



Amsterdam Center for International Law

**INTRODUCTION TO THE SYMPOSIUM ON
RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS
AND OF (MEMBER) STATES:
*Attributed or Direct Responsibility or Both?***

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1 Introduction

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ASR)¹ left a gap on a matter theoretically falling within its ambit, namely the responsibility of States for the wrongful acts of international organizations of which those States were a member and, possibly, even if those States were not a member.² Article 1 of the Draft Articles on the Responsibility of International Organizations (hereinafter 'the Draft Articles'), which are presently entering the phase of second reading in the International Law Commission (ILC)³ under the guidance of rapporteur Giorgio Gaja, announces that the future draft articles on this issue mean to fill that gap. Paragraph 2 of that article states: 'the present draft articles also apply to the international responsibility of a State for the internationally wrongful conduct of an international organization.' Like Article 57 of the ASR, Article 1 of the Draft Articles is not limited to the responsibility of a State for the wrongful acts of an

* University of Amsterdam. The author is indebted to Prof André Nollkaemper for many useful remarks to an earlier version of this introduction and to Christiane Ahlborn and Brechtje Vossenbergh for research assistance and critical reading of the final draft.

¹ International Law Commission 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' UN Doc A/C.6/56/10 (2001) (ASR)

² See the commentary to art 57 of ASR in J Crawford (ed) *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press Cambridge 2002) p 310.

³ A full text of all the Draft Articles on the Responsibility of International Organizations with accompanying commentaries by the ILC has appeared in the International Law Commission 'Report of the International Law Commission on the Work of its 61st Session' (4 May-5 June and 6 July to 7 August 2009) UN Doc A/C.6/64/10 pp 39-174 ('Draft Articles'); A Reinisch gives a good overview of the literature that has hitherto appeared in fn 3 of his contribution to this symposium, see p 000 of this collection of articles for the symposium. In addition one may mention: Samantha Besson, 'La pluralité d'Etats responsables. Vers une solidarité internationale?', (2007) 17 *Revue Suisse de droit international et européen* 13-38 and Andrew Stumer, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections', (2007) *Harvard International Law Journal* 553-580

international organization of which that State is a member.⁴ Inversely there is also the problem of the responsibility of international organizations for the wrongful acts of in particular the Member States of those organizations, a subject that obviously falls directly under the mandate of the ILC in respect of the responsibility of international organizations, but may have an impact on the ASR.⁵ It may be that what seems to be at first sight a wrongful act of a State under the rules of the ASR in the end turns out not to be wrongful, ought not to have been attributed to that State, or for which in the end that State should not bear the responsibility itself, but rather an international organization of which it is a member should do so.⁶

It seemed to the Amsterdam Centre for International Law (ACIL) that the issues related to the responsibility of an international organization in connection with the act of a State and to the responsibility of a State in connection with an act by an international organization were among the most interesting and most controversial of the new Draft Articles on the Responsibility of International Organizations. Therefore, it organized an expert seminar on these issues in Amsterdam on 24 April 2008.⁷ The seminar benefited from the presence of a limited group of academic experts and practitioners from international organizations and Ministries of Foreign Affairs, as well as from the active participation of the ILC rapporteur on the subject. The three articles that follow are the result of three interventions at the seminar and have benefited from the ensuing discussions.

As a consequence of the two problem areas mentioned above, left open by ASR, there are two special chapters included in the Draft Articles: Chapter IV of Part II called “Responsibility of an International Organization in connection with (NB not *for*) the act of a State or another

⁴ However, the most important relevant Draft Articles, namely art 16 and 60, refer exclusively to a situation involving the responsibility of a Member State for the act of international organization or of an international organization for the act of a Member State.

⁵ However, art 16 of the Draft Articles (n 3) states: ‘This chapter is without prejudice to the international responsibility of the State or the international organization which commits the act in question, or of any other State or international organization.’ This seems to imply that the draft articles aim for simultaneous responsibility of the organization and its Member States. For further discussion, see p 000 of this collection of articles for the symposium.

⁶ Another matter that is, strictly speaking, not covered by either set of draft articles is the invocation of the responsibility of a State by an international organization. However, as the rapporteur has said, it would be easy enough to apply the relevant articles on State Responsibility *mutatis mutandis*, see G Gaja, Special Rapporteur ‘Seventh Report on Responsibility of International Organizations’ UN Doc A/C.6/610 (‘Seventh Report’) para 8. This report is part of the ILC Report on its 61st Session (2009).

⁷ The ACIL expert seminar did not discuss the “operational aspects” of these questions, such as the invocation of the responsibility of a plurality of responsible States or international organizations cf art 47 of the Draft Articles (n 3).

International Organization” and Part V (formerly called Chapter x)⁸ under the title “Responsibility of a State in connection with the act of an International Organization”. Chapter IV and Part V discuss such issues as “aid or assistance”, “direction and control” and “coercion” given to or exercised over a State by an international organization and vice versa.⁹ These articles broadly correspond to similar provisions in the ASR.¹⁰ The chapters in question, however, also contain a number of articles that are unique to the Draft Articles and it is on these articles that most of the following contributions will concentrate. These articles deal with the consequences of the “incurring” of responsibility by an international organization for an act by a Member State that has been taken pursuant to certain decisions etc. of the organization in question and by a State in case it has transferred powers to an international organization so as to put the organization in a position to commit acts that are contrary to that State’s international obligations.¹¹

This direct “incurring” or “attribution” of responsibility to an international organization or a State is obviously closely linked to responsibility that comes about through the normal way of attributing a wrongful act to an international organization or a State. It is for that reason that this introduction to the Symposium texts not merely seeks to place the provisions on direct attribution of responsibility within the overall context of the Draft Articles, but more specifically regards how the articles relate to the rules on attribution.

