosnia's statement of intention are reproduced in Craig Scott and others, 'A Memorial for Bosnia' (1994-1995) 16 Mich J Int'l L 12.

[520] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Order on Further Request for Indication of Provisional Measures) [1993] ICJ Rep 325 407 (Separate Opinion of Judge ad hoc Lauterpacht) 440-41 [102]. Bosnia and Herzegovina initially asked the ICJ to consider the legal effects of the arms embargo imposed by UNSC Resolution 713 in this case, but retracted the issue in 1994: Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004) 13-15.

[521] Quigley, 'Complicity' (n 474) 86.

[522] UNSC, *USSR: Revised draft resolution* (UN Doc S/15347/Rev1, 1982). Quigley seems to refer to a statement made by the representative of the USSR, Mr Ovinnikov, UNSC, *Minutes of the 2391st Meeting* (UN Doc S/PV2391, 1982) [56]: 'the responsibility of the United States for what has taken place today is clear. For each further step of the Israeli occupiers into Lebanese territory, for each Lebanese and Palestinian child who is killed, for each old person who is killed, for each woman who is killed, I say that the responsibility for all of that will be borne not only by Israel but also by the United States'.

[523] UNSC, *Minutes of the 6710th Meeting* (UN Doc S/PV6710, 2012) 13 (Mrs Clinton).

[524] UNSC, *Minutes of the 6711th Meeting* (UN Doc S/PV6711, 2012) 3 (Mr Araud).

also been suggested that the vote of a member State could give rise to complicity in the wrongful act of the international organization adopting the decision. Klein was one of the first to express the view that if a member State knowingly casts a vote that leads to the adoption of an institutional act that is in itself wrongful, the State can be considered to have provided unlawful assistance to the organization.[525]

In accordance with the constitutive elements of complicity outlined above, a first difficulty in establishing legal responsibility in any of the above-mentioned cases is the need to demonstrate that the vote in question 'materially facilitated' the commission of a wrongful act. Member States do of course collectively determine the conduct of any international organization, but a single vote would only under highly exceptional circumstances be so crucial that it could be considered to have a real impact on the commission of the wrongful act. Even in the extreme scenario of member States authorizing the provision of material support by the organization to another State with the full knowledge that it will be used for the commission of an internationally wrongful act, it is doubtful that each single vote could in itself be considered to make a 'substantial' or 'significant' contribution to the commission of that wrongful act.[526] This is particularly so because mere moral or political support falls outside the scope of the prohibition on complicity according to Article 16 ARS and Article 58 ARIO. Allegations of complicity are more likely to be successful where an individual member State has special influence over the decision of the organization, either because the size of membership is very small, because voting is weighed in favour of the State or because the State has veto power.[527] In such exceptional circumstances, it appears conceivable that a single vote would make a difference for the commission of a wrongful act by another State so that the voting State could incur responsibility for complicity in that State's wrongful act, provided that it also fulfils the requisite mental element as well as the 'double obligation' requirement.

---

[525] Klein, *Responsabilité des organisations internationales* (n 35) 469-70 and Klein, 'Attribution of Acts' in (n 245) 308; similarly Geslin, 'Réflexions' (n 24) 573; Palchetti, 'Responsabilità per il voto' (n 204) 365; Lanovoy, 'Complicity' in (n 420) 148-9.

[526] This is not to say that the State could not incur responsibility on a different ground, such an obligation to ensure respect with certain obligations or prevent the occurrence of a wrongful act or for the provision of material support.

[527] Similarly Lanovoy, 'Complicity' in (n 420) 149. On the particularities of member State conduct - such as the veto - taken in accordance with the UN Charter, see section 4. Complicity on the basis of acts taken within the framework of the UN below.

Where complicity in the wrongful act of an international organization is in question, establishing that a single vote 'materially facilitated' the act of the organization raises the same problems. It is doubtful that a single vote really 'assists' the organization in adopting a specific decision or conduct. It may be a necessary part of a decision that makes it lawful for the organization, under the organization's internal law, to act in a certain way, but it does not necessarily 'materially facilitate' the organization's act.[528] Depending on the general distribution of votes, the vote of one individual State may not have any impact at all, apart from perhaps reinforcing the legitimacy of a collective decision. In order to qualify as substantial assistance in the organization's unlawful act, Member State conduct would arguably need to go beyond the mere casting of a vote and include further elements, such as the introduction of a proposal setting out the conduct in question or the provision of information that is important for the ensuing wrongful act. In this sense, even though the requisite mental element will often be easy to establish, given the general care with which States cast votes within international organizations,[529] member State responsibility for complicity based on voting behaviour appears to be an exceptional scenario.

Even though the normal participation in decision-making processes will, for these reasons, only amount to unlawful assistance in highly exceptional circumstances, the ILC proposes to further restrict the scope of the prohibition on complicity where the 'primary' wrongful act is committed by an international organization. According to Article 58(2) ARIO, '[a]n act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State' for wrongful aid and assistance in the organization's unlawful act. Article 58(2) ARIO does not have an equivalent in Article 16 ARS. The reference to the 'rules of the organization' was not specifically included in SR Gaja's first proposal of what is today Article 58 ARIO, but was already referred to in his report.[530] Article 58(2) ARIO has been interpreted in the sense that in order to amount to unlawful assistance, a member State's conduct must go beyond the role that is attributed to it under the organization's rules, such as participating in decision-making processes, even if

---

[528] Contrary Klein, 'Attribution of Acts' in (n 245) 308, who notes that 'the vote of each member State allows the adoption of a resolution by the organization (...)'.
[529] In this sense, Klein, *Responsabilité des organisations internationales* (n 35) 470. This view however presupposes that no wrongful intent by the State is required for complicity.
[530] Gaja, *Fourth Report, Addendum* (n 446) 5 [62]; 6 (Article 25); ILC, *Report of the International Law Commission on the Work of its 58th Session* (UN Doc A/61/10, 2006) 279 [2].

that participation makes a significant contribution to the organization's wrongful act.[531] This interpretation is supported by statements of the ILC drafting committee, according to which the intention was to draw 'a basic conceptual distinction between member States acting *qua* members and member States acting in a capacity other than a member'.[532] Apart from exceptional, and rather implausible, cases such as 'vote-rigging', it is accordingly difficult to see how the conduct of a member State in decision-making organs could ever amount to unlawful assistance in a wrongful act of the organization.

As a matter of principle, it is not clear why the conduct of States *qua* members should fall outside of the scope of the prohibition on complicity. According to the definition proposed by the ILC, the 'internal rules' of an international organization include 'the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.[533] The content of many of these internal rules, in particular of the constitutive treaty, but also of resolutions adopted by certain collective organs, is determined by the member States. In accordance with the ILC's proposal, member States could in principle set up internal rules that allow them to participate in ways that would otherwise amount to unlawful assistance in the organization's wrongful acts. In other words, member States would be permitted to avoid responsibility for what would otherwise be unlawful acts by adopting the corresponding internal institutional rules. Apart from raising questions of a systemic nature,[534] this appears to be inconsistent with the *pacta tertiis* rule, according to which a third party is not affected in its rights under international law by treaties

---

[531] In this sense Palchetti, 'Responsabilità per il voto' (n 204) 363-4; Ryngaert and Buchanan, 'Member State Responsibility for the Acts of International Organizations' (n 175) 142; Oliver De Schutter, 'Human Rights and the Rise of International Organisations' in Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 87; Thomas D Grant, 'International Responsibility and the Admission of States to the United Nations' (2008-2009) 30 Mich J Int'l L 1095 1095 1146-48.

[532] ILC, *Statement of the Chairman of the Drafting Committee, 3 June 2011* (2011) 36. Similarly, SR Gaja pointed out that '[t]he influence which may amount to aid or assistance (...) has to be used by the State as a legal entity that is separate from the organization', Gaja, *Fourth Report, Addendum* (n 446) 5 [62].

[533] ILC, *ARIO with commentaries* (n 17) Article 2(b). The ILC thereby 'imported' the definition contained in VCLTIO (n 49) (Article 2(1)(j)) with minor changes. Generally on the use of the term in the context of the VCLTIO see Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 IOLR 403 and on international organizations and the law of treaties Brölmann, *Institutional Veil* (n 14).

[534] The notion of an 'institutional veil' hiding the responsibility of international organizations is particularly problematic because the responsibility of international organization is at present difficult to enforce: see Chapter 1.

concluded between other States.[535] In accordance with Article 58(2) ARIO, member States would be permitted to justify their conduct vis-à-vis third States by reference to rules by which the third State is not bound. Of course, the *pacta tertiis* rule is part of the law of treaties, while not all 'internal rules' of international organizations are of a conventional source.[536] Constitutive treaties further have a special character which is 'conventional and at the same time institutional'.[537] Some have even argued that the internal rules of international organizations, including the constitutive treaties, should be exclusively classified as 'internal constitutional law' during the life of the organization, not as part of international law.[538] However, this does not change the fact that an organization's internal rules should not have normative effect for third parties under international law. If classified as 'internal constitutional law', the internal rules of international organizations are equated with the domestic laws of States, which for the purposes of international law are considered 'mere facts'[539] without normative force. A State cannot justify a breach of its international obligations by reference to its domestic law, and neither can an international organization.[540] There is no reason why a member State should be able to justify a breach of international law - *in casu* the breach of the prohibition on complicity - by reference to the organization's 'internal constitutional law'.[541] If the 'internal rules' of an international organization are by contrast seen as 'subsystems of international law' established on the basis of an international treaty, they would be *res inter*

---

[535] Articles 34 VCLT and VCLTIO (n 49). The *pacta tertiis* rule is 'one of the fundamental legal principles of the international community composed of sovereign States' and has been affirmed in numerous international decisions: Budislav Vukas, 'Treaties, Third-Party Effect' (2011) MPEPIL [29].

[536] Institutional acts adopted by an international organization nevertheless derive their binding force from the law of treaties. As noted by G Balladore Palliere, ' Le droit interne des organisations internationales ' (1969) 127 RdC 1 15, the constituent treaty gives rise to the organization's internal legal order. Still, it is the principle of *pacta sunt servanda* 'qui continue d'être présent et de constituer le pivot autour duquel tournent toutes les obligations des Etats, tous les pouvoirs de l'organisation'.

[537] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by WHO) (Advisory Opinion) [1996] ICJ Rep 66 74-5 [19].

[538] Ahlborn, 'Internal Rules' (n 533) 417 *et seq*; this view is also defended Philippe Cahier, 'Le droit interne des organisations internationales' (1963) 67 RGDIP 563, 579. The tribunal in *Electrabel SA v Hungary* (Decision on Jurisdiction, Applicable Law, Liability) (2012) ICSID Case no ARB/07/19 30 November 2012 [4.119] *et seq* rejected such a suggestion in an investment dispute between two EU member States, finding that 'EU has to be classified first as international law'.

[539] *Upper Silesia (Merits)* (n 198) 19.

[540] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1932] PCIJ Series A/B No 44 24-5; *Elettronica Sicula SPA (ELSI)* [1989] ICJ Rep 15 51 [73]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep [88]; also ILC, *ARS with commentaries* (n 38) 38 [7] (Article 3). The ILC recognises that this principle applies to international organizations and their internal rules where they are not part of international law: ILC, *ARIO with commentaries* (n 17) 15.

[541] Similarly Ahlborn, 'Internal Rules' (n 533) 442. Ramses A Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defense Policy: A Competence-Responsibility Gap?' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union* (Hart 2013) 355 note that Article 58(2) ARIO 'could undermine the authority of the Draft Articles, as it seems to allow a 'way out'.

alios acta for any State or organization that is not a contracting party to that treaty.[542] Depending on which legal classification of the 'internal rules' one accepts, it goes either against the basic principles of the law of international responsibility or against the basic principles of the law of treaties to attribute legal effect to the internal rules of the organization in relation to third parties.

The ILC's stance can only be explained by policy reasons, in particular by the concern that extending the prohibition on complicity to conduct taken by States within decision-making organs 'could negatively affect the decision-making process in many organizations, because the risk of incurring responsibility would hamper the reaching of consensus'.[543] Such concerns also seem to underlie some of the statements made to the ILC. UNESCO, for example, was of the view that

> the international organizations to which the present draft principles would apply do have an international legal personality and, therefore, they are subjects which are in principle autonomous from their member States. Given this premise, it must be made clear that all actions taken by member States within the context of the constitutional framework of the organization (in terms of their contribution to their organization's decisions to act or not to act) would not entail their responsibility, unless a specific provision to this end is provided under its constitutive treaty.[544]

Conceptual inconsistencies aside, it is doubtful that Article 58(2) ARIO can actually advance the stated aim of safeguarding the autonomy of international organizations in their decision-making. For the exclusion clause of Article 58(2) ARIO clearly does not apply to cases in which States are alleged to be

---

[542] Articles 34 VCLT and VCLTIO (n 49). Interestingly, the ILC recognized this, noting that '[w]hen the rules of the organization are international law, they may affect the characterisation of an act as internationally wrongful under international law. However, while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members': ILC, *ARIO with commentaries* (n 17) 15 [3]; see also Mirka Möldner, 'Responsibility of International Organizations –Introducing the ILC's DARIO' (2012) 16 Max Planck Yb of UN Law 281 319. The provision on *lex specialis* (Article 64 ARIO), according to which the general rules of responsibility only apply to the extent that the questions regulated therein are not governed by special rules of international law, only refers to special rules that apply 'as between the parties' bound by these special rules: ILC, *ARS with commentaries* (n 38) 140; ILC, *ARIO with commentaries* (n 17) 102 [7]. Accordingly, they would not be opposable to third parties. This is acknowledged in ILC, *ARIO with commentaries* 15 [3]; similarly Arnold N Pronto, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Nijhoff 2013) 156.

[543] Gaja, *Fourth Report, Addendum* (n 446) 13 [93]. This concern appears to be shared by Crawford, *State Responsibility (2013)* (n 418) 412, who notes that 'a broader definition of aid and assistance in the present context would risk a wave of abstentions within the voting patterns of international organizations' and by José Manuel Cortés Martin, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Institute Andaluz de Administración Pública 2008) 301, 306-07, for whom this would be tantamount to denying the 'separate will' of the organization. See also IDI, 'Provisional' (n 123) 388 [37]: '[w]here the organization has a *volonté distincte* the continuing role of states as members *qua* organs should be regarded as neutral as regards the issue of members' liability for the acts of the international organization'.

[544] ILC, Comments 2006, Addendum (n 214) 26.

complicit, on the basis of their votes, in the wrongful act of another State, as opposed to the international organization.[545] As the examples cited above illustrate, the former scenario appears to be far more frequent in practice.[546] In this sense, if there is indeed a risk that States act overly careful within decision-making organs because of the possibility of incurring responsibility for complicity, this cannot be adequately addressed by Article 58(2) ARIO alone. Given the restrictive scope of the prohibition on complicity, which not only requires that the assistance materially facilitates the wrongful act, but also that the complicit State has 'full knowledge' of the circumstances, responsibility for complicity by reason of a vote is in any case highly exceptional. The concern that States could be inhibited from participating in decision-making organs for that reason should not be overstated, and does not justify the proposal of a rule which is conceptually inconsistent.

In accordance with the distinction drawn in the beginning of this chapter, the scenario of responsibility for complicity in another entity's wrongful act because of the casting of a vote should be distinguished from cases in which a State is under a 'free-standing' international obligation to adopt a certain conduct within a decision-making organ. In the latter case, the State's responsibility for non-compliance would not be 'derivative', but arises directly from the breach of the obligation in question. It is accordingly immaterial whether or not such conduct was taken 'in accordance with the rules of the organization'. As the commentary on Article 58 ARIO points out, '[t]he fact that a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations'.[547] For example, Greece was under the obligation under Article 11 of the Interim Accord concluded with Macedonia not to oppose Macedonia's admission to international organizations of which it was a member, and was held responsible for its breach thereof.[548] Obligations to

---

[545] ILC, *ARIO with commentaries* (n 17) Article 58(1).
[546] The ILC does not cite any practice in support of Article 58 ARIO, but notes that 'it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State', ibid 91 [3].
[547] ibid 91 [5].
[548] *FYROM v Greece* (n 203) [22], [170]. Another example of where a positive obligation 'extended' to the conduct of States within a decision-making organ is cited in Palchetti, 'Responsabilità per il voto' (n 204) 359. In *Gasparini* (n 141), the ECtHR found that the two respondent States were justified in assuming, at the moment when they

prevent certain harmful conduct may be particularly relevant in this context. Palchetti suggests that given the broad construction of the duty to prevent genocide upheld by the ICJ,[549] a member State that has knowledge of the risk of the commission of genocide could possibly incur responsibility for failure to prevent genocide if it effectively opposes the taking of preventative measures within a decision-making organ.[550] According to the Court, one relevant parameter for assessing whether a State has duly discharged its obligation to prevent genocide is indeed 'the capacity to influence effectively the action of persons likely to commit, or already committing, genocide', which includes 'legal criteria', since 'a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide'.[551] Based on these elements, the argument has been made that permanent members of the UNSC have a special capacity to influence outcomes which would need to be taken into account when assessing whether their obligation to prevent genocide was duly discharged. According to Zimmermann, the duty to prevent genocide

> entails an obligation for permanent members [of the Security Council] (...) only to veto a resolution aimed at preventing genocide (...) if they believe that any such resolution is not able to pursue that goal, but not for any other political reasons given that they would thereby violate their obligation to prevent genocide and war crimes.[552]

A similar scenario was discussed in a recent case concerning Germany's participation in NATO's Operation Allied Force in 1999, where claimants argued that Germany had acted unlawfully by not objecting, within NATO's decision-making organ, to the inclusion of the partly civilian-used bridge of Varvarin on a list of potential targets. The German Constitutional Court rejected the claims as unfounded, but stated that '[t]the preparation of military target lists and the non invocation of a veto right against the

---

approved the NATO staff regulations within the North Atlantic Council, that NATO's internal review mechanism would satisfy the requirements of due process.

[549] *Genocide Convention Case* (n 194) 221 [430] ('the obligation of States parties is (...) to employ all means reasonably available to them, so as to prevent genocide so far as possible').

[550] Palchetti, 'Responsabilità per il voto' (n 204) 360-61. The author however also concedes that the obligation to prevent would not automatically translate into an obligation to vote in favour of any measure designed to address the harm. Similarly Frederik Naert, 'Binding International Organisations to Member State Treaties' in Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 164.

[551] *Genocide Convention Case* (n 194) 221 [430].

[552] Andreas Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 644 (with the same conclusion in relation to the duty to ensure respect for the four Geneva Conventions of 1949). A similar view is defended by Anne Peters, 'The Security Council's Responsibility to Protect' 8 IOLR 15 48, albeit on the hypothetical premise that the 'responsibility to protect' translates into substantive obligations under international law.

inclusion of an object on those lists as a legitimate military target are not political decisions, which would be beyond judicial control'.[553] The CESCR expressed the view that States that are both parties to the Covenant and members of international financial institutions must 'take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures',[554] which would presumably encompass their conduct within decision-making organs of international financial institutions. Whether or not a member State would incur responsibility on the basis of its vote under such circumstances depends on the particularities of the case and on construction of the primary norm in question.

3.2 Financial contributions

Even though some international organizations have alternative sources of income as well, most international organizations rely heavily on member State contributions.[555] It has been suggested that funding provided by member States to an international organization could amount to unlawful aid and assistance.[556] On closer inspection, it is useful to distinguish between the situation where a member State 'facilitates' with its financial contribution the unlawful acts of an international organization, and the situation in which the financial contributions are 'channelled' through the organization to support the unlawful activities of other States. In the former case, Article 58(2) ARIO appears to exclude contributions that are due 'in accordance with the rules of the organization', such as regular membership

---

[553] *Case 2 BvR 2660/06* (n 143) [55]; English translation by Klaus Ferdinand Gärditz, 'Bridge of Varavarin' (2014) 108 AJIL 86 90.

[554] CESCR 'General Comment No 19' (2008) UN Doc E/C.12/GC/19 [58]. See also CESCR 'General Comment No 18' (2005) UN Doc E/C.12/GC/18 [30]; CESCR 'General Comment No 15' (2002) UN Doc E/C.12/2002/11 [36]; and CESCR 'General Comment No 14' (2000) UN Doc E/C.12/2000/4 [39]. Instruments cited by De Schutter, 'Sliding Scales' in 88. The Committee has also stressed member State obligations in its Concluding Observations on reports submitted by member States: eg 'Concluding Observations of the Committee on Economic, Social and Cultural Rights - Belgium' (2000) UN Doc E/C.12/1/Add.54 [31]; ECOSOC, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights - Italy' (2000)UN Doc E/C.12/1/Add.43 [20] (Italy). Critically, François Gianviti, 'Economic, Social, and Cultural Rights and the International Monetary Fund' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 124-26 (former General Counsel of the IMF).

[555] Not all funding of all international organizations is contributed by member States. The World Bank and regional development banks for example earn money through investments and through financial services rendered to members; other organizations including the UN have an internal system of taxation: see Schermers and Blokker, *International Institutional Law* (n 17) 679-70 [1051; 687 [1071. Still, '[t]he vast majority of international organizations rely for their funds on (...) (compulsory) contributions levied on members, gifts or voluntary contributions, and retributions for services rendered': ibid 630 [965].

[556] Ryngaert and Buchanan, 'Member State Responsibility for the Acts of International Organizations' (n 175) 143 are of the view that 'a state's financial backing of an [International Financial Institution]'s activities which result in human rights violations with knowledge of the circumstances surrounding such conduct could constitute aid or assistance'.

contributions.[557] By contrast, voluntary or extra-budgetary contributions would presumably not be excluded.[558] This already limits the practical relevance of the prohibition on complicity considerably and is, as submitted above, conceptually inconsistent. In addition, an injured party needs to establish that the Member State furnished the financial assistance intentionally or at least with the 'full knowledge' that the organization would commit an unlawful act. This condition is most likely to be met either if the wrongful act of the organization is already occurring, or if the decision to commit what amounts to an internationally wrongful act has already been adopted by the organization. Practice, or rather the absence thereof, suggests that this is still a rare scenario.[559]

The scenario of a member State's funds being channelled through an international organization to another State, where they facilitate the commission of wrongful acts by that State, appears to be more likely. During the debates in the ILC, the potential relevance of the prohibition on complicity for international financial institutions was a recurrent topic. SR Gaja noted in his third report that 'an international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of human rights of certain affected individuals'.[560] The proposal was met with considerable criticism by potentially concerned organizations.[561] The IMF was generally critical of the transposition of Article 16 ARS and submitted that '[g]iven the fungible nature of financial assistance', only 'assistance that is earmarked for the wrongful conduct' could possibly give rise to an organization's responsibility for assistance in an unlawful act.[562] The IMF provides loans to member States in order to help them 'correct maladjustments in their balance of payments'.[563] Since 'IMF financing is not targeted to particular conduct', it would according to this view be unlikely to fall within the scope of the

---

[557] Gaja, *Seventh Report* (n 232) 25 [74], where the SR notes that Article 58(2) ARIO distinguishes complicity from 'mere involvement of a member State in the day-to-day functioning of an international organization', which, as suggested by one State, could include 'a financial contribution to the annual budget of the organization' (that State being Jordan, statement cited in UNGA, *6th Committee - Summary Record of the 16th Meeting* (UN Doc A/C6/61/SR16, 2006) [4]).

[558] In this sense, ILC, Comments 2006, Addendum (n 214) 23 (ILO) and ILC, Comments 2011 (n 225) 35-36 [2]-[3] (ILO).

[559] Wessel and den Hertog, 'Competence-Responsibility Gap' in (n 541) 354 argue that due to the fact that EU Common Security and Defense Policy missions are funded by member States, member State complicity in the organization's wrongful acts would be a possible scenario, albeit without reference to a specific case.

[560] Gaja, *Third Report* (n 259) 11 [28].

[561] For an overview of the first reactions see Reinisch, 'Aid or Assistance' (n 503).

[562] ILC, 'Comments International Organizations' (2007) UN Doc A/CN.4/582 10.

[563] Article 1(v) *Articles of Agreement of the International Monetary Fund* (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39 .

prohibition.[564] The World Bank, which does support specific projects through the IBRD, expressed concern that the prohibition on complicity might 'create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients'.[565] It suggested the inclusion of a clarification that 'organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong'.[566] General Counsels of both institutions have argued in the past that international financial institutions should not be required to take into account considerations that do not find a basis in their constitutive instruments, such as considerations relating to the political situation in the receiving State.[567]

Despite the opposition of certain organizations, the ILC decided to transpose Article 16 ARS *mutatis mutandis*.[568] As a matter of principle, this is no doubt justified. It is generally agreed that obligations under customary international organization are binding on international organizations if they're addressed to them.[569] Nothing in the prohibition of complicity suggests that this is an international obligation addressed only to States, but not to international organizations. Whether or not an international organization must comply with the prohibition of complicity according to its constitutive instrument should further not be decisive, as non-compliance with general international law cannot be justified by reference to the terms of

---

[564] ILC, Comments 2007 (n 562) 10.
[565] ILC, Comments 2011 (n 225) 27 [1].
[566] ibid 28 [2].
[567] In this sense the (then) General Counsel of the IMF, Gianviti, 'Economic, Social, and Cultural Rights and the International Monetary Fund' in (n 554) 129, who argued (in private capacity) that 'the Fund has no general mandate to ensure that its members abide by their international obligations. The extent to which the Fund may consider the international undertakings of its members is defined by the fund's own purposes'. Similarly the former General Counsel of the World Bank, Ibrahim F.I. Shihata, 'Human Rights, Development, and International Financial Institutions' (1992-93) 8 Am U J Int'l L&Pol 27 34-35, who argued that human rights considerations could be taken into account to the extent that they had broader economic implications. An even more restrictive view was defended by the IBRD's General Counsel in 1966, in response to UNGA Resolutions appealing to the Bank to stop lending to Portugal and South Africa. The General Council indicated that in accordance with Art IV Section 10 of the Bank's Articles of Agreement, decisions had to be taken based on economic considerations only, and that the Bank was prohibited from interfering in the political affairs of any member: statement reproduced Marjorie M. Whiteman, *Digest of International Law*, vol 13 (US Dept. of State Publication 1968) 727.
[568] ILC, *ARIO with commentaries* (n 17) Article 14.
[569] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 89-90 [37]. While most commentators agree that international organizations are bound by customary international law, they do not agree on why this is the case. For Verdirame, this follows from the objective legal personality of international organizations: Verdirame, *UN and HR* (n 21) 71, 202. Janik on the other hand argues that international organizations must have participated, in similar ways as States, in the formation of customary international law: Cornelia Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (Mohr Siebeck 2012) 442; still others are of the view that obligations under customary international law are generally applicable and binding on every entity that is capable of bearing them: Clapham, *Non-state Actors* (n 455) 87.

their constitutive instruments.[570] In practice, the lawfulness of lending policies of international financial institutions has indeed been challenged on the basis of alleged misconduct of the receiving State. After 1965, the UN General Assembly repeatedly requested the World Bank and the IMF to refrain from providing financial, economic or technical assistance to South Africa and Portugal because of their records of human rights violations.[571] More recently, the UN made the assistance of MONUC to Congolese troops conditional upon their compliance with human rights and humanitarian law.[572] The internal UN memorandum specifically highlighted that 'MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law'.[573] Support was withdrawn from a unit that was strongly suspected of being involved in abuses.[574] In the World Bank's practice, funding was denied in at least one case because there was a risk that the project would have contributed to involuntary resettlements.[575] According to Article 14 ARIO, international organizations are therefore rightly obliged to refrain from the provision of financial means 'for the purpose' of committing internationally wrongful acts, or, arguably, also if they have 'full knowledge' of plans of the receiving State to use the funds in unlawful ways. At the same time, it is clear that a mere 'risk' of this being the case would not be sufficient, as knowledge must be actual rather than

---

[570] ILC, *ARIO with commentaries* (n 17) 15 [2]-[3]; Pierre Klein, 'Les institutions financières internationales et les droits de la personne' (1999) 32 RBDI 97 110 *et seq* (according to whom the institutions are even bound by a duty of 'vigilence').

[571] UNGA Res 2105(XX) (1965) UN Doc A/RES/2105(XX) [11]; UNGA Res 2107(XX) (1965) UN Doc A/RES/2107(XX) [9]; UNGA Res 2184(XXI) (1966) UN Doc A/RES/2184(XXI) [9]. In UNGA Res 37/2 (1982) UN Doc A/RES/37/2 [2]-[3], the UNGA not only requested the IMF 'to refrain from granting any credits or other assistance to South Africa', but also urged States Members of the IMF 'to take appropriate action towards that end'. Generally on the dispute, Samuel A Bleicher, 'UN v IBRD: A Dilemma of Functionalism' (1970) 24 International Organization 31 and Klein, 'Les institutions financières internationales et les droits de la personne'.

[572] MONUC's policy paper 'specifies that MONUC will not participate in or support operations with [Forces armées de la République démocratique du Congo] units if there are substantial grounds for believing that there is a real risk that such units will violate international humanitarian, human rights or refugee law in the course of the operation. MONUC will also participate in or support only those operations that fully comply with international humanitarian, human rights and refugee law, and will participate only in operations that are jointly planned', UNSC, '30th Report of the Secretary-General MONUC' (2009) UN Doc S/2009/623 4[12]. As the UN's former legal advisor, Patricia O'Brien, pointed out, '(t)hat policy was now applied wherever the United Nations was considering providing support to non-United Nations security forces, so as to avoid its being implicated, or perceived to be implicated, in aiding or assisting the commission of a wrongful act', UNGA, 'Sixth Committee Summary Record 18th Meeting' (2011) UN Doc A/C.6/66/SR.18 6 [28].

[573] The memorandum was 'leaked' to the New York Times and extracts of it were included in Gaja, *Eighth Report* (n 159)17 [47].

[574] UNSG Report MONUC (n 572) [2].

[575] See World Bank Inspection Panel, *China - Gansu and Inner Mongolia Poverty Reduction Project : Qinghai Component,* Inspection Panel Investigation Report of 28 April 2000, following which the Board of Executive Directors voted to deny financing for the Qinghai component of the project: Sean D Murphy, *United States Practice in International Law. Vol 1: 1999-2001* (CUP 2002) 209-10.

potential.[576] Furthermore, because of the 'double obligation' requirement, mainly 'primary' wrongful acts consisting of non-compliance with customary international law appear to be practically relevant, given that international organizations are themselves usually not parties to multilateral conventions.[577] International organization can incur responsibility for complicity in another entity's wrongful acts, but only under the same restrictive conditions as a State.

As far as the position of member States is concerned, practice indicates that they take into account the purposes for which their funds will eventually be used when voting within decision-making organs of international financial institutions. The US introduced legislation in 1977 according to which it will use its 'voice and vote' in a number of international financial institutions to 'advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in (...) a pattern of gross violations of internationally recognized human rights (...)'.[578] At the same time, there is clearly no prohibition of 'complicity in complicity': a State would not incur responsibility simply for enabling an international organization to assist a State in the commission of a wrongful act.[579] The State would only incur responsibility for complicity if its own contribution to the wrongful act of that State fulfils the criteria of Article 16 ARS. Given the general difficulties of enforcing the responsibility of international organizations, combined with the fact that international organizations are not necessarily bound by the same obligations as States, it could accordingly be argued that member States can circumvent the prohibition on complicity by channelling funding through an international organization. This concern might be warranted if indirect assistance, thus assistance provided through an intermediary, were excluded from the scope of the prohibition. As submitted above, it should not. It is indeed difficult to see why a State should be permitted to fund the unlawful activities of another State simply because the

---

[576] ILC, *ARIO with commentaries* (n 17) Article 14(a) requires that an organization provide aid or assistance 'with knowledge of the circumstances of the internationally wrongful act'.
[577] ibid Article 14(b). The IMF noted in this context that 'States and international organizations seldom have identical or even similar obligations', which would be problematic in light of the 'double obligation' requirement, ILC, Comments 2005 (n 41) 5.
[578] 22 US Code § 262d - *Human rights and US assistance policies with international financial institutions*. This goes beyond the obligation of UN member States to carry out decisions of the UNSC for the maintenance of international peace and security 'directly and through their action in the appropriate international agencies of which they are members' (Article 48(2) UNC); which was already recognized as applying to the IMF in 1945: Whiteman, *Digest* (n 567) 368.
[579] ILC, *ARS with commentaries* (n 38) Articles 16 and 2; respectively, ILC, *ARIO with commentaries* (n 17) Articles 58 and 4.

money is transmitted through a third party, if the first State has 'full knowledge' that the funds are to be used to facilitate an unlawful act.[580] The same principle should apply in the context of international organizations: if a member State provides funding to an international organization with the knowledge that it will eventually be used for unlawful purposes in a third State, it should incur responsibility for complicity.

