

Sarah Bayani

International Legal  
Responsibility of  
International  
Organizations in the  
ILC Draft Articles  
and Beyond

Göttingen University Press



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*À William,  
pour son amour...*





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Brussels 2018

Sarah Bayani

# Table of Contents

List of Abbreviations .....	XIII
Introduction .....	1
I. Terminology .....	15
II. Globalization and International Organizations .....	16
1. Unprecedented Change in the Nature of the Activities of IOs .....	16
2. The Impacts of the Changes on the Prominence of the Issue of Responsibility of IOs .....	17
III. Methodology .....	19
<b>Chapter One: Comparative study of the nature of State and IO .....</b>	<b>23</b>
I. The nature of State as primary subject of international law for the purpose of international responsibility .....	24
1. From the perspective of International legal Theory .....	25
2. From the perspective of International Relations .....	25
3. From the perspective of Political Sciences .....	26

II. Phenomenon of International Organizations from legal and non-legal perspectives .....	28
1. From the perspective of International Legal Theory .....	28
2. From the perspective of International Relations .....	34
3. From the perspective of Political Sciences .....	39
III. Conclusion.....	40
<b>Chapter Two: The General Principle of International Responsibility in International Law and international legal discourse .....</b>	<b>43</b>
I. The Legal Basis of the general principle of International Responsibility in the International Legal Order .....	44
II. The Nature of the Principle of International Legal Responsibility .....	48
III. A ‘bilateralist’ or an ‘international community interest’ standpoint? .....	50
IV. The Place of Responsibility in the General Framework of Accountability of IOs .....	53
1. Historical and initial Optimism towards IOs or normative ideas of IOs disillusioned.....	55
2. The categorization presented in the ILC Berlin final Report.....	57
3. Conclusion .....	104
V. The intrinsic features of international legal responsibility.....	105
1. Legal personality as a precondition of accountability generally and responsibility specifically .....	105
2. International Criminal Responsibility for IOs?.....	115
3. Attribution of Conduct to an IO .....	120
4. Fragmentation of the law of International responsibility.....	124
5. The Theory of Abuse of Rights and its relevance to responsibility of IOs .....	126
<b>Chapter Three: ILC Articles on Responsibility of International Organizations .....</b>	<b>127</b>
I. Private Codification efforts.....	129
II. Drafting the ARIIO following the model of the ASR .....	129
1. Direct Applicability of the provisions of ASR on IOs .....	134
2. ARIIO or the end product of a legal transplantation in the law of international Responsibility.....	135
3. Sparse Opinio Juris.....	146

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4. Scant Case Law .....	147
5. Limited Available Pertinent and Relevant Practice .....	148
6. The Role of Policy Considerations in the formulation of Articles .....	152
7. ILC's Working Methods .....	154
III. The Nature of international Responsibility in ARIO: an objective or a subjective responsibility conception? .....	162
1. A shift towards "Objectivization"? .....	163
2. Re-introduction of subjective element .....	164
3. The role of damage and injury .....	168
IV. Attribution of Conduct: a closer look at the complicated case of PPPs .....	175
V. Principle of Speciality and its relevance and implications for the responsibility of IOs .....	180
VI. The Appropriateness of the "One-Size-Fits-All" Approach .....	183
1. Agency Relationship between States and IOs .....	188
2. Transfer of Powers to IOs .....	192
VII. The Role of Damage and the definition of Injured State or IO in ARIO .....	194
VIII. ARIO: A "post-Westphalian" model of international law? .....	196
IX. The Dual Character of an International Organization .....	198
1. Functional Duality in the framework of ITAs .....	200
2. The test of "effective control" in the ARIO .....	200
3. Prevalence of the Obligations arising out of the UN Charter over the ARIO Articles .....	201
<b>Chapter Four: The (In)appropriateness of the definition of Responsibility in ARIO for IOs .....</b>	<b>203</b>
I. The sources, content and scope of the Obligations of International Organizations .....	208
1. The International Organizations' own Obligations .....	210
2. Through the Obligations of their Member States .....	277
3. Beneficiaries of the Obligations of International Organizations .....	282
II. Necessity of accountability to fill the responsibility gap .....	291