That these three issues are of special interest is amply borne out by the Seventh Report on the Responsibility of International Organizations,¹² in which the rapporteur not only proposes the final articles, but also re-discusses certain issues with a view to the finalization of the first reading of the Draft Articles. It is telling that no less than 15 of the 36 pages devoted to this revisiting of articles that were discussed earlier, are devoted to the question of attribution, to the responsibility of an international organization in connection with the act of a State or another international organization and to the responsibility of a State in connection with the act of an international organization.¹³ This demonstrates that these issues were considered relatively controversial by States and international organizations alike and have provoked

⁸ See Statement of the Chairman of the Drafting Committee Mr M Vazquez-Bermudez, 5 June 2009, p 3 available at <<http://www.un.org/law/ilc>> (last visited 1 November 2009)

⁹ Artt 13-15 and 57-9 of the Draft Articles (n 3).

¹⁰ See artt 16-18 ASR (n 1).

¹¹ Artt 16 and 60 of the Draft Articles (n 3).

¹² Seventh Report (n 6)

¹³ Seventh Report (n 6) pp 8-15, 17-20, 24-30.

considerable discussion both inside the ILC, in the United Nations (UN) General Assembly's Sixth Committee, and also in academic circles.¹⁴ Moreover, some of the relevant draft articles, notably those on attribution, already have had a certain resonance in national and international tribunals.¹⁵ Moreover, the rules on attribution have drawn some serious criticism from the European Union (EU) that could be of broader relevance if other Regional Economic Integration Organizations (REIOs) follow the EU's development.

2 Attribution

Article 4 of the Draft Articles sets out two conditions for an internationally wrongful act by an international organization that entails the international responsibility of that organization: (1) the act must be attributable to the international organization under international law, and (2) the act constitutes a breach of an international obligation of that organization. For international responsibility to arise therefore, attribution of the wrongful act to an international organization would seem indispensable.

Article 5 states the general rule of attribution in terms somewhat different from those of articles 4 and 5 of the ASR:

The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.¹⁶

¹⁴ For an overview of the most important literature on the topic, see fn 3 of the article by Reinisch, p 000 of this collection of articles for the symposium; see also fn 3 above.

¹⁵ Cf *Behrami v France (Admissibility)* (2007) 45 EHRR SE10 and *Saramati v France Germany and Norway* (2007) 45 EHRR SE10, see on this case: Pierre Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considerations critiques sur l'arrêt Behrami et Saramati', (2008) 53 *Annuaire français de droit international* 43-64 and Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operation: The Behrami and Saramati Cases', (2008) 8 *Human Rights Law Review* 151-170. Also cf *R (on the application of Al-Jedda) v Secretary of State for Defense* [2007] UKHL 58 [2008] 1 AC 332 (*Al-Jedda* case), see on this case: Francesco Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 *Netherlands International Law Review* 35-62.

¹⁶ Art 4§1 of the Draft Articles (n 3) and artt 4 and 5 ASR (n 1) formulate the actions of organs of an international organization in near-identical fashion to art 4 of the Draft Articles, but instead of 'agents', art 5 ASR speaks of 'persons or entities exercising elements of governmental authority.'

According to the same article an “agent” includes officials and other persons or entities through whom the organization acts, whereas the functions of the organs or agents of an international organization shall be determined by the rules of the organization. These rules consist in particular of the constituent instruments, decisions, resolutions and other acts taken by the international organization in accordance with those instruments. Established practice of the organization is also part of the “rules of the organization”.

It is especially this reference to the “rules of the organization”, as well as its definition, that inspired the European Commission (EC) to argue in communications with the ILC, as well as in cases before Panels and the Appellate Body of the World Trade Organizations (WTO), that normally the EU Member States and its authorities acted as organs or agents of the EU. The normal mode of operation of EU law is that it is applied, implemented and executed by the authorities of the Member States; there is no “Union” or “quasi-federal” layer of government worth speaking of. There are a number of Union agencies, but these agencies have special, mostly regulatory tasks, not the day-to-day duty to apply, implement or execute EU law.¹⁷ Even in an area as totally covered by EU law as customs, there is no EU customs service that applies and enforces the Community Customs Code.¹⁸ It is the national customs services of the Member States that do so, using their national administrative and criminal law system for enforcement. However, the national customs services are coordinated by an EU system of guidelines relating to interpretation and application of Community customs law¹⁹ and the unity of interpretation of Community customs law by Member State authorities is assured by the Court of Justice of the European Communities (ECJ) through preliminary questions from the courts of Member States under Article 234 EC Treaty.

This system, comparable to so-called “executive federalism”, is close to the German way of organizing federalism and the opposite of the US system of federalism with its separate layer of federal administration, federal police (Federal Bureau of Investigation, FBI) and federal

¹⁷ One of the few European agencies that has somewhat operational tasks (management of the co-ordination of operational tasks of the Member States) – and exceptionally so – is FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. See Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L349/1.

¹⁸ For the Community Customs Code, see Council Regulation (EC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L302/1.