As far as the mental element of complicity is concerned, a member State may be aware of the fact that its financial contribution will be used for the commission of a wrongful act in the receiving State and oppose the project within the organization's decision-making organ for that reason. Yet, it may be outvoted and bound, under the organization's rules, to comply with the collective decision and provide a mandatory contribution.[581] Whether a member State would incur responsibility for aid and assistance under these circumstances depends on the interpretation of the subjective element. Clearly, such a State would not provide funding for the purpose of assisting the wrongful act. In accordance with the view defended above, the State should nevertheless incur responsibility if it has 'full knowledge' that its contribution will be used to facilitate the commission of a wrongful act. Furthermore, it is not decisive that the Member State was bound to make the contribution in accordance with the rules of the organization: Article 58(2) ARIO only applies to instances of complicity in the wrongful act of the international organization, not of another State.

3.3 Technical or material support for collective operations

A member State may further incur responsibility for complicity on the basis of the provision of technical or material support for an operation carried out under the auspices of an international organization.[582] Complicity in the wrongful acts of an international organization is a particularly relevant scenario where,

---

[580] Aust and Nolte accept that an export guarantee provided to private corporations could fulfil the required material element for assistance, if it facilitates the commission of a wrongful act by the third State: Nolte and Aust, 'Equivocal Helpers' (n 476) 11.

[581] Whether or not a non-consenting or abstaining member is bound by the collective decision depends of course on the organization's internal rules. Article 31(1) *Consolidated Version of the Treaty on European Union* [2016] OJ C 202 (TEU) eg provides that Council decisions must be taken unanimously, but that an abstaining State may make a formal declaration, which results in it not being obliged to apply the decision.

[582] Naturally, the same is true for a non-member State that aids or assists a unlawful act of an international organization: Article 58(1) ARIO. The scenario of complicity of a host State in unlawful acts of a UN peace-keeping operation is envisaged by Amrallah, 'International Responsibility' (n 351) 69.

in accordance with the rules on attribution discussed in Chapter 2, conduct is exclusively attributable to an international organization. Depending on the interpretation one adopts, this would be the case where the personnel carrying out the wrongful conduct are organs or agents of the organization, but not of the States, or indeed where the State places its own organ at the disposal of an international organization without retaining effective control over its conduct.[583] The wrongful act would accordingly give rise to the exclusive 'primary' responsibility of the organization, opening up the question of a possible 'derivative' responsibility for aid and assistance of its members. As of today, few international organizations have the power to carry out operational activities under their exclusive control. Still, there are practical examples including UN peacekeeping operations and EU Common Security and Defence Policy (CSDP) operations where such exclusive 'primary responsibility' of the organization is at least arguable.[584]

Assuming that the wrongful conduct is indeed exclusively attributable to the organization, the responsibility of member States could only be established on some other basis. Complicity appears to be a possible scenario: the EU does not itself recruit force members, but relies on personnel made available by members and third States.[585] CSDP operations are financed by all EU member States collectively, unless a member State has made a formal declaration and abstained from the vote authorizing the mission.[586] Responsibility for the provision of logistic resources to support their forces and for the organization of means of transportation also rests with the troop-contributing States.[587] As Sari and Wessel have noted, 'the EU depends completely on the support of its Member States and third parties to conduct military

---

[583] On the attribution conduct to the State of organs placed at the disposal of an international organization: see (n 357) *et seq* and accompanying text.

[584] In this sense the UN itself: UNSG Report on the Financing of Peacekeeping (n 74) [17]-[18]; ILC, Comments 2011, Addendum(n 225) 10 *et seq*; also Amrallah, 'International Responsibility' (n 351) 65-66. Naert concludes that the EU exercises 'effective control' during CSDP operations, even though for him it does not necessarily follow that conduct would be attributed exclusively to the EU: Naert, 'The International Responsibility of the European Union in the Context of its CSDP Opertions' in (n 286) 335; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 515-16. Aurel Sari and Ramses A Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013) 140 submit that EU military operations should be seen as *de facto* organs of the EU whose conduct is presumed to be 'attributable to the international organization rather than to contributing states'.

[585] Sari and Wessel, 'EU Military Operations' in (n 584) 131.

[586] TEU (n 581).Articles 41(2) and 31(1).

[587] European External Actor Service, *EU Concept for Logistic Support for EU-led Military Operations* (Doc No EUMS 3853/11, 2011) [13], [72]

missions'.[588] The UN equally relies on troop-contributing States. Costs for the financing of peacekeeping operations are borne collectively by all member States.[589]

While such support could undoubtedly 'materially facilitate' the commission of unlawful acts in the course of the military operation, responsibility for complicity further requires that the subjective element be fulfilled. Unlawful acts that were taken *ultra vires* by force members, thus either contrary to or without official instructions, would most likely not be taken with the 'full knowledge' of member States, and much less be purposefully supported by them. Given the strict subjective element of complicity, neither would damage unintentionally caused during an operation give rise to a supporting State's responsibility for complicity. By contrast, where member States decide on mission objectives that are unlawful, or where they support an operation even though unlawful acts are known to be committed, they should incur responsibility for complicity if they support its implementation materially. This should be the case irrespective of whether or not they acted in accordance with the rules of the organization. As Brownlie has pointed out, 'it cannot be reasonable to create a license to harm the interests of third States by creating an international organization'.[590] Yet, this would precisely be the effect of excluding all member State acts 'done in accordance with the rules of the organization' from the scope of the prohibition on complicity. If, by contrast, member States can be held responsible for complicity, they must ensure that not only their conduct complies with international law, but also the conduct of partner States and the organization through which they cooperate. This is likely to act as an important constraint that prevents States from using international organizations to further activities they themselves could not lawfully engage in.

4. Complicity on the basis of acts taken within the framework of the UN

One of the general difficulties encountered by the ILC in its work on the ARIO was the great variety of

[588] Sari and Wessel, 'EU Military Operations' in 138.
[589] Article 17(2) UNC (n 44); *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151 . Expenses do not fall within the regular budget, and assessment rates for the financing of peacekeeping operations are based on an adjusted scale of assessments, with permanent members of the UNSC being assessed at a higher rate: UNGA Res 55/235 (2001) UN Doc A/RES/55/235 [4]-[5].
[590] Ian Brownlie, 'The Responsibility of States for the Acts of International Organizations' in Ragazzi (ed), *Responsibility* (2005) 359.

international organizations.[591] It is evident that an international organization such as, for example, UNIDROIT, is unlikely to ever incur responsibility for complicity in another's internationally wrongful act, being dedicated primarily to the harmonization of national private law.[592] By contrast, as seen above, the prohibition on complicity is potentially relevant for international financial institutions, as well as for organizations engaged in operational activities. The ILC started from the premise that despite the obvious factual differences among international organizations, they are all subject to the same legal framework governing their responsibility.[593] However, as far as the responsibility of member States for their conduct taken within the framework of an international organization is concerned, this may not necessarily be true. The UN holds a special position in this regard due to Article 103 of its Charter, which provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[594]

In accordance with Article 103 UNC, conflicting obligations are not invalidated, but they are 'suspended' so that the Member State must not comply with them.[595] Importantly for the purposes of this chapter, non-compliance with the conflicting obligation does not give rise to international responsibility.[596] Naturally, this can have an incidence on the responsibility of member States for non-compliance with their own international obligations, but also on their potential responsibility for complicity. The special legal position of the UN Charter is reiterated in both sets of ILC draft articles on international responsibility, which are 'without prejudice to the Charter of the United Nations'.[597] The draft articles are 'in all respects to be interpreted in conformity with the Charter'.[598] As Gaja notes, this 'rather cryptic

---

[591] Gaja, *Eighth Report* (n 159) 5 [4]; also Alvarez, 'International Organizations: Accountability or Responsibility?' in (n 10) and the different interventions in ASIL Panel, 'The Roles and Responsibilities of International Organizations' (2011) 105 ASIL Proceedings 343.
[592] ILC, Comments 2011 (n 225) 13-14 (comments UNIDROIT).
[593] ILC, *ARIO with commentaries* (n 17) Articles 1-2.
[594] UNC (n 44) Article 103.
[595] Zemanek, 'Foundations' (n 24) 230; ILC, *Conclusions of the Work of the Study Group on the Fragmentation of International Law* (ILC Yb 2006 Vol II(2), 2006) [333]-[34]. This was also acknowledged by Baroness Hale in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 [126], who noted that a right conflicting with an obligation imposed by the UNSC 'is qualified but not displaced'.
[596] Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009-2010) 20 Duke J Comp & Int'l L 69 77.
[597] ILC, *ARS with commentaries* (n 38) Article 59; ILC, *ARIO with commentaries* (n 17) Article 67.
[598] ILC, *ARS with commentaries* (n 38) 143 [2].

provision is basically intended to avoid interferences by the law on State responsibility with the functions that UN organs exercise for maintaining peace'.[599] This leads to the question whether acts of UN member States that find a legal basis in the Charter are generally exempt from the prohibition on complicity.[600] The question is of considerable importance since it does not only affect the conduct of member States taken within the framework of the UN, but might also have implications for their conduct within other international organizations. For example, when acting within the framework of a regional defence organization, a member State's responsibility for complicity might be precluded if it is under an obligation under the UN Charter to engage in what would otherwise be unlawful assistance in a wrongful act. In order to assess the impact of Article 103 UNC on the prohibition on complicity in the context of international organizations, three sub-questions will be distinguished: first, whether there are obligations under the Charter that could possibly conflict with the prohibition on complicity; and second, whether obligations under the Charter would prevail over the prohibition on complicity in the event of a conflict even though the latter reflects customary international law. Third, and most importantly, it must be established how a 'conflict' between two obligations should be defined in order to better understand under what circumstances States are dispensed of complying with the prohibition of complicity.

4.1 Obligations under the Charter

There are a number 'obligations under the Charter' in the sense of Article 103 UNC that could hypothetically enter into conflict with the prohibition on complicity. One potentially relevant obligation flows from Article 17(2) of the Charter, namely the duty of member States to bear the 'expenses of the Organization (...) as apportioned by the General Assembly'.[601] As the ICJ has confirmed in the *Certain Expenses* advisory opinion, this obligation covers all expenses of the UN relating to the 'purposes of the United Nations', which are broadly defined in Article 1 UNC.[602] Whether the organ authorizing the expense was competent to do so in accordance with the Charter, or whether the expense was 'irregular as

---

[599] Giorgio Gaja, 'Comment: The Impact of Security Council Resolutions on State Responsibility' in Georg Nolte (ed), *Peace through International Law* (2009) 54.
[600] This appears to have been the understanding of some of the State representatives in the Sixth Committee - for example, the Austrian representative was concerned that the prohibition on complicity would 'provide sending States with reason and justification to interfere with the command structures' of the UN, UNGA Sixth Committee, *6th Committee, 61st session, 13th meeting* 8 [39].
[601] UNC (n 44) Article 17(2).
[602] *Certain Expenses* (n 589) 167-68.

a matter of th[e] internal structure', is not decisive.[603] If it is admitted that the UN can, in principle, commit an unlawful act while acting within its 'purposes' (*intra vires*),[604] then it appears that member States would be required to bear the expenses of such an unlawful expense in accordance with Article 17(2) UNC. For example, if a peacekeeping operation were entrusted with enforcement tasks in the absence of a UNSC authorization or the consent of the concerned State, an arguable case could be made that its use of force would be contrary to the prohibition of the use of force, but it would not necessarily be *ultra vires* for the organization.[605] If budgeting was done before the commission of the unlawful act and with 'full knowledge' of the member States, it is conceivable that the provision of funding could fall within the scope of the prohibition on complicity.

According to Article 25 UNC, member States further 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.[606] As the ICJ confirmed in the *Lockerbie* case, the effect of Article 103 UNC extends to obligations flowing from binding decisions of the Security Council;[607] at least if these obligations are 'in accordance with the Charter'.[608] If it has established the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council may further, under Article 41 UNC, impose obligations on members of a non-military character to maintain or restore international peace and security. Such obligations may include the taking of economic sanctions against a State,[609] the duty to cooperate with a UN interim administration,[610] the extradition of suspected

---

[603] There is a presumption that the organization acted *intra vires*: ibid 168.
[604] In this sense already Elihu Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations' in *Essays in Honour of Lord McNair* (Stevens & Sons 1965).
[605] As the Court noted in *Certain Expenses* (n 589) 163, 'it is the Security Council which, exclusively, may order coercive action'. The Court found that UNEF did not amount to an 'enforcement action' because the Egyptian government had given its consent; but see also the Dissenting Opinion of Judge Koretsky at 257-59 challenging that view.
[606] UNC (n 44)Article 25.
[607] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v USA)* (Order of 14 April 1992) [1992] ICJ Rep 114 126 [42]; also Zemanek, 'Foundations' (n 24) 230; Rudolf Bernhardt, 'Art. 103' in Bruno Simma (ed), *The Charter of the United Nations* (2nd edn, OUP 2002) 1295 [9], 1300 [27]-[30] (with practical examples supporting this interpretation), *contra Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v the USA)* (Preliminary Objections) [1998] ICJ Rep 115 152 (Separate Opinion Judge Rezek) 152 [2].
[608] The latter qualification is added by Derek W. Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 EJIL 89 92; Derek W. Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in Hazel Fox (ed), *The Changing Constitution of the United Nations* (BIICL 1997) 81.
[609] As eg in UNSC Res 661 (6 August 1990) UN Doc S/RES/661 [3]-[4] (Iraq).
[610] As eg in UNSC Res 1244 (n 91) (UNMIK).

terrorists[611] or the implementation of sanctions against individuals.[612] The UNSC may also delegate its power to take binding decisions to a subsidiary organ if this is a measure that is 'necessary for the maintenance of international peace and security'.[613] It has done so in relation to the ICTY and the ICTR, which are both subsidiary organs of the UNSC with the power to impose binding decisions on member States relating to cooperation and judicial assistance.[614] Such decisions can include 'the identification and location of persons; (...) the taking of testimony and the production of evidence; (...) the service of documents; the arrest of detention of persons; (...) the surrender or the transfer of the accused to the International Tribunal'.[615] The effect of Article 103 UNC also covers obligations arising from binding resolutions adopted by UN organs other than the SC, such as possible obligations of member States under staff regulations adopted under the UNGA's authority.[616] The obligation of States parties to a dispute before the ICJ to comply with decisions of the Court also flows directly from the Charter.[617] It is conceivable that a binding decision of a UN organ could in exceptional cases impose an obligation on member States that conflicts with the prohibition on complicity. For example, a number of individuals have (unsuccessfully) sought to challenge their extradition to either the ICTR or the ICTY claiming that the tribunal did not fully comply with certain guarantees of fair trial.[618] If a tribunal, or a third State to whom extradition is requested, were indeed known to be engaging in systematic violations of due process

---

[611] As eg in UNSC Res 748 (31 March 1992) UN Doc S/RES/748 (Libya).

[612] As eg in UNSC Res 1267 (n 101) and UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333 (Taliban, Usama bin Laden, Al-Qaida).

[613] Sarooshi, *UN and Collective Security* (n 278) 107-09. The UNSC also delegated such powers to the UN High Representative for Bosnia and Herzegovina: UNSC Res 1722 (21 November 2006) UN Doc S/RES/1722 [4] and *Milorad Bilbija* (n 148) [59]-[63].

[614] Sarooshi, *UN and Collective Security* (n 278) 107.

[615] As in UNSC Res 827 (25 May 1993) UN Doc S/RES/827 Article 29. On the binding force of such decisions see also *Prosecutor v Blaskic* (Judgment on the Request for Review of Decision of July 18) IT-95-14-AR108bis (29 October 1997) [26]; cited by Sarooshi, *UN and Collective Security* 108.

[616] Bernhardt, 'Art. 103' in (n 607) 1296 [9]; ILC, *Fragmentation of International Law - Report of the Study Group, finalized by M Koskenniemi* (UN Doc A/CN4/L682, 2006) 168-69 [331]; Johann Ruben Leiæ and Andreas Paulus, 'Art. 103' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, OUP 2012) 2124 [39]. Non-binding resolutions of any UN organ are not covered by Article 103 UNC, as they cannot give rise to binding obligations: Robert Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations by the Security Council?' (2004) 64 ZaöRV 21 31.

[617] UNC (n 44) Article 94(1).

[618] See eg *X c Office fédéral de la police* (1997) BGE 123 II 175 (Swiss Federal Tribunal) 186-88 [7b] (in which the tribunal found that the ICTR could, in accordance with its statute, be presumed to comply with rights of due process); similarly *Elizaphan Ntakirutimana v Janet Reno Attorney General of the US* (1999) 184 F3d 419 (US Court of Appeals, 5th Circuit) ; *Naletilić v Croatia* (App no 51891/99) (2000) ECHR 4 May 2000. In *Milosevic v the Netherlands* (n 144) 4 not the extradition was challenged, but the applicant argued that his detention during the trial before the ICTY 'with the active connivance of the Netherlands authorities' was unlawful.

guarantees, then the extradition of accused individuals could arguably give rise to responsibility for aid and assistance in the tribunal's or the third State's wrongful acts.[619]

4.2 Shall prevail over obligations under any other international agreement

As discussed above, the prohibition on complicity is part of customary international law. According to Article 103 UNC, obligations of members under the Charter 'shall prevail' over conflicting obligations *under any other international agreement*. A literal interpretation of Article 103 UNC suggests that no prevailing effect is intended over obligations under custom, as do the *travaux préparatoires* of Charter.[620] On the contrary, the drafters consciously decided to make reference to the obligations of member States 'under any other international agreement' rather than to 'any other obligations', which would have clearly included obligations under custom.[621] A significant part of the doctrine concludes on that basis that obligations under the Charter would not prevail over obligations under general international law in the case of a conflict.[622] Still, the majority view holds that a broad interpretation of Article 103 UNC should be adopted and that obligations under the Charter should not only prevail over obligations under treaties in the case of a conflict, but over obligations deriving from any source of international law, including custom.[623] This is often justified by reference to the object and purpose of the provision. For Bernhardt, the 'ideas underlying Art. 103' are applicable to conflicts between Charter obligations and obligations

---

[619] In *R (on the application of Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (QB), [2015] 3 WLR 503 [194] the High Court held (*per Justice Leggatt*) that '[i]n principle it seems to me that transferring a person into the custody of another State, if done with knowledge of the relevant circumstances, could amount to assistance giving rise to responsibility in accordance with article 16 for complicity in acts of torture or other serious mistreatment by the receiving State'. The German Constitutional Court also accepted that the extradition of a person could amount to unlawful aid and assistance in an internationally wrongful act: *2 BvR 1506/03* (n 423) [47], [55]. Similarly, the Swiss Federal Tribunal took into account in an extradition case whether the extradition would amount to cooperation in an unlawful act of the requesting State (*in casu*, a breach of the law of sovereign immunity): *Marcos c Office fédéral de la police* (1989) BGE 115 Ib 496 (Swiss Federal Tribunal) 503 [5d].

[620] Bernhardt, 'Art. 103' in (n 607) 1293 [2]; Leiæ and Paulus, 'Art. 103' in (n 616) 2132 [66].

[621] Bernhardt, 'Art. 103' in (n 607) 1293 [2].

[622] In this sense Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in (n 608) 80; Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59 69; Rain Liivoja, 'The Scope of the Supremacy Clause of the UN Charter' (2008) 57 ICLQ 583 612; Tzanakopoulos, *Disobeying the Security Council* (n 190) 75.

[623] Zemanek, 'Foundations' (n 24) 232 [470] (albeit stating that 'that interpretation rests on shaky ground'); Bernhardt, 'Art. 103' in (n 607) 1298-99 [21]; De Wet, *The Chapter VII Powers of the United Nations Security Council* (n 520) 182; *Milanovic, 'Norm Conflict'* (n 596) 79; Leiæ and Paulus, 'Art. 103' in (n 616) 2133 [68]; in this sense also ILC, *Report on Fragmentation* (n 616) 176 [345]. Gill appears to draw a distinction between general obligations under the Charter and UNSC decisions under Chapter VII. He argues that the prevailing effect of UNSC decisions under Chapter VII over the obligations of member States under custom does not derive from Article 103 UNC, but is implicit in Chapter VII itself: T D Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 NYIL 33 62-63.

under custom, since 'Art. 103 must be seen in connection (...) with the character of the Charter as the basic document and "constitution" of the international community'.[624] Milanovic argues that obligations under treaties often have the same content as obligations under custom, and that 'it would run contrary to the object and purpose of Article 103 if it could only preclude a state's responsibility for failing to abide by the treaty, and not by the identical customary rule'.[625]

In relation to the prohibition on complicity, there are other decisive reasons for considering that obligations under the Charter prevail in case of a conflict. The drafting history of Article 16 ARS strongly suggests that complicity was not prohibited under customary international law when the Charter entered into force in 1945. When SR Ago proposed the rule in 1978 by way of 'progressive development' of the law, underlying State practice was still relatively scarce.[626] It was not least thanks to the inclusion in the draft articles that the rule was consolidated in practice and can today be regarded as firmly established in customary international law.[627] There are strong indications that the prohibition on complicity was never meant to cover State conduct taken pursuant to the UN Charter, but that such conduct was 'carved out' of the prohibition. The savings clauses of Articles 59 ARS and 67 ARIO state that the draft articles are 'in all respects to be interpreted in conformity with the Charter'.[628] As Gowlland-Debbas notes, Article 59 ARS makes it clear that 'the rules of State Responsibility cannot interfere with the Charter, including the Security Council's action in the field of peace maintenance'.[629] This suggests that the scope of the prohibition on complicity ends where it would conflict with obligations under the UNC. In terms of the legal consequences, there is little difference between the 'subordination' of the prohibition on complicity in the case of a conflict by the operation of Article 103 UNC, and the exclusion of member State acts taken pursuant to obligations under the Charter from the scope of the prohibition. In both scenarios, the

---

[624] Bernhardt, 'Art. 103' in (n 607) 1298-99 [21]; similarly Leiæ and Paulus, 'Art. 103' in (n 616) 2133 [68].
[625] Milanovic, 'Norm Conflict' (n 596) 78-79.
[626] ILC, *Record of the 1519th Meeting* (n 420) 240 [21].
[627] See (n 424).
[628] ILC, *ARS with commentaries* (n 38) 143 [2]. The ILC made a conscious decision that Article 59 ARS should regulate the relationship between the UN Charter and all parts of the ARS, not only over those dealing with the implementation of responsibility: Vera Gowland-Debbas, 'The Security Council and Issues of Responsibility under International Law' (2012) 3 RdC 185 278-9.
[629] Gowland-Debbas, 'SC and Responsibility' (n 628) 279.

Member State can engage in conduct that would otherwise amount to unlawful aid and assistance without incurring responsibility.

4.3 In the case of a conflict

The crucial question for the assessment of whether complicity is at all a relevant ground of member State responsibility in the UN context is, then, how a 'conflict' with obligations under the Charter should be defined. If defined broadly, any conduct carried out in the implementation of a Charter obligation, or indeed an authorization, could be considered to be exempt from the prohibition on complicity. This would mean that the prohibition on complicity would not only be of little importance when States act within the framework of the UN or in the context of UN-led operations, but whenever their conduct is based on a binding resolution of the UN. Accordingly, conduct taken within other international organizations such as NATO, the EU or the AU would also be 'carved out' from the prohibition of complicity if there was a prior decision of the UN. By contrast, if a 'conflict' is defined narrowly, only conduct that is explicitly required by an obligation under the Charter would be exceptionally permitted. Member States would accordingly be required to take the prohibition on complicity into account when acting pursuant to a binding decision of the UN, unless they are explicitly required to provide assistance for the commission of an unlawful act. The prohibition on complicity would remain relevant as a constraint on State conduct in all but exceptional cases.

How a 'norm conflict' is best defined in international law is controversial, and it falls outside the scope of this thesis to deal with this important question in detail.[630] It suffices to say that some define a norm conflict narrowly, as an incompatibility between two obligations, so that a State cannot comply with both.[631] Others define a norm conflict more broadly as encompassing an incompatibility between a

---

[630] For a detailed analysis, Joost Pauwelyn, *Conflict of Norms in Public International Law : How WTO Law Relates to other Rules of International Law* (CUP 2003); Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' 17 EJIL 395.

[631] This definition is often attributed to Jenks, who noted that '[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties', C Wilfred Jenks, 'The Conflict of Law-making Treaties' (1953) 30 BYIL 301 426. On the inadequacy of this narrow definition, Vranes, 'Definition Norm Conflict' (n 630).

prohibitory and a permissive rule, such as an authorization.[632] In the latter case, a breach of one of two norms can be avoided by subordinating the permissive rule and complying with the prohibitory rule. Vranes notes that this should be seen as a conflict between the two norms, for 'if a given conduct is at the same time permitted and prohibited, or subject to unilaterally incompatible obligations, it is not unequivocally but contradictorily regulated from the viewpoint of the addressee of these norms'.[633]

In the context of Article 103 UNC, a majority of writers appear to be of the view that authorizations pronounced by the UNSC under Chapter VII should be assimilated with 'obligations' under the Charter, and also that they should prevail over other obligations in the event of a conflict.[634] This view is notably defended in spite of the wording of Article 103 UNC, which attaches prevailing effect to *obligations* of the UN members under the Charter. It is argued that according to the original intentions of the drafters of the Charter, the UNSC would not have been required to resort to authorizations in order to take forcible measures to safeguard international peace and security, but would have acted exclusively by way of obligations imposed on member States.[635] Since the corresponding provision was never put in place, and considering the UNSC's actual practice, the effectiveness of the collective security system would be severely impaired if member States carrying out UNSC authorizations incurred responsibility for non-compliance with conflicting treaty obligations.[636]

This interpretation finds some confirmation in practice. Most prominently, it was upheld by the House of Lords in the *Al-Jedda* case. The facts of the case have been discussed above, in relation to the questions of

---

[632] A broader definition of a 'norm conflict' that should encompass conflicts between permissive norms and obligations is suggested by Pauwelyn, *Conflict of Norms* (n 630) 175-76: "if one norm constitutes, has led to, or may lead to, a breach of the other". A broad definition is also advocated by *Vranes, 'Definition Norm Conflict'* (n 630) 414, who advocates the adoption of a definition introduced by Kelsen, according to which '[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated'; (citing Kelsen, 'Derogation', in H. Klecatsky, R. Marcic, and H. Schambeck (eds), *Die Wiener Rechtstheoretische Schule* (1968), 1483).
[633] Vranes, 'Definition Norm Conflict' (n 630) 404-05.
[634] In this sense Sarooshi, *UN and Collective Security* (n 278) 151; Kolb, 'Article 103 and Authorizations' (n 616) 31; Milanovic, 'Norm Conflict' (n 596) 78; Leiæ and Paulus, 'Art. 103' in (n 616) 2126 [43].
[635] Kolb, 'Article 103 and Authorizations' (n 616) 23. Article 43(1) UNC provides that '[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security'. However, such agreements were never concluded.
[636] Sarooshi, *UN and Collective Security* (n 278) 151.

attribution of conduct it raised.[637] UNSC Resolution 1546, adopted in June 2004, set out the legal framework governing the continued presence of the multinational force (MNF) in Iraq, after the end of the occupation. Acting under Chapter VII of the Charter, the UNSC determined

> that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.[638]

One of letters annexed to the resolution, written by then US Secretary of Defense Colin Powell, set out the responsibilities of the MNF and mentioned that its activities could include 'internment where this is necessary for imperative reasons of security'. Al-Jedda had been held in detention by British troops in Iraq for several years without trial. He challenged the lawfulness of his detention under Article 5(1) ECHR, as well as under common law. Once it had been established that the detention was attributable to the UK, all depended on whether Article 5(1) ECHR was 'qualified' by UNSC Resolution 1546 through the operation of Articles 25 and 103 of the Charter. The House of Lords concluded, in accordance with what it identified as an important part of the doctrine, that Article 103 UNC applied 'where conduct is authorised by the Security Council as where it is required'.[639] Lord Bingham explained that

> since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them (...) the Security Council can do little more than give its authorisation to member states which are willing to conduct such tasks.[640]

In the particular circumstances at hand, this meant, according to the House of Lords, that the authorization to detain Al-Jedda on security grounds prevailed and that no violation of Article 5(1) ECHR had occurred.

Seized with a complaint introduced by Al-Jedda, the ECtHR found that the detention had been unlawful.[641] The Court did not rule out that possibility of a norm conflict between an authorization and a

---

[637] See (nn 314 *et seq*).
[638] UNSC Res 1546 (n 313) [10].
[639] *Al-Jedda (HL)* (n 595) [33] (*per Lord Bingham*).
[640] ibid.
[641] *Al-Jedda* (n 145) [110].

prohibition covered by Article 103 UNC, at least not explicitly.[642] Rather, it narrowed down the scope of the conflict by establishing an interpretative presumption that the UNSC did not intend its authorization to conflict with other obligations, in casu Article 5 ECHR:

> in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.[643]

Given the facts that security internment was not mentioned in the resolution itself; that the preamble referred to the commitment of all forces that act in accordance with international law; and that 'the terminology of the Resolution appear[ed] to leave the choice of the means to achieve this end to the Member States within the Multi-National Force',[644] it found that no such conflict had existed. According to the Court, 'neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge'.[645] In effect, the ECtHR thereby established that if the UNSC intends an authorization to prevail over other obligations of member States, it at the very least needs to use 'clear and explicit language' signalling that this effect is intended.[646]

The ECtHR's judgment in *Al-Jedda* illustrates that in practice, the most important question in defining a 'conflict' might not be whether a conflict can arise between an authorization on the one hand, and a prohibition on the other hand. Rather, it is the question of how far one must go to eliminate a possible conflict by harmonious interpretation of the two norms in question. In *Al-Jedda*, the ECtHR established a strong presumption of compatibility, according to which nothing short of an explicit invitation or order to engage in the prohibited conduct would be considered a conflict. In its subsequent case law, the Court

---

[642] In his dissenting opinion, Judge Poalelungi suggested that the majority had accepted the House of Lords' conclusion that Article 103 UNC did cover authorizations, but disagreed on the question whether the authorization to detain was couched in sufficiently clear language: ibid (n 145) 66 (Partially Dissenting Opinion of Judge Poalelungi). However, the Court also repeatedly referred to 'obligations' when discussing the effect of Article 103 UNC: ibid at [101] *et seq*.
[643] ibid (n 145) [102].
[644] ibid [105].
[645] ibid [109].
[646] ibid [102]. Similarly, with regard to the requirement of clear and ambiguous wording, Milanovic, 'Al-Skeini and Al-Jedda' (n 104) 138.

went even further. In *Al-Dulimi*, the Court noted that even though the UNSC resolution in question 'imposed on States an obligation to "freeze without delay" the financial assets or economic resources' of the designated persons, this could not 'be understood as precluding any judicial scrutiny of the measures taken to implement it'.[647] Accordingly, there was no 'real conflict' triggering the application of Article 103 UNC.[648] A number of domestic courts have interpreted UNSC resolutions in a similarly restrictive manner.[649] Such techniques of conflict avoidance can be accommodated, up to a certain limit, within the general rules of treaty interpretation. The ICJ pointed out in *Rights of Passage* that 'a text from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'.[650] Article 31(3)(c) VCLT which, as part of custom,[651] is in principle applicable to the interpretation of the UNC,[652] states that in the interpretation of treaties, 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account, is of particular importance.[653] Accordingly, a 'contradiction should only be assumed when norms stand in clear conflict with each other or in the case that the contradictory intent is clearly

---

[647] In *Al-Dulimi (GC)* (n 114) [142]-[148]. This part of the Court's reasoning was strongly criticized by Judge Keller in her concurring opinion, who pointed out that in the particular case at hand, there was 'no room for compliance with both the ECHR and the UN Charter': at [8]. This corresponds to the conclusions of the Swiss Federal Tribunal, *A c Département fédéral de l'économie* (2008) 2A:783/2006 /svc (Swiss Federal Tribunal) [9.1]: *'la description des mesures (...), des personnes et des entités visées (...) ainsi que du mandat confié au Comité des sanctions 1518 (...) est détaillée et ne laisse aucune place à l'interprétation'*. By contrast, the ECtHR concluded that there was some room for manoeuvre and that 'before taking the above-mentioned measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary', *Al-Dulimi (GC)* (n 114) [150].