<b>Chapter Five: Drawbacks of unclarities surrounding the obligations of IOs for ARIO</b> .....	295
I. Limited scope of applicability of ARIO in practice.....	296
II. The risk of the Abuse of Legal Personality of IOs by their member States.....	297
1. At the time of establishment or subsequent transfer of powers and competences .....	300
2. In the framework of decision-making.....	303
3 At the Time of the Implementation of the Decisions .....	311
III. Solutions to prevent and/or remedy the abuse of the separate legal personality of IOs .....	312
1. Piercing the Organizational Veil.....	314
2. The general duty to co-operate.....	321
3. ILC ARIO solutions for the problem of the abuse of legal personality of IOs.....	324
4. Further Considerations .....	332
5. Conclusion .....	334
Concluding Remarks.....	339
Annexes.....	345
Bibliography .....	347

## List of Abbreviations

AJIL	American Journal of International Law
AFDI	Annuaire Français de Droit International
AfDB	African Development Bank
AJPIL	Austrian Journal of Public and International Law
ALR	Administrative Law Review
ARIEL	Austrian Review of International and European Law
ADB	Asian Development Bank
ASR	Articles on State Responsibility
BYBIL	British Year Book of International Law
DARIO	Draft Articles on Responsibility of International Organizations
EBRD	European Bank for Reconstruction and Development
ECHR	European Court of Human Rights

ECJ	European Court of Justice
EU	European Union
ed.	Editor
eds.	Editors
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
FYIL	Finnish Yearbook of International Law
fn.	Footnote
GA	General Assembly
Georgetown JIL	Georgetown Journal of International Law
GoJIL	Goettingen Journal of International Law
HRQ	Human Rights Quarterly
Harvard Intl LJ	Harvard International Law Journal
IAMs	Independent Accountability Mechanisms
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IDI	Institut de Droit International
IFC	International Finance Corporation
IFIs	International Financial Institutions
ILA	International Law Association
ILC	International Law Commission
ILC Yearbook	Yearbook of the International Law Commission
ILO	International Labour Organization
ILOAT	International Labour Organization Administrative Tribunal
IMF	International Monetary Fund
IO	International Organization
IOLR	International Organizations Law Review
J. Int. Disp. Settlement	Journal of International Dispute Settlement



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LJIL	Leiden Journal of International Law
MDBs	Multilateral Development Banks
Mich.JIL	Michigan Journal of International Law
MPEPIL	Max Planck Encyclopedia of Public International Law
NGO	Non-Governmental Organization
NJIL	Netherlands Yearbook of International Law
Nordic JIL	Nordic Journal of International Law
OP&Ps	Operational Policies and Procedures
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
OUP	Oxford University Press
Para.	Paragraph
PCIJ	Permanent Court of International Justice
RCADI	Recueil des Cours de l'Académie de Droit International
REIOs	Regional Economic Integration Organizations
RGDIP	Revue Générale de Droit International Public
SAYIL	South African Yearbook of International Law
SC	Security Council
UN	United Nations
ULR	Utah Law Review
Virginia JIL	Virginia Journal of International Law
WB	World Bank
YBILC	Yearbook of International Law Commission
ZAÖRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht



## Introduction

The present dissertation will be dealing with a topic that is, according to *Paul Reuter*, at the heart of international law and constitutes an essential part of what may be considered the constitution of the international community.<sup>1</sup> The purpose of this thesis is to examine and review some specific aspects relevant to the question of international legal responsibility of international organizations (hereinafter IOs), mainly with a view to assessing the International Law Commission's work on the codification of the international legal rules in this area. These efforts of the ILC have ultimately been resulted in the submission to and adoption by the General Assembly of the United Nations, of a set of draft articles on the responsibility of international organizations, already known and hereinafter referred to as ARIO. It should also be reminded at the outset that, as is the case in ARIO, the study will only focus on intergovernmental IOs and will not consider the legal situation of, for example, non-governmental organizations (NGOs) in international law.