¹⁹ Case C-379/00 *Overland Footwear Ltd v Commissioners of Customs & Excise* [2002] ECR I-11133 (*Customs Case*) paras 17-25.

courts.²⁰ In short the question that arises here is whether the national customs services (and other such Member State organs) are acting as organs of the State²¹ or are in reality acting as organs of an international organization, i.e. the European Union, if one takes into account the rules of that organization. In other words, in such situations and in the case of a limited number of international organizations, the question arises, not whether the institutional veil of the international organization has to be lifted, but whether the institutional veil of the State has to be drawn aside in order to show that it is in reality the organization's face that is hiding behind it. This is no doubt sacrilegious, but it is sacrilege that comes from the simple fact that, if – in the words of Catherine Brölmann – in the international law of treaties and, one may add, also in the law of responsibility, the boundaries of the international organizations are sometimes porous and sometimes hard, the same must be true for the Member States of those organizations.²² The true question is in which situations the boundary of the international organization ought to be hard and the boundary of its Member States porous and vice versa. Moreover, as we will see when discussing the special articles on the “incurring of responsibility” by international organizations and the Member States of those organizations, there is the additional question whether to pull the veil aside in respect of responsibility alone or also in respect of attribution entailing responsibility.

Returning to the general articles on attribution, Article 6 of the Draft Articles sets out an additional rule of attribution:

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.

In the discussion concerning this article, there are two issues that have come to the fore. One is the issue of what constitutes “effective control”, especially in the context of states and other international organizations placing military contingents at the disposal of the United Nations

²⁰ It is remarkable that most cases that, among others, posed the problem of executive federalism were fought on customs issues with the United States, see *EC - Customs Classification of Certain Computer Equipment* (adopted 22 June 1998) WT/DS 62, 67 and 68 (*LAN-case*) and *EC – Selected Customs Matters* (adopted 11 December 2006) WT/DS 315.

²¹ See art 4 ASR (n 1).

²² See CM Brölmann *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties* (Hart Publishing Oxford 2007) chap 11.

or other international organizations, such as the EU or the African Union. The other is again the matter of the division of powers and responsibility between the EU/EC and its Member States. Is “placing at the disposal of” the right characterization of the relationship of executive federalism described above, and if so, can the EU be said to exercise “effective control” over the authorities of its Member States, when those States apply EU law?

The first issue has provoked a strong debate about the decision of the European Court of Human Rights (ECtHR) in the well-known *Behrami and Saramati cases* and its progeny.²³ In these cases the ECtHR decided that the UN, through the United Nations Interim Administration Mission in Kosovo (UNMIK), exercised sufficient control over the national contingents of the Kosovo Force (KFOR) of the North Atlantic Treaty Organization (NATO) to be able to speak of “effective control” within the meaning of Article 6 and thus to declare the UN responsible for the various acts that were deemed wrongful by complainants. Since the ECtHR could not be said to have jurisdiction over the UN and since there was no territorial jurisdiction of the ECtHR over Kosovo either, it declared such cases inadmissible.

The rapporteur has criticized this case law in his Seventh Report and he is by no means alone in his criticism.²⁴ There seems to be a clear clash here between the ultimate political control, as exercised by the Security Council and the Secretariat of the UN on the basis of the legal authority of the Security Council granted by Article 42 of The UN Charter,²⁵ and the “effective control” as required by Article 6 of the Draft Articles. It is clear that the latter requires rather close operational control over a peacekeeping or a peace-building operation. Whereas in cases as *Behrami and Saramati* no such close operational control seems to have existed to judge by the facts of the case, it would seem to have been present in the case of the

²³ See *Behrami and Saramati cases* (n 15); See also *Kasumaj v Greece* (ECtHR, 5 July 2007) and *Slavisa Gajic v Germany* (ECtHR, 28 August 2007); In addition the ECtHR has also referred to art 5 of the Draft Articles (n 3) in a case concerning attribution of allegedly wrongful acts to the High Representative in Bosnia and Herzegovina, *Dušan Berić and others v Bosnia and Herzegovina* (ECtHR, 16 October 2007); In addition there have been cases before national courts, such as the *Al-Jedda* case in the UK (n 15) and a case before a Dutch Court concerning the responsibility of the Dutch contingent of the UN Protection Force (UNPROFOR) in the former Yugoslavia for the massacre at Srebrenica, see *‘Mothers of Srebrenica’ et al v the State of the Netherlands and the UN* (10 July 2008 District Court of The Hague) RAV 2008/101 (*Mothers of Srebrenica case*)

²⁴ Seventh Report (n 6) para 26, fn 38. See also the literature referred to in fn. 15 above.

²⁵ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 993 TS (UN Charter)

Srebrenica massacre, where there were regular contacts between the Dutch contingent and the UN commanders.²⁶

Seen in that light, it is quite right for the rapporteur to reject the idea that there is such “effective control” when the authorities of the Member States merely carry out Community law. There may be a Commission infringement case against the Member State, if the latter’s authorities are chronically lax in carrying out and enforcing EU law, but day-to-day effective control is not part of the EU set-up. However, those who plead for taking account of the special situation of organizations like the EU do not base themselves so much on the special attribution provision of Article 6, since those commentators regard the idiom of “placing State authorities at the disposal of” an international organization as totally inadequate for rendering the true state of the Community “constitutional” system that governs the relationship between the Union and its Member States in the application of Community law.²⁷ They rather interpret Article 5 so that organs of the Member State must be seen as organs of the EU, when that is justified on the basis of the rules of the organization. Moreover, in order to make that interpretation explicit, they plead for a special provision laying down this view in so many words in order to take account of the category of REIOs, the legislation of which is applied and enforced by the organs of the Member States of each respective organization.²⁸

However, the rapporteur rejects such special provisions, since he is of the view that it is contrary to the judgment of the ECtHR in the well-known *Bosphorus* case.²⁹ He also regards this approach as contrary to the judgment of the ECJ in the so-called *Kadi* case on appeal from the Court of First Instance of the European Communities (CFI).³⁰ This introductory article is not the place to enter into a wholesale debate with the rapporteur, who enjoys the support of the full ILC in this matter, but the way he gives weight to certain cases seems somewhat random. One wonders why one single judgment of the ECtHR (*Bosphorus*) should

²⁶ *Mothers of Srebrenica* case (n 24). In that case, The District Court of The Hague did not follow the opinion expressed in the text, but the facts of that case seem to bear it out nonetheless.