[648] *Al-Dulimi (GC)* (n 114) [149].

[649] In *Abdelrazik* (n 146) 129] (*per Zinn J*), the Canadian Federal Court found that the travel ban imposed by UNSC Res 1267 (n 101), which provided that States shall 'prevent the entry into or the transit through their territories' did not prevent listed persons from transiting airspace of member States. In *Bosphorus Hava v Minister for Transport* (1994) 2 ILRM 551 (Irish HC) (*per Murphy J*), the Court found that Ireland was not empowered to impounded a Yugoslav aircraft leased by a Turkish company because '[t]he regulation [implementing UNSC Res 820/1993] was not intended to punish or penalise peoples or countries that had not caused or contributed to the tragic events in the former Yugoslavia'. In *R (on the application of Othman) v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022, [2001] All ER (D) 413 (Nov) [57] (*per Collins J*) the High Court found that an asset freeze could not go so far 'as to mean that the individual in question (...) has because of having no means of support, reached a situation where his health and perhaps his very life are at risk'. For a critical assessment: Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (OUP 2010) 65-6.

[650] *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125 142.

[651] The customary character of Article 31 VCLT (n 511) has been confirmed repeatedly, eg in *Kasikili / Sedudu Island (Botswana / Namibia)* [1999] ICJ Rep 1045 1059-60 [18]-[20].

[652] In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 442 [94] the Court held that as far as the interpretation of a UNSC resolutions are concerned, 'the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance', but that factors such as statements of representatives made at the time of adoption also need to be taken into account.

[653] VCLT (n 511) Article 31(3)(c).

expressed'.[654] It falls outside the scope of this chapter to systematically discuss the numerous domestic and regional cases that deal with the interpretation (or lack thereof) of UNSC resolution - a task that has furthermore been undertaken elsewhere.[655] At a very minimum, one may however conclude that member States are not simply relieved from their duty not to provide unlawful aid and assistance when carrying out obligations or authorizations under the Charter. Member States must 'respect their international law obligations unless expressly derogated from (...)'.[656] If member States engage in conduct that amounts to unlawful aid or assistance without being explicitly required or authorized to do so, they would incur responsibility for complicity as in any other context. Accordingly, the prohibition on complicity is not displaced, and still acts as an important constraint on State conduct taken within the framework of the UN or on the basis of a binding decision of a UN organ.

5. Conclusions on complicity as a ground of member State responsibility

International organizations need their members as their 'life supporting system'.[657] Member States not only establish international organizations and determine their conduct collectively; they also provide them with funding and resources to carry out operational activities. Many, if not most, international organizations still predominantly engage in 'normative activity', taking decision that must be implemented by member States. International organizations that do engage in operational activities typically rely on their member States for the contribution of personnel, logistical support, and financing. This chapter has sought to demonstrate that even where the primary wrongful conduct is attributable exclusively to the international organization, member States are constrained in their actions by the prohibition on complicity. This does not mean that they are generally responsible if the organization's activities are harmful to third parties. The prohibition on complicity has relatively strict conditions of application. It not only requires that the State made a contribution to an act or omission of another entity that was contrary to an obligation incumbent on both entities, it also requires that the assisting State had 'full knowledge of the circumstances', including of the fact that the assistance would be used for unlawful purposes. This chapter has argued that if these

---

[654] Leiæ and Paulus, 'Art. 103' in (n 616) 2119 [18](Fn omitted).
[655] Eg Vera Gowland-Debbas and Djacoba Liva Tehindrazanarivelo, *National Implementation of United Nations Sanctions* (Martinus Nijhoff 2004); Tzanakopoulos, 'Domestic Court Reactions' in (n 649); Bardo Fassbender, *Securing Human Rights? : Achievements and Challenges of the UN Security Council* (OUP 2011).
[656] Gowland-Debbas, 'SC and Responsibility' (n 628) 382-3.
[657] Sadurska and Chinkin, 'Collapse of the ITC' (n 121) 888.

conditions are fulfilled, member States should incur responsibility, irrespective of whether or not the assistance was required under the organization's internal rules. Under such narrow circumstances, member States may in principle incur responsibility for complicity on the basis of their vote within decision-making organs, on the basis of financial contributions, or on the basis of material or logistic support. By imposing member State responsibility in cases of deliberate wrongdoing, the prohibition on complicity important for ensuring that States cannot use international organizations as 'vehicles' to avoid international responsibility.

CHAPTER 4: SUBSTANTIVE REMEDIES FOR WRONGFUL ACTS OF MEMBER STATES

1. Introduction

As demonstrated in the two previous chapters, the rules on the engagement of State responsibility are not simply displaced when States act within the framework of international organizations. Member States carry out a variety of acts attributable to them, including the participation in decision-making organs, the implementation of normative acts, the provision of financial support and the loan of personnel for operational activities of international organizations. These contributions are essential in that they enable the organization to carry out its activities, and may for very same reason trigger the member States' responsibility if the organization's acts are wrongful.[658] At the same time, where several States act conjointly within the framework of an international organization, one is seldom in the presence of a single case of member State responsibility causing injury to a third party. More likely, there will be a plurality of members, as well as the organization, which contribute to varying degrees to the harmful outcome. The plurality of implicated parties leads to additional difficulties as far as the consequences of responsibility are concerned. In general, the commission of an internationally wrongful act gives rise to 'a new legal relationship' between the responsible and the injured party, characterised by the secondary obligations to cease, and not repeat, the commission of the wrongful act and, importantly, to provide reparation for any injury caused.[659] Originally conceived as a bilateral relationship between the injuring and the injured State, the duty to make reparation hinges on the establishment of a link of causation between the wrongful act of the responsible State and any resulting injury. Establishing a link of causation can be more difficult where multiple States contributed to a collective harmful outcome, as it makes it necessary to disentangle the various contributions of individual member States and the organization and to determine to what extent they, taken individually, had an impact on the harmful outcome.

In accordance with the general approach of the thesis, this chapter investigates whether the particular

---

[658] Naturally, State conduct only gives rise to responsibility if it is wrongful. The most relevant general grounds of member State responsibility, in particular complicity, are discussed in Chapter 3.

[659] ILC, *ARS with commentaries* (n 38) Articles 29-31; ILC, *ARIO with commentaries* (n 17) Articles 29-31; Pellet, 'Definition' in (n 181) 8.

challenges raised by such situations of 'shared responsibility'[660] can be accommodated by the general rules on substantive remedies for internationally wrongful acts. In particular, it seeks to assess whether an injured party faces additional obstacles in obtaining a remedy for wrongful acts committed within the framework of international organizations, lending support to the concern that States can avoid bearing the consequences of wrongful acts by acting through international organizations. Where the law is unsettled or contested, it will discuss whether these difficulties could be resolved within the four corners of the existing legal framework by way of interpretation. From the outset, it is necessary to point out that the difficulties entailed by situations of shared responsibility are not unique to international organizations, but can also arise where States cooperate on an informal basis. As such, they cannot be said to be normative consequences of the 'institutional veil' or the separate legal personality of international organizations.[661] At the same time, where States cooperate through an international organization, the difficulties of distinguishing the contribution of the individual State from the contributions of other members or the collective arise almost by definition. They are a core problem for the implementation of member State responsibility and deserve as such a detailed investigation. This chapter is structured as follows: the first part briefly discusses cessation and non-repetition as general secondary obligations arising from any internationally wrongful act. These obligations are relatively easy to implement in the context of international organizations, but go little beyond insistence on the continued obligation to perform the primary obligation breached. The second part turns to the obligation to make reparation, traditionally seen as the main element of international responsibility. After discussing the forms reparation for injury caused by the activities of international organization can take, it turns to the most difficult aspect of reparation in this context; namely, the establishment of a link of causation between the wrongful act and injury in the presence of multiple responsible parties.

---

[660] The term 'shared responsibility' is used by André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2012-2013) 34 Mich J Int'l L 359 367-68 as referring to situations of 'responsibility of multiple actors (...) for their contribution to a single harmful outcome (...)', where the harmful outcome is indivisible and actors incur responsibility separately rather than collectively. In addition to these scenarios, this chapter covers situations where not all actors involved incur responsibility for a wrongful act, which is a realistic scenario given the fact that international organizations are not necessarily bound by the same substantive obligations as their members: see (n 49).

[661] On this notion, see Chapter 1 Section 4. The 'institutional veil' and the 'hidden' role of member States.

2. General obligations arising from any internationally wrongful act

One of the novelties introduced by the ILC in the ARS was the conceptual distinction between consequences that arise automatically from any internationally wrongful act and consequences that arise only if the internationally wrongful caused any 'injury'.[662] The obligations of cessation and non-repetition, set out in Article 30 ARS, are those consequences that arise directly from any internationally wrongful act, irrespective of whether any injury was caused. They do not lead to major difficulties in the context of international organizations. If a State commits an internationally wrongful act, it is under the obligation to 'cease that act, if it is continuing',[663] and to offer guarantees of non-repetition, if the circumstances so require.[664] The same principles apply to responsible international organizations.[665] That a responsible party must cease its wrongdoing is uncontroversial.[666] For some, cessation is not even 'a new obligation that arises as a consequence of the wrongful act'.[667] In some sense, the obligations to cease wrongful conduct and to continue to perform the primary obligation in question are simply 'the two sides of one and the same coin'.[668] SR Crawford on the contrary was of the view that cessation is a 'secondary consequence of a breach of an international obligation', not least because 'the question of cessation can only arise in the event of a breach'.[669] It is true that the duty of cessation is more specific as it is triggered by a concrete breach.[670] Rather than stating a general duty of continued performance of the primary obligation in question, it refers to the duty to comply with the obligation in the specific circumstances of a breach.

---

662 The ILC eliminated 'injury' from the definition of an internationally wrongful act in an effort to make international responsibility more 'objective': Pellet, 'Definition' in (n 181) 9. According to the traditional 'bilateralist' model often associated with Anzilotti, the commission of a wrongful act and the infliction of injury give rise to a relative right of the injured State against the responsible State, Dionisio Anzilotti, *Teoria generale della responsibilità dello stato nel diritto internazionale* (Lumachi ed, 1902) 100.

663 ILC, *ARS with commentaries* (n 38) Article 30(a).

664 ibid and ILC, *ARIO with commentaries* (n 17) Articles 30(b). The ICJ has repeatedly found such guarantees to be unnecessary, since '[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed', *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 267[150]; *FYROM v Greece* (n 203) 47 [168]. It will only order a State to offer such guarantees 'when there are special circumstances which justify this': *Jurisdictional Immunities* (n 58)[138].

665 ILC, *ARIO with commentaries* (n 17) Article 30.

666 The obligation of cessation is 'well established in general international law', *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136 197 [150].

667 ILC, *ARIO with commentaries* (n 17) 55-56 [2]; similarly and Catherine Deman, 'La cessation de l'acte illicite' (1990) 2 RBDI 476 480; Brigitte Stern, 'The Obligation to Make Reparation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 564.

668 Willem Riphagen, *Second Report on State Responsibility* (ILC Yb Vol II(1), 1981) 87 [68].

669 James Crawford, *Third Report on State Responsibility* (UN Doc A/CN4/507, 2000) 23.

670 ILC, *ARS with commentaries* (n 38) 89 [5]; Tzanakopoulos, *Disobeying the Security Council* (n 190) 142. This seemed also the distinction drawn by the Court between Israel's general duty to comply with its international obligations and the more specific 'obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory', *Wall Opinion* (n 666) 197-98 [149]-[151].

Arguably, however, the more convincing reason why it was justified to deal with cessation in a separate provision is its close link to restitution as a form of reparation.[671] Whereas cessation aims to 'secur[e] an end to continuing wrongful conduct',[672] restitution requires the 're-establish[ment] [of] the situation which existed before the wrongful act was committed'.[673] In practice, the two often go hand in hand. For example, if an asset freeze was unlawful, a responsible State might be required to unblock the assets by way of (juridical) restitution, which would at the same time amount to cessation of an ongoing wrongful act. Still, it is important to distinguish cessation and restitution in conceptual terms. Restitution is, at least according to the ILC, the 'primary form' of reparation; but it must only be made if it is neither impossible nor disproportionate.[674] If making restitution is impossible or would entail a disproportionate burden, the responsible State is permitted to pay compensation for injury instead. The duty of cessation, by contrast, is unconditional.[675] If an internationally wrongful act is continuing, a responsible State may not choose to pay compensation instead of repealing an unlawful act if the wrongful act is ongoing. This crucial difference between cessation and restitution was reiterated by the ICJ in the *Wall Opinion*. After having established that the wall in the occupied Palestinian territories was built in breach of international law, the ICJ found that Israel was under the obligation to dismantle the wall not as a result of its obligation to make restitution, but rather because it was obliged to cease its wrongful conduct.[676] The ICJ's finding that the maintenance of the wall was a continuous breach that had to be ceased thus effectively prevented possible arguments of Israel that compensation would be more appropriate than the removal of the wall.[677] Even though in terms of its content the obligation of cessation is largely co-extensive with the obligation of continued performance, the separate provision on cessation thus recalls that if a measure

---

[671] Crawford, *Third Report* (n 669) 23.
[672] ILC, *ARS with commentaries* (n 38) 88 [1].
[673] ibid Article 35; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 103 [273].
[674] See (nn 681 *et seq*).
[675] As noted by Christian Dominicé, 'Observations sur les droit de l'Etat victime d'une fait internationalement illicite' in Prosper Weil (ed), *Droit international 2* (Pedone 1982) 30-31; Pierre d'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in Pierre-Marie Dupuy and others (eds), *Völkerrecht als Wertordnung Festschrift für Christian Tomuschat* (NP Engel Verlag 2006) 470.
[676] Palestine had submitted under the rubric 'cessation' that Israel was under 'a duty immediately to cease the construction, planning and operation of the Wall within the Occupied Palestinian Territory', whereas it was under 'restitution' that it demanded Israel to 'reverse[] the construction of the Wall and the regime associated with it (...)' and to 'rescind all previous actions including by the lifting of any restrictions imposed on the movement of persons and goods and on the operations of humanitarian organizations in the relevant area', *Legal Consequences of the Construction of a Wall* (Written Statement by Palestine) 29 January 2004 [609], [625].
[677] In this sense, d'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in (n 675) 470.

amounts to a continuous breach, the secondary rules on reparation do not provide any flexibility for a responsible State or organization.

3. The obligation to make reparation for injury

Whereas the obligations of cessation and non-repetition 'have more to do with a return to legality than with reparation for injury',[678] the main function of reparation is to reverse the consequences of the wrongful act as far as the injured party is concerned. As the PCIJ famously noted in the *Chorzów Factory* case, reparation 'must, so far as possible, wipe out all the consequences of the illegal act and re- establish the situation which would, in all probability, have existed if that act had not been committed.'[679] This well-established obligation is codified in Articles 31 ARS and ARIO, according to which a responsible State or organization is 'under an obligation to make full reparation for the injury caused by the internationally wrongful act'.[680] Before addressing the difficulties that arise with this relatively simply formula in the context of member State responsibility - in particular, the need to establish a link of causation between the wrongful conduct and the injury - the different forms of reparation will be briefly discussed.

3.1 The forms of reparation: restitution, compensation, satisfaction

3.1.1 Restitution

Reparation for injury can be made in the form of restitution, compensation, satisfaction, or a combination of all three. To make restitution, which is the 'primary form' of reparation,[681] means to the 're-establish the situation which existed before the wrongful act was committed'.[682] To do so, the State may be required to make restitution in kind, as for example by returning illegally seized territory or property,[683] or to make

---

[678] André Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 Ind J Global Legal Studies 535 546-47 (references omitted).
[679] *Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Series A No 17 12.
[680] The obligation to make reparation for injury caused by a wrongful act, well-established since the PCIJ's ruling in ibid, also applies to international organizations: *Immunity from Process* (n 154) 88-89 [66].
[681] See *Chorzów (Merits)* (n 679) 47; *Wall Opinion* (n 666) 198 [152]-[153]. Further, in this sense, J. H. W. Verzijl, *International Law in Historical Perspective. Part 6, Juridical Facts as Sources of International Rights and Obligations* (A.W. Sijthoff 1973) 742; Bernard Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages' (1984) 185 RdC 9 77; Cristiano d'Orsi, 'L'obligation de réparation dans le projet d'articles sur la responsabilité de l'Etat: Une analyse critique' (2005) 58 RHDI 115 124; James Crawford, *Third Report on State Responsibility, Addendum* (UN Doc A/CN4/507/Add1, 2000) 10 [130].
[682] ILC, *ARS with commentaries* (n 38) Article 35; *Pulp Mills* (n 673) 103 [273].
[683] Eg *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v Czechoslovakia)* [1933] PCIJ Series A/B No 61 249 (immovable property); *Case Concerning the Temple of Preah Vihear*

'juridical restitution' by modifying a legal situation.[684] Restitution goes beyond the obligation of cessation in that a responsible State is not only required to modify or annul a wrongful act, but also to reverse the consequences of the wrongful act 'in such a way that the situation which existed before the wrongful acts were committed is re-established'.[685] For example, rather than simply annulling a wrongful act, which would in many situations be required by the obligations of cessation and continued performance, the State must make sure that the effects caused by the wrongful decision are eliminated. There are several examples of this in the context of international organizations. In the case of *Abdelrazik*, the Canadian Supreme Court found that the Canadian authorities had unlawfully prevented a Canadian citizen from returning to Canada. This was notwithstanding the fact that the concerned person had been included in the Security Council's 1267 sanctions list and was therefore subject to a travel ban.[686] The Court found that the applicant was entitled to an effective remedy, namely 'to be put back to the place he would have been but for the breach -- in Montréal'.[687] Canada was also under an obligation to provide funding for the return to the extent that the applicant incurred additional expenses because of Canada's unlawful conduct.[688] In the case of *Abdulrahim,* which also concerned a person included on a UNSC sanctions list, it was the EU - an international organization - that was required to make juridical restitution. The CJEU found that even though the name of the applicant had been struck off the sanctions list, he maintained an interest in pursuing the action for annulment of the contested regulation as far as it concerned him. The Court found that there was an important distinction between the repeal of an act, which did not amount to recognition of its illegality, and annulment, by which an act was removed retroactively. This difference was important enough to substantiate an interest of the applicant to pursue the action:

(Cambodia v Thailand) (Merits) [1962] ICJ Rep 6 37 (objects); *Assanidze v Georgia* (App no 71503/01) (2004) [GC] ECHR 8 April 2004 50 [14] (release); *Wall Opinion* (n 666) 198 [153] (return of land and property seized).

[684] ILC, *ARS with commentaries* (n 38) 97 [5]; the term 'juridical restitution' is already used by Jean Personnaz, *La réparation du préjudice en droit international public* (Recueil Sirey 1938) 77; also Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration : Principles and Practice* (OUP 2011) 73.

[685] Eg *Jurisdictional Immunities* (n 58) [137]; *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening)* [2014] ICJ Rep 226 [245].

[686] The wrongfulness of the conduct was not precluded by the operation of Article 103 UNC, according to which obligations under the Charter prevail over conflicting commitments, because 'properly interpreted, the UN travel ban present[ed] no impediment to Mr. Abdelrazik returning home to Canada', *Abdelrazik* (n 146)[129].

[687] ibid [158].

[688] ibid [160]. However, while the Canadian Supreme Court explicitly referred to the secondary rules on State responsibility, it did not base its decision on these rules. Canada had breached subsection 6 of the Canadian Charter of Fundamental Rights and Freedoms, not a norm of international law, which meant that the secondary rules of State responsibility were not directly applicable.

> (...) the interest of an applicant such as Mr Abdulrahim in bringing proceedings is retained, despite the removal of his name from the list at issue, for the purpose of having the Courts of the European Union recognise that he should never have been included on the list or that he should not have been included under the procedure which was adopted (...). Indeed whilst recognition of the illegality of the contested act cannot, as such, compensate for material harm or for interference with one's private life, it is nevertheless capable (...) of rehabilitating him or constituting a form of reparation for the non-material harm which he has suffered by reason of that illegality (...).[689]

In other words, only a declaration of the *ex tunc* invalidity of the contested act would place the applicant in the legal situation that existed prior to the wrongful act and thereby, in the words of the PCIJ, 'wipe out' the effects of the unlawful act.[690]

At the same time, where it is the member State that is required to make restitution, this can lead to difficulties if the wrongful act was the result of a decision of an international organization. In such situations, making (juridical) restitution may be impossible, because the State does not have the competence to do so. One relevant if controversial[691] example of impossibility to make restitution is the case of *Sayadi Vinck*. As the director and secretary of Fondation Secours International, a foundation suspected of being associated with Al-Qaida, the applicants' names were placed on the SC sanctions list in 2003.[692] The HRC reviewed a complaint brought by Sayadi and Vinck against Belgium, their State of nationality, which was also the State that had transmitted their names to the Council and suggested they be included on the UN's sanctions list. According to the applicants, Belgium had violated their rights under the ICCPR by transmitting their names to the SC, by restricting their access to their funds and by preventing them from working and travelling. The Committee found *inter alia* that Belgium had breached its obligations under the ICCPR by transmitting the names of the two individuals to be included on the SC sanctions list.[693] According to the Committee, their presence on the publicly accessible list amounted to a breach of their right to free movement and to 'an attack on their honour and reputation, in view of

---

[689] *Abdulrahim v Council and Commission* (n 111) [71]-[72], [68].
[690] *Chorzów (Merits)* (n 679) 12.
[691] The decision has rightly been criticized for its failure to discuss the relevance of Article 103 UNC, according to which the obligations of UN member States under the Charter prevail over conflicting treaty obligations, see M Milanovic, M 'Sayadi: The Human Rights Committee's Kadi (or a pretty poor excuse for one...)', 29 January 2009, <www.ejiltalk.org> (last accessed 19 September 2016).
[692] *Sayadi Vinck* (n 261) [2.1] *et seq*.
[693] It found that Belgium has breached Articles 12 (right to liberty of movement) and 17 (right not to be subjected to unlawful attacks on his honour and reputation) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 99 UNTS 171 (ICCPR).

the negative association that some persons could make between the authors' names and the title of the sanctions list'.[694] Yet, while member States are obliged to cooperate in the listing of individuals suspected of being involved in terrorist activities and to carry out the sanctions imposed by the UNSC, Belgium was 'itself not competent to remove the authors' names from the Sanctions Committee's list'.[695] To make full juridical restitution and to re-establish the *status quo ante* was thus factually impossible for the State. Still, the Committee did not accept that the State was thereby released from its obligation to make restitution. It found that Belgium was required 'to do all it can to have their names removed from the list as soon as possible (...)'.[696] It could thus be argued that even if making restitution is difficult and is not a matter within the sole competence of the responsible Member State, efforts must be made to make restitution as far as possible.

Similarly, where a member State's vote within a decision-making organ was itself unlawful and prevented a desired outcome,[697] the individual State will not be in a position to revert the outcome by its individual actions. This is because the outcome is ultimately determined by a collective decision. However, as argued by Palchetti, as a matter of restitution, a State should not only be required to vote differently in the future, but also to initiate a new vote within the international organization.[698] In *FYROM*, the ICJ found that Greece had breached its obligations under a bilateral treaty when it objected to Macedonia's admission to NATO in April 2008. As Macedonia only sought a declaration of wrongfulness of Greece's past conduct, as well as assurances with a view to future conduct, the Court did not discuss what form restitution could take in this context.[699] Yet, it could be argued that with the mere declaration of wrongfulness, Macedonia wasn't placed in exactly the situation that existed prior to the breach, as its opportunity to begin accession talks had passed. Macedonia could accordingly have argued that to the extent that Greece had caused this

---

[694] *Sayadi Vinck* (n 261) 26 [10.12].
[695] ibid 26 [12].
[696] ibid 26 [12]. A similar point was raised by the ECtHR in *Nada v Switzerland* (n 146) 52 [194], albeit not with regards to the question of reparation, but whether there had been a breach in the first place. Only the countries of citizenship or residence were entitled to approach the Sanctions Committee for the purposes of the delisting procedure. Acknowledging that Switzerland was neither Nada's State of citizenship nor his State of residence, the Court nevertheless pointed out that 'it does not appear that Switzerland ever sought to encourage Italy to undertake such action or to offer it assistance for that purpose'.
[697] The difficulties in establishing a link of causation between the (unlawful) vote and any resulting injury are discussed below.
[698] Palchetti, 'Responsabilità per il voto' (n 204) 370.
[699] *Memorial FYRM* (n 143) 114 [6.1] *et seq*; *FYROM v Greece* (n 203) 47 [167]-[168].

outcome, it was also required to initiate a new vote on accession by way of restitution. In this sense, an injured State could insist that material impossibility of restitution should not be easily accepted in the context of international organizations and that the responsible State or organization is required to take steps to re-establish the situation that existed before its wrongful act as far as possible. Such an interpretation would allow courts to do justice to the fact that, at least according to the ILC, restitution enjoys precedence of other forms of reparation.[700]

3.1.2 Compensation

Where making restitution is either impossible or disproportionate,[701] where it does not lead to 'full reparation', or indeed where parties choose this form of reparation,[702] compensation becomes relevant. According to draft Articles 36 ARS and ARIO, a State or organization 'responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution'.[703] As far as responsible States are concerned, compensation is well-established as a form of reparation, and it is even more frequent in practice than restitution.[704] For responsible international organizations, the transposition of this obligation might not be so obvious. International organizations are usually conferred funding by their members in order to be able to carry out specific functions.[705] The payment of large sums of compensation can mean that less resources are available for the organization's core activities. This was precisely the reasoning behind the UN's decision, taken in 1998, to limit its financial liability for third-party claims resulting from peacekeeping operations.[706] As the SG noted in his report to the General Assembly, '[t]o the extent that funds are used

---

[700] ILC, *ARS with commentaries* (n 38) Articles 36-37, ILC, *ARIO with commentaries* (n 17) Articles 36-37. Several authors have however questioned the primacy of restitution over compensation: in particular Hans W Baade, 'Indonesian Nationalization Measures before Foreign Courts - A Reply ' (1960) 54 AJIL 801 822; Christine D. Gray, *Judicial Remedies in International Law* (Clarendon 1990) 13, 95-96; Christine Gray, 'The Choice Between Restitution and Compensation' (1999) 10 EJIL 413 416. They point out that even in the *Chorzów* case, where the PCIJ held that reparation means '[r]estitution in kind, or, *if this is not possible*, payment of a sum corresponding to the value which a restitution in kind would bear' no restitution was ordered, *Chorzów (Merits)* (n 679) 47 (*emphasis added*).

[701] ILC, *ARS with commentaries* (n 38) Article 35; *Pulp Mills* (n 673) 103 [273].

[702] As eg in *Kuwait v AMINOIL* (1982) 66 ILR 518 533 [III.1].

[703] ILC, *ARS with commentaries* (n 38) Article 36.

[704] Because it is more frequent in practice, several authors question the primacy of restitution over compensation: see (n 700).

[705] Not all funding of all international organizations is contributed by member States: see (n 555).

[706] UNGA, *Third-party liability: temporal and financial limitations* (A/RES/52/247, 1998)(n 73) [5], [8]-[11]. *Inter alia*, the UNGA decided that '[t]he amount of compensation payable for injury, illness or death of any individual (...) shall not exceed a maximum of 50,000 United States dollars (...). Prior to that, the UN had already limited its tortious liability

to pay third-party claims, lesser amounts may be available to finance additional peacekeeping or other United Nations operations.[707] At the same time, considerations as to the effect of large damage payments have been in advanced in the context of State responsibility as well, but were ultimately eliminated from the ARS on second reading.[708] As a matter of principle, it is indeed difficult to see why 'one category of actors (States) would face more severe legal consequences for internationally wrongful acts than another category of actors (international organizations)'.[709] The UN appears to recognize that under general international law, a limitation of its duty to make 'full reparation' cannot be imposed unilaterally on third parties.[710] In practice, the UN therefore includes a reference to its limited financial liability in status-of-forces agreements with host States.[711] *A contrario*, it follows that in general, international organizations including the UN are bound to make 'full reparation' for injury caused by wrongful acts in the same way as States, including in situations where no special agreement on liability or no status-of forces-agreement exists.

3.1.3 Satisfaction

If neither restitution nor compensation is an appropriate remedy, or if they are in themselves insufficient, reparation must be made in the form of satisfaction. Satisfaction is generally seen as the form of

---

to visitors, albeit with the effect of the relevant resolution being territorially limited to its headquarters in New York: UNGA Res 41/210 (n 73). See Paul Szasz, 'The United Nations Legislates to Limit its Liability' (1987) 81 AJIL 739 744.

[707] UNSG, 'Administrative and Budgetary Aspects of the Financing of UN Peacekeeping' (1997) UN Doc A/51/903 5 [12]; UNSG Report on the Financing of Peacekeeping (n 74) 9 [38] *et seq.*

[708] Draft Article 42 (3) adopted on first reading, reproduced in ILC, *Report of the International Law Commissionon the Work of its 48th Session* (UN Doc A/51/10, 1996) 66 stated that reparation must not 'result in depriving the population of a State of its own means of subsistence'. The provision was designed to deal with cases such as Germany's war reparations after WW1 and aimed to take account of the fact that payments for damages could be very considerable and affect the population of the responsible States. It was deleted upon the suggestion of SR Crawford, who noted that to the extent that injury was caused, there was no justification for requiring the victims to bear the loss, and that States were free to establish limits on liability in particular subject areas (such as ultra-hazardous activity): Crawford, *Third Report* (n 669) 19 [38]; Crawford, *Third Report, Addendum* (n 681) 30 [163]. The provision was nevertheless relied on by the Eritrea -Ethiopia Claims Commission in *Eritrea's Damages Claims* (Eritrea-Ethiopia Claims Commission) (2009) XXVI RIAA 505 (Final Award) [19] and *Ethiopia's Damages Claims* (Eritrea-Ethiopia Claims Commission) (2009) XXVI RIAA 631 (Final Award) [19].

[709] ILC, 'Comments International Organizations' (2008) UN Doc A/CN.4/593 (European Commission).

[710] See UNSG, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations* (UN Doc A/51/903, 1997) (n 707) 9 [37] ('The United Nations must ensure that potential claimants, whether the host State or the individual, consent to the limitations or are otherwise bound by them regardless of their consent'). See further UN Secretariat, 'Settlement claims' (n 73) 383 [10] ('the liability of the Organization to a third party is independent of its internal financial regulations and process').

[711] Eg Article VII [54] *Status of Forces Agreement between the UN and the Government of the Republic of South Sudan Concerning the UN Mission in South Sudan* (signed and entered into force 8 August 2011) 2776 UNTS 48873.

reparation appropriate for 'moral damage' rather than 'financially assessable' harm.[712] A State can incur 'moral damage' if its reputation or honour are affected.[713] In such situations, satisfaction can take the form 'an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality'.[714] There are no difficulties here. If there are multiple responsible parties, each of them may express regret or offer apologies for their individual wrongful acts. For example, both NATO and the US offered formal apologies after the Chinese embassy in Belgrade was bombed by NATO forces in the context of Operation Allied Force.[715] 'Moral damage' may also be inflicted on individuals, including individual pain and suffering, loss of loved ones or personal affront associated 'with an intrusion on one's home or private life'.[716] In such cases, satisfaction may take the form of financial payments.[717] As the umpire in the *Lusitania* case pointed out, an injured party

> is, under the rules of international law, entitled to be compensated for any injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation (...) and such compensation should be commensurate to the injury suffered.[718]

In such cases, the amount of compensation is determined on the basis of equitable principles.[719]

3.2 Linking the wrongful act to the resulting injury

A responsible State or organization is under the duty to make reparation for any injury *caused* by its wrongful act. Recognized as relevant forms of injury are, as indicated above, both moral and material damage.[720] However, establishing a relationship of causation between each individual wrongful act and injury can be complicated in the context of international organizations, because the wrongful act of one member State is likely to be accompanied by parallel wrongful acts by the organization or other member

---

[712] ILC, *ARS with commentaries* (n 38) 99.
[713] For example, in *Affaire du Manouba* (France, Italie) (1913) XI RIAA 463 472, Italie was required to pay the symbolic sum of 1 Franc to France 'à titre de réparation morale de l'atteinte portée à l'honneur du pavillon français'.
[714] ILC, *ARS with commentaries* (n 38) Article 37(2).
[715] The US also made *ex gratia* payments to China and to the victims: Murphy, *US Practice 1999-2001* (n 575) 99 *et seq.*
[716] ILC, *ARS with commentaries* (n 38) 92 [5].
[717] *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 324 334 21, the Court found that 'the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation' and awarded financial compensation; similarly *Lusitania Cases (US-German Mixed Claims Commission)* (1923) VII RIAA 32; *Al-Jedda* (n 145) [114].
[718] *Lusitania* (n 717) 40.
[719] *Diallo (Compensation)* (n 717) 334-35 24; *Al-Jedda* (n 145) [114].
[720] ILC, *ARS with commentaries* (n 38) 92 [5].