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<sup>1</sup> Reuter, Paul, "Trois observations sur la codification de la responsabilité internationale des États pour fait illicite", in *Le droit international au service de la paix, de la justice et du développement-Mélanges Michel Virally*, Pedone, Paris, 1991, p. 390; reproduced in Paul Reuter, *Le développement de l'ordre juridique international-Écrits de droit international*, Economica, Paris, 1995, p. 574.

The post World War I era is often referred to as the advent of international organizations.<sup>2</sup> Another turning point was the end of the cold war, which has led to the activation of the world organization, which is undoubtedly a welcome development, but at the same time it has brought with it the rise of possibility and the potential of the breach of the legal obligations and violations of the rights of other entities and individuals by the same organization and its counterparts in general. Globalization is another reality of the current post-Cold War world.<sup>3</sup> The end of the Cold War, as *Koh* observes, "... initiated the era of global law in which we now live".<sup>4</sup> One of the most remarkable characteristics of this global law era is the expansion of supra-national governance mechanisms.<sup>5</sup> Mechanisms of global governance created by the post-cold war international law are dramatically changing our views of public law, including constitutional and administrative law.<sup>6</sup> Supranational entities can and do impose regulatory solutions, which in many instances supersede those that had been adopted domestically in accordance with the preferences and values of the people.<sup>7</sup>

As much more activities have entered the international domain, the IOs have become more and more involved in the international affairs, and consequently, this has contributed to the enlargement of the international personality of IOs.<sup>8</sup>

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<sup>2</sup> Paulus, Andreas L., "The International Legal System as a Constitution", in J.L. Dunoff and J. P. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance*, OUP, 2009, pp. 69–109, at p. 72.

<sup>3</sup> Wälde, Thomas W., "Investment Arbitration as a Discipline for Good-Governance", in Todd Wiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospect*, Ardsley Transnational Publishers, 2003, p. 475.

<sup>4</sup> Koh, Harold H., "Review Essay: Why Do Nations Obey International Law?", *Yale Law Journal*, Vol. 106, 1997, pp. 599–630, at p. 617.

<sup>5</sup> Helfer, Laurence R. and Dinwoodie, Graeme B., "Designing Non-National Systems: The case of the Uniform Domain Name Dispute Resolution Policy", *William and Mary Law Review*, Vol. 43, 2001, p. 141, at pp. 144–45; Esty, Daniel C., "Good Governance at the Supranational Scale: Globalizing Administrative Law", *Yale Law Journal*, 2006, Vol. 115, at p. 1495; David Held, "The Transformation of Political Community: Rethinking Democracy in the Context of Globalization", in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Edges*, New York, CUP, 1999, p. 84.

<sup>6</sup> Montt, Santiago, *State Liability in Investment Treaty Arbitration*, Hart Publishing, 2009, p. 131.

<sup>7</sup> Helfer, Laurence R., "Constitutional Analogies in the International Legal System", *Loyola Los Angeles Law Review*, Vol. 37, 2003, p. 197. According to this author, where treaty obligations are dynamic and evolve through institutional processes outside of any one state's control, compliance with those obligations may clash with domestic preferences and raise trenchant legitimacy concerns.

<sup>8</sup> Klabbers, Jan, "The Life and Times of the Law of International Organizations", *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317; Brölmann, Catherine, "A Flat Earth? International Organizations in the System of International Law", *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 319–340; Österdahl, Inger, "The EU and Its Member States, Other States, and International Organizations – The Common European Security and Defence Policy After Nice", *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 341–372; Klabbers, Jan, "Institutional Ambivalence by Design: Soft Organizations in International Law", *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 403–421; March, James G., and Olsen, Johan P., "The Institutional Dynamics of International Political Orders", *IO*, Vol. 52, 1998, pp. 943–69; Finnemore, Martha and Sikkink, Kathryn, "International Norm Dynamics and Political Change", *IO*, Vol. 52, 1998, pp. 887–917; Kennedy, David, "Putting the Politics Back in International Politics", *Finnish Yearbook*