²⁷ This includes the present author, see E Paasivirta and PJ Kuijper ‘Does one size fit all: The European Community and the Responsibility of International Organizations’ [2005] XXXVI Netherlands Ybk of Intl L 169-225; See also S Talmon ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’ in: M Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Leiden 2005) p 405 ff.

²⁸ Paasivirta and Kuijper (n 28) p 212-16.

²⁹ *Bosphorus Hava Yollari Turzim ve Ticaret Anonim Sirketi v Ireland (Bosphorus case)* 2005-VI (2006) 42 EHRR 1 para 153; Seventh Report (n 6) para 33.

³⁰ Joined Cases C-402/05 P and C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] OJ C285/2 (*Kadi* (ECJ)); See also Seventh Report (n 6).

be enough to dismiss the wish of the EU, a number of authors and the evolving case law of the WTO dispute settlement organs,³¹ whereas another single judgment (*Behrami and Saramati*) should be incapable of modifying the view of the ILC about attribution. There is also an obvious difference, from the point of view of “the internal rules of the organization”, between the implementation of a Security Council Resolution by the EU/EC, as in the *Kadi* case, and the application of directly applicable Community law by the Member States.³²

Another article of considerable interest in the chapter on attribution is Article 8 of the Draft Articles, which reads as follows:

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

This article corresponds to Article 11 of the ASR. To some extent it finds its counterpart in Article 61 of the Draft Articles, which states that a State member of an international organization is responsible for an internationally wrongful act of that organization, if

- (a) It has accepted responsibility for that act; or
- (b) It has led the injured party to rely on its responsibility.

There are obvious differences between these two articles. Article 8 operates on the basis of a modification of the applicable rule of attribution through assumption of the impugned behaviour by the international organization, whereas Article 61 operates directly at the level of the assumption of responsibility, without necessarily accepting that the wrongful act was attributable to the Member State rather than to the international organization. Moreover, as Article 61§2 states, the international responsibility resulting from the State member of an

³¹ See also the rather cool rejection of this position in the Commentary of the International Law Commission ‘Report of the International Law Commission on its 57th Session’ (2 May-3 June and 4 July-5 August 2005) UN Doc A/C.6/60/10 pp 92-96 (introductory commentary to Chapter IV).

³² Binding Security Council resolutions are not automatically “law of the land” in all UN Member States and do not overrule the constitutional rules of the Member States, according to the ‘internal rules’ of the UN. By contrast directly applicable Community law laid down in Regulations *is* the “law of the land” in the Member States, must be applied by the Courts over any earlier or later provisions of national law and without awaiting any legislative or even constitutional procedure to change national law. This flows directly from the nature of Community law itself, see Case C-106/77 Simmenthal III [1978] ECR 629.

international organization assuming responsibility is a subsidiary one. This implies that a shared responsibility is possible – even likely³³ – which is not the case when an international organization acknowledges or accepts certain wrongful conduct as its own under Article 8.

It is interesting to note that States and international organizations seem to have acted quite differently in connection with these provisions in recent practice. On several occasions especially the EU seems to have been ready to tolerate that some WTO Panels, instead of going along with its theory of executive federalism as the panels did later on, interpreted such interpretations by WTO Panels as amounting to the EU acknowledging and accepting certain behavior by its Member States authorities as its own within the meaning of Article 8.³⁴ On the other hand States have been decidedly wary to accept even partial responsibility for acts that those States preferred to ascribe entirely to international organizations. This is true in particular for the position of those States in respect to a number of cases related to the events in former Yugoslavia, such as in the *Behrami and Saramati* cases before the ECtHR and the *Legality of Use of Force* cases before the International Court of Justice (ICJ).³⁵

It is also interesting to note that a certain enthusiasm for accepting attribution on the part of the European Commission in international trade cases, as mentioned above, has not been matched by classical international organizations, such as the UN, in particular in respect of international peacekeeping missions. For them, and this includes the sector of the EU that is charged with the Common Foreign and Security Policy (CFSP) that has mounted several international police and military missions in the framework of peacekeeping and peace-building missions,³⁶ such voluntary assumption of responsibility went rather too far. For these organizations, the traditional dividing line between the overall command responsibilities of the international organization and the military command of that organization over the mission

³³ This is also the consequence of artt 18 and 62; See further p 000 of this collection of articles for the symposium.

³⁴ See in particular the LAN-case (n 20).

³⁵ *Legality of the Threat or Use by a State of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; Prof Pierre Klein in particular pointed this out quite forcefully during an oral presentation at the ACIL expert seminar.

³⁶ The EU presently consists of two sectors, the classical supra-national EC sector, laid down in the EC Treaty (n 20), and the EU in the narrow sense, laid down in the Treaty on European Union as amended (adopted 7 February 1992) [1992] OJ C191/1, that operates on inter-governmental principles. The classical EC side has developed extensive foreign relations powers, sometimes of an exclusive nature and pre-empting Member State action. This EC-system largely runs on the basis of decisions by a qualified majority. On the other hand, the EU sector operates the CFSP on a strictly inter-governmental and consensual basis, whereby the foreign policy powers of Member States are unaffected by the fact that certain aspects of foreign- and defense policy are run on a common basis.

on the one hand and the authority over disciplinary and criminal matters of the commanders of the different national contingents on the other³⁷ is a convenient frontier that should also be maintained for allocating attribution and/or responsibility in the case of internationally wrongful acts committed in the course of the mission.