States. Conduct may give rise to the responsibility of several entities because some entities only incur a form of 'ancillary' responsibility, or because the wrongful conduct of several entities is concerted or otherwise factually related.[721] Difficulties arise namely where a specific material damage cannot be clearly linked to the wrongful conduct of one State and thereby severed from the harm caused by others, but appears as an indivisible whole resulting from the collective conduct.[722] For example, if an international organization and several of its members engage in a military operation in the course of which civilian installations are destroyed, it can be difficult to link specific parts of the damage to the acts of an individual State. The question then arises whether a responsible member State is under the obligation to make reparation for the whole damage suffered by the injured party, even though its wrongful act was merely a piece in a broader context involving multiple States and international organizations; whether this duty can be apportioned among several responsible parties; or whether a responsible State can avoid making reparation altogether because it can point to the conduct of co-responsible entities.

3.2.1 The argument for a rule of 'joint and several responsibility'

In the literature and by States in international proceedings, it has been argued that where several States commit internationally wrongful acts in concert, a regime of 'joint and several responsibility' should apply.[723] Because international organizations and their members act 'in concert' almost by definition, it is only logical that it has been argued that such a rule should in principle apply in this context.[724] The term

---

[721] The scope of concurrent attribution to the State and the international organization is discussed in Chapter 2; complicity as a ground of member State responsibility in Chapter 3.

[722] This scenario is a subset of what has been termed a situation of 'shared responsibility': the 'responsibility of multiple actors for their contribution to a single harmful outcome', André Nollkaemper, 'Introduction: Procedural Aspects of Shared Responsibility in International Adjudication' (2013) 4 JIDS 277 281; also Nollkaemper and Jacobs, 'Shared Responsibility' (n 660). Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471 472 uses the term 'overdetermination' where multiple causes contribute to a harmful outcome.

[723] Brownlie affirmed that 'a rule of joint and several liability in delict should certainly exist as a matter of principle, but practice is scarce', Ian Brownlie, *Principles of Public International Law* (4th edn, OUP 1990) 456, but also Brownlie, *State Responsibility* 189; further John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale J' IL 225; Quigley, 'Complicity' (n 474) 126 (in the context of responsibility for aid and assistance); Orakhelashvili, 'Division of Reparation Between Responsible Entities' in (n 137) 657. The argument was also invoked in the US applications instituting proceedings against Hungary and the USSR in *Treatment in Hungary of Aircraft and Crew of United States of America* (*USA v Hungary)* ICJ Pleadings 8 10 and *Treatment in Hungary of Aircraft and Crew of United States of America (USA v USSR)* ICJ Pleadings 42 44; cases which were later withdrawn.

[724] In this sense Meng, 'Internationale Organisationen' (n 22) 339, 356; Yee, 'Member State Responsibility (Honour Schachter)' in (n 137); Yee, 'Member State Responsibility (Honour Brownlie)' in (n 137) 336; Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States* (SHARES Research Paper 28 (2013), ACIL 2013-26, 2013) 23-25. A rule of 'joint and several responsibility' was also invoked by

'joint and several responsibility' is borrowed from domestic legal systems and is not always used consistently. The gist of the argument in favour of the application of the regime of 'joint and several responsibility' in international law, however, seems to be that an injured State would not be obliged to demonstrate which particular part of the injury was caused by the wrongful act of the responsible State, but could ask any responsible party to make reparation, usually in the form of compensation, for the full injury caused by the group. As Noyes and Smith note, joint and several responsibility 'impos[es] upon each wrongdoer an obligation to pay compensation for the entire injury, even for that share of the harm ultimately defined as the responsibility of another party'.[725] It thereby takes the burden of proving the link of causation between the individual acts of one responsible party and the injury off the injured party. In this sense, a regime of joint and several responsibility aims to protect the interests of the injured party over the interests of the perpetrators.[726] Still according to Noyes and Smith, this is justified since States acting in a 'common enterprise' can be considered to 'expect and implicitly consent to the attendant risks and burdens by entry into the concerted activity'.[727] 'Joint' responsibility indicates that all responsible States are liable to make full reparation; whereas 'several' makes it clear that a claim can not only be brought against the group, but also against any State individually.[728] It would not be necessary that all responsible States made the same contribution to the injury. In principle, the injured State might bring its claim against a co-responsible State that was not the 'primary' perpetrator but merely an accomplice or bystander, even though 'concerns of fairness (...) suggest application of a *de minimis* rule'.[729] If a regime of 'joint and several responsibility' were accepted under general international law, it would thus be unnecessary in situations involving a plurality of responsible parties to establish a link of causation between the wrongful act of one single State and the injury. It would be sufficient to demonstrate that the wrongful conduct of several States acting in concert caused the injury.

Yugoslavia in Legality of Use of Force (Serbia and Montenegro v Canada) (Oral Pleadings) CR 1999/14 10 May 1999 40 (*per counsel Ian Brownlie*).

[725] Noyes and Smith, 'Joint and Several Liability' (n 723) 259. The principle was also invoked in this sense by Australia's submission in *Nauru* (n 198) 258 (it raised the question 'whether the liability of the three States would be "joint and several" (solidaire), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share'). By contrast, 'joint and several responsibility' is also sometimes used to refer to an alleged liability of member States for the wrongful acts of international organization qua membership.

[726] Noyes and Smith, 'Joint and Several Liability' (n 723) 259; Samantha Besson, 'La pluralité d'Etats responsables: Vers une solidarité internationale?' (2007) 17 RSDIE 13 25.

[727] Noyes and Smith, 'Joint and Several Liability' (n 723) 259-60.

[728] James Crawford, *Third Report on State Responsibility, Addendum 2* (UN Doc A/CN4/507/Add2, 2000) 25 [272].

[729] Noyes and Smith, 'Joint and Several Liability' (n 723) 263.

Some authors have drawn support for a rule of joint and several responsibility from the 1902 *Samoan Claims* arbitration.[730] In this case, the UK and the US were held responsible for breaches of the 1899 Convention between Germany, Great Britain and the USA providing for the neutrality and autonomous government of the Samoan Islands.[731] In response to turmoil following the election of a new king, the two countries militarily intervened in support of one party and distributed arms and ammunition among one side to the conflict. King Oscar II, the sole arbitrator over the dispute, found that the military actions had been 'unwarranted' and that 'His Britannic Majesty's Government and the United States' Government are responsible under the Convention of the 7th of November 1899 for losses caused by said military action'.[732] However, the case does not fully support the conclusion that each State would have been obliged to make full reparation for the damage jointly caused, since the 'question as to the extent to which the two Governments, or each of them, may be considered responsible for such losses' was reserved for a future decision. They eventually reached a settlement with all foreign governments whose citizens had incurred losses and paid compensation 'in equal moieties'.[733]

The possible existence of a rule of 'joint and several responsibility' under international law was further discussed by the US Court of Claims in the 1955 *Anglo-Chinese Shipping Company* case, but without any clear conclusion in its favour.[734] The owner of the SS Josephine Moller, a vessel registered under the laws of Hong Kong, brought an action against the United States for compensation for the alleged use of the ship during the occupation of Japan after 1945. The decision to use the vessel for the reparation of Japanese submarine cables had been taken by the Supreme Commander of the Allied Powers, but also 'on behalf of each one of the Allied Powers'.[735] The Court found that the occupation of Japan had been a 'joint venture'

---

[730] ibid 242. The case is also referred to by Christine Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart 2008).
[731] *Samoan Claims* (Germany, GB, USA) (1902) IX RIAA 15.
[732] ibid 27.
[733] ibid 20; for the details of 'Joint Report No II of August 12, 1904', in which the British and the American Commissioner presented their methods for the calculation of damages in that case, see Marjorie M Whiteman, *Damages in International Law*, vol III (US Department of State 1943) 1778-81.
[734] *Anglo-Chinese Shipping Co v US (The Josephine Moller)* (1955) 127 F Supp 553, (1955) 22 ILR 982 (US Court of Claims).
[735] ibid 986.

of the US, the UK, the USSR and China, but that the question of whether the rule of joint and several responsibility could be applied to sovereign nations engaged in a joint enterprise had never been decided.[736] It ultimately found it unnecessary to resolve the question, since Japan was responsible for the use of the vessel, not the Allied Powers.[737]

In *Certain Phosphate Lands in Nauru*, Australia, but notably not Nauru, raised the question of the existence of a rule of joint and several responsibility in international law.[738] Nauru claimed that Australia had breached its obligations under the UN Charter, the Trusteeship Agreement for Nauru and general international law when acting as one of the members of the tripartite Administering Authority for Nauru. Among other things, it claimed compensation for the damage it had incurred through Australia's alleged failure to rehabilitate previously exploited phosphate lands.[739] The Administering Authority had been created by the Trusteeship Agreement approved by the UN General Assembly in 1947 and was made up of the governments of Australia, New Zealand and the UK. As the case was brought against Australia only, Australia

> raised the question whether the liability of the three States would be 'joint and several' (solidaire), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share.[740]

According to Australia, there was no support in practice for a rule 'that in the case of parallel unlawful acts by two or more States it is possible to claim from any one of them the entire compensation for the whole damage suffered'.[741] Judge Shahabuddeen rightly pointed out in his separate opinion that Australia's arguments raised two different questions, only one of which could be considered as a preliminary objection. One question was whether Australia could be sued alone for the alleged breach of the

---

[736] Ibid.
[737] *Anglo-Chinese Shipping* (n 734) 987.
[738] For Nauru's position, see *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Memorial of the Republic of Nauru) (1990) 236 [623] ('As a matter of international law, the presumption is that two or more States which are involved in some form of common enterprise are separately responsible for their own acts, notwithstanding the participation or support of other States').
[739] Certain Phosphate Lands in Nauru (*Nauru v Australia*), Application, 19 May 1989 30-31.
[740] *Nauru* (n 198) 258 [48].
[741] *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* Preliminary Objections of the Government of Australia 126 [305].

Trusteeship Agreement; the other question, which had to be dealt with in the merits phase, was whether Australia was under an obligation to pay compensation for the full damage caused.[742] In accordance with this view, the ICJ decided not to

> settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems (...) and, in particular, the special role played by Australia in the administration of the Territory.[743]

Because the case was settled before a decision on the merits was rendered, the Court did not have the opportunity to discuss the potential relevance of the principle of joint and several responsibility for the apportionment of damages in this case.

Judge Simma argued in favour of a rule of joint and several responsibility in his separate opinion in the *Oil Platforms* case and even concluded 'the principle of joint-and-several responsibility (...) can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1 (c), of the Court's Statute'.[744] However, it appears that he was concerned with a slightly different issue: namely, whether a State could be held responsible under international law on the basis of 'joint conduct', if the State's own conduct was insufficient to establish an internationally wrongful act.[745] Simma discussed the unsuccessful US counter-claim according to which Iran had incurred responsibility under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran due to its military actions in the Persian Gulf, which allegedly impaired the conditions for commerce between Iran and the US. The problem with this counter-claim was that the US failed to show that specific acts impairing commerce between the two States, in particular mine-laying, were attributable to Iran. As Judge Simma explained, in the context of the war between Iran and Iraq, 'two States created the situation adverse to neutral shipping in the Gulf: Iran and Iraq or, to be more precise, Iran or Iraq'.[746] Clearly establishing which State

---

[742] *Nauru* (SO Shahabuddeen) (n 198) 286. A similar point is made by Talmon, 'Plurality' in (n 245) 209.
[743] *Nauru* (n 198) 262 [56].
[744] *Oil Platforms (Iran v USA)* (Merits) [2003] ICJ Rep 161 324 (Separate Opinion of Judge Simma) 358 [74].
[745] This appears also to be the way in which Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in (n 730) 172 uses the term 'joint and several responsibility'. Interestingly, Talmon described the same factual circumstances in terms of concurrent attribution of the conduct of a joint organ: Talmon, 'Plurality' in (n 245) 202.
[746] *Oil Platforms (Merits)* (n 744) 324 (Separate Opinion of Judge Simma) 345 [42].

contributed in what part to the negative impact on the freedom of commerce and navigation in the Gulf was not possible. Applying the principle of joint and several responsibility, Simma argued, Iran could be held responsible as a joint tortfeasor even for damage or impediments it did not directly cause.[747] However, Simma acknowledged that the question whether Iran had committed a wrongful act in the first place had to be distinguished from issues of compensation.[748] Even if Iran had acted wrongfully, as suggested by Simma, it would not necessarily follow that it was under the obligation to make compensation for the whole damage caused by the two States. Be that as it may, the ICJ did not follow Simma's assessment, but rejected the US counter-claim decisively.[749]

In the *Eurochannel Arbitration*, a recent case in which a rule of joint and several responsibility was discussed, there was broad agreement between the parties that no such rule existed as a matter of general international law.[750] The tribunal discussed whether France and the UK incurred responsibility vis-à-vis private concessionaries because of their alleged failure to take the steps necessary to address problems caused by clandestine migration in the Eurotunnel. It found that there was a 'combined failure of the Respondents to meet their obligations under (...) the Concession Agreement'.[751] Yet there was no finding of 'joint and several responsibility', as initially argued by the claimants, but only of breaches of the relevant clauses of the agreement by the two contracting States.[752] Since questions of compensation were reserved for the second phase of the proceedings, the tribunal also did not deal with the question 'as to whether and on what basis any damages should be apportioned as between the Respondents (...)'.[753] The two governments eventually reached separate amicable settlements with the Eurotunnel Group, in which the amount of compensation to be paid by the French government was considerably higher than the UK's.[754]

---

[747] ibid 357 [73].
[748] ibid 358 [73].
[749] *Oil Platforms (Merits)* (n 744) 218-19.
[750] The claimants accepted that no such rule existed as a matter of general international law, but argued that it had been agreed between the parties, *Eurochannel arbitration* (n 198) 51 [165].
[751] ibid 102 [315].
[752] ibid 103 [317].
[753] ibid 112 [351].
[754] The Eurotunnel Group reached an amicable settlement over the payment of $24 million with the French government in April 2008, and a settlement over the payment of $8 million with the UK government in December 2009; Eurotunnel, Press Release 2009 Results, 9 March 2010, [3.5], available at <www.eurotunnelgroup.com> (last accessed 19 September 2016).

De lege lata, a general rule of joint and several responsibility does not appear to exist in international law.[755] This view is also reflected in the ILC draft articles, whose commentary states that 'the general rule in international law is that of separate responsibility of a State for its own wrongful acts'.[756] The ILC 'neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act'.[757] This means that in cases involving the responsibility of several parties in relation to the same harmful act, the apportionment of the duty to make reparation must indeed be decided in each individual case by assessing whether the individual State's wrongful act *caused* the injury in question.

2.2.2 Apportionment of the duty to make reparation in accordance with the rules on causation

Whether a certain injury can be considered the consequence of a specific wrongful act in international law is not merely a question of fact or observation of nature, but one of legal assessment. As Stern notes, '*[j]uridiquement, la causalité n'est pas autre chose qu'un accord intellectuel, l'explication communément admise de la succession de deux faits entre lesquels l'esprit humain admet un enchaînement*'.[758] Establishing an agreement over whether a certain wrongful act can be considered in law to have caused a certain injury is not always easy. It has been observed that international case law is disparate and contradictory, being inspired by theories prevailing in the domestic legal systems of adjudicators rather than independent analysis.[759] Adding to this sense of disunity is the fact that many primary rules have built-in tests resembling causation which determine whether the particular obligation has been breached.[760] For example, in order to assess whether a State has violated a due diligence obligation to prevent a certain harmful outcome, it may be necessary to assess to what extent the State's failure to act had an impact on the outcome. Or, in order to establish whether a State breached the obligation not to aid and assist another State in the commission of a

---

[755] In this sense also d'Argent, 'Reparation, Cessation' in (n 447) 245-46; José Manuel Cortés Martin, 'The Responsibility of Members Due to Wrongful Acts of International Organizations' (2013) 12 CJIL 679 716. This conclusion is not only true for the ICJ and general international law, but also for reparation under the ECHR Maarten Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 JIDS 361 380.

[756] ILC, *ARS with commentaries* (n 38) 125 [6]; Article 47.

[757] ibid 125 [6].

[758] Brigitte Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone 1973) 189. Similarly ILC, *ARS with commentaries* (n 38) 92-93 [10].

[759] In this sense, among many, Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695 708.

[760] Stern, 'The Obligation to Make Reparation' in (n 667) 570.

wrongful act, one must investigate whether the assistance made a 'substantial contribution'.[761] However, this does not mean that the same standard of causation would apply to determine the extent of the responsible State's duty to make reparation. The ICJ recognized in the *Genocide Convention* case that the test of causation relied on to establish the breach of a particular primary obligation is not necessarily the same as the test relied on to establish whether the wrongful act caused a specific injury.[762] It found that Serbia had breached its obligation to prevent genocide, but it still wasn't under an obligation to compensate Bosnia or its population for the harm incurred. The ILC does not deal with the rules regarding the establishment of a causal link between a wrongful act and injury in any systematic manner. On the contrary, the commentary on Article 31 ARS stipulates that 'the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation'.[763] This is certainly true at the level of primary rules, but not necessarily at the level of secondary rules on reparation.[764]

Only the test of causation applied at the level of general secondary rules will be discussed here. It is in principle accepted that two elements of a test of causation must be distinguished.[765] The first element is that of 'cause-in-fact'. It answers the question '[w]hat sort of condition must be attributed to an agency for its action or intervention (...) to count as causal'.[766] In international law, as in domestic contexts, it is often suggested that a wrongful act must be a *necessary* condition for the occurrence of a certain harm in order to be counted as its cause.[767] According to this view, one must proceed to a counterfactual analysis of

---

[761] See (nn 475 *et seq*).
[762] *Genocide Convention Case* (n 194) 233 [461].
[763] ILC, *ARS with commentaries* (n 38) 93 [10]. For the ILC, one relevant factor would be 'whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule'.
[764] In this sense also Stern, 'The Obligation to Make Reparation' in (n 667) 570.
[765] Plakokefalos, 'Causation' (n 722) 475, strongly advocates a more consistent application of this distinction to achieve more clarity in case law. The ILC notes the distinction, pointing out that 'causality in fact is a necessary but not a sufficient condition for reparation, ILC, *ARS with commentaries* 92-3 [10]. In jurisprudence, the distinction is well-accepted: R Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 Iowa LR 1001; Michael S. Moore, *Causation and Responsibility An Essay in Law, Morals, and Metaphysics* (OUP 2009) 81 *et seq*. On its relevance for the determination of the impact of contributory fault of the injured State, David J Bedermann, 'Contributory Fault and State Responsibility' (1989-1990) 30 Va J Int'l L 335 249-51.
[766] Tony Honoré, 'Causation in the Law' (<*http://plato.stanford.edu/archives/win2010/entries/causation-law/*>, 2010) [3.1].
[767] The PCIJ, for example, held that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re- establish the situation which would, in all probability, have existed *if that act had not been committed*', *Chorzów (Merits)* (n 679) 12 (*emphasis added*). In this sense eg also Bedermann, 'Contributory Fault' (n 765) 349. The ILC does

whether the harm would have occurred *but-for* the wrongful act, in other words, establish whether the wrongful act was a *conditio sine qua non* for the harm. As will be shown below, the application of the *but-for* test can lead to unsatisfactory results in situations where a certain indivisible harm was produced by a combination of several wrongful acts. What if one State's wrongful conduct simply made a relatively minor contribution to the harmful outcome? Or what if the outcome would have been the same whether or not the State had engaged in its wrongful conduct? Again, it is where several wrongful acts result in a single indivisible injury that the most serious difficulties arise. If damage can be severed according to the respective acts of several responsible parties, each party will simply be under the obligation to make reparation for the part of the injury caused by its wrongful act. By contrast, no such division is possible where the injury caused forms an indivisible whole, as for example the loss of a company, the death or imprisonment of a person or the destruction of property. In jurisprudence, alternative 'cause-in-fact' tests have been proposed to deal with such problems: a 'strong sufficiency' test on the one hand and a 'scalar' approach on the other hand. While it goes beyond the scope of this thesis to discuss the merits of these respective approaches in conceptual terms, this section will evaluate their implications for situations of member State responsibility. Different scenarios of co-responsibility with concurrent causation of harm will be discussed, following the lines of the seminal work of Brigitte Stern: cumulative causation, additional causation, and complementary causation.[768]

Before addressing these different scenarios, the second element of a test of causation, termed 'proximate causation',[769] 'foreseeability' or 'scope of responsibility'[770] must be briefly discussed. Proximate causation aims to exclude those consequences of a particular act that are too removed from the wrongful act as that it could be considered their cause in law. In early international law literature, non-proximate harm was

---

not formally subscribe to this view, but some of its statements in the commentary suggest such an understanding. Further on this (n 807).

[768] Stern, *Préjudice* (n 758); also Pierre d'Argent, *Les réparations de guerre en droit international public* (Bruylant 2002) 636-37; d'Argent, 'Reparation, Cessation' in (n 447); and Plakokefalos, 'Causation' (n 722). Similar distinctions are drawn by H. L. A. Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 205 *et seq*, but with different conclusions, as discussed below.

[769] Bedermann, 'Contributory Fault' (n 765) 349.

[770] Plakokefalos, 'Causation' (n 722) 375

sometimes referred to as 'indirect' damage, but this ambiguous term is now commonly avoided.[771] Proximity of injury is not a difficulty that is specific to the context of international organizations, but is rather a commonly identified problem in cases involving questions of State responsibility.[772] It will accordingly only very briefly be discussed at this point. It is clear that if every wrongful act that is a 'necessary' or 'sufficient' condition[773] for a certain harm to occur were considered its cause in law, the duty to make compensation would extend indefinitely. For example, an act of aggression by one State that triggers a flow of refugees could be seen as a necessary cause for the injury that results from the commission of a crime by one refugee in the host country. Accordingly, there is general agreement that harm or loss that is 'contingent and indeterminate', 'too remote' or 'not proximate' cannot be considered to have been 'caused' by the wrongful act.[774] As the Eritrea-Ethiopia Claims Commission stressed in relation to the situation of an armed conflict, '[a] breach of the *jus ad bellum* by a State does not create liability for all that comes after'.[775] At the same time, whether a certain harm is sufficiently 'proximate' cannot be determined by a one single criterion, and much would depend on the concrete circumstances of the case. As the ILC notes, '[i]n international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search of a single verbal formula"'.[776] In case law, damage is generally regarded as 'proximate' if it is the normal and foreseeable consequence of the wrongful act.[777] This can be the case both for harm that results directly from the wrongful act and for

---

[771] In this sense Whiteman, *Damages* (n 733) 1766, for a criticism of this use of the term see eg Verzijl, *International Law in Historical Perspective. Part 6, Juridical Facts as Sources of International Rights and Obligations* 743; Stern, *Préjudice* 204.
[772] Clyde Eagleton, *The Responsibility of States in International Law* (NYU Press 1928) 208; Whiteman, *Damages* (n 733) 1765 et seq; Gray, *Judicial Remedies in International Law* (n 700) 33-39; Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833 846.
[773] Whether a certain factor must be necessary (*sine qua non*) or simply sufficient for the harm to occur is discussed below.
[774] *Chorzów (Merits)* (n 679) 57, in relation to the head of damages arising from the alleged competition between the dispossessed Chorzów Factory and the German company; ILC, *ARS with commentaries* (n 38) 92-93 [10]. See also Stern, *Préjudice* (n 758) 192-93.
[775] *Final Award Ethiopia* (n 708) 66 [289]. The UN Compensation Commission dealing with claims against Iraq was competent to award compensation for any 'direct' loss, damage or injury resulting from the invasion and unlawful occupation of Kuwait, UNSC Res 687 (3 April 1991) UN Doc S/RES/687 [16].
[776] ILC, *ARS with commentaries* (n 38) 93 [10] (citing PS Atiyah, *An Introduction to the Law of Contract*, 5th ed (Oxford, Clarendon Press, 1995), 466).
[777] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Repr edn, CUP 1994) 246; Arthur W. Rovine and Grant Hanessian, 'Toward a Forseeability Approach to Causation Questions at the United Nations Compensation Commission' in Richard B Lillich (ed), *The United Nations Compensation Commission* (Transnational Publishers 1995) 244.

harm that arises only after one or several intermediary steps.[778] In order to establish whether compensation is due, tribunals generally assess 'whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question'.[779] Whether a certain harm is considered 'too remote' might even depend on the primary obligation breached, as types of injury whose occurrence the obligation breached was designed to prevent are less likely be considered 'unforeseeable'.[780] At the same time, it is evident that this foreseeability test leaves considerable discretion to judges.[781] This may at least partly explain the perceived lack of consistency in case law.

2.2.2.1 Cumulative causation

In what Stern describes as a situation of 'cumulative causation', each of several factors is a necessary condition without which the harm would not have been produced (a *conditio sine qua non*).[782] This implies that in itself, each condition would have been *in*sufficient, because the other condition was also necessary for the harm to occur. To illustrate this scenario, Stern refers to the case of *John*, in which a US ship had been unlawfully seized by the UK and brought off its course, after which it was hit by a localised storm and perished.[783] Both the forced change of course and the bad weather were necessary but by themselves insufficient conditions for the damage to arise. Cumulative causation can arise between a wrongful act and an external factor or force majeure, as in *John*, or between the wrongful act of one State and the acts of a third party.[784] Applied to the context of international organizations, one might think of a wrongful decision adopted by an international organization which was subject to the veto of several member States, so that the absence of the veto by one State is a necessary but insufficient condition for the wrongful

---

[778] See eg the *Administrative Decision No II* (US-German Mixed Claims Commission) (1923) VII RIAA 23 29-30: 'it matters not how many links in the chain of causation there may be connecting with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced link by link, to Germany's act'.

[779] *Decision No 7* (Eritrea-Ethiopia Claims Commission) (2007) 46 ILM 1121 13-14; *Final Award Ethiopia* (n 708) 64 [284], 11-12 [39]. Not among the 'proximate' consequence of the *jus ad bellum* violation was the decline in foreign investment and international development assistance, since 'any reduction in development assistance resulted from decisions taken by international financial institutions and foreign governments for their own reasons', ibid 101 [465]; 104 [469].

[780] ILC, *ARS with commentaries* (n 38) 93 [10]; Crawford, *Third Report* (n 669) 15-16 [28].

[781] For Plakokefalos, 'Causation' (n 722) 478, by using terms such 'proximity' or 'forseeability' tribunals may hide policy considerations 'under causal language'.

[782] Stern, *Préjudice* (n 758) 270 *et seq*; similarly Personnaz, *La réparation du préjudice en droit international public* (n 684) 140.

[783] Case reproduced in Albert Geouffre de Lapradelle and Nicolas Politis, *Recueil des arbitrages internationaux*, vol II (2ème edn, 1957) 748.

[784] Stern, *Préjudice* (n 758) 272.

decision and any resulting harm.[785] One might also think of a situation in which a State knowingly provides aid and assistance to another State or organization for the commission of a wrongful act and where the latter would not have been able to commit the wrongful act without the assistance. Any resulting injury act would have been caused cumulatively by the wrongful act and the wrongful assistance.

Stern concludes on the basis of case law that the fact that a certain injury was caused cumulatively by several factors is irrelevant for a responsible party's duty to make compensation.[786] Where a particular harm is truly indivisible and has been caused by cumulative conditions, the responsible party is under the obligation to make full reparation for the harm it has thereby caused. This is in accordance with a strict *but-for* test of causation, according to which a factor is considered a 'cause' for a certain harm if it was *necessary*. The conclusion that each responsible State must under such circumstances make full reparation for injury finds support in case law, most notably in the ICJ's *Corfu Channel* case. Albania was found liable to compensate for the full damage resulting from its wrongful failure to inform the UK of the presence of mines in its territorial waters, even though another State - Yugoslavia - had laid the mines and thereby contributed to the harmful outcome in an at least comparable way.[787] Considering the circumstances of the case, it is reasonable to conclude that both Albania's failure to notify the presence of the mines in its waters and the other State's placing of the mines were necessary conditions for the damage - the destruction of the two British warships - to arise.[788] In this sense, *Corfu Channel* supports Stern's conclusion that any responsible party whose wrongful act was a necessary condition for the harm must pay full compensation. At the same time, it must be borne in mind that the analysis of proximate causes is not dispensed of in such situations. At times a wrongful act can be one of several necessary conditions for a certain injury, but still be far removed in a chain of causation and entirely unforeseeable. Only if both tests are met will a State be under the obligation to make reparation for the damage. This is also the

---

[785] In order to lead to a situation of responsibility of several parties, the member State would of course need to be under the obligation to seize the veto and oppose the decision, which in practice may be very difficult to establish.
[786] Stern, *Préjudice* (n 758) 280. Similarly, in the context of international organizations, Klein, *Responsabilité des organisations internationales* (n 35) 592.
[787] *Corfu Channel (Merits)* (n 456) 36; *Corfu Channel Case (UK v Albania)* (Compensation) [1949] ICJ Rep 244 .
[788] In this sense also d'Argent, 'Reparation, Cessation' in (n 447) 226 who in Pierre d'Argent, 'Reparation and Compliance' in Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law : The Enduring Impact of the Corfu Channel Case* (Routledge 2012) 344-45 however also accepts that the Court's judgment would be consistent with other theories of causation such as adequate or efficient causation.

solution suggested by the ILC, which points out in the commentary on the ARS that 'unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct'.[789]

2.2.2.2 Additional causation

In what Stern describes as a situation of 'additional causation', the wrongful act is not a necessary condition for the harm to arise, because it would have been caused in any case due to other circumstances or the acts of a third party.[790] It is the last scenario, acts by third parties, which is particularly relevant in the context of international organizations. While highly hypothetical, one might think of a situation in which several member States of a decision-making organ are under an obligation not to veto a certain decision.[791] If one State nevertheless vetoes the decision and the absence of a decision leads another party to incur injury, its wrongful act would have produced the injury by additional causation if another State decided simultaneously to veto the decision. In this situation, neither party's veto was necessary for the injury to arise, as the other State's veto would have been sufficient.[792] A similar scenario arises where a State's wrongful act would not actually have been sufficient, in itself, to produce the harm, but nevertheless makes a certain contribution. This would be the case if a State votes in a manner that is unlawful, but if its vote was not decisive for the adoption of the organization's (unlawful) decision and any resulting injury. Or, if one State aids and assists another State or organization in the commission of a wrongful act, but the assisting State's support was not decisive for the resulting injury to occur.[793]

---

[789] ILC, *ARS with commentaries* (n 38) 93. This passage has notably been relied on in recent decisions to support the same conclusion: Yukos Universal Ltd (Isle of Man) v Russia PCA Case No AA 227 (2014) (Final Award) 547 [1774].

[790] Stern, *Préjudice* (n 758) 275; Personnaz, *La réparation du préjudice en droit international public* (n 684) 142. Hart and Honoré (n 768) distinguish further been additional and alternative causation, the latter being 'hypothetical': the alternative cause that would have caused the harm did not actually occur, as in if A had not killed B, B would have been killed by C; Hart and Honoré, *Causation* (n 768) 249.

[791] On the question whether the conduct of States within decision-making organs can give rise to their responsibility, see Chapter 3 Section 3.1 Participation in decision-making organs.

[792] A similar scenario is discussed in Jane Stapleton, 'Choosing What We Mean by Causation in the Law' 73 Missouri Law Review 433 474-75.