It would seem, therefore, that there is a strong difference between the attitude toward international responsibility of international organizations between, on the one hand, REIOs with important law-based foreign relations powers that have a tendency to develop over time and, on the other, traditional international organizations where this is not the case. The former have an interest to insist on attribution and responsibility, since these form the natural external counterparts to the foreign relations powers that have been transferred to these organizations by the Member States thereof under the relevant founding treaty. Because of this transfer only these organizations are capable of undoing the offending rules and/or practices. Moreover, for such REIOs any interference by third States with attribution and responsibility has the potential of upsetting the “constitutional” division of powers between the international organization and its Member States in the field of external relations.³⁸ This in turn may have important repercussions for the position of the REIO on the international scene, or in another international organization.³⁹ Such questions are much less pressing for traditional intergovernmental organizations, like those of the UN family. Hence, the divide on this point runs right across the EU, separating its traditionally supra-national EC part from the intergovernmental CFSP-side.

3 Responsibility without attribution for an act

Before turning to the provisions of the two chapters that acknowledge in greater detail the relationship between international organizations and the Member States of those organizations in respect of international responsibility, it is important to return to what was said at the

³⁷ This distinction can be traced back all the way to the very first UN peacekeeping missions. See RCR Siekmann *National Contingents in United Nations Peace-keeping Forces* (Nijhoff Dordrecht 1991) chap 4.

³⁸ Such a division of powers is considered all the more vulnerable in the eyes of the organization’s institutions, when, as is the case in the EC, it is largely based on case law of the Court of the Organization. For an exhaustive analysis of the Court’s case law see M Mendez, *The Legal Effect of Community Agreements: Lessons from the Court*, Doctoral Thesis EUI Florence, April 2009, available via <<http://hdl.handle.net/1814/12039>> (last visited 1 November 2009).

³⁹ The question of attribution and responsibility in cases before the panels and the Appellate Body of the WTO could have serious consequences for the newly acquired position of the European Community as “original member” of the WTO under Article XI:1 of the Agreement Establishing the World Trade Organization 1867 UNTS 154 (adopted 15 April 1994, entered into force 1 January 1995) (the Marrakesh Agreement).

beginning of this section, namely that the articles concerning the attribution of a wrongful act to an international organization, read together with Article 4, seem to lay down an essential component or condition of the international responsibility of an international organization. However, Part II, Chapter IV, and Part V of the Draft Articles show that attribution may not be an indispensable condition for responsibility. Already in respect of the corresponding articles 16, 17 and 18 of the ASR it could be said that the provisions on “aid and assistance”, “direction or control” and “coercion” dealt with situations where wrongfulness and attribution of the act were no longer concomitant or, in any case, were not necessarily fully united in the same State.⁴⁰ These categories are all different ways of expressing a primary norm that a State cannot help, push or force another State to commit an act that is wrongful for the latter State. The same is true for the corresponding provisions of the Draft Articles.

However, the Draft Articles add another primary norm beyond that of not pushing or aiding a State or an international organization in whatever way to commit an act that is internationally wrongful. These articles create a primary norm that is peculiar to the relationship between international organizations and the Member States of that organization. This new norm deals with such questions as: can an international organization get around its international obligations by binding its Member States to committing certain acts that are not internationally wrongful for those States, but are so for the organization itself? Or: can States grant powers to an international organization that can be used by that organization for the purpose of committing an act that is contrary to the international obligations of the Member State(s), but not of the international organization: thus, as it were, circumventing the obligations of the Member State(s)?

This underlying primary norm raises many questions, but the organizers of the ACIL expert seminar also believed that the old categories of “aid or assistance” and “direction or control” raised specific issues, when international organizations were involved in them. August Reinisch will further develop these issues in his contribution to the Symposium below.⁴¹ Niels Blokker⁴² and Esa Paasivirta⁴³ will discuss the rules that express the new underlying primary

⁴⁰ Especially the formulation in art 18 that ‘the act would, **but for** the coercion, be an internationally wrongful act of the coerced State’, creates the impression that the wrongfulness for the coerced State could be entirely eliminated as a consequence of the coercion. However, the same formula is not used in the articles on “aid and assistance” and “direction and control”.

⁴¹ See pp 000-000 of this collection of articles for the symposium.

⁴² See pp 000-000 of this collection of articles for the symposium.

⁴³ See pp 000-000 of this collection of articles for the symposium.

norm. These rules go beyond notions such as “aid and assistance” and “direction and control”, and are essentially restricted to the relation between the international organization and its Member States.

4 Aid or Assistance

Article 13 of the Draft Articles concerns the responsibility of an international organization for the aid and assistance given to a State or another international organization, when the latter commit an internationally wrongful act. The mirror image of that article, Article 57, prohibits the aid and assistance given by a State in the commission of an internationally wrongful act by an international organization. The conditions for the international organization and the State respectively being responsible for such aid and assistance are the same according to both articles, namely that (1) the organization or the State does so with the knowledge of the circumstances of the internationally wrongful act, and (2) that the act would be internationally wrongful if committed by the aided or assisted State or organization.

Just as proscribed in Article 16 ASR, States and international organizations cannot aid and assist each other or other international organizations in the committing of an act that is wrongful for the organization or the State that is being aided or assisted. The primary rule behind the article on aid and assistance, therefore, is that an international person may not facilitate the commission of an internationally wrongful act by another international person.

5 Direction and/or Control

The same approach applies to the two articles on direction and/or control. Article 14 concerns the responsibility of an international organization that directs and controls a State or another international organization in the commission of an internationally wrongful act. The mirror image of this article is Article 58, which covers the direction and control exercised by a State over the commission of an internationally wrongful act by an international organization. The conditions for establishing international responsibility in both cases are identical to those laid down in the articles on aid or assistance: the direction and control must be aimed at an act that would be wrongful for the international organization or State being directed and controlled, and the latter must also act with knowledge of the circumstances of the internationally wrongful act.

Just as proscribed by the corresponding article from the ASR, Article 17, direction and control are seen as cumulative. The question is, whether these acts should rather be seen as alternatives: direction **or** control. The accumulation of the two notions does not seem to serve any particular purpose. During the ACIL expert seminar, the rapporteur noted this issue and the matter of retaining the formulation of the ASR was broached. The ILC in the end has not seen fit to modify the drafting in this respect at the end of its first reading; in its 2009 annual report the cumulative phrasing remains part of both articles.⁴⁴

Responsibility for international wrongful acts through direction and/or control may have some actual relevance for international organizations and States, especially insofar as the two entities work together in a more or less hierarchical relationship in the framework of peacekeeping missions and emergency humanitarian operations. However, even when such a hierarchical relationship is missing and the entities are merely working together in the same emergency, the notion of aid and assistance might be relevant for establishing international responsibility, in the event that anything goes seriously wrong.

During the ACIL expert seminar it was pointed out, for instance, that the ECtHR might have done better by analyzing the situation in *Behrami and Saramati* in terms of Article 14 on direction and control rather than in the framework of the rules on attribution, and in particular the rules on the conduct of organs of a State or another international organization placed at the disposal of an international organization (Article 6 of the Draft Articles). Although there is little doubt that the ECtHR also misinterpreted the notion of effective control as specified in Article 6, the analysis in terms of direction and control (Article 14 of the Draft Articles), or even aid and assistance (Article 13 of the Draft Articles), would have left room for shared responsibility that does not seem to be available at all, or to the same extent, under the rules of attribution. Both Chapter IV of Part Two and the new Part Five end with identical articles (Articles 18 and 62 of the Draft Articles) that explicitly state that the chapter/part in question is without prejudice to the international responsibility of the State or international organization that is being aided or assisted or controlled and directed. In this respect Chapter IV and Parts Two and Five follow Article 19 of the articles on State Responsibility. The

⁴⁴ See on this issue more extensively the contribution by Reinisch on pp 000-000 of this collection of articles for the symposium.

chapter on attribution (Chapter II of Part Two), however, does not contain any provision on shared responsibility in the case of attribution.

6 Coercion

The provisions on coercion were hardly discussed during the ACIL expert seminar. Coercion does not seem to be a problem that would occur very often in respect of an international organization. A Member State would have to act so far outside its normal role in order to be considered as coercing the organization that it would seem scarcely credible. A non-Member State would merely have the theoretical possibility to coerce an international organization, unless the coercion would be exercised on elements of the organization outside headquarters. Theoretically a host State, whether a Member State or not, could mobilize sufficient physical elements of pressure to amount to coercion, but one could only imagine this happening, once the host State did not care any longer about its position in relation to the organization and all its Members: a situation that will not easily occur. Finally coercion of a State by an international organization is not easy to conceive outside the framework of the rules of the organization, for instance under Chapter VII of the UN Charter.

The two articles that cover coercion of a State by an international organization or of an international organization by a State (respectively Articles 15 and 59 of the Draft Articles) repeat the forceful language of Article 18 of the ASR that states that “but for” the coercion the act would be wrongful for the State or the organization that is being coerced. But since even these articles are covered by Articles 18 and 62 of the Draft Articles respectively, the possibility of shared responsibility between the coercer and the coerced remains just as much a possibility – at least in theory – as between assister and assisted party or between the director and the party that is directed.

7 The special articles concerning the relation between organizations and Member States

The articles on aid and assistance, on control and direction, and on coercion are applicable to all States, as States that are not Members of a particular organization are also capable of acting in this way in respect of international organizations and, in turn, international organizations may also be in a position to aid, control and coerce non-Member States. There

are certain forms of exercising authority or influence over a State or an international organization, however, that are specifically available only to a Member State in relation to an international organization or to an international organization vis-à-vis its Member States. These forms of action, therefore, ought to fall within the normal role of a Member State within an international organization or within the normal relationship between an organization with a Member State; whereas such forms of action as were discussed in the preceding sections clearly are outside the realm of normal relations between international organizations and the Member States of those organizations.

The clearest example of the latter case is when an international organization adopts a decision binding on a Member State or international organization to commit an act that would be internationally wrongful if committed by the international organization taking the decision. In addition Article 16§1 of the Draft Articles requires that the decision then circumvents an international obligation of that organization. The international responsibility of the international organization taking such a decision is directly *incurred* by that organization, as is formulated in Article 16§1 of the Draft Articles. There is no question of attribution either to the organization or the Member State; it even would seem from the text of Article 16§1 that the Member State actually does not need to carry out the decision of the international organization in order for the latter to incur responsibility.⁴⁵

However, such carrying out of the intention of the international organization is necessary, when the latter does not take a binding decision, but merely produces an authorization or recommendation. In that case the State or international organization that is a Member of the international organization actually needs to commit the wrongful act that was authorized or recommended before the international responsibility is incurred by the international organization deciding on an authorization or a recommendation.⁴⁶

⁴⁵ Art 16§1 of the Draft Articles (n 3) reads as follows: ‘An international organization incurs international responsibility if it adopts a decision binding a Member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.’