[793] For the establishment of responsibility for wrongful aid or assistance, it is sufficient that the assistance made a significant contribution; it must not be necessary for the commission of the wrongful act, see ILC, *ARS with commentaries* (n 38) 67; also already Quigley, 'Complicity' (n 474) 122. This illustrates that the standard of causation applied for the establishment of the breach and the standard applied for the establishment of the duty to compensate for damage is not necessarily the same, as explicitly acknowledged by the Court at *Genocide Convention Case* (n 194) 233 [461].

Stern concludes that in situations of additional causation, the responsible State is under no obligation to make reparation, since the wrongful act was not a necessary condition for the harm.[794] The suggestion that the duty to make reparation arises only if the wrongful act was a necessary condition for the resulting damage finds some support in the ICJ's reasoning in the *Genocide Convention* case. In this case, after having established that Serbia had acted wrongfully because it failed to employ all means reasonably available to prevent the genocide in Srebrenica,[795] the Court went on to discuss the consequences of this finding in terms of Serbia's duty to make compensation for the damage incurred by Bosnia. Central to the Court's analysis was the question whether Serbia's failure to take appropriate measures was a necessary condition for the genocide - 'whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession'.[796] The Court noted:

> The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus would be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide in Srebrenica *would in fact have been averted* if the Respondent had acted in compliance with its legal obligations.[797]

According to the Court, it was not established that with the employment of the required means, the genocide would have been prevented.[798] Accordingly, no causal nexus between the wrongful act and the injury was established and Serbia did not have to pay any compensation to Bosnia. The case thus supports the view that no compensation is due unless the wrongful conduct can be considered a *conditio sine qua non* for the injury.[799]

The assumption that a certain wrongful act or omission must always be a necessary condition for the resulting harm in order to be considered its cause can be problematic in cases of 'additional causation'. It

---

[794] Stern, *Préjudice* (n 758) 276-80.
[795] *Genocide Convention Case* (n 194) 221 [430]; 22-226 [438].
[796] ibid 234 [462].
[797] ibid 234 [462] (*emphasis added*).
[798] Ibid.
[799] Curiously, Bosnia's claim for compensation was only related to a finding of a violation of the substantive obligation not to commit genocide, whereas it seemed to agree with Serbia that in case of a violation of the duty to prevent genocide, a declaratory judgment would be the appropriate remedy. On this point see *Genocide Convention Case* (n 194) [459]. Critically of the Court's reasoning, Gattini, 'Genocide Judgment' (n 759) 706-07. Christian Tomuschat, 'Reparation in Cases of Genocide' (2007) 5 JICJ 905 907-08 agrees with the Court's reasoning on causation, but argues that the Court should have shifted the burden of proof: Serbia should have been required that even with the required measures, the genocide would have been committed.

has notably been criticized in domestic contexts, as it can have puzzling consequences.[800] Applying a strict *sine qua non* test leads to the conclusion that in some cases of additional causation, no State is under the obligation to make reparation for harm, because each State can point to the other State's wrongful conduct which was sufficient to cause it. This problem is well-known in domestic contexts and has been described by Hart and Honoré as follows:

> This is the case where two causes, each of them sufficient to bring about the same harm, are present on the same occasion. A defendant starts a fire which, before it destroys property, joins a fire started by another. (...) In these cases the normal assumption that on any given occasion only one set of sufficient conditions of a given contingency is present has broken down. (...) we cannot say that either was necessary on this occasion and so a condition sine qua non, because the other case would have sufficed to produce it.[801]

Applied to the above-mentioned example of several member States each using their respective veto-power in an unlawful manner, the *sine qua non* test leads to the conclusion that no State should be considered liable to make reparation for injury, as the other State's veto would have caused the injury in any case. Such an outcome is obviously unsatisfactory, especially given international law's lack of a rule of 'joint and several responsibility' if several States commit wrongful acts in concert.[802]

Alternative tests have been proposed in the domestic context to deal with this particular situation. Hart and Honoré suggested a weaker necessity test to deal with the problem of additional causes, according to which each factor is properly described as a cause of the harm 'when each factor is sufficient, with other normal conditions, to bring about the harm as and when it occurs'.[803] This test has later been refined by Wright and is currently known as the NESS-condition: a factor is considered a 'cause' if it was a 'necessary element of some set of actual conditions that was sufficient for the occurrence' of the harm.[804] Wright describes this as a 'weak necessity and strong sufficiency' test. Applied to the example of the unlawful use of the veto, one could conclude on the basis of this test that each individual Member State possessing the right to veto a decision and having decided to exercise the right to veto under the particular circumstances was a set of conditions that was sufficient to produce the harm. Since the actual exercise would further be

---

[800] Hart and Honoré, *Causation* (n 768) 112, 235.
[801] ibid (n 768) 123.
[802] See (n 755) above.
[803] Hart and Honoré, *Causation* (n 768) 235.
[804] Wright, 'Pruning the Bramble Bush' (n 765) 1020.

a necessary element of that sufficient set, it could be counted as a cause for the failure to adopt the decision and for the subsequent and foreseeable injury.[805] Adopting this approach would be one way to deal with such - rather exceptional - cases of additional causation in international law.

The weak necessity, strong sufficiency test however does not resolve the question whether a State whose wrongful act is not an necessary element of a set of conditions sufficient to cause the injury should be under an obligation to make some reparation.[806] For the purposes of this thesis, the most important practical example of such 'non-necessary' contributions are acts of complicity, even though a wrongful failure to prevent, similar to the above-cited example of Serbia's failure to prevent genocide, would arguably be covered by this scenario as well. The ILC notes that 'where the assistance is a *necessary* element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State'.[807] In many situations, however, a State that wrongfully aids and assists another State in the commission of a wrongful act makes a 'significant' but not necessary contribution to the wrongful act and any resulting injury: the 'assistance may have (...) contributed only to a minor degree, if at all, to the injury suffered'.[808] Such a non-decisive contribution to an indivisible injury could neither on the basis of the *but-for*, nor on the basis of the NESS-test, be considered a 'cause' for the harm. In the domestic context, complicity is sometimes described as a non-causal form of responsibility for this reason.[809] Some authors have accordingly concluded that the aiding and assisting State must not pay any compensation if its contribution was not necessary.[810] This view also seems to be implicit in Bosnia's argumentation in the *Genocide Convention* case:

> the "Republika Srpska", the Bosnian Serb Army and the other armed forces fighting on the Serb side in the territory of Bosnia and Herzegovina would *never* have been able to carry out their intention to commit genocide without the Respondent's massive aid and encouragement: this aid

---

[805] This would, in any case, be true if the vetoes were exercised simultaneously. Wright appears to assume that if one set of factors (ie fire X) produced the harm prior to the intervention of the other set of factors (ie fire Y); the second set of factors would not actually be sufficient to produce the harm: ibid 1022.
[806] As Wright notes '[a] condition was a cause under the NESS test if it was *necessary in the circumstances for the sufficiency* of any actually sufficient set, even if, due to other actually or hypothetically sufficient sets, it was not - as required by the but-for test - necessary in the circumstances for the result', ibid 1021 (*emphasis added*).
[807] ILC, *ARS with commentaries* (n 38) 67 [10].
[808] ibid 67 [10].
[809] For an account and criticism of this view, Moore, *Causation and Responsibility An Essay in Law, Morals, and Metaphysics* (n 765) 280-322; John Gardner, 'Complicity and Causality' (2007) 1 Crim Law and Philos 127.
[810] In this sense, Klein, *Responsabilité des organisations internationales* (n 35) 592.

> was not a mere concomitant factor of the enormous damages and losses suffered by Bosnia and Herzegovina and its nationals, but their decisive cause.[811]

Bosnia evidently attempted to establish that Serbia's contribution was in fact a necessary factor for the harm. Because the ICJ eventually did not find Serbia responsible on the basis of aid and assistance, but on the basis of a failure to prevent genocide, the Court did not rule on this issue.

This contrasts with the commonly defended view in the literature that some form of reparation must be made where unlawful aid and assistance is provided for a wrongful act that results in third party harm, even if that assistance was not necessary for the damage to occur. Aust is of the view that '[c]ompensation in cases of complicity does not have to rest on the assumption that the wrongful act would not have occurred but for the aid or assistance furnished in its support',[812] as this would fail to account for the fact that the State nevertheless actively engaged in wrongful conduct. Others have gone even further and have argued that if the damage is indivisible, the State that committed the wrongful act and the State that aided and assisted the wrongdoing State should both be under the obligation to make compensation for the full damage.[813] In *El Masri*, one of the few international cases finding that a State was responsible for facilitating another State's harmful acts, the ECtHR did not proceed to an analysis of whether the assistance was necessary for the harm to occur when ordering the responsible State to make compensation.[814] The theoretical foundations of the duty to make compensation were however not explored.

---

[811] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits and Counter-claims, Reply of the Government of Bosnia and Herzegovina, 23 April 1998 880 [11] (*emphasis in the original*); 81 [15].

[812] Aust, *Complicity* (n 471) 285; similarly Vladyslav Lanovoy, *Responsibility for Complicity in an Internationally Wrongful Act: Revisiting a Structural Norm* (Paper Presented at the SHARES Conference, 17 and 18 November 2011, Amsterdam, 2011) 18, who argues 'any kind and degree of aid or assistance to the wrongdoing [should] generate[] at least some legal consequences for the aiding or assisting State, even where its participation was simply an intervening cause of the injury').

[813] Quigley, 'Complicity' (n 474) 128; Felder, *Beihilfe* (n 504) 277. In accordance with the view defended above, this conclusion would be correct only if both were cumulative causes, ie if the aid and assistance was (also) a *conditio sine qua non*.

[814] The ECtHR held Macedonia responsible 'for the violation of the applicant's rights under [Article 3 ECHR] since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring (...)', *El-Masri* (n 423) 64 [211]. The acts amounting the torture had been inflicted by the agents of another State, and whether or not Macedonia's conduct was necessary for the injury to occur was not discussed. The Court awarded compensation, albeit for a number of different breaches, without discussing this aspect, ibid [267]-[270].

It is suggested that there are two possible ways in which such an approach could be motivated in conceptual terms. First, an alternative approach proposed in the literature consists of taking varying degrees of contribution into account when determining whether a certain action was a 'cause-in-fact' for the resulting harm. For certain authors, there can kind be different kinds,[815] or different degrees of causation,[816] on the basis of which a distinction can be drawn between an accomplice and the principal perpetrator without concluding that accomplice liability is non-causal. Relying on Gardner's work, Jackson argues that complicity in international law should indeed be seen as a form of causal responsibility, albeit an indirect one: 'the principal causes the injury; the accomplice makes a causal contribution to the principal's causing the injury'.[817] According to this view, assistance is a different kind of causal contribution to the harm, but a causal contribution nevertheless. Applied to cases of international responsibility, such an approach would presumably allow courts to distinguish between degrees of influence a wrongful act had on the resulting harm, with mere aid and assistance causing the resulting harm 'to a lesser extent' or 'more indirectly' than the primary wrongful act. Judge Ečer presumably referred similar considerations in his dissenting opinion in *Corfu Channel*, where he submitted that the Court should have discussed 'the relationship between the degree of culpability and the amount of compensation' when establishing Albania's duty to make compensation for its failure to prevent the destruction of the British warships.[818] At the same, it is not clear how a distinction between 'forms' or 'degrees' of causation would play out at the level of the secondary rules in the allocation of the duty to make reparation for indivisible harm. As the rule is currently understood, a responsible State is under the obligation to make 'full reparation' for the injury caused by its wrongful act.[819] It is difficult to see how a court could, in application of this rule, 'apportion' the duty to make reparation for indivisible harm once it has established that there is indeed a relationship of causation between the wrongful aid and assistance and the produced harm.

---

[815] John Gardner, 'Moore on Complicity and Causality' [2008] 156 UPenn Law Review PENNumbra 432.
[816] Moore, *Causation and Responsibility An Essay in Law, Morals, and Metaphysics* (n 765) 300.
[817] Jackson, *Complicity* (n 414) 178. In the words of Gardner, 'Complicity' (n 809) 128, an accomplices makes 'a difference to the difference that principals make'.
[818] *Corfu Channel (Compensation)* (n 787) 252, 254 (Dissenting Opinion Judge ad-hoc Ecer).
[819] ILC, *ARS with commentaries* (n 38) Article 31.

A second possible way of dealing with such 'non-necessary contributions' would be to focus on a different type of damage. As noted above, both material and moral damage are recognized forms of injury for which reparation must be made. Even if it may not be possible to establish a relationship of causation between the wrongful assistance and the material damage, the very fact that aid and assistance in a wrongful act was knowingly provided can be considered to give rise to 'moral damage'.[820] Lanovoy argues in this sense that '[r]egardless of whether complicit conduct leads to a quantifiable estimate of material damage, it always contributes to a moral damage or legal injury'.[821] Recognizing the 'moral damage' caused by the mere fact of being complicit in another's wrongful act would mean that the complicit State must make reparation in an appropriate form. At a first time, it would be required to make restitution by revoking its contribution, as far as this is possible. To the extent that the consequences of the wrongful act are not 'fully wiped out', other forms of reparation must also be considered. As discussed above, reparation for moral harm is unlikely to take the form of financial compensation where it is inflicted on a State.[822] By contrast, financial compensation is possible where moral harm is inflicted on an individual. In such situations, the amount of compensation would not need to be established on the basis of the rules on causation, but is generally determined on the basis of equitable principles.[823]

2.2.2.3 Complementary causation

The third and last scenario of causation by multiple parties identified by Stern is complementary causation.[824] While in the case of cumulative causation, contributions of several parties are necessary to produce the harm, and while in the case of additional causation, the contribution of at least one party can be disposed of, complementary causation means that the actions of several parties add up and finally result in what appears to be a single, indivisible harm. One might think of a joint military operation during

---

[820] As Gaja noted as Chairman of the Drafting Committee on the ARS, '"[m]oral" damage could be taken to include not only pain and suffering, but also the broader notion of injury, which some might call "legal injury" and had been done to States', ILC, *Summary Record of the Meetings of the 52nd Session* (ILC Yb 2001 Vol I, 2000) 388 [16]. This is close to the view originally defended by Anzilotti, for whom '[l]e dommage se trouve compris implicitement dans le caractère anti-juridique de l'acte': Anzilotti, '*Responsabilité internationale*' (n 180) 13-14.

[821] Lanovoy, 'Complicity' in (n 420) 166. Similarly, for Quigley, '[t]he path to assessing higher or lower damages against a complicit State is left open by the concept that the act of a complicit State is a wrong separate from that of the principal State', Quigley, 'Complicity' (n 474) 129.

[822] For a criticism, Tomuschat, 'Reparation' (n 799) 909-911.

[823] *Lusitania* (n 717) 40; *Diallo (Compensation)* (n 717) 334-5 [21], [24]; *Al-Jedda (HL)* (n 595) 114.

[824] Stern, *Préjudice* (n 758) 281 *et seq*; this scenario is also discussed by Riphagen, *Second Report on State Responsibility* (n 668) 14 [44].

which the concerted conduct of several States leads to the destruction of civilian property, which was a frequently invoked claim in the context of NATO's Operation Allied Force.[825] Unlike in cases of cumulative causation, the acts of only one State would have been sufficient to cause some harm. Unlike in cases of additional causation, the outcome would have been different had the individual State not participated. The challenge is precisely to evaluate the effect of the individual contribution of one State on the overall result. Stern concludes that in cases where there was a complementary intervention of the acts of a third party, tribunals usually establish a break-down among the different intervening causes.[826] In *Martini,* for example, the umpire of the claims commission concluded that the loss of profit incurred by one company was in equal parts due to the general situation of war, the acts of revolutionaries and the wrongful breach of contract by the Venezuelan government. The latter was accordingly ordered to make compensation only for a third of the overall damage.[827] One may also refer to the *Zafiro* case, where the arbitration tribunal accepted in principle that the amount of damages to be paid by the US would be reduced if it were shown that a particular part of the damage was caused by private parties.[828] The ECtHR has proceeded to a similar break-down in cases involving the responsibility of several States.[829] The above mentioned *Eurochannel Arbitration* equally supports this assessment, in which the amounts of compensation paid by the UK and France were not identical.

In the specific context of international organizations, a fourth scenario of concurrent causation must be mentioned. As has been demonstrated in Chapter 2, there are situations in which conduct can be attributed concurrently to a member State and to an international organization, notably in the context of

---

[825] Eg *Case 2 BvR 2660/06* (n 143) relating to the role Germany played, as a member of the North Atlantic Council, in the destruction of the partly civilian-used bridge at Varvarin; *Banković* (n 4); *Legality (Belgium) (Preliminary Objections)* (n 5).

[826] Stern, *Préjudice* (n 758) 285. d'Argent, 'Reparation, Cessation' in (n 447) 224: 'a situation of "complementary" causes calls for the apportionment of the obligation to make reparation in due proportion to the causal influence of each wrongful act on the apparently globally harmful outcome'.

[827] According to the umpire, '[i]t would (...) be manifestly unfair to hold the Government responsible for [the full] amount, because a very large part of the difficulty in working the mines was due to the direct action of revolutionists, with whom the Government was at war, and another considerable percentage must be attributed to the fact that the mines could not have been worked with thorough success even had the Government properly performed its duties, because of the existence of a state of warfare in the neighbourhood of the mines and railway, (...), a condition for which the Government can not be held to contractual or other responsibility', *Martini Case* (Italian-Venezuelan Claims Commission) (1903) X RIAA 644 666-67.

[828] *Earnshaw and Others* (GB v USA) (Zafiro Case) (1925) VI RIAA 160 164; Whiteman, *Damages* (n 733) 1769 *et seq.*

[829] Eg *Ilascu* (n 210) [484] *et seq*; for an overview see Den Heijer, '*Shared Responsibility ECtHR*' (n 755) 378-81.

peacekeeping or other security and military operations.[830] If the conditions for concurrent attribution are fulfilled, and if members of peacekeeping contingents engage in conduct that is unlawful for both entities, then the organization and the member State will both incur responsibility for an internationally wrongful act. There will accordingly be two identical wrongful acts of two parties that cause any relevant injury.[831] However, it seems unproblematic to conclude in this scenario that both parties caused the relevant injury in law and are accordingly obliged to make full reparation.[832] The reason why scenarios involving multiple responsible parties are often difficult is because the acts of others constitute intervening causes that influence the link between the individual wrongful act and the harmful outcome. In the case of concurrent attribution, by contrast, no such intervening factors arise, as there is but a single course of conduct, which is merely attached to two legal persons.

2.2.3 Internal Recourse

Even though international law does not currently know the principle of 'joint and several responsibility', there are thus circumstances where a single State can be ordered to make full reparation for damage caused concurrently by several responsible States or organizations. In accordance with the theories of concurrent causation discussed above, this would at the very least be the case where damage was caused concurrently by cumulative causation (more than one responsible party's wrongful conduct being a necessary condition for the harm to arise) and, according to the view defended above, also in cases of additional causation, if both wrongful acts were necessary elements of a set of conditions sufficient to cause the harm. Further, each responsible party is under the obligation to make full reparation where conduct is attributed concurrently to an international organization and a State, or to two States, provided that this conduct conflicts with obligations incumbent on both parties. In all three scenarios, the responsible State is obliged to make full reparation because it is considered to have caused the entire damage by its wrongful act. In cases of complementary causation, by contrast, tribunals would as far as

---

[830] See Chapter 2, Section 3.3 Conduct of member State organs 'placed at the disposal' of an international organization.

[831] Given the fact that the definition of a wrongful act is a) conduct attributable to a State/ an international organization, b) that conduct being in breach of an obligation incumbent on that State / that international organization, one is technically in the presence of two parallel wrongful acts. The ILC's use of the terminology of responsibility for 'the same internationally wrongful act' in Article 47 ARS and Article 48 ARIO is in this sense misleading: see Ahlborn, *Share or not share* (n 724) 5.

[832] Similarly Condorelli, 'Statut des forces ' (n 359) 899.

possible establish a break-down of the overall damage and only order the responsible State to make reparation for the part of the damage caused by its own wrongful contribution.

Situations in which one State must make full reparation for damage caused concurrently thus do not arise because the State bears responsibility for 'joint' conduct or for the conduct of another subject of law, but rather because international law recognizes a link of causation between the State's wrongful act and the full damage. To the extent that the co-responsible party is not involved in the proceedings, the latter benefits from this state of affairs due to the prohibition of 'double recovery'. Articles 47(2)(a) ARS and 48(3(a) ARIO make it clear that an injured State or organization cannot, by way of compensation, recover more than the damage it has suffered. This rule is in accordance with the PCIJ's affirmation in *Chorzów* that it must 'avoid awarding double damages'.[833] The co-responsible State or organization is thus released from its obligation to pay compensation for the harm caused by its wrongful conduct to the extent that the co-responsible party has already made good the damage. While the scenario of reparation by compensation appears to be most practically relevant here, the same would in principle be true where one of several co-responsible States makes full reparation by restitution. For example, if several upstream States pollute a river, it is possible to image that each State's contribution would have been sufficient to destroy the entire fish stock, in which case one would be in a case of additional causation. Further, it is possible to imagine that one State is ordered by a court to make full reparation in the form of material restitution and rebuild the fish stock, in which case the situation *ex ante* would be re-established without participation of the co-responsible States. This leads to the question whether, and on what basis, a responsible party would be able to bring a claim against the other co-responsible parties and demand that the costs of reparation should be shared among them.

2.2.3.1 Recourse among co-responsible parties under customary international law

A right of internal recourse would allow a State that has made full reparation for damage arising from its wrongful act to turn against other States or organizations that are concurrently liable to make reparation for the same damage and demand a contribution. The ILC draft articles leave the question open: the fact

[833] *Chorzów (Merits)* (n 679) 49. In the same vein, *Harza v Islamic Republic of Iran* (1986) 11 Iran-USCTR 76 [30]; *Itel Corporation v Republic of Iran* (1992) 28 Iran-USCTR 159 [31]-[32].

that several parties incur responsibility concurrently is 'without prejudice' to any right of recourse against the other responsible parties.[834] As a matter of customary international law, there is indeed no evidence of the existence of such a right among co-responsible parties.[835] There appear to be no cases in which a co-responsible party was found to be under an obligation, under general international law, to contribute to the payment of reparation for damages concurrently caused. Whether such a right should exist *de lege ferenda* depends not least on what one considers to be the primary purpose of international responsibility. From the traditional perspective that sees State responsibility largely as a form of remedial justice aimed at the restoration of the injured State's legal position,[836] a general right of recourse is dispensable. As long as the *status quo* is fully restored, it matters little whether the burden is borne by one or by several responsible parties. Accordingly, a court may insist that reparation is made to the injured party, but accept that 'as between the joint wrongdoers the loss lies where it falls'.[837] By contrast, if the inducement of compliance with international law is seen as one or even the primary purpose of State responsibility, it would appear that allowing one State to breach international law without having to bear any material consequences for its actions is counter-productive. This would be even more so where the responsible State obtains a financial or economic benefit from its unlawful act. Accordingly, the co-responsible entity should be obliged to participate in the reparation and contribute a share corresponding to its wrongdoing. According to a third view, if the law of State responsibility is seen as the implementation of an abstract idea of justice, it could be argued that the choice of the co-responsible State against which the claim is brought is ultimately arbitrary.[838] The co-responsible State draws an unjustified advantage from the fact that a claim was brought against a co-responsible party first, or even from the fact that judicial remedies are more easily available against the latter. This could even constitute a disincentive for States to voluntarily accept the compulsory jurisdiction of international courts.

---

[834] ILC, *ARS with commentaries* (n 38) Article 47(2)(b) and ILC, *ARIO with commentaries* (n 17) Article 48(3)(b).
[835] Various authors including Noyes and Smith, 'Joint and Several Liability' (n 723) 260; Quigley, 'Complicity' (n 474) 128; are favourable to such a right, but only as a matter of principle. Also Besson, 'Pluralité' (n 726) 29, who notes that '[l]e régime général est particulièrement silencieux sur la question des recours internes en cas de solidarité'; Talmon, 'Plurality' in (n 245) 210 ('[t]here is (...) no evidence of the existence in customary international law of a general right of recourse against other responsible States').
[836] Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (n 772) 844.
[837] Crawford, *Third Report, Add 2* (n 728) 27 [276]; Crawford, *State Responsibility (2013)* (n 418) 357 (with reference to the maxim *ex turpi causa non oritur actio*).
[838] Aust, *Complicity* (n 471) 293.

If a general right to recourse between co-responsible parties were accepted, the follow-up question of how the costs for reparation should be apportioned would need to be addressed. The easiest solution would be to divide the total amount to be paid by the number of responsible parties.[839] By contrast, Besson has argued that a right of recourse between several responsible parties should be based on the notion of fault, meaning that the amount of compensation to be paid by each responsible State should depend on the gravity of its wrongful act.[840] However, as discussed above, a possible internal right of recourse becomes relevant precisely where all responsible parties are considered to have caused the full damage and must make full reparation. Unless one accepts the notion that they are different kinds of causal relationships, or degrees of causing, an apportionment of compensation based on the weight of their respective contributions appears to be difficult. There would need to be a benchmark to assess 'degrees' of fault and thereby establish a distinction between different 'types' of wrongful acts. At present, such a distinction is only drawn on the basis of the norm that is breached, with a breach of a *ius cogens* norm entailing a number of specific consequences.[841]

Despite these difficulties, the possibility of internal recourse appears to be particularly important in the context of international organizations. A member State that incurs responsibility for its conduct taken within the framework of the international organization did not act in isolation, but will often simply be carrying out some form of a collective decision. Arguably, the ability to share the costs for collective actions among several member States is one of the main incentives for States to establish international organizations. It therefore runs counter the idea of institutionalised international cooperation that one State will be obliged to bear the full and exclusive consequences if a collective decision leads to a harmful outcome. This concern has been voiced strongly with regard to peacekeeping operations, where troop-contributing States have been held responsible for the wrongful conduct of soldiers placed at the UN's disposal. Schrijver notes that 'it is not fair to hold troop-contributing countries responsible for damage suffered by citizens of the country in which the United Nations intervened, when this damage is caused by

---

[839] In *Samoan Claims* (n 731) 20, the two responsible States paid for the damage in 'equal moieties'.
[840] Besson, 'Pluralité' (n 726) 37.
[841] Within the ILC's framework, these specific consequences are however not concerned with compensation. For an earlier theory of reparation distinguishing between wrongful acts 'deliberately' or 'maliciously' committed and 'culpable negligence', see Gaetano Arangio-Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in *Mélanges Michel Virally* (Pedone 1991) 35-37.

or on behalf of the international organization' and that '[i]t would be fairer to hold all member States of the organization jointly liable (...)'.[842] At the same time, this is to some extent the unavoidable consequences of the application of the normal rules on State responsibility, with their focus on individual responsibility, in the context of international organizations.

2.2.3.2 Recourse among co-responsible parties according to a special agreement

One way to resolve this conundrum is to regulate the distribution of the costs arising from wrongful acts in advance by specific agreement. Because the modalities of the cooperation are predetermined within the context of international organizations, the inclusion of a clause relating to the distribution of costs of wrongful acts is in principle possible, and is even common practice for some international organizations. NATO member States have put in place a relatively sophisticated system for the settlement of claims arising from the conduct of forces stationed on the territory of other member States.[843] Claims must, at a first time, be settled by the receiving State. This State will later be able to turn against the (co-)responsible State(s) and recover some or even most of the costs. If there is more than one sending State responsible for the damage, 'the amount awarded or adjudged shall be distributed equally among them'.[844] A similar regime was created by the Convention on International Liability for Damage caused by Space Objects, albeit in the context of liability not arising from the commission of a wrongful act.[845] If several signatory States launch a space object jointly, they are 'jointly and severally' liable for any damage caused by it. If one 'launching State paid compensation for damage, it has 'the right to present a claim for indemnification to other participants in the joint launching'.[846] In the context of peacekeeping, the UN reserves a right to recourse against troop contributing States for 'damage [that] was caused as a result of gross negligence or wilful misconduct of a member of its national contingent, or has entailed his international criminal

---

[842] Nico Schrijver, 'Beyond Srebrenica and Haiti - Exploring Alternative Remedies against the United Nations' (2013) 10 IOLR 588 595. Schrijver accepts that States are responsible for their own wrongful conduct taken within the framework of international organizations, ie conduct being attributable to them.

[843] See Article VIII Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (concluded 19 June 1951, entered into force on 23 August 1953) 199 UNTS 67. The treaty however does not regulate claims arising between the forces of the sending State and a third State or its citizens.

[844] Ibid.

[845] The Space Liability Convention (n 130) provides for the liability of several States (Article IV(1), V(1)), including the apportionment of reparation among several liable States (Article IV(2)) and V(2)), as well as the liability of international organizations and their members (Article XXII). For a detailed discussion of this Convention and the underlying conceptions of international organizations it reflects see Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (n 35) 151 *et seq*.

[846] Space Liability Convention (n 130) Article V(2).

responsibility'.[847] In the absence of a specific agreement, the costs for reparation can be shared on an *ex gratia* basis. In the case of *Nauru,* in which the injury resulted from the cooperation of three States, Australia reached a settlement with Nauru in its own name, but sought financial contributions from the UK and New Zealand via diplomatic channels.[848] Given the particularities of institutionalised cooperation through international organizations, it appears that member States have avenues that allow them to share the costs of collective action, even in the absence of a general right to internal recourse.

3. Conclusions on substantive remedies against wrongful acts of member States

In the context of international organizations, the application of the secondary rules on reparation for injury is complicated by the fact that member States generally do not act in isolation. One member State's wrongful conduct may have been taken pursuant to a binding decision of an international organization or in concert with the organization and other member States. Or one might be in the presence of a case of responsibility for complicity, where the responsible State merely made a contribution to another entity's harmful conduct. When it comes to substantive remedies, this raises the question under what circumstances, and to what extent, a single responsible member State is under the obligation to make reparation for injury. This question is both important for the responsible State, who risks bearing the consequences of conduct not attributable to it, and for the injured party, who risks being faced with a situation where each State points to the conduct of other States to argue that no reparation is due. This chapter has sought to demonstrate that the rules on substantive remedies can be interpreted in ways that make sure that the transfer of powers to an international organization neither leads to a deterioration of the situation of injured parties, nor to a disproportionate burden for co-responsible States.

Since international law does not currently know a rule of 'joint and several responsibility' protecting the interests injured parties, the rules on causation must be relied on to establish to what extent a responsible State is required to make reparation for injury. Distinguishing between three different situations of

---

[847] UNSG Report on the Financing of Peacekeeping (n 74) 10 [42]. This is reflected in Article 9 of the Model Memorandum of Understanding generally concluded between the UN and the troop contributing State: UNGA, 'Manual on Policies and Procedures' (2006) UN Doc A/C.5/60/26 . The MoU was modified in UNGA, 'Report of the Special Committee on Peacekeeping Operations' (2007) UN Doc A/61/19 Part III.

[848] ASIL, 'Australia - Republic of Nauru: Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru' (1993) [32] 6 ILM 1471 1473.

concurrent causation, this chapter argued that difficulties arise first and foremost where a wrongful act made a contribution that was not necessary for the injury to occur, as would be the case in many instances of responsibility for complicity. Here it is difficult to assert, according to the most common test of causation, that the wrongful contribution was in itself a cause of the harm. This chapter argued that there are ways in which international law could in principle deal with this situation, such as by focusing on the moral damage caused by complicity rather than on material damage. In general, this chapter concluded that there are certain situations in which one State must make full reparation for damage caused concurrently, not because the State bears responsibility for 'joint' conduct or for the conduct of another subject of law, but because international law recognizes a link of causation between the State's wrongful act and the full damage. In order to deal with such situations, States should in advance agree on a rule of 'internal recourse' when acting within the framework of an international organization, as they have in fact done with respect to several existing organizations.

CHAPTER 5: THE ENFORCEMENT OF MEMBER STATE RESPONSIBILITY

1. Introduction

Responsibility is the automatic consequence of any internationally wrongful act.[849] No act of invocation is required for the secondary obligations of cessation and reparation to arise. In principle, a responsible State is therefore required to re-establish the *status quo ante* from the very moment the wrongful act was committed. At the same time, it is clear that States often do not agree over whether a particular conduct amounts to an internationally wrongful act attributable to the State, or are unwilling to make reparation on their own initiative. It is therefore necessary to distinguish the existence of the legal obligation to make reparation from its enforcement, ie from actual 'attempts to induce a State to cease its wrongful conduct and to remedy its consequences'.[850] This last substantive chapter of the thesis deals with the availability of judicial remedies for the enforcement of member State responsibility. In accordance with the general approach of this thesis, it addresses the question of whether there are additional obstacles that hinder the judicial enforcement of responsibility if a wrongful act was committed within the framework of an international organization. More specifically, this chapter investigates to what extent the very fact that the invocation of member State responsibility is often used a means to overcome the lack of remedies against international organizations is problematic. The current underdevelopment of procedural remedies against international organizations means that in many situations where an arguable case for the concurrent responsibility of the organization and one or several of its members could be made, injured parties will turn against the member States *only*. They will try to challenge conduct attributable to the individual State - such as the participation of one of its organs in a multinational operation, its implementation of a binding decision, its support for the organization's activities, or its vote in a decision-making organ, thereby explicitly dissociating it from the overall conduct of the organization. Still, an assessment of the lawfulness of an individual member State's contribution will often require an assessment of the lawfulness of the

---

[849] Nollkaemper, 'Unity of the Law of International Responsibility' (n 678) 546-47; ILC, *ARS with commentaries* (n 38) 91 [4].

[850] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 5. SR Riphagen proposed to make so-called 'tertiary' rule on the enforcement of responsibility an integral part of the draft articles, Willem Riphagen, *Fourth Report on State Responsibility* (ILC Yb 1983 Vol II(1), 1983) 8 [33]. In the version of the draft articles adopted in 2001, countermeasures are the only means of enforcement of responsibility included: James Crawford, 'Overview of Part Three of the Articles on State Responsibility' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2012) 932.

organization's activities. This raises the question whether the - often unavoidable - absence of the organization from proceedings prevents courts from adjudicating a case of member State responsibility.

The determination of an absent international organization's responsibility can be implicit or explicit. Implicit determination of responsibility is here defined as a determination of responsibility that follows by necessary or very probable implication, without the court actually stating so. This would for example be the case if conduct is found to be attributable concurrently to a member State and to the international organization and engages the responsibility of the State for breach of an obligation that is also binding on the organization.[851] Explicit determination of responsibility is defined as a statement of a court that the organization committed an internationally wrongful act, even if that statement is not binding for the organization. Making such an explicit determination of the organization's responsibility is arguably necessary in order to adjudicate the responsibility of a member State for complicity in the organization's wrongful acts, as well as for the more exceptional ground of responsibility for direction and control over an organization's wrongful act.[852] The focus of this chapter in addressing the scenarios of implicit or explicit determination of an absent international organization's responsibility is narrow. First, the chapter is only concerned with the judicial enforcement of member State responsibility. It does not at all deal with lawful countermeasures, whose availability as a means to enforce responsibility in the context of international organizations has been thoroughly analysed elsewhere.[853] Second, because the chapter is only concerned with procedural obstacles to the judicial enforcement of member State responsibility, a significant part of domestic case law dealing with member State responsibility will not be taken into account.

---

[851] Here it would technically be possible that the organization (but not the State) could successfully rely on circumstances precluding wrongfulness, but this scenario appears to be rather unlikely. If not a necessary implication, the responsibility of the organization would at least be very probable if the member State's responsibility is established.

[852] On these two ground of responsibility, see Chapter 3 of this thesis.

[853] As a remedy for international organizations see Frédéric Dopagne, *Les contre-mesures des organisations internationales* (Anthemis 2010); as a remedy against international organizations, see Tzanakopoulos, *Disobeying the Security Council* (n 190); Tzanakopoulos, 'Countermeasure of Disobedience' in (n 38); Vezzani, 'Countermeasures by Member States against International Organizations' in (n 38).

Domestic courts play an increasingly important role in the enforcement of State responsibility, in particular as far as the responsibility of the forum State is concerned.[854] The adjudication of member State responsibility in domestic courts can also amount to an indirect determination of the lawfulness of the activities of an international organization. This is evident where a State's responsibility for an allegedly wrongful implementation of a binding decision of an international organization is invoked, in particular where the concerned decision leaves the member State no or only very little discretion in how to implement it. A court seized of such a case will be required to determine whether the manner in which the State complied with the binding decision is unlawful, which comes close to ruling on the lawfulness of the decision itself. The ECtHR acknowledged this in *Al-Dulimi v Switzerland*:

> The Court emphasises that it is not its role to pass judgment on the legality of the acts of the UN Security Council. However, where a State relies on the need to apply a Security Council resolution in order to justify a limitation on the rights guaranteed by the Convention, it is necessary for the Court to examine the wording and scope of the text of the resolution in order to ensure, effectively and coherently, that it is consonant with the Convention.[855]

As explained by Reinisch, there are different ways in which domestic courts, as well as the CJEU and the ECtHR, have proceeded to a review of such implementing acts while avoiding a determination of the lawfulness of the organization's decision.[856] Some courts have dissociated the domestic implementing measure from the binding decision and reviewed it, in a 'dualist' fashion, against domestic law standards;[857] others have read a margin of discretion into the binding decision which allowed them to review the implementing measure as opposed to the binding decision itself.[858] Other courts abstained from a review altogether;[859] or proceeded to a low intensity review because the decision emanated from a particular

---

[854] See Nollkaemper, 'Domestic Courts' (n 54).
[855] *Al-Dulimi (GC)* (n 114) [139].
[856] August Reinisch, 'Conclusion' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (OUP 2010) 258 *et seq*.
[857] ibid in 260-61. Such a 'dualist' strategy was most famously adopted by the ECJ in *Kadi (ECJ)* (n 104), and further developed in *Kadi II (CJEU)* (n 104); but it was also emulated by domestic courts, notably the UKSC in *Ahmed (SC)* (n 146).
[858] Such narrow readings of the underlying decision were adopted by the Canadian Federal Court in *Abdelrazik* (n 146) and the ECtHR in *Nada v Switzerland* (n 146), as well as *Al-Dulimi (GC)* (n 114).
[859] In this sense for example *R v Comptroller of Patents, Designs and Trade Marks Ex p Lenzing* [1997] RPC 245(QB), [1997] 9 LS Gaz R 264 [40], where the court held (*per Jacob J*) that because the UK and the other member States of the EPO had agreed at an international level that the EPO's Board of Appeals was the final arbiter of oppositions against patent registrations, '[i]t is not for national courts to query its doings, whether in a direct or collateral attack'.

international organization.[860] This suggests that the fact that an act of a State was the implementation of a decision of an international organization can indeed under certain circumstances make the judicial enforcement of member State responsibility more difficult. If the particular implementing conduct were taken solely on the basis of the domestic act, courts might be less reticent to proceed to a full review of the lawfulness of that act.

Nevertheless, this chapter will not deal further with the enforcement of member State responsibility for wrongful implementing measures, which covers a large part of to domestic, as well as CJEU and ECtHR case law, for two reasons. First, such indirect challenges against acts of international organizations in domestic courts already received extensive treatment in the literature.[861] It emerges from these studies that while the strategies of engagement vary considerably across courts and jurisdictions, there is a general trend towards an increased engagement with normative acts of international organizations, through the intermediary of the member States' acts of implementation, in particular where the procedural remedies available against the international organization are considered deficient.[862] In this sense, the risk of an 'accountability gap' accompanying the more active role of international organizations is an element that is being taken into account. Second, when it comes to challenges against the implementation of decisions of international organizations, procedural and substantive questions are often interwoven. Often the question is not so much whether the implication of an international organization bars the adjudication of member State responsibility, but rather whether the member State has committed a wrongful act in the first place, even though it was merely implementing a decision of an international organization. A significant part of the cases cited in this context concern the implementation of decisions of the UNSC. Here the question is not only whether a particular court is competent to indirectly review a decision of the

---

[860] A low intensity review is practiced by the ECtHR in respect to acts that implement 'strict' decisions of international organizations that offer 'equivalent human rights protection': *Bosphorus* (n 114) [155]-[56]; *Michaud* (n 146) [102]-[104] (in relation to the EU). Further on the 'equivalent protection' test as a standard of review: Veronika Bílková, 'The Standard of Equivalent Protection as a Standard of Review' in Lukasz Gruszczynski and Werner Wouter (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014). In relation to decisions of the UNSC, a number of courts found that they could only review such decisions for compliance with *jus cogens* obligations: eg Case T-315/01 *Yassin Abdullah Kadi v Council and Commissio*n [2005] ECR II-3649 [226] *et seq*; *Youssef Mustapha Nada v SECO* (2007) BGE 133 II 450 (Swiss Federal Tribunal) [7].

[861] *Inter alia*, Giorgio Gaja, 'The Review by the European Court of Human Rights of Member States' Acts Implementing European Union Law: 'Solange' Yet Again?' in Pierre-Marie Dupuy and others (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (NP Engel 2006); August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (OUP 2010); Koutroulis, 'Non-interférence' in (n 183).

[862] Reinisch, 'Conclusion' in (n 856) 263.

Security Council taken under Chapter VII of the Charter, but also against what legal standards the implementing conduct should be evaluated, given the fact that according to Article 103 UNC, the obligations of UN member States 'shall prevail over other obligations under any international agreement' in the case of a conflict.[863] Domestic courts may be reluctant to determine whether a resolution is in conformity with international law, in particular human rights law, not because this would amount to an indirect determination of the UN's responsibility, but rather because it might trigger the application of Article 103 UNC.[864] In other words, the implication of an international organization in such cases raises substantive questions relating to the hierarchy of norms in international law and to the avoidance of norm conflicts.[865]

This chapter will only deal with cases where the fact that an organization's responsibility would be determined is invoked as a *procedural* obstacle to the enforcement of member State responsibility. In doing so, it will take select domestic case law into account, where the implication of an international organization was invoked as a procedural ground of inadmissibility. The first part of this chapter deals briefly with the general rules on the invocation of responsibility, focusing on the question whether it is possible to invoke the responsibility of only one of several co-responsible parties. The second part of this chapter deals with possible procedural obstacles to the judicial enforcement of member State responsibility where an absent organization's responsibility would be determined implicitly. The third and last part of the chapter turns to the case where a court is required to make an explicit determination of the responsibility of an absent international organization. While it appears likely that the *Monetary Gold* principle would be an obstacle to the adjudication of such cases if the absent party were a State, it is not clear whether the same would be true for an absent international organization. In order to determine whether the *Monetary Gold* principle should apply to absent international organizations, different interpretations of the rationale of the principle will be contrasted.

---

[863] UNC (n 44) Article 103.
[864] This is corroborated by the fact that some courts have in fact determined that the particular resolution in question was in conflict with certain human rights obligations of the State, but nevertheless saw themselves compelled to apply it: eg *Nada v SECO* (n 860) 464 [8.3] (no effective remedy).
[865] As far as they are relevant for the purposes of this thesis, these questions are addressed in Chapter 3, Section 4. Complicity on the basis of acts taken within the framework of the UN.

2. The exclusive invocation of Member State responsibility

It is sometimes argued that if there are multiple co-responsible parties, difficulties of enforcement arise already at the level of invocation. The rules on the invocation of international responsibility define which party has 'standing' to invoke responsibility for an internationally wrongful act, independently of any particular forum. The ILC proposes a two-tiered system according to which both 'injured States' and, under specific circumstances, 'States other than injured States' are entitled to invoke responsibility.[866] By introducing this distinction, the ILC attempted to open the door for the invocation of responsibility for breaches of *erga omnes* and *erga omnes partes* obligations by States other than the one primarily affected by the breach.[867] At the same time, it sought to draw a distinction between the two scenarios in terms of the rights associated with the invocation of responsibility, notably by reserving the right to resort to lawful countermeasures in response to a breach to those States that can be considered to be 'injured' by the breach. A 'non injured' State may demand performance of the obligation to make reparation only in the interest of the injured party.[868] Whether the distinction between 'injured' and 'non injured' States is conceptually consistent,[869] and whether the resort to countermeasures in response to breaches of *erga omnes* obligations is indeed restricted to 'injured' States, despite contrary practice, is contested.[870] However,

---

[866] ILC, *ARS with commentaries* (n 38) Articles 42, 48; transposed to ILC, *ARIO with commentaries* (n 17) Articles 43, 49. The ILC draft articles are generally 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State': Article 33(2) ARS and Article 33(2) ARIO. On the invocation of responsibility by private parties: Edith Brown Weiss, 'Invoking State Responsibility in the 21st Century' (2002) 96 AJIL 798; Kate Parlett, The Individual in the International Legal System : State-centrism, History and Change in International Law (CUP 2011) Part II.

[867] *Erga omnes* obligations, which arise 'towards the international community as a whole', derive for example 'from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination', *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 32 [33]-[34]. In the case of *erga omnes partes* obligations, '[a]ll the other States parties have a common interest in compliance with these obligations by the State (...) [which] implies that the obligations in question are owed by any State party to all the other States parties to the Convention', *Obligation to Prosecute or Extradite* (n 262) 449 [68]. On the development of the law of international responsibility away from a 'bilateralist' system in which responsibility can only be enforced by the holder of a subjective right, to a system with communitarian traits, including the (now abandoned) concept of 'international crimes', see Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Yoram Dinstein (ed), *International Law at a Time of Perplexity* (Nijhoff 1989) 821 *et seq.*

[868] ILC, *ARS with commentaries* (n 38) Article 48(2)(b); ILC, *ARIO with commentaries* (n 17) Article 49(4)(b).

[869] The ILC's approach has been criticized notably by Brigitte Stern, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Injury' in Maurizio Ragazzi (ed), *International Responsibility Today* (Nijhoff 2005); Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alan Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010).

[870] For a recent application, see *Banque Centrale de Syrie c Département fédéral de l'économie, de la formation et de la recherche DEFR* (2014) Case B-3639/2012 (Swiss Federal Administrative Tribunal) [2.1]; the decision was appealed to the Swiss Federal Tribunal. Further examples are discussed in Martin Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third Party Countermeasures and Their Relationship to the

it is not necessary to further investigate this question for the purposes of this chapter, because the alleged difficulties that arise in contexts of 'shared responsibility' are not related to the identity of the injured party. Rather, it has been argued that the rules on invocation are an obstacle where there is a plurality of *responsible* parties.[871]

Articles 47(1) ARS and 48(1) ARIO provide that where several States or international organizations are responsible 'for the same internationally wrongful act', 'the responsibility of each State [or organization] may be invoked in relation to that act'.[872] *A priori*, such concerns therefore do not seem warranted. Even if there are multiple responsible States or organizations to which a certain injurious conduct is attributable, each party's responsibility can be invoked independently. For example, where wrongful conduct of members of a peacekeeping contingent is attributable concurrently to an international organization and the sending State, it is possible to only invoke the State's responsibility in relation to the breach, with the corresponding consequences in terms of reparation. This is precisely the conclusion reached by the Dutch Supreme Court in the *Nuhanović* and *Mustafić* cases on the basis of Article 48(1) ARIO.[873] It is also in accordance with the ICJ's approach in *Nauru*, where it found no reason why a claim could not be brought against Australia for its allegedly wrongful conduct taken as a member of the tripartite Administrative Authority.[874] The principle of independent invocation seems to apply *a fortiori* where several States or organizations are responsible not 'for the same internationally wrongful act' as stated in Articles 47(1) ARS and 48(1) ARIO,[875] but for different but factually connected harmful acts, as in cases of wrongful aid and assistance in another entity's unlawful act.[876] Where the right to invoke responsibility is based on

---

UN Security Council ' 77 BYIL 333. Generally on 'third party countermeasures', Tams, *Enforcing Obligations Erga Omnes in International Law* .

[871] In this sense eg Nollkaemper, 'Introduction' (n 722) 287; Annemarie Vermeer-Künzli, 'Invocation of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 261.

[872] ILC, *ARS with commentaries* (n 38) Article 47(1) and ILC, *ARIO with commentaries* (n 17) Article 48(1).

[873] *Mustafić (SC)* (n 145) 19; *Nuhanović (SC)* (n 145) 20. However, just like the lower instance court, the Supreme Court did not find it necessary to establish whether conduct was in fact attributable to the UN. For a criticism of this aspect of the judgments, see (n 392).

[874] *Nauru* (n 198) 258-59 [48]

[875] The expression responsibility 'for the same wrongful act' is unfortunate. Because each State and each international organization is an independent addressee of rights and obligations under international law, it would be more accurate to speak of parallel but identical wrongful acts if conduct is attributable to two or more parties and constitutes a breach of their respective obligations: Ahlborn, *Share or not share* (n 724) 11-12.

[876] In this sense Besson, 'Pluralité' (n 726) 27; Martins Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4 JIDS 295 302; Christian Tams, 'Countermeasures against Multiple

individual injury, the injured State is required to demonstrate 'that the conduct of each and every member of the responsible plurality constitutes injury, providing the invoking state with standing'.[877] Where one State was merely implicated in another's wrongful act, it may not always be possible to establish that its aid and assistance was wrongful, because only aid and assistance that makes a 'substantial contribution' to the primary wrongful act entails responsibility. However, where such a wrongful contribution is established, it does not appear to be difficult to conclude that the State who was injured by the 'primary' wrongful act was also 'directly affected' by the unlawful assistance and therefore entitled to invoke responsibility as an 'injured State'.[878] In this sense, while responsibility for ancillary conduct may at times be difficult to establish, there do not seem to be further obstacles to the invocation of such responsibility at a procedural level. Because it is possible to invoke the responsibility of only one implicated State, an injured State facing a plurality of responsible parties is furthermore not required to demonstrate its entitlement to invoke responsibility in relation to each and every involved party. It could in principle choose to proceed with the 'strongest case' only.

3. The exclusive judicial enforcement of Member State responsibility

As far as the enforcement of member State responsibility in court is concerned, the absence of a co-responsible State or organization from the proceedings may however amount to an obstacle to the admissibility of a case, even if the tribunal's jurisdiction could otherwise be established.[879] Such arguments are usually brought by reference to the *Monetary Gold* principle, according to which the ICJ cannot adjudicate a claim if the interests of an absent State would 'not only be affected by a decision, but would form the very subject-matter of the decision'.[880] Even though the *Monetary Gold* principle was developed primarily in the jurisprudence of the ICJ and its predecessor,[881] a convincing argument has been made that it reflects a general principle of international adjudication and is, as such, binding for international courts

---

Responsible Actors' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art* (CUP 2014) 326.

[877] Vermeer-Künzli, 'Invocation of Responsibility' in (n 871) 260.

[878] See Giorgio Gaja, 'The Concept of an Injured State' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 943.

[879] As noted in *Oil Platforms (Merits)* (n 744) 177 [29] '[o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits'.

[880] *Case of the Monetary Gold removed from Rome in 1943 (Preliminary Question)* [1954] ICJ Rep 19 32.

[881] Notably, *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Series B No 5 27.

other than the ICJ.[882] In its case law, the ICJ referred to the *Monetary Gold* principle as 'a well-established principle of international law (...)'[883] and 'a fundamental principle (...) manifestly embodied in the Statute'.[884] This suggests that the *Monetary Gold* principle is not merely a constraint on the exercise of jurisdiction imposed by the ICJ's Statute, but a legal rule that exists independently of the Statute.[885] Consistently with this, judicial bodies other than the ICJ have referred to or applied the principle. The ACmHPR stated in *Al-Asad v Djibouti*, a case brought by an individual allegedly subjected to extraordinary rendition by the US, that it in principle 'recognises the rule of international law enunciated in the *Monetary Gold Case* (...)'.[886] In *Larsen v the Hawaiian Kingdom*, an arbitration tribunal found that it was unable to adjudicate the case because of the *Monetary Gold* principle. For the tribunal, '[t]he principle of consent in international law would be violated if this Tribunal were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party'.[887] The arbitration tribunal in *Chevron and Texaco v Ecuador* observed that under international law, and in accordance with the *Monetary Gold* principle, 'although a tribunal may have jurisdiction over a dispute it must not or should not exercise that jurisdiction if the very subject-matter of the decision would determine the rights and obligations of a State which is not a party to the proceedings'.[888] The ECtHR also appeared to make reference to the principle when stating, in a series of extradition cases, that while establishing the responsibility of the extraditing State 'inevitably involves an assessment of conditions in the requesting country against the standards of the Convention, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, the Convention, or otherwise'.[889] To the

---

[882] In this sense Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council (Working Paper, May 2010)* (2010) 19; referring to it as 'general principle' further Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (4th edn, Martinus Nijhoff 2006) 546; Chester Brown, 'Article 59' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice* (2nd edn, OUP 2012) 1442 [70].

[883] *Monetary Gold* (n 880) 32. Similarly already *Eastern Carelia* (n 881) 27.

[884] *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6 17.

[885] Akande, *Prosecuting Aggression* (n 882) 19-20. This point is discussed further below.

[886] *Al-Asad v Djibouti* (n 472) [180]. The Commission however went on to find that 'so far as it relates to violations of human rights and of such gravity as torture in particular, the mere fact that the conduct of a third state would as of necessity have to be examined will not absolve a State Party from accounting for its obligations duly undertaken under the Charter'. The case was declared inadmissible for other reasons.

[887] *Larsen v the Hawaiian Kingdom* PCA Case no 99-001 (2001) 119 ILR 566 34 [11.20]. It went to find that the 'gist of the dispute' was a dispute between the two parties and a third party (the USA), at 38 [12.7].

[888] *Chevron Corporation and Texaco Petroleum Company v Ecuador* PCA Case 2009-23 (2012) (Jurisdiction and Admissibility) 19 [4.60].

[889] *Soering v the UK* (App no 14038/88) (1989) 11 EHRR 439 [91]; *Al-Saadoon and Mufdhi v the UK* (Merits) (App no 61498/08) (2009) ECHR 2 March 2010; see also Den Heijer, '*Shared Responsibility ECtHR*' (n 755) 374, who however

extent that the *Monetary Gold* principle would be an obstacle to the adjudication of member State responsibility before the ICJ, it would therefore most likely be an obstacle before other international courts and tribunals, too.

3.1 Implicit determination of an international organization's responsibility

This section discusses the scenario of an indirect determination of the responsibility of an international organization, namely where the adjudication of the responsibility of one Member State makes an *implicit* statement on the lawfulness of the organization's acts. The claim that an implied finding of the responsibility of an absent organization would, in accordance with the *Monetary Gold* principle, render a case inadmissible, is often voiced in international proceedings. Several respondent States brought arguments along these lines in the *Legality of the Use of Force* cases. France argued that

> determining the responsibility of the other NATO Members and of the Organization itself (...) cannot be severed from [the responsibility of France] and is an indispensable condition for, the latter. It is a logical prerequisite, in that in any event France could be held responsible only for collective actions from which its own acts cannot be separated'.[890]

In response to Serbia's claims relating to occurrences after the establishment of UNMIK and KFOR, the UK similarly argued 'that the subject-matter of any judgment which the Court might give regarding the FRY'S claims concerning the period since 10 June 1999 would be the legal interests of other States and of the United Nations itself'.[891] Such arguments were also advanced by the respondent States in the cases of *Banković* and *Behrami and Saramati*.[892] For jurisdictional reasons, these claims were never addressed by the courts.

Still, it appears that to the extent that they are invoked as a bar to the adjudication of concurrent

---

notes that the ECtHR does sometimes examine the human rights records of third countries, 'thereby potentially encroaching upon the legal position of third States'. Two striking examples of this would be *Al Nashiri v Poland* (n 423) [516] and *El-Masri* (n 423) [211]. In *Banković* (n 4) [83] and *Behrami* (n 4) [153], the principle was invoked, but ultimately not addressed by the court.

[890] *Legality, Preliminary Objections France* (n 6) 31-33 [36], [47].

[891] Legality of Use of Force (Serbia and Montenegro v the UK) Preliminary Objections of the UK 4 July 2000 95-97 [6.25], [6.27]. See further Legality, Preliminary Objections Belgium (n 6) 179 [533]; Preliminary Objections of Italy (n 115) 19.

[892] *Banković* (n 4) [83]; *Behrami* (n 4) [153]. The ECtHR found it unnecessary, in the light of other obstacles to its jurisdiction, to examine whether the principle would have been an obstacle to admissibility.

responsibility, such claims could be dismissed already by reference to the substantive scope of the *Monetary Gold* principle. The ICJ's case law is sufficiently well established to conclude that the substantive scope of the principle is narrow.[893] In its judgment in *Nauru*, the Court drew a distinction between an 'implied' finding of responsibility and its actual determination. It distinguished *Nauru* from the *Monetary Gold* case on the facts, pointing out that 'the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia' and that 'there would not be a determination of the possible responsibility of New Zealand and the United Kingdom *previous* to the determination of Australia's responsibility'.[894] According to the Court, the case would only have been inadmissible if it had been necessary for the Court to *first* determine the rights and obligations of absent third parties *in order to* find on the merits of the case.[895] As Judge Shahabuddeen explained in his separate opinion, the Court is precluded from exercising its jurisdiction 'only if what was involved was a judicial determination purporting to produce legal effects for the absent Party, (...) and not merely an implication in the sense of an extended consequence of the reasoning of the Court'.[896] This reading that ties the *Monetary Gold* principle to the question whether a claim must be adjudicated as a necessary prior step was confirmed in the *East Timor* case, which is the only other case in which a claim was found to be inadmissible on that basis.[897] The Court's evolving jurisprudence thus indicates that the *Monetary Gold* principle is an obstacle where the Court needs to legally determine the responsibility of an absent State in order to assess the merits of the case, but not where the concurrent responsibility of an absent State would be implicit, as in the case of co-responsible States acting in concert. As Thirlway notes, 'the established jurisprudence of the Court is now that the *Monetary Gold* principle does not require the Court to refrain from deciding on the responsibility of a State allegedly incurred by actions carried on jointly

---

[893] See already *Nicaragua (Jurisdiction and Admissibility)* (n 422) 431 [88].
[894] *Nauru* (n 198) 261 [55] (original *emphasis*).
[895] The narrow reading of the *Monetary Gold* was criticized by Judge Schwebel in his dissenting opinion. According to Schwebel, whether the determination of the responsibility of an absent State was simultaneous or prior in respect to the finding on the responsibility of the respondent should be irrelevant: '[w]hat is dispositive is whether the determination of the legal rights of the present party effectively determines the legal rights of the absent party': ibid (n 198) (Dissenting Opinion Judge Schwebel) 331.
[896] ibid (n 198) (Separate Opinion of Judge Shahabuddeen) 296.
[897] The Court found that 'Australia's behaviour cannot be assessed without *first* entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty (...)' *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 102 [28] (*emphasis added*); and declared the case inadmissible.

with one or more other States, not before the Court'.[898] Accordingly, where the responsibility of an absent international organization, or an absent State for that matter, would need to be determined only implicitly, the *Monetary Gold* principle is no obstacle to the adjudication of member State responsibility.

As a principle of international adjudication, the *Monetary Gold* principle is not directly relevant for domestic courts, where similar considerations are more likely to be discussed in terms of the doctrine of act of State.[899] Interestingly, however, in domestic proceedings where an implicit finding of the responsibility of an absent international organization was invoked as a ground of inadmissibility, courts came to very similar conclusions. In one of the *Kunduz* cases, the Higher Provincial Court of Cologne found that the case against Germany was admissible even if it would imply a determination of the lawfulness of actions of NATO or of foreign States.[900] In the *Varvarin* case, the same court explained in greater detail that

> even if the preliminary question whether the attack on the bridge of Varvarin was contrary to (public international) law needed to be addressed in the course of the proceedings, and if therefore, the Court needed to focus on the actions of NATO or other (unidentified) States - for it is undisputed that fighter planes of the Federal Republic of Germany did not themselves carry out the attack - this would not be sufficient to deny the admissibility of the case. Because this would amount to a mere incidental determination of a question of public international law, with no direct consequences in terms of the liability or responsibility of other States, and would concern only the attack as such.[901]

In the case of *Mukeshimana-Ngulinzira*, which concerned the responsibility of Belgium for the conduct of a military contingent contributed to UNAMIR, the argument that the court lacked jurisdiction as this would imply a determination of the responsibility of the UN and other member States was also rejected.[902] While it cannot of course be excluded that a particular domestic court would decline to exercise jurisdiction for other reasons, it would appear that an implied finding of the responsibility of an absent international organization would not *per se* prevent the adjudication of cases of member State responsibility.

---

[898] Hugh Thirlway, 'The Law and Procedure of the International Court of Justice, Supplement 2010: Parts 9 and 10' (2011) 81 BYIL 83; similarly Robert Kolb, *The International Court of Justice* (Hart 2013) 573-74; Paparinskis, 'Procedural Aspects' (n 876) 311.
[899] In this sense, the Court found in *Belhaj & Anor v Straw & Ors* [2014] EWCA Civ 1394, [2016] 1 All ER 121 [68]-[77], [114]-[121] that the act of State doctrine was engaged where a court was required to determine the lawfulness of the conduct of foreign States, but also that the public policy limitation to this doctrine applied under the particular circumstances of the case. The case is currently pending on appeal before the UKSC.
[900] *Case no 7 U 4/14* (n 145) [23].
[901] Case 7 U 8/04 (2005) (Higher Provincial Court Cologne) [79] (translation by the author).
[902] *Mukeshimana-Ngulinzira* (n 145) [22].

3.2 Explicit determination of an international organization's responsibility

By contrast, cases where an explicit determination of the responsibility of an absent party is necessary are more problematic, because they *a priori* fall within the substantive scope of the *Monetary Gold* principle as defined in *Nauru*. Two scenarios of Member State responsibility discussed in this thesis require an explicit, prior determination of the responsibility of a third party: responsibility for complicity in another's wrongful act and responsibility for direction and control over another's wrongful act. Both responsibility for complicity and for direction and control presuppose that a third party committed an internationally wrongful act, without which the complicit State or the directing and controlling State would not incur responsibility.[903] In order to determine whether the State is responsible, it is thus necessary to determine first whether the primary wrongful act was committed. The ILC rightly pointed out that the *Monetary Gold* principle 'may well apply to cases under article 16 [ARS], since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act'.[904] By contrast, the *Monetary Gold* principle is unlikely to be an obstacle in cases of State responsibility for failure to prevent a certain harmful outcome. Here the Court would be required to determine, as a prerequisite, whether the harmful event actually occurred. For as the Court stressed in the *Genocide Convention* case, '[i]t is at the time when commission of the prohibited act (...) begins that the breach of an obligation of prevention occurs'.[905] According to the Court, there can be no breach of the obligation to prevent a certain prohibited conduct if that conduct did not occur.[906] Accordingly, if a member State's

---

[903] Articles 16-17 ARS; Articles 58-59 ARIO; see Chapter 3, Section 2.1.2 Complicity and other forms of ancillary responsibility. By contrast, in the case of coercion, the wrongfulness of the 'coerced' State or organization's actions are precluded (because the coercion amounts to *force majeure*) and in the case of responsibility for 'circumvention' through transfer or delegation of powers, no wrongful act by the third party is required. See ILC, *ARS with commentaries* (n 38) 69 [2] and Article 17(3) and 61(2) ILC, *ARIO with commentaries* (n 17). If the *coerced* State's responsibility (or rather, lack thereof) is invoked, the Court may be required to determine the coercion by the coercing State or organization: André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' in Eva Rieter and Henri de Weale (eds), *Evolving Principles of International Law* (Martinus Nijhoff 2011) 211.

[904] ILC, *ARS with commentaries* (n 38) 67 [11]; Jackson, *Complicity* (n 414) 171. It is however interesting to note that the Court saw no obstacle to the adjudication to the UK's second claim in the *Corfu Channel* case, according to which 'the minefield was laid with the connivance of the Albanian Government', *Corfu Channel (Merits)* (n 456) 16. In the literature, this claim is sometimes interpreted as a claim of responsibility for complicity (rather than co-perpetration): Lanovoy, *Revisiting a Structural Norm* (n 419) 2; and accompanying text. The Court rejected the UK's argument, but pointed out that the established facts 'in no way lead[] to the conclusion that they participated in a criminal act', *Corfu Channel (Merits)* (n 456) 17.

[905] *Genocide Convention Case* (n 194) 221-22 [431].