⁴⁶ Article 16§2 of the Draft Articles (n 3) reads as follows:
‘An international organization incurs international responsibility if:
It authorizes a Member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a Member State or international organization commit such an act; and that State or international organization commits the act in question in reliance on that authorization or recommendation.’

Another peculiarity of Article 16 is the explicit statement that the provisions relating to binding decisions, authorizations, and recommendations apply whether or not the act in question is internationally wrongful for the Member State or the international organization to which the decision, authorization, or recommendation are addressed (Article 16§3 of the Draft Articles).

This same approach applies to the companion article of Article 16 of the Draft Articles: Article 60.⁴⁷ In this respect these special articles are different from the cases of aid or assistance, of direction and control and of coercion. This is because the articles concerning the latter cases envisage that a principal party aids and assists, commands and controls or coerces an accessory (whether an organization or a State) into doing something contrary to the international obligations of the latter. The special articles, however, concern a principal bringing about a result through an intermediary (albeit an international organization or a State) that is contrary to the international obligations of the principal, but not necessarily those of the intermediary. If the result sought by the principal party is nevertheless contrary also to the international obligations of the intermediary organization or State, the only consequence is double responsibility of both the organization and its Member States or member organizations.

Whereas Article 16 already had a somewhat manipulative tone, Article 60 is even stronger on this score. Its first paragraph reads as follows:

A State member of an international organization incurs international responsibility if it *seeks to avoid complying with*⁴⁸ one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

The article sets out a series of events that virtually no State could bring about all on its own, since it would need at least several other States as “partners in crime” in order to incite the organization from the inside to commit an act contrary to the Member State’s international obligations to which the organization would not be bound. This may be an element that pleads

⁴⁷ See Article 60§2 of the Draft Articles (n 3): ‘Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.’

⁴⁸ Earlier versions of the draft article used the term *circumvent*.

for an objective approach to the interpretation of the article that is less colored by pejorative terms like “taking advantage of”.⁴⁹

It may also be instructive to read Articles 60 and 16 of the Draft Articles together, in which case one needs to start with Article 60. The story then goes as follows: States set up an international organization and provide that organization with a certain number of powers. These powers are then exercised by the international organization. In certain instances this exercise of powers by the international organization may (inadvertently or not) lead to the avoidance of (A) international obligations of one or more Member State(s) as *per* Article 60 or (B) circumvention of the international obligations of the international organization itself as per Article 16.

In case (A) the organization **itself** needs to perform the act that is contrary to the obligations of its Member State(s). It needs to act in an “operational capacity”. If the organization acts in a “legislative” or “rule-making” capacity and takes a decision that binds its Member States to act against their international obligations, the objective is not reached. The Member States will be bound to act against their obligations and circumvention will not be achieved.

In case (B) the organization needs to take a decision, or issue an authorization or recommendation binding or inciting the Member States of that organization to act contrary to its own obligations in order to achieve the objective of circumventing its own international obligations. So in that case the organization has to act essentially in a “rule-making” capacity, otherwise circumvention will not take place.

This demonstrates that, though the two articles seem to mirror each other to a certain extent, the articles are actually applicable to different kinds of international organizations or to an international organization in two totally different modes of operation. Moreover, reality intrudes: the articles in question are based on a notion of use or abuse of the separate international personality of international organizations and the need to pierce the “institutional veil in international law”,⁵⁰ that in many cases hardly responds to reality. Thus the problems related to the fact that the EU was not bound by the European Convention on Human Rights

⁴⁹ Paasivirta adroitly explains how such “taking advantage of” may be merely the consequence of the international organization not having yet developed the same package of international treaty obligations as its Member States, simply because it is behind, see p 000 of this collection of articles for the symposium.

⁵⁰ See Brölmann (n 23).

(ECHR),⁵¹ while the Member States were so bound, were caused by the legislative activity of the EU leading to alleged breaches of the ECHR by the Member States that implemented such legislation, and not by operational action of the EU. Thus Article 60 does not cover such actions, although many believe that this article was inspired by the case law of the ECtHR on these matters and these cases are mentioned in the commentary to Article 60.⁵² Moreover, the EC Treaty provision that ensures that Member States are bound by international agreements concluded by the EC,⁵³ demonstrates that at least in some cases the institutional veil no longer needs to be pierced. After all, the EC can sue Member States in Luxemburg for not carrying out EC Treaty obligations and has in fact done so.⁵⁴

The special articles concerning the relationship between an international organization and its Member States raise quite a number of issues. Some of these concern the wording, others the subjective or objective nature of terms such as “circumvention” in the old version or “seek to avoid compliance” in the new one, the moralistic approach that seems to underlie these articles and the well-known – but as yet not sufficiently thoroughly discussed – question of whether these provisions take account in a sufficient manner of the special position of REIOs in relation to the Member States of such organizations. These, and other questions are discussed hereinafter in greater detail by Niels Blokker (regarding Article 16 of the Draft Articles) and Esa Paasivirta (regarding Article 60 of the Draft Articles).

8 Some concluding remarks

According to the present state of the Draft Articles on this subject, the international responsibility of international organizations can come about in two ways: either through a combination of the international wrongfulness of an act and the attribution of that act to the international organization (in reality through one of its organs or acting through its agents as actors) or through a combination between the international wrongfulness of an act attributable to a Member State or a Member international organization and a mechanism by which the organization of which they are Members directly incurs responsibility. Similarly a Member

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953 (ECHR).

⁵² See the document containing the ‘Draft Articles’ (n 3) 167-170

⁵³ Article 300§7 EC Treaty (n 20). The relevant paragraph reads as follows: ‘Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’

⁵⁴ As an example, see IP/09/1461 *Commission v UK* of 8 October 2009 regarding improper implementation of certain ECJ rulings on the right of establishment under Community Law.