[906] ibid 221 [431]; by reference to ILC, *ARS with commentaries* (n 38) Article 14(3) ('The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs (...)'). See however Gattini,

failure to prevent another State's or an international organization's harmful conduct is at stake, the Court would be required to make a prior pronouncement on whether the harm actually occurred. However, even where the harm is committed by a third party, such a pronouncement must not amount to a direct determination of its responsibility.[907] It might well be that the harmful conduct is not wrongful for its author, that the wrongfulness of the conduct is precluded because of specific circumstances, or that the author remains unidentified. For example, the ICJ did not see any obstacle to the adjudication of the UK's claims in *Corfu Channel*, where it found that Albania had acted wrongfully because it had had knowledge of the presence of mines in its territorial waters, but failed to warn approaching British warships of the danger.[908] It found that Albania had breached its obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States',[909] but did not investigate by whom those wrongful acts had been committed. Accordingly, unless the State is under the obligation to prevent the occurrence of a wrongful act that can by definition only be committed by a State or an international organization, the *Monetary Gold* principle would not bar the adjudication of member State responsibility in accordance with the ICJ's case law.

To the extent that there are scenarios of Member State responsibility which do fall within the substantive scope of the *Monetary Gold* principle, it is important to know whether the principle applies in the same way where the absent party is an international organization rather than a State. While the *Monetary Gold* principle is a well-known potential obstacle to the adjudication of cases of responsibility for complicity in general, its application to international organizations would lead to an additional hurdle where States act within the framework of an international organization. By establishing an international organization and acting through it, States could in some sense create an additional obstacle to the adjudication of their own

---

'Genocide Judgment' (n 759) 702, for whom it is not evident 'why it should not be possible to hold responsible a state which manifestly breached its obligation to prevent a violation of a peremptory norm of international law, even if the event was averted at the very brink owing to the intervention of third parties'. One possible explanation of the Court's finding is that obligations of prevention oblige the State in a particular situation to take the measure *necessary* for the prevention of the harm. It is difficult to see how measures could have been necessary to prevent the harm if even in the absence of the measures, the harm did not occur.

[907] In this sense, Sarah Heathcote, 'State Omissions and Due Diligence. Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility' in Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012) 305; Paparinskis, 'Procedural Aspects' (n 876) 309-310; .

[908] *Corfu Channel (Merits)* (n 456) 17, 22.

[909] ibid 22.

responsibility. In practice, the *Monetary Gold* principle is indeed most often invoked as a 'shield' by respondent States.[910]

As discussed, the view that the *Monetary Gold* principle applies to organizations such as the UN and NATO was already expressed in the submissions of several respondent States in the *Legality of the Use of Force* cases. More recently, this question came to the fore in the *FYROM* case, where the lawfulness of Greece's conduct in NATO's North Atlantic Council was at stake. Greece submitted that the Court 'could not decide on the FYROM's Application without necessarily deciding on the legality of NATO's decision since that Organization is not a minor participant but the most important actor in and the only author of the decision not to invite the FYROM to join the Organization'.[911] The Court rejected Greece's argument by reference to the narrow substantive scope of the principle, stating that it

> does not need to determine the responsibility of NATO or of its member States in order to assess the conduct of the Respondent. (...) The present case can be distinguished from the *Monetary Gold* case since the Respondent's conduct can be assessed independently of NATO's decision, and the rights and obligations of NATO and its member States other than Greece do not form the subject-matter of the decision of the Court on the merits of the case (...).[912]

The Court thus did not tackle the question whether the *Monetary Gold* principle applies to absent international organizations, even though the above-cited passage can be read as being based on that assumption.[913] Neither did the parties deal with that question in their submissions. For Macedonia, *Monetary Gold* was 'wholly irrelevant' because its claims in no way implicated NATO's conduct or responsibility,[914] so that the more fundamental question of the personal scope of the principle presumably did not need to be addressed. If the ICJ were requested to determine the responsibility of an absent international organization in a future case, it might deal with that question in greater detail. As has been noted by commentators and courts discussing the personal scope of the *Monetary Gold* principle, whether or not one considers the principle to apply to entities other than States is closely linked to what one

---

[910] Exceptionally, the Court has referred to the principle *proprio motu*, eg in *Jurisdictional Immunities* (n 58) 47 [126].
[911] *Counter-Memorial Greece* (n 202) 123 [6.96].
[912] *FYROM v Greece* (n 203) 660-61 [43].
[913] Paparinskis, 'Procedural Aspects' (n 876) 315. For Judge *ad hoc* Roucounas, '[t]o uphold the Applicant's thesis means that, for the first time, the highest international court is ruling through a member State on the lawfulness of an act of a third-party international organization', *FYROM v Greece* (n 203) 720, 728 [22] (Dissenting Opinion Judge ad hoc Roucounas).
[914] *FYROM v Greece* (n 203) 79 [3.33].

considers to be its primary rationale.[915] Even though they are often cited conjointly, it is possible to identify three distinct rationales of the principle, with different implications for the position of absent international organizations.

3.2.1 The *Monetary Gold* principle protects the principle of consent under the Statute

At first sight, the *Monetary Gold* principle simply appears to protect the principle of consent under the Statute. As the Court noted in *Monetary Gold*, '[w]here (...) the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it'.[916] It is well known that the ICJ does not have compulsory jurisdiction, being competent to exercise jurisdiction over a contentious case only if the States parties to the dispute have given their consent to the Court's exercise of jurisdiction in accordance with Articles 35 - 37 of the ICJ Statute.[917] The Court does not have the power to compel an absent State to participate in the proceedings. By virtue of Article 59 of the Statute, decisions of the Court do not have binding force except between the parties. In this sense, even if a court were to determine the responsibility of an absent party in a particular case, this would not entail any obligations for the absent State to comply with the judgment, and neither would the decision enjoy the effect of *res iudicata* as far as the legal position of the third State is concerned. Still, an authoritative pronouncement on the legal situation of the absent State 'can legally or factually prejudice the position of the third State'.[918] If the Court were to adjudicate on the responsibility of an absent State, this could be seen as a circumvention of one of the most basic principles governing the Court's competence. In other words, the *Monetary Gold* principle can be interpreted as barring adjudication *because* the absent State's consent is explicitly required under the Statute. By extension, it has been argued that the *Monetary Gold*

---

[915] In this sense, Nollkaemper, 'Shared Responsibility ICJ' in (n 903) 217; Paparinskis, 'Procedural Aspects' (n 876) 315; Paolo Palchetti, 'Litigating Member State Responsibility' (2015) 12 IOLR 468; as well as *Chevron/Texaco v Ecuador (Jurisdiction and Admissibility)* (n 888) [4.60] *et seq*.

[916] *Monetary Gold* (n 880) 32-33.

[917] ICJ Statute (n 5) Articles 35-37. Because it is concerned with the judicial enforcement of member State responsibility, this chapter does not deal with the question to what extent the *Monetary Gold* principle applies in advisory proceedings. The best view is that it does apply, but only to a limited extent where the absent State has, as a member of the ICJ Statute, accepted the power of the Court to deliver advisory opinions: Akande, *Prosecuting Aggression* (n 882) 20-24.

[918] Brown, 'Article 59' in (n 882) 1141 [68]; further Chinkin, *Third Parties in International Law* (n 474) 156-57; Alexander Orakhelashvili, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from *Monetary Gold* to *East Timor* and Beyond' (2011) 2 JIDS 373 379.

principle does not necessarily bar the adjudication of the rights, obligations, or responsibility of an absent non-State entity, because the Statute is silent on the adjudication of disputes involving such entities. As Thirlway explains

> It is (...) possible to regard the *potential* presence of the third State as a litigant, as the very reason why its absence limits the options open to the Court. The Court may adjudicate on the interests of a State if there is consent (creative of jurisdiction); accordingly, it is the interests of States absent from the proceedings, i.e. those States that have *not* consented, that must not be affected by the decision.[919]

Similarly, Palchetti notes that

> Since this principle [the principle of consent], as embodied in the Statute, only applies in relation to States, there would be no reason for extending the *Monetary Gold* principle to subjects which, under the Statute, are not entitled to give their consent to the Court's jurisdiction. The fact that the ICJ does not have jurisdiction over international organizations would be a sufficient reason to conclude that the principle only concerns States.[920]

A contrario, it would follow that if the Statute did confer jurisdiction on the Court to adjudicate cases involving international organizations with their consent, then the principle would apply to them, too. However, to the extent that this interpretation ties the *Monetary Gold* principle to the ICJ Statute, one may object that the Court has repeatedly referred to it as a general principle of international law merely *embodied* in the Statute.[921] When applying the *Monetary Gold* principle, courts do not seem to refer merely to the constraints imposed on them by their respective statutes, but rather to a general principle of international adjudication. If this view is correct, then the terms of jurisdiction expressed in any particular statute would not appear to be decisive for the question whether or not the *Monetary Gold* principle applies to absent international organizations.

---

[919] Hugh Thirlway, 'Responsibility of International Organizations: What Role for the International Court of Justice?' in Maurizio Ragazzi (ed), *Responsibility of International Organizations (In Memory of Sir Ian Brownlie)* (Nijhoff 2013) 357.
[920] Palchetti, 'Litigating' (n 915) 480. Similarly, Nollkaemper, 'Shared Responsibility ICJ' in (n 903) 217-18. Presumably, this would mean that where a court is competent to exercise jurisdiction over international organizations if they have consented to its jurisdiction, the court would be barred from letting a case proceed if the rights, obligations, or responsibility of an absent organization was at stake. The applicability of the *Monetary Gold* principle before ITLOS - one of the few courts with jurisdiction over international organizations - has never been tested: Ilias Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) 4 JIDS 385 394-95.
[921] *Monetary Gold* (n 880) 32; *Right of Passage (Preliminary Objections)* (n 650) 17.

3.2.3 The *Monetary Gold* principle protects the sovereign independence of States

The *Monetary Gold* principle is then perhaps best seen as an expression of the general and well-established principle of international law according to which a State must consent to international adjudication.[922] As far as the position of international organizations is concerned, one would thus need to investigate whether that principle applies in the same way to international organizations as to States. This leads to further, largely unexplored questions. For example, would States have the right to establish an international court competent to decide cases involving international organizations even if these organizations have not consented? In other words, should international organizations in this regard be compared to individuals, where States evidently do possess such powers, or should they be compared to States, who, as sovereign entities, must in some form consent to adjudication? One possible response would be that the principle of consent has in the past been seen as an expression of the sovereign independence and equality of States.[923] The link between the inability of the Court to determine the rights and obligations of a non-consenting State and the personality of States as sovereign entities was in any case made by the PCIJ in the *Eastern Carelia* advisory opinion, where it noted that '[t]his rule (...) accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States'.[924] As a principle closely associated with the core attributes of statehood, the principle of consent and, by implication, the *Monetary Gold* principle, would not necessarily be transposable to international organizations, who have been described as 'neither sovereign nor (...) equal'.[925] The ICJ drew an explicit distinction in the *Reparation Opinion* between States, who possess 'the totality of international rights and duties recognized by international law', and the more limited rights and obligations incumbent on international organizations such as the UN.[926] Distinguishing international organizations in this regard

---

[922] *Ambatielos Case (Greece v UK)* (Jurisdiction) [1952] ICJ Rep 28 39; *Eastern Carelia* (n 881) 27; generally on that principle and its relationship to *Monetary Gold*, Chittharanjan Felix Amerashinge, *Jurisdiction of International Tribunals* (Kluwer 2003) 69 *et seq*.
[923] Akande, *Prosecuting Aggression* (n 882) 13.
[924] *Eastern Carelia* (n 881) 27.
[925] Paul Reuter, *Sixth Report on the Question of Treaties concluded between States and International Organizations or Between Two or More International Organizations* (ILC Yb 1977 Vol II (Part One), 1977) 120-21 [5]-[6], for whom 'sovereignty requires that they [States] may not be legally committed by the will of a third party'. Generally on the principle of consent to treaties and its difficult application to international organizations: Christian Tomuschat, 'International Organizations as Third Parties under the Law of International Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011); Brölmann, *Institutional Veil* (n 14).
[926] *Reparation for Injuries* (n 15) 180.

from States, Szasz suggests that the principle of consent to jurisdiction should not apply to international organizations even if the ICJ Statute were modified to allow cases against them, for

> The right of states to refuse to submit to the jurisdiction of the ICJ, even if they are parties to its Statute, is grounded in views about the sovereign power and immunities of states that can be limited only by their own consent'. (…)' [This principle] would seem to be entirely inappropriate for IGOs, which, unlike states, are creatures of international law and with no inherent sovereign rights.'[927]

It would follow *a fortiori* that international organizations cannot rely on the *Monetary Gold* principle, which protects States from an adjudication of their responsibility even if they would not be legally bound by the Court's judgment. In this sense, Kolb notes that '[t]he *Monetary Gold* rule rests on respect for the principle of consent to the Court's jurisdiction' and 'therefore concerns only sovereign States'.[928] Because an international organization is not sovereign, he argues, the protection afforded to it by Article 59 of the Statute is sufficient: 'not being sovereign, it has no additional rights'.[929]

In this context, it is noteworthy that international organizations, as subjects created by the common will of their members, do indeed differ from States when it comes to adjudication. This begins with the fact that member States have the power to design dispute settlement mechanisms for their international organizations in the constitutive instruments, to which the organization is not formally a contracting party.[930] A number of constitutive treaties of international organizations provide for a compulsory system of dispute settlement through arbitration for disputes between the organization and its members.[931] It would appear that for these organizations, and under the conditions set out in these treaties, the principle of consent to adjudication does not apply. The differences between States and international organizations are also noteworthy when it comes to their immunities from jurisdiction and enforcement. Sovereign

---

[927] Paul C. Szasz, 'Granting International Organizations Ius Standi' in AS Muller, David Raič and J. M. Thuránszky (eds), *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff 1997) 185.
[928] Kolb, *The International Court of Justice* (n 898) 575.
[929] Ibid.
[930] Constitutive instruments are drafted before the international organization 'comes into life', thus at a point where the organization's independence does not yet exist. However, nothing appears to preclude member States from modifying the constituent instrument of an existing organization to include provisions on dispute settlement, as these instruments retain their character as international treaties: Article 5 VCLTIO (n 49).
[931] Eg Article XVI(a)-(b) Agreement relating to the International Telecommunications Satellite Organization (concluded 20 August 1971, entered into force 12 February 1973) 1220 UNTS 19677 and further instruments cited in Schmalenbach, 'Dispute settlement' in (n 37) 260.

immunities before foreign domestic courts are an attribute of statehood and can in this sense be compared to the principle of consent to international adjudication.[932] States enjoy, under customary international law, jurisdictional immunity for their sovereign acts before the domestic courts of foreign States. This is seen as an expression of the sovereign equality of States - the principle of *par in parem no habet imperium*.[933] In the case of international organizations, the situation is far less clear. There is a broad variety of views as to whether international organizations enjoy any immunity at all under customary international law, whether they enjoy such immunity only vis-à-vis their member States, or whether only the UN enjoys such immunity.[934] Some international organizations do not enjoy immunity from jurisdiction.[935] In recent years, domestic courts have come to the conclusion that international organizations do not enjoy immunity under general international law absent an applicable treaty provision. As the Canadian Supreme Court stated, '[i]nternational organizations derive their existence from treaties, and the same holds true for their rights to immunities'.[936] This conclusion in accordance with the widely held view, already briefly addressed in Chapter 1 of this thesis,[937] that international organizations enjoy immunities for different reasons than States. International organizations are conferred immunities because they need them to enable them to perform their functions effectively.[938] They reflect thus an obvious interest of the organization's member States who want the organization to strive, but not necessarily of non-member States, who would for that reason not have concluded treaties relating to privileges and immunities with the particular organization. Based on these considerations, it could be argued that to the extent that the *Monetary Gold* principle is an expression of the sovereign equality and independence of States, it would indeed not be applicable to

---

[932] In this sense James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 75; Akande, *Prosecuting Aggression* (n 882) 13-14.

[933] *Al-Adsani v the UK* (App no 35763/97) (2001) [GC] ECHR 2001-XI [54]; Fox and Webb, *The Law of State Immunity* (n 56) 13-14.

[934] For an overview over such different views, in particular in earlier doctrine, see August Reinisch, *International Organizations Before National Courts* (CUP 2000) 146 *et seq*. In recent literature, there is a clear trend towards the rejection of the view that international organizations enjoy immunity under customary international law. See only Singer, 'Jurisdictional Immunity' 98-99; Ryngaert, 'Immunity of International Organizations' (n 62) 124-25; Fox and Webb, *The Law of State Immunity* (n 56) 572; Wood, 'IO Immunity' (n 62) 317.

[935] For example, Exchange of notes amending the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and CAB International (adopted 11/18 July 1997, entered info force 1 August 1999) UNTS Vol 2117 No A-21519 and UNTS Vol 1297 No. 1-21519.

[936] *Amaratunga v Northwest Atlantic Fisheries Organization* 2013 SCC 66 (2013) (Supreme Court of Canada) [29]; in this sense *Drago v International Plant Genetic Resources Institute* (2007) Case no 3718, Giustizia Civile Massimario 2007 2, ILDC 827 (IT 2007) (Italian Supreme Court of Cassation) [6-3]-[6.5]. For a number of earlier cases nevertheless affirming such immunity under customary international law, see August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013) 8 Fn 50.

[937] See (nn 57 *et seq*) and accompanying text.

[938] Among many Muller, *Host States* (n 56) 151 *et seq*, Blokker, 'Untouchables' (n 56) 260.

international organizations. Because they are not sovereign, the adjudication of the responsibility of international organizations without their consent would not constitute the same, insurmountable obstacle.

3.2.3 The *Monetary Gold* principle protects due process rights of absent parties

Before subscribing to such a view, it should however be noted that according to a third interpretation, the *Monetary Gold* principle is not merely an expression of the principle of consent, but also and more generally serves to protect the due process rights of absent parties. As mentioned above, the ICJ's judgments and decisions are binding only *inter partes*. Still, a determination of responsibility can have important consequences for an absent State. Because the State cannot be compelled to join a case for which it has not accepted the Court's jurisdiction, its legal position would be determined without any possibility for it to defend its case. For Rosenne, the exercise of jurisdiction must be refused in such cases because of the maxim *audiatur et altera pars*, according to which any court is required to hear both parties to a dispute.[939] Mirroring this view, the arbitration tribunal in *Chevron and Texaco v Ecuador* found that the principle *inter alia* expresses 'a concern that the rights of States should not be ruled upon unless they are properly before the Court and are given full opportunity to present the case'.[940] If seen from a due process perspective, there is no reason to conclude that the *Monetary Gold* principle should not apply to absent international organizations or even to absent private parties[941], for 'what is at issue is the protection of the legal position of the third party, irrespective of whether it is capable of giving or withholding consent to the jurisdiction of the ICJ'.[942] In accordance with this, Judge Schwebel argued in his dissenting opinion in the *Lockerbie* case that the Court should not review the decisions of the UNSC, as '[f]or the Court to adjudge the legality of the Council's decisions in a proceeding brought by one State against another would be for the

---

[939] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd edn, Martinus Nijhoff 1997) 557.
[940] *Chevron/Texaco v Ecuador (Jurisdiction and Admissibility)* (n 888) 20 [4.63].
[941] The question whether the *Monetary Gold* principle applies to private parties was raised, but ultimately left unanswered, by the tribunal in ibid 19 [4.60]. Arguably, the ICJ came close to determining the responsibility of (absent) individuals in the *Genocide Convention* case. It held that 'the acts committed at Srebrenica (...) were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995', *Genocide Convention Case* (n 194) 166 [297]. However, no finding on individual criminal responsibility was thereby intended. Furthermore, whether there is an overlap between the prohibition of genocide addressed to State, which was at stake in the case, and the prohibition of genocide addressed to individuals is not entirely clear: Nollkaemper, '*Concurrence*' (n 181) 634-35.
[942] Palchetti, 'Litigating' (n 915) 479.

Court to adjudicate the Council's rights *without giving the Council a hearing*, which would run counter to fundamental judicial principles'.[943]

Principles of due process are of course important for the Court,[944] and the adjudication of the responsibility of an absent party can raise such issues. However, to the extent that the *Monetary Gold* principle flows from the principle of consent, it rather appears to be the cause of these concerns than a response to them. As far as absent States are concerned, issues of due process can arise because the Court is not competent to compel States to participate in contentious proceedings. Third States can intervene as concerned non-parties, under the circumstances set out by the Statute, but only on their own initiative.[945] As noted by Chinkin, 'a State is entitled not to become involved in proceedings before the Court'.[946] If the Court did have the power to compel States to join proceedings, then they could simply plead their case and be heard by the court. In this sense, the *Monetary Gold* principle protects the right of States not to be compelled to join proceedings in order to protect their procedural rights. Arguably, as far as international organizations are concerned, the question is thus not so much whether the due process rights of international organizations should be respected (which they should), but again whether international organizations cannot, in a fashion similar to States, be compelled to participate in proceedings in order to defend their legal interests.

It has long been recognized that the best way to allow international organizations to intervene in proceedings in which their interests are at stake would be to modify the Court's statute to allow them to

---

[943] *Lockerbie (USA) (Preliminary Objections)* (n 607) (Dissenting Opinion of President Schwebel) 156, [172] (*emphasis added*). The US memorial for the preliminary objections phase does not make such an argument.
[944] See *Judgment No 2867* (n 48) 24-27 [33]-[39]; in particular the declaration by Judge Greenwood [2]-[4].
[945] See Articles 62-63 ICJ Statute (n 5); *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras)* (Application to Intervene) [1990] ICJ Rep 92 133-34 [97]. In order to intervene as a party, there would need to be a jurisdictional nexus between the intervening State and the existing parties: Chinkin, *Third Parties in International Law* (n 474) 172 *et seq*. Admittedly, however, even if a third State was permitted to intervene as a non-party in proceedings, this would not necessary lead the Court to the conclusion that the *Monetary Gold* principle does not apply in respect to that State. In *Jurisdictional Immunities* (n 58) 150-51 [127] the Court noted that it could not 'rule on the question of whether the decisions of the Greek courts did themselves violate (...) immunity (...) since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings'. Greece had been authorized to intervene as a third-party pursuant to Article 62 ICJ Statute precisely 'in so far as this intervention was limited to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy': ibid 105-06 [6]-[12].
[946] Chinkin, *Third Parties in International Law* (n 474) 199.

participate as parties in contentious proceedings.[947] Absent such a modification, the Court does in principle have the power, by virtue of Article 34(2) of the Statute and Article 69(1) of the Rules of the Court, to 'request of public international organizations information relevant to cases before it (...)' - a power it does not possess vis-à-vis absent States.[948] Unlike Article 34(3) of the Statute, which gives the Court the right to invite international organizations to give their views concerning the construction of their constitutive instruments or of an international convention adopted thereunder,[949] Article 34(2) has never been applied. However, it would arguably be an avenue by which international organizations could be given the opportunity to file observations as far as their legal interests are concerned.[950]

In relation to proceedings before courts other than the ICJ, whether or not international organizations can be requested to participate in proceedings depends on the particular statute. The ECtHR requested the UN to submit its observations in the *Behrami and Saramati* case,[951] but it does not appear to have done so in comparable cases. Many courts allow the filing of *amicus curiae* briefs. As noted by Chinkin and Mackenzie, at least in domestic contexts, *amicus curiae* briefs have come to be used for broader purposes than to simply place information at the court's disposal.[952] In cases brought exclusively against member States, but with a strong link to the organization's activities, international organizations have sometimes submitted observations on their own initiative.[953] Particularly noteworthy in this context is the increasingly active role of the EU as *amicus curiae* intervener in certain proceedings directed against its member

---

[947] Calls to modify Article 34(1) of the ICJ Statute in this sense are almost as old as the court. Sir Robert Jennings famously referred to this provision an 'extraordinary anomaly': Robert Jennings, 'The International Court of Justice at Fifty' 89 AJIL 493 504.

[948] Article 34(2) ICJ Statute (n 5) and Article 96(1) of the Rules of the Court.

[949] See eg the observations filed by the ICAO in the *Aerial Incident of 3 July 1988* case, which was removed from the court's list by *Aerial Incident of 3 July 1988 (Iran v USA)* (Order) [1996] ICJ Rep 9 .. Article 34(3) ICJ Statute is not often applied in practice. For further references, Christine Chinkin and Ruth Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"' in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement* (Transnational Publishers 2002) 141-43.

[950] In practice, whether Article 34(3) ICJ Statute effectively allows an international organization to present its case would of course depend on the interpretation of that provision. For Chinkin and Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"' in (n 949) 139-40, the Court may only request information, but not legal arguments. It however does not seem ruled out that international organizations present such arguments *proprio motu*. Similarly, Palchetti, 'Litigating' (n 915) 482.

[951] *Behrami* (n 4) [118]-[120]. Pursuant to Article 36(2) ECHR (n 53) and Rule 44(3)-(4) of the Rules of the Court, as of 1 January 2016, the Court may 'invite, or grant leave to, (...) any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing'.

[952] Chinkin and Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"' in (n 949) 154.

[953] Eg *Bosphorus* (n 114) [122] *et seq* (EU); *Senator Lines* (n 129) 2, 9 (EU).

States.[954] Unless the principle of consent also applies to international organizations, what seems to be important from a due process perspective is that an international organization whose responsibility is being determined by a court is granted an effective possibility to be heard. If such effective avenues are available, it is submitted, the mere fact of the organization's absence from the proceedings should not be seen as a ground of inadmissibility of cases against the member States.

4. Conclusions on the judicial enforcement of Member State responsibility

Having established under what circumstances member States incur responsibility for their own wrongful conduct taken within the framework of international organizations, this last substantive chapter of the thesis turned to the judicial enforcement of member State responsibility. Here the very fact that the enforcement of member State responsibility, *in lieu* of the organization's responsibility, implies an indirect review of the lawfulness of the organization's acts can be problematic. In numerous proceedings, both before domestic and international courts, respondent States have argued that the fact that the organization's responsibility would need to be determined in its absence constitutes a procedural bar to the admissibility of the case. This chapter concluded that in relation to cases of member State responsibility that would imply an implicit determination of the organization's responsibility, the *Monetary Gold* principle would not be an obstacle, as such cases fall outside of the substantive scope of the principle. It is mainly in two cases of member State responsibility - complicity and direction and control - that the *Monetary Gold* principle would most likely be an obstacle, because a prior and explicit determination of the organization's responsibility is necessary. The crucial question in such constellations is whether the *Monetary Gold* principle applies to absent international organizations. According to the view defended in this chapter, a plausible argument can be made that it does not. The *Monetary Gold* principle is best seen as a general principle of adjudication that goes hand in hand with the principle of consent to jurisdiction. As sovereign entities, States cannot be compelled to submit to the jurisdiction of an international tribunal without having given, in some form, their consent to the tribunal's exercise of

[954] The EU has begun to play an increasingly role in investor-State arbitrations instituted against its members, submitting not only observations concerning facts but also legal arguments: see *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary* (Award) ICSID Case no ARB/07/22 23 September 2010 [8.2]; *Ioan Micula et al v Romania* (Final Award) (2013) ICSID Case no ARB/05/20 11 December 2013 [36]; *Electrabel v Hungary (Jurisdiction)* (n 538) [1.6].

jurisdiction over them. If a court could nevertheless determine their responsibility in their absence, they would be forced to either intervene to plead their case, or to bear the consequences of being judged, even if in a non-binding manner, in their absence. Unlike States, international organizations are not sovereign and equal, and the principle of consent to jurisdiction does not appear to apply to them in the same way. Accordingly, it is submitted, they should be given the opportunity to be heard where their responsibility is at stake, but the mere fact of their absence from proceedings should not be seen as a ground of inadmissibility.

GENERAL CONCLUSIONS

A party seeking to hold a member State responsible for wrongful acts committed within the framework of an international organization faces important obstacles. At a first time, it must show that the impugned conduct is attributable to the respondent State, as opposed to or in addition to the organization and other member States. Second, it must demonstrate the wrongfulness of conduct. This may not be so difficult where the State implements a (wrongful) decision of an international organization or where it makes a major contribution to a military operation in the course of which wrongful acts occur. However, in many cases, a member State's conduct will be merely ancillary, such as the participation in the organization's decision-making or the provision of financial or logistical support. Even if an arguable case for the wrongfulness of the organization's conduct could be made, it is by no means clear that the member State's contribution to that conduct is in itself wrongful, since, as far as complicity as a ground of responsibility is concerned, it is also necessary that the assistance made a substantial contribution to the wrongful act and that it was taken with full knowledge of the circumstances. Where conduct was taken within the framework of the UN, the respondent State may further raise the objection that it was carrying out obligations under the UN Charter, which prevail over other international obligations in the case of a conflict. Even if a third party successfully establishes that a member State committed a wrongful act while acting within the framework of an international organization, it is not a given that it will be accorded a remedy that goes beyond the mere satisfaction of a declaratory judgment. For the injured party must also demonstrate that the responsible member State's wrongful act caused in itself injury, even though it perhaps only made a relatively minor contribution to a collective operation. Finally, if the enforcement of responsibility is sought through a court, the injured party must demonstrate the admissibility of its case against the member State despite the absence of the concerned international organization from the proceedings.

All this could lead one to conclude that member State responsibility is a marginal phenomenon and does not deserve the extensive treatment it is currently afforded in academic literature. By way of conclusion, a few brief thoughts will be presented on why it is, in the opinion of this author, nevertheless important to recognize the possibility of member State responsibility and to interpret the rules on international responsibility in ways that do not place additional obstacles in the way of third parties. One reason for this

relates to the effectiveness of international law as a legal system, one reason is political and one reason is instrumental.

Effectiveness of international law. As Lauterpacht noted, '[a]n obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition of the existence of the duty, does not constitute a legal bond'.[955] Under international law, States are generally free to establish international organizations according to the design they collectively choose and to confer on them the powers they deem desirable. If States were indeed permitted to carry out activities through international organizations which they could not otherwise carry out without incurring responsibility, they would be permitted to undo their international obligations. It goes without saying that this would not only call into question the legal value of the affected norms, but also fundamentally undermine the effectiveness of international law.

Reputation of international organizations. When the first international organizations were established towards the end of the 19th century and particularly in the first half of the 20th century, international lawyers had high hopes that they would herald a new area of international cooperation and peaceful coexistence. Today, the main preoccupation no longer appears to be how international organizations can most effectively limit the 'selfish power policy of national governments'[956], but rather how the lawfulness and legitimacy of their exercise of powers can be ensured. In other words, the primary concern has become how to *guard the guardians*. This, it is submitted, has a lot to do with prominent cases including the FRY cases before the ICJ, *Banković* and *Behrami and Saramati* before the ECtHR as well as the Srebrenica-related cases before Dutch courts, which left the impression that member States are indeed able to hide behind the 'institutional veil', to the detriment of third parties. Many international organizations do important work. Not holding member States responsible in cases where this would be justified simply because they operated within the framework of an international organization risks negatively affecting the reputation of international organizations and might therefore undermine public support for their work.

---

[955] Hersch Lauterpacht, *The Function of Law in the International Community* (New edn, OUP 2011) 197.
[956] Schermers, 'Succession of States and International Organizations' (n 49) 112.

Holding international organizations responsible. The invocation of member State responsibility is almost always a reaction to the fact that remedies against international organizations are missing. Even though the ARIO have by now been repeatedly referred to by courts, this has never been in a case brought against an international organization. The means to improve remedies against international organizations lie first and foremost in the hands of their members, which could not only create better internal remedies, but also propose modifications to the statutes of international and regional courts to allow cases against international organizations to proceed. Recent practice indicates that the indirect enforcement of the responsibility of international organizations through their member States might serve as an incentive for them to create better procedural against their international organizations. Given the multifarious obstacles to the enforcement of member State responsibility, injured parties might in principle prefer to direct their case against the organization. In this sense, member State responsibility is perhaps only an intermediary step on the way to a better integration of international organizations into the system of international responsibility, but a necessary one at that.

BIBLIOGRAPHY

Ago R, '"Binding" Advisory Proceedings of the International Court of Justice' (1991) 85 AJIL 439

Ahlborn C, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 IOLR

——, 'To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States' (SHARES Research Paper 28 (2013), ACIL 2013-26, 2013)

Akande, D, 'International Organizations', in MD Evans (ed) *International Law* (3rd edn, OUP 2010) 272

Akande D, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (Working Paper, May 2010) (2010)

Allott P, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harv Int'l LJ* 1

Alvarez JE, 'International Organizations: Accountability or Responsibility?' in *Legitimacy and Accountability in International Law, Proceedings of the 33rd Annual Conference of the Canadian Council on International Law* (2005)

——, 'Revisiting the ILC's Draft Rules on International Organization Responsibility ' (2011) 105 ASIL Proceedings 344

Amerasinghe CF, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259

——, *Jurisdiction of International Tribunals* (Kluwer 2003)

——, *Principles of the Institutional Law of International Organizations* (2nd rev. edn, CUP 2005)

Amrallah B, 'The International Responsibility of the United Nations for Activities Carried Out By UN Peace-Keeping Forces' (1976) 32 *Rev Egypt DI* 57

Angelet N and Weerts A, 'Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme ' (2007) 134 JDI 1

Anzilotti D, *Teoria generale della responsibilità dello stato nel diritto internazionale* (Lumachi ed, 1902)

——, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 13 RGDIP 5

Arangio-Ruiz G, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in *Mélanges Michel Virally* (Pedone 1991)

Aust HP, *Complicity and the Law of State Responsibility* (CUP 2011)

——, 'The Normative Environment for Peace' in Nolte G (ed), Peace through International Law (Springer 2011)

Baade HW, 'Indonesian Nationalization Measures before Foreign Courts - A Reply ' (1960) 54 AJIL 801

Balladore Palliere G, 'Le droit interne des organisations internationales' (1969) 127 RdC 1

Bartels L, 'Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System' (2013) 4 JIDS 343

Bedermann DJ, 'Contributory Fault and State Responsibility' (1989-1990) 30 Va J Int'l L 335

Bernhardt R, 'Art. 103' in Simma B (ed), *The Charter of the United Nations* (2nd edn, OUP 2002)

Besson S, 'La pluralité d'Etats responsables: Vers une solidarité internationale?' (2007) 17 RSDIE 13

Bílková V, 'The Standard of Equivalent Protection as a Standard of Review' in Gruszczynski L and Wouter W (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014)

Bleicher SA, 'UN v IBRD: A Dilemma of Functionalism' (1970) 24 International Organization 31

Blokker N, 'International Organizations and their Members' (2004) 1 IOLR 140

——, 'International Organizations: the Untouchables? ' (2014) 10 IOLR 259

——, 'Member State Responsibility for Wrongdoings of International Organizations' (2015) 12 IOLR 319

Blum N, *The European Convention on Human Rights beyond the Nation-state* (Helbling & Lichtenhahn 2015)

Boon K, 'The Slippage Problem in Attribution Doctrines' (2014) 15 Melb JIL 330

Bothe M, *Streitkräfte internationaler Organisationen* (Heymann 1968)

——,'Peacekeeping Forces' [2011] MPEPIL

Boutin B, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: The Continuous Quest for a Tangible Meaning for 'Effective Control' in the Context of Peacekeeping' (2012) 25 LJIL 521

Bowett DW, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 EJIL 89

——, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in Fox H (ed), *The Changing Constitution of the United Nations* (BIICL 1997)

Boyle AE, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?' (1990) 39 ICLQ 1

Bradlow D and Fourie A, 'The Operational Policies of the World Bank and the International Finance Corporation ' (2013) 10 IOLR 3

Breitegger A, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations' (2009) 11 Int C L Rev 155

Brölmann C, *The Institutional Veil in Public International Law : International Organisations and the Law of Treaties* (Hart 2007)

——, 'Member States and International Legal Responsibility' (2015) 12 IOLR 358

Brown C, 'Article 59' in Zimmermann A, Tomuschat C and Oellers-Frahm K (eds), *The Statute of the International Court of Justice* (2nd edn, OUP 2012)

Brown D, 'The Role of The United Nations in Peacekeeping and Truce-Monitoring' (1994) 2 RBDI 558

Brown Weiss E, 'Invoking State Responsibility in the 21st Century' (2002) 96 AJIL 798

Brownlie I, *System of the Law of Nations: State Responsibility* (Clarendon Press 1983)

——, *Principles of Public International Law* (4th edn, OUP 1990)

——, 'State Responsibility: The Problem of Delegation' in Ginther K and others (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität* (Duncker & Humblot 1994)

——, 'The Responsibility of States for the Acts of International Organizations' in Ragazzi (ed), International Responsibility Today (2005)

Butkiewicz E, 'The Premisses of International Responsibility of Inter-Governmental Organizations' (1981-1982) 11 PYIL 117

Cahier P, 'Le droit interne des organisations internationales' (1963) 67 RGDIP 563

Caron DD, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857

Cassese A, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' 18 EJIL 649

Chen Y, 'Attribution, Causation and Responsibility of International Organizations' in Sarooshi D (ed), *Remedies and Responsibility for the Actions of International Organizations* (Hague Academy of International Law 2014)

Cheng B, *General Principles of Law as Applied by International Courts and Tribunals* (Repr edn, CUP 1994)

Chinkin CM, *Third Parties in International Law* (Clarendon Press 1993)

——, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in Shiner P and Williams A (eds), *The Iraq War and International Law* (Hart 2008)

Chinkin C and Mackenzie R, 'Intergovernmental Organizations as "Friends of the Court"' in Boisson de

Chazournes L, Romano C and Mackenzie R (eds), *International Organizations and International Dispute Settlement* (Transnational Publishers 2002)

Clapham A, *Human Rights Obligations of Non-state Actors* (OUP 2006)

——, 'The Subject of Subjects and the Attribution of Attribution' in Boisson de Chazournes L and Kohen MG (eds), *International Law and the Quest for its Implementation : Liber Amicorum Vera Gowlland-Debbas* (Brill 2010)

Condorelli L, 'Le statut des forces de l'ONU et le droit international humanitaire' (1995) 78 Riv Dir Intern 881

——, 'De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions de Forces de Maintien de la Paix' (2014) 1 QIL 3

Condorelli L and Kress C, 'The Rules of Attribution: General Considerations' in Crawford J (ed), The Law of International Responsibility (2010)

Corten O and Klein P, 'The Limits of Complicity as a Ground for Responsibility' in Bannelier K, Christakis T and Heathcote S (eds), *The ICJ and the Evolution of International Law*: *The Enduring Impact of the Corfu Channel Case* (Routledge 2012)

Cortés Martin JM, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Institute Andaluz de Administración Pública 2008)

——, 'The Responsibility of Members Due to Wrongful Acts of International Organizations' (2013) 12 CJIL 679

Cravioto A and others, Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti (2011)

Crawford J, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 75

——, *State Responsibility. The General Part* (CUP 2013)

——, 'Overview of Part Three of the Articles on State Responsibility' in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (OUP 2012)

Crawford J and Brownlie I, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012)

d'Argent P, *Les réparations de guerre en droit international public* (Bruylant 2002)

——, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in Dupuy P-M and others (eds), *Völkerrecht als Wertordnung Festschrift für Christian Tomuschat* (NP Engel Verlag 2006)

——, 'Reparation and Compliance' in Bannelier K, Christakis T and Heathcote S (eds), *The ICJ and the Evolution of International Law : The Enduring Impact of the Corfu Channel Case* (Routledge 2012)

——, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual

Attribution of Conduct' (2014) 1 QIL 17

——, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law* (CUP 2015)

d'Aspremont J, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 IOLR 91

——, The Law of International Responsibility and Multilayered Institutional Veils: the Case of Authorized Regional Peace-Enforcement Operations (SHARES Research Paper 24 ACIL 2013-10, 2013)

D'Orsi C, 'L'obligation de réparation dans le projet d'articles sur la responsabilité de l'Etat: Une analyse critique' (2005) 58 RHDI 115

Dannenbaum T, 'Translating the Standard of Effective Control into a System of Effective Accountability' (2010) 51 Harv Int'l LJ 113

——, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61 ICLQ 713

Dawidowicz M, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third Party Countermeasures and Their Relationship to the UN Security Council ' 77 BYIL 333

De Schutter O, 'Human Rights and the Rise of International Organisations' in Wouters J and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010)

De Visscher P, 'Opérations des Nations Unies: Rapport préliminaire' (1971) 54 AIDI

——, 'Travaux préparatoires: Opérations militaires des Nations Unies' (1971) 54 AIDI

De Wet E, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004)

Dekker IF, 'Making Sense of Accountability in International Institutional Law ' (2005) 36 NYIL 83

Deman C, 'La cessation de l'acte illicite' (1990) 2 RBDI 476

Den Heijer M, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 JIDS 361

Dominicé C, 'Observations sur les droit de l'Etat victime d'une fait internationalement illicite' in Weil P (ed), *Droit international 2* (Pedone 1982)

——, 'L'immunité de juridiction et d'exécution des organisations internationales' (1984) 187 RdC

——, 'Request of Advisory Opinions in Contentious Cases?' in Boisson de Chazournes L, Romano C and Mackenzie R (eds), *International Organizations and International Dispute Settlement* (Transnational Publishers 2002)

——, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of another State' in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (OUP 2010)

Dopagne F, *Les contre-mesures des organisations internationales* (Anthemis 2010)

Dupuy R-J, ' Le droit des relations entre les organisations internationales' (1960) 100 RdC 457

Eagleton C, *The Responsibility of States in International Law* (NYU Press 1928)

——,'International Organization and the Law of Responsibility' (1950-I) 76 RdC 319

Eeckhout P, 'The EU and its Member States in the WTO - Issues of Responsibility' in Bartels L and Ortino F (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006)

Fassbender B, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights. Study Commissioned by the UN Office of Legal Affairs)' (2006) 3 IOLR 437

——, *Securing Human Rights? : Achievements and Challenges of the UN Security Council* (OUP 2011)

Felder A, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Schulthess 2007)

Forteau M, 'Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales' in SFDI (ed), *La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme* (Pedone 2009)

Fox H and Webb P, *The Law of State Immunity* (3rd edn, OUP 2013)

Frank D, *Verantwortlichkeit für die Verletzung der Europäischen Menschenrechtskonvention durch internationale Organisationen* (Helbling & Lichtenhahn 1999)

Gaillard E and Pingel-Lenuzza I, 'International Organisations and Immunity from Jurisdiction: to Restrict or Bypass' (2002) 51 ICLQ 1

Gaja G, 'Some Reflections on the European Community's International Responsibility' in Schermers HG, Heukels T and Mead P (eds), *Non-contractual Liability of the European Communities* (Martinus Nijhoff 1988)

——, 'The Review by the European Court of Human Rights of Member States' Acts Implementing European Union Law: 'Solange' Yet Again?' in Dupuy P-M and others (eds), *Völkerrecht als Wertordnung : Festschrift für Christian Tomuschat* (NP Engel 2006)

——, 'Comment: The Impact of Security Council Resolutions on State Responsibility' in Nolte G (ed), *Peace through International Law* (2009)

——, 'The Concept of an Injured Statute' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010)

——, 'The 'Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR' (2013) 2 ESIL-Reflections 1

——, The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations (SHARES Research Paper 25, 2013)

——, 'Note introductive' (2013) 47 RBDI 9

——, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 BYIL 10

Garcia - Amador FV, 'La responsabilité internationale de l'état, la responsabilité des Organisations internationales' (1956) 34 Rev' d DIP 146

Gärditz KF, 'Bridge of Varavarin' (2014) 108 AJIL 86

Gardner J, 'Complicity and Causality' (2007) 1 Crim Law and Philos 127

——, 'Moore on Complicity and Causality' (2008) 156 UPenn Law Review PENNumbra 432

Gattini A, 'Smoking/No Smoking: Some Remarks on the Present Place of Fault in the ILC Articles on State Responsibility' (1999) 10 EJIL 397

——, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695

Gazzini T, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)' (2001) 12 EJIL 391

——, 'Personality of International Organizations' in Klabbers J and Wallendahl A (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011)

Geslin A, 'Réflexions sur la répartition de la responsabilité entre l'organisation internationale et ses Etats membres' (2005) 3 RGDIP 539

Gianviti F, 'Economic, Social, and Cultural Rights and the International Monetary Fund' in Alston P (ed), *Non-State Actors and Human Rights* (OUP 2005)

Gill TD, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 NYIL 33

——, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011) 42 NYIL 37

Ginther K, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Springer-Verlag 1969)

Gonzalez MP, 'Les organisations internationales et le droit de la responsabilité' (1988) 92 RGDIP 63

Gowlland-Debbas V, 'The Security Council and Issues of Responsibility under International Law' (2012) 3 RdC 185

Gowlland-Debbas V and Tehindrazanarivelo DL, *National Implementation of United Nations Sanctions* (Martinus Nijhoff 2004)

Gowlland Gualtieri A, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel' (2001) BYIL 213

Graefrath B, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages'

(1984) 185 RdC 9

Grant RW and Keohane RO, 'Accountability and Abuse of Power in World Politics' (2005) 99 Am Polit Sci Rev 29

Grant TD, 'International Responsibility and the Admission of States to the United Nations' (2008-2009) 30 Mich J Int'l L 1095 1095

Gray CD, *Judicial Remedies in International Law* (Clarendon 1990)

——, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Orders of Provisional Measures of 8 April 1993 and 13 September 1993' (1994) 43 ICLQ 704

——, 'The Choice Between Restitution and Compensation' (1999) 10 EJIL 413

Greenwood C, 'The Tin Council Litigation in the House of Lords' (1990) 49 CLJ 8

Guillaume M, 'La réparation des dommages causés par les contingents français en ex-Yougoslavie et en Albanie' (1997) XLIII AFDI 151

Hafner G, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks' in Fastenrath U and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011)

Hakimi M, 'State Bystander Responsibility' (2010) 2 EJIL 341

Hart HLA and Honoré T, *Causation in the Law* (2nd edn, Clarendon Press 1985)

Hartwig M, *Die Haftung der Mitgliedstaaten für internationale Organisationen* (Springer 1993)

Heathcote S, 'State Omissions and Due Diligence. Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility' in Bannelier K, Christakis T and Heathcote S (eds), *The ICJ and the Evolution of International Law : The Enduring Impact of the Corfu Channel Case* (Routledge 2012)

Higgins R, Problems and Process: *International Law and How We Use It* (Clarendon Press 1994)

——, 'Preliminary Exposé' (1995) 66 AIDI 251

Hirsch M, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Nijhoff 1995)

Hoffmeister F, 'Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 EJIL 723

Holzinger K, *EMRK und internationale Organisationen: die Zulässigkeit der Übertragung von Hoheitsrechten aus Sicht der EMRK und ihre Folgen für die konventionsrechtliche Verantwortlichkeit der Mitgliedstaaten* (Nomos 2010)

Hovell D, *The Power of Process : The Value of Due Process in Security Council Sanctions Decision-making* (OUP

2016)

Independent International Commission on Kosovo, *The Kosovo Report: Conflict ; International Response ; Lessons learned* (OUP 2000)

Jackson M, *Complicity in International Law* (OUP 2015)

Janik C, 'Die EMRK und internationale Organisationen - Ausdehnung und Restriktion der equivalent protection-Formel in der neueren Rechtsprechung des EGMR' (2010) 70 ZaöRV 127

——, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (Mohr Siebeck 2012)

Jenks CW, 'The Conflict of Law-making Treaties' (1953) 30 BYIL 301

Jennings R, 'The International Court of Justice at Fifty' 89 AJIL 493

Kennedy D, 'The Move to Institutions' (1987) 8 Cardozo L Rev 841

Kingsbury B, Krisch N and Stewart RB, 'The Emergence of Global Administrative Law' (2004-2005) 68 Law & Contemp' Problems

Klabbers J, 'Presumptive Personality: The European Union in International Law' in Koskenniemi M (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998)

——, 'The Life and Times of the Law of International Organizations' (2001) 70 Nord JIL 287

——, 'Contending Approaches to International Organizations' in Klabbers J and Wallendahl A (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011)

——, 'The Transformation of International Organizations Law' (2015) 26 EJIL 9

——, *An Introduction to International Organizations Law* (3rd edn, CUP 2015)

Klein P, *La responsabilité des organisations internationales : dans les ordres juridiques internes et en droit des gens* (Editions Bruylant 1998)

——, 'Les institutions financières internationales et les droits de la personne' (1999) 32 RBDI 97

——, 'The Attribution of Acts to International Organizations' in Crawford J (ed), The Law of International Responsibility (OUP 2010)

——, 'Les articles sur la responsabilité des organisations internationales: Quel bilan tirer des travaux de la CDI?' (2012) LVVIII AFDI 1

——, 'Le panel consultatif des droits de l'homme (Human Rights Advisory Panel) de la MINUK' in Kohen M, Kolb R and Tehindrazanarivelo DL (eds), *Perspectives of International Law in the 21st Century. Liber Amicorum Christian Dominicé* (Martinus Nijhoff 2012)

Kolb R, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000)

——, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations by the Security Council?' (2004) 64 ZaöRV 21

——, *The International Court of Justice* (Hart 2013)

Kuijper PJ and Paasivirta E, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 IOLR 111

Koutroulis V, 'Entre la non-interférence et le contrôle judiciaire: l'équilibrisme des juridictions nationales face aux actes des organisations internationales' in Sarooshi D (ed), *Remedies and Responsibility for the Actions of International Organizations* (Brill 2013)

Lanovoy V, Responsibility for Complicity in an Internationally Wrongful Act: Revisiting a Structural Norm (Paper Presented at the SHARES Conference, 17 and 18 November 2011, Amsterdam, 2011)

——, 'Complicity in an Internationally Wrongful Act' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law* (CUP 2014)

Lapradelle AGd and Politis N, *Recueil des arbitrages internationaux, Vol II* (2ème edn, 1957)

Larsen KM, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control ' Test' (2008) 19 EJIL 509

——, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012)

Lauterpacht E, 'The Legal Effect of Illegal Acts of International Organisations' in *Essays in Honour of Lord McNair* (Stevens & Sons 1965)

——, *'The Function of Law in the International Community* (New edn, OUP 2011)

Leck C, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct ' (2009) 10 Melb JIL 346

Leiæ JR and Paulus A, 'Art. 103' in Simma B and others (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, OUP 2012)

Liivoja R, 'The Scope of the Supremacy Clause of the UN Charter' (2008) 57 ICLQ 583

Lord Robertson of Port Ellen, *Kosovo One Year On: Achievement and Challenge* (NATO, 2000)

Lowe V, 'Responsibility for the Conduct of other States' (2002) 101 Kokusaiho Gaiko Zassi

Marston G, 'The Arab Monetary Fund: Legal Person or Creature from Outer Space?' (1991) 50 CLJ 218

Mendelson M, 'The Definition of 'International Organization' in the International Law Commission's Current Project on the Responsibility of International Organizations' in Ragazzi M (ed), *International Responsibility Today Essays in Memory of Oscar Schachter* (Nijhoff 2005)

Meng W, 'Internationale Organisationen im völkerrechtlichen Deliktsrecht' (1985) 45 ZaöRV 324

Messineo F, 'The House of Lords in Al-Jedda and Public International Law' (2009) LVI NILR 35

——, 'Things Could Only Get Better: Al-Jedda beyond Behrami' (2011) 50 Mil L & L War Rev 321

——, 'Attribution of Conduct' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law* (CUP 2014)

Milanovic M, 'State Responsibility for Acts of Non-State Actors' (2009) 22 LJIL 307

——, 'Norm Conflict in International Law: Whither Human Rights?' (2009-2010) 20 Duke J Comp & Int'l L 69

——, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 EJIL 121

Milanović M and Papić T, 'As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267

Möldner M, 'Responsibility of International Organizations –Introducing the ILC's DARIO' (2012) 16 Max Planck Yb of UN Law 281

Moore MS, *Causation and Responsibility An Essay in Law, Morals, and Metaphysics* (OUP 2009)

Mowbray AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004)

Muller AS, *International Organizations and Their Host States* (Brill 1995)

Murphy SD, *United States Practice in International Law. Vol 1: 1999-2001* (CUP 2002)

——, 'Codification, Progressive Development, or Scholarly Analysis?' in Ragazzi M (ed), *Responsibility of International Organizations* (Nijhoff 2013)

Murray O, 'Piercing the Corporate Veil' (2011) 8 IOLR 291

Naert F, 'Binding International Organisations to Member State Treaties' in Wouters J and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010)

——, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010)

——, 'The International Responsibility of the European Union in the Context of its CSDP Opertions' in Evans MD and Koutrakos P (eds*), The International Responsibility of the European Union* (Hart 2013)

Nollkaemper A, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615

——, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 AJIL 760

——, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 Ind J Global Legal Studies 535

——, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 JICJ 1143

——, 'Issues of Shared Responsibility before the International Court of Justice' in Rieter E and de Weale H (eds), *Evolving Principles of International Law* (Martinus Nijhoff 2011)

——, 'Introduction: Procedural Aspects of Shared Responsibility in International Adjudication' (2013) 4 JIDS 277

Nollkaemper A and Jacobs D, 'Shared Responsibility in International Law: A Conceptual Framework' (2012-2013) 34 Mich J Int'l L 359

Nolte G, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13 EJIL 1083

Nolte G and Aust HP, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 1

Noyes JE and Smith BD, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale J' IL 225

Olleson S, *State Responsibility before International and Domestic Courts: The Impact and Influence of the ILC Articles* (OUP 2016 (forthcoming))

Orakhelashvili A, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59

——, 'Division of Reparation between Responsible Entities' in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (OUP 2010)

——, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from Monetary Gold to East Timor and Beyond' (2011) 2 JIDS 373

Paasivirta E, 'The Responsibility of Member States of International Organizations?' (2015 12 IOLR 448

Palchetti P, 'Sulla responsabilità di uno stato per il voto espresso in seno ad un'organizzazione internazionale' (2012) 95 Riv Dir Intern 352

——, 'Litigating Member State Responsibility' (2015) 12 IOLR 468

Paparinskis M, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4 JIDS 295

Parlett K, *The Individual in the International Legal System : State-centrism, History and Change in International Law* (CUP 2011)

Pauwelyn J, *Conflict of Norms in Public International Law : How WTO Law Relates to other Rules of International Law* (CUP 2003)

Pavoni R, 'Choleric notes on the Haiti Cholera Case' (2015) 19 QIL 19

Pellet A, 'The Definition of Responsibility in International Law' in Crawford J, et al (ed), *The Law of International Responsibility* (OUP 2010)

Personnaz J, *La réparation du préjudice en droit international public* (Recueil Sirey 1938)

Peters A, 'The Security Council's Responsibility to Protect' 8 IOLR 15

Pisillo Mazzeschi R, 'Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme' (2008) 333 RdC

Pitschas C, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Duncker & Humblot 2001)

Plakokefalos I, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) 4 JIDS 385

——, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471

Portmann R, *Legal Personality in International Law* (CUP 2010)

Pronto AN, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations' in Ragazzi M (ed), *Responsibility of International Organizations* (Nijhoff 2013)

Prost K, 'Remarks to the 49th meeting of the Committee of Legal Advisors on Public International Law of the Council of Europe' (Strasbourg, 20 March 2015)

Quigley J, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987) 57 BYIL 77

Reinisch A, *International Organizations Before National Courts* (CUP 2000)

——, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131

——, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals' (2008) 7 CJIL 285

——, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63

——, 'Conclusion' in Reinisch A (ed), *Challenging Acts of International Organizations Before National Courts* (OUP 2010)

——, 'To What Extent Can and Should National Courts 'Fill the Accountability Gap'?' (2013) 10 IOLR 572

—— (ed) *Challenging Acts of International Organizations Before National Courts* (OUP 2010)

—— (ed) *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013)

Reinisch A and Weber UA, 'In the Shadow of Waite and Kennedy' (2004) 1 IOLR 59

Ritter J-P, 'La protection diplomatique à l'égard d'une organisation internationale' (1962) 8 AFDI 427

Rosenne S, *The Law and Practice of the International Court, 1920-1996* (3rd edn, Martinus Nijhoff 1997)

——, *The Law and Practice of the International Court, 1920-2005* (4th edn, Martinus Nijhoff 2006)

Rovine AW and Hanessian G, 'Toward a Forseeability Approach to Causation Questions at the United Nations Compensation Commission' in Lillich RB (ed), *The United Nations Compensation Commission* (Transnational Publishers 1995)

Ryngaert C, 'The Immunity of International Organizations Before Domestic Courts' (2010) 7 IOLR 121

——, 'The Responsibility of Member States of International Organizations' (2015) 12 IOLR 502

Ryngaert C and Buchanan H, 'Member State Responsibility for the Acts of International Organizations' (2011) 7 Utrecht L Rev 131

Sabahi B, *Compensation and Restitution in Investor-State Arbitration : Principles and Practice* (OUP 2011)

Sadurska R and Chinkin CM, 'The Collapse of the International Tin Council: A Case of State Responsibility?' (1990) 30 Va J Int'l L 845

Salmon J, 'Les accords Spaak -U Thant du 20 février 1965' (1965) 11 AFDI 468

Sari A, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9 IOLR 77

Sari A and Wessel RA, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in Van Vooren B, Blockmans S and Wouters J (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013)

Sarooshi D, *The United Nations and the Development of Collective Security* (Clarendon 1999)

——, *International Organizations and their Exercise of Sovereign Powers* (OUP 2005)

——, 'International Organizations and State Responsibility' in Ragazzi M (ed), *Responsibility of International Organizations* (Nijhoff 2013)

Scelle G, 'Le phénomène juridique du dédoublement fonctionnel' in Schätzel W and Schlochauer HJ (eds), *Rechtsfragen der internationalen Organisation : Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (1956)

Schermers HG, 'Succession of States and International Organizations' (1975) 6 NYIL 103

Schermers HG and Blokker N, *International Institutional Law : Unity within Diversity* (5th edn, Nijhoff 2011)

Schilling T, 'Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats' (2004) 64 ZaöRV 343

Schmalenbach K, *Die Haftung internationaler Organisationen : Im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Lang 2004)

——, 'Third Party Liability of International Organizations' in Langholtz H, Kondoch B and Wells A (eds), International Peacekeeping, vol 10 (Koninklijke Brill 2006)

——, 'Dispute settlement' in Klabbers J and Wallendahl A (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011)

Schrijver N, 'Beyond Srebrenica and Haiti - Exploring Alternative Remedies against the United Nations' (2013) 10 IOLR 588

Scott C and others, 'A Memorial for Bosnia' (1994-1995) 16 Mich J Int'l L

Scovazzi T, 'Within and Beyond Mutatis Mutandis' in Ragazzi M (ed), *Responsibility of International Organizations* (Nijhoff 2013)

Seidl-Hohenveldern I, 'Der Rückgriff auf die Mitgliedstaaten in internationalen Organisationen' in Bernhardt R (ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte : Festschrift für Hermann Mosler* (Springer 1983)

Seyersted F, 'United Nations Forces - Some Legal Problems' (1961) 37 BYIL 351

——, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon Their Constitutions?* (Krohns Bogtrykkeri 1963)

——, 'Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non-Members?' (1964) 4 IJIL 233

Shelton D, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833

Shihata IFI, 'Human Rights, Development, and International Financial Institutions' (1992-93) 8 Am U J Int'l L&Pol 27

Siekmann RC, *National contingents in United Nations Peace-keeping Forces* (Martinus Nijhoff 1991)

Simma B, 'Bilateralism and Community Interest in the Law of State Responsibility' in Dinstein Y (ed), *International Law at a Time of Perplexity* (Nijhoff 1989)

——, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 EJIL 1

Simmonds R, *Legal Problems Arising from the United Nations Military Operations in the Congo* (Nijhoff 1968)

Singer M, 'Jurisdictional Immunity of International Organizations' (1995) 36 Va J Int'l L 53

Stapleton J, 'Choosing What We Mean by Causation in the Law' 73 Missouri Law Review 433

Stern B, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone 1973)

——, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Injury' in Ragazzi M (ed*), International Responsibility Today* (Nijhoff 2005)

——, 'The Elements of an Internationally Wrongful Act' in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (OUP 2010)

——, 'The Obligation to Make Reparation' in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (OUP 2010)

Stumer A, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' (2007) 48 Harv Int'l LJ 553

Szasz P, 'The United Nations Legislates to Limit its Liability' (1987) 81 AJIL 739

——, 'Granting International Organizations Ius Standi' in Muller A, Raič D and Thuránszky JM (eds), *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff 1997)

Talmon S, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Ragazzi M (ed), *International Responsibility Today* (Nijhoff 2005)

——, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Shiner P and Williams A (eds), *The Iraq War and International Law* (2008)

Tams CJ, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005)

——, 'Countermeasures against Multiple Responsible Actors' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art* (CUP 2014)

Thirlway H, 'The Law and Procedure of the International Court of Justice, Supplement 2010: Parts 9 and 10' (2011) 81 BYIL

——, 'Responsibility of International Organizations: What Role for the International Court of Justice?' in Ragazzi M (ed), *Responsibility of International Organizations. In Memory of Sir Ian Brownlie* (Nijhoff 2013)

Tomuschat C, 'General Conclusions' in Tomuschat C (ed), *Kosovo and the International Community* (Kluwer Law 2002)

——, 'Reparation in Cases of Genocide' (2007) 5 JICJ 905

——, 'International Organizations as Third Parties under the Law of International Treaties' in Cannizzaro E (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011)

——, 'Attribution of International Responsibility' in Evans M and Koutrakos P (eds), *The International Responsibility of the European Union* (Hart Publishing 2013)

Townsend G, 'State Responsibility for Acts of de facto Agents' (1997) 14 Ariz J Int'l & Comp L 635

Tzanakopoulos A, 'Domestic Court Reactions to UN Security Council Sanctions' in Reinisch A (ed), *Challenging Acts of International Organizations before National Courts* (OUP 2010)

——, *Disobeying the Security Council : Countermeasures against Wrongful Sanctions* (OUP 2011)

——, 'The Countermeasure of Disobedience' in Ragazzi M (ed), *The Responsibility of International Organizations* (Martinus Nijhoff 2013)

Venzke I, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012)

Verdirame G, *The UN and Human Rights : Who Guards the Guardians?* (CUP 2011)

Verhoeven J, *Droit international public* (Larcier 2000)

Vermeer-Künzli A, 'Invocation of Responsibility' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014)

Verzijl JHW, *International Law in Historical Perspective. Part 6, Juridical Facts as Sources of International Rights and Obligations* (AW Sijthoff 1973)

Vezzani S, 'Countermeasures by Member States against International Organizations' in Ragazzi M (ed), *Responsibility of International Organizations* (Martinus Nijhoff 2013)

Vichneveskaia S, 'ISAF Claims Process in a Nutshell' (2008) 16 NATO Legal Gazette 2

Virally M, 'Definition and Classification of International Organizations: A Legal Approach' in Abi-Saab G (ed), *The Concept of International Organization* (UNESCO 1981)

Vranes E, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' 17 EJIL 395

Vukas B, 'Treaties, Third-Party Effect' (2011) MPEPIL

Webb P, 'Should the 2004 UN State Immunity Convention serve as a model/starting point for a future un Convention on the Immunity of International Organizations?' (2014) 10 IOLR 319

Weil P, 'Le droit international en quête de son identité: cours général de droit international public' (1992) 237 RdC 11

Wessel RA and den Hertog L, 'EU Foreign, Security and Defense Policy: A Competence-Responsibility Gap?' in Evans M and Koutrakos P (eds), *The International Responsibility of the European Union* (Hart 2013)

Whiteman MM, *Damages in International Law, vol III* (US Department of State 1943)

——, *Digest of International Law*, vol 13 (US Dept. of State Publication 1968)

Wilde R, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12 ILSA JICL 395

Wood M, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013)

10 IOLR 287

Wouters J and Schmitt P, 'Challenging Acts of Other United Nations' Organs, Subsidiary Organs, and Officials' in Reinisch A (ed), *Challenging Acts of International Organizations Before National Courts* (OUP 2010)

Wright R, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 Iowa LR 1001

Yee S, 'The Responsibility of States Members of an International Organization for Its Conduct As a Result of Membership or Their Normal Conduct Associated With Membership' in Ragazzi M (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005)

——, 'Member Responsibility' and the ILC Articles on the Responsibility of International Organizations: Some Observations' in Ragazzi M (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013)

Zaum D, 'The Security Council, the General Assembly, and War: the Uniting for Peace Resolution' in Lowe V and others (eds), *The UN Security Council and War* (OUP 2008)

Zemanek K, 'The Legal Foundations of the International System' (1997) 266 RdC 9

Zgonec-Rozej M, 'Al-Jedda v United Kingdom ' (2012) 106 AJIL 830

Zimmermann A, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in Fastenrath U and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011)

Zwanenburg M, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005)