State may be held internationally responsible through the international wrongfulness of an act attributable to an international organization and a similar mechanism of direct incurrence of responsibility by the State member of that organization.

The mechanism of direct incurrence of responsibility combined with an act that is attributable to another entity, be it Member State or an international organization, makes shared responsibility possible. The international organization may be bearer of incurred responsibility and a Member State may be responsible through attribution for the same wrongful act and vice versa. Such shared responsibility is a possibility that international organizations and the Member States of those organizations are certainly in need of. But is it sufficient that this exists by a combination of these two kinds of responsibility? The question is whether shared responsibility through shared attribution is also possible. In theory rapporteur Gaja answers this question in the affirmative and one may well be inclined to agree with him.⁵⁵ However, it is interesting to note that the rapporteur does not really succeed to give an example of dual attribution from real life. He mentions the bombardments of Serbia in connection with its possibly genocidal activities in Kosovo, but in the cases that came before the ICJ and ECtHR concerning the responsibility for these events, the arguments of some States were directed at entirely shifting the responsibility to NATO, not to divide it or share it between the organization and its Member States.⁵⁶ According to the present wording of Article 4 of the Draft Articles, shared or divided attribution would not seem to be a permissible construction of attribution. Attribution seems to be a black or white question: is it an organ or agent of an international organization that has acted or the organ or agent of a Member State? The choice has to be made. The only third way seems to be joint responsibility of Member States and the organization, as accepted by the ECJ in cases of so-called mixed agreements which are not accompanied by a declaration of competence.⁵⁷

As we have seen, once the choice of attribution has been made in favour of an organ or agent of a Member State, it may be irrevocably the wrong choice in the case of international organizations, such as the EU, but possibly in the longer run also other REIOs. The Member States' authorities of these REIOs directly apply legislation and implement policies, as if the latter were the legislation and policies of that REIO. Moreover such organizations often

⁵⁵ See *Second Report on the Responsibility of International Organizations*, UN doc. A/CN.4/541, paras 5-13.

⁵⁶ *Ibid*, para 7 and accompanying footnotes.

⁵⁷ *Ibid*, para 8.

dispose of internal enforcement mechanisms to correct the improper application and enforcement by the Member States of the organizations of the legislation adopted and the international agreements concluded by the international organization in question. In such a situation, as we suggested earlier, the State's veil should be removed, showing the international organization that is behind the State. Under those circumstances the attribution should be to the organization for which Member State authorities act as organs in a kind of "*dédoublement fonctionnel*". Especially in the areas of complete transfer of exclusive powers to the international organization by its Member States, this is the only satisfactory solution.⁵⁸

The kind of shared responsibility offered in particular by Articles 16 and 62 of the Draft Articles is not fully satisfactory in such cases, since it is too dependent, for instance, on the emotive notion of circumvention or avoidance of responsibility through a decision binding a Member State (Article 16 of the Draft Articles). Shared responsibility is very necessary in areas of shared competence between international organizations and Member States, but probably results not so much from the exceptional situation described in Articles 16 and 62 of the Draft Articles, but simply from an error of the Member States in implementation or a misconception regarding the boundary between Member State and organization competence.

9 The Contributions

The contributions open with an article by August Reinisch in which he discusses some burning issues with respect to aid and assistance (Articles 13 and 57 of the Draft Articles) and direction and control (Articles 14 and 58 of the Draft Articles). As to aid and assistance he focuses on the resistance if the International Financial Institutions (IFIs), notably the International Monetary Fund (IMF), against the blanket application of this provision to all international organizations. His remarks on direction and control concentrate on military operations and on the doubtful need to make these two concepts cumulative.

⁵⁸ It may be the case that the rapporteur and the ILC have wanted to open an escape route for the EU and other REIO's that may develop in the same direction through draft Article 63, *Lex specialis*. This provision reads as follows: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or the implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the international organization and its members." Especially the last words of the draft article and its reference to internal rules, as well as the commentary seem to point in this direction. See *International Law Commission*, Report of the Sixty-first Session (2009) A/64/10, pp. 173-175. However a further inquiry into this question fell outside the scope of the ACIL Expert Seminar, since in the spring of 2009 draft Article 63 was not yet in the public domain.

Niels Blokker contributes some reflections on the “abuse” of the Member States by the international organization, whereas Esa Paasivirta has taken on the subject of “abuse” of the organization by its members. Professor Blokker concentrates on five questions concerning Article 16 of the Draft Articles, the first two of which concentrate on awkward textual issues, namely the restriction to Member *States* and the rather broad reference to decisions instead of a limitation to *binding* decisions by which an international organization may compel its Members to avoid the obligations of the organization. The other three questions analyze the notion of circumvention and further develop the issue of binding decisions by asking principled questions as to why an international organization should be responsible for its recommendations and authorizations, linking the last issue to UN Security Council authorizations for the use of armed force.

Esa Paasivirta concentrates on the new version of Article 60 of the Draft Articles (previously Article 28) and reacts to it mainly from an EC perspective. He sketches the development of the article throughout the first reading of the Draft Articles and considers whether it might not be an over-reaction to what he calls “public morals” issues. He also considers whether existing legal mechanisms might not be used to address the problem of how the “treaty obligations” of an organization are not identical to those of its Member States. Finally he wonders whether the subjective standard of the Member State “seeking to avoid compliance with one of its own international obligations” is a workable criterion.

The organizer of the Symposium, the ACIL, hopes that the results of the Symposium will contribute to intensify the discussion on these Draft Articles both inside and outside the ILC during the second reading of those articles.