International organizations are now able to influence the internal processes of states or change the direction of administrative decisions. As an example, WTO dispute settlement decisions are in most cases factually decisive for domestic administrative action. The costs of non-compliance would simply be too high to allow domestic administrative processes real freedom to deviate from a WTO decision.<sup>9</sup> International institutions are not only directly involved in international relations, but they also indirectly play a role at the international and national level through affecting the behavior of both States and individuals.<sup>10</sup> The dispute settlement bodies could undertake the task of concretizing the general principles that states have agreed on.<sup>11</sup> It is also to be noted that as one of the reasons, the lack of density in treaties results in the delegation of power to international bodies.<sup>12</sup>

The participation of IOs in the international life is at the same time one of the consequences of the changing structures of the international legal system, and also one of its manifestations. IOs have not only grown in number,<sup>13</sup> but are now among the major players in many areas of international relations, and it is possible that in the years and decades to come this participation will grow even more rapidly given the number of applications for admission to different IOs. Although some authors may be found who have warned about the proliferation of international institutions to secure global justice, and in spite of pessimism expressed by these scholars in international relations, the general trend has been to the contrary. The number of international organizations has increased in an unprecedented pace during the past century.<sup>14</sup>

Such increase in the role of IOs in international affairs could possibly one day – although there are still no signs of a total replacement on the horizon – attain the point that they could be considered even completely as equals and counterparts of States, the major and principal subjects of international law, in terms of the scope of competences, powers, functions and the roles playing in international relations. Therefore, it is of utmost necessity that the international legal system prepares for and adapts itself with these emerging new situations. Otherwise, there

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*of International Law*, Vol. 9, 1998, pp. 17–27; Evans, M. D., “State Responsibility and the ECHR”, in M. Fitzmaurice and Sarooshi, D., *Issues of State Responsibility before International Judicial Institutions*, Hart Publishing, Oregon, 2004, pp. 139–140; Alvarez, José E., “International Organizations: Then and Now”, *AJIL*, Vol. 100, No. 2, 2006, pp. 324–347.

<sup>9</sup> Krisch, N. and Kingsbury, Benedict, “Global Governance and Global Administrative Law in the International Legal Order”, *EJIL*, Vol. 17, 2006, pp. 1–13, at p. 4.

<sup>10</sup> Bodansky, Daniel, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?”, *AJIL*, Vol. 93, 1999, pp. 596–624, at p. 601.

<sup>11</sup> Kumm, Mattias, “The Legitimacy of International Law: A Constitutionalist Framework of Analysis”, *EJIL*, Vol. 15, No. 5, 2004, pp. 907–931, p. 914.

<sup>12</sup> Montt, Santiago, *State Liability in Investment Treaty Arbitration*, *op. cit.*, p. 135.

<sup>13</sup> Loibl, Gerhard, “Theme III: Global Governance: Institutions – Co-operation and Transparency between International Legal Institutions”, *LJIL*, Vol. 16, No. 4, 2003, pp. 900–901, at p. 900.

<sup>14</sup> Langlois, Anthony J., “Is Global Justice a Mirage?”, *European Journal of International Relations*, Vol. 17 (1), 2011, pp. 145–157, at p. 147.

would be a large gap in the system that would even grow deeper every day, and the international legal system would gradually distance itself from reality.

In the international legal order, international responsibility has often been described as the corollary of international law, the best proof of its existence and the most credible measure of its effectiveness.<sup>15</sup> Significant attention in numerous volumes has been dedicated to the question of international legal responsibility. At the same time, the concepts of accountability and responsibility of international organizations have been the subject of increasing attention over the last half-century. No one would evermore doubt that the question of the responsibility of IOs is not anymore a theoretical one, but definitely implies various relevant practical aspects. The issue of the liability for the conducts of the peace-keeping personnel of the United Nations is one of the prime examples that have surpassed almost all the territorial borders on the globe.<sup>16</sup>

By their nature and especially the amplitude of the scope of their activities, the international organizations have now attained a high potential to damage individuals and legal persons. They are nowadays more than ever before involved in almost all our everyday life matters, be it international, domestic, public or even private affairs. They assume wide ranging tasks, from delivering cooperation development assistance and aid in almost all the corners of the world where such assistance or aid is needed, to the implementation of duties relating to the realization of the rule of law in the context of transitional justice. Even when an IO issues a report, there is always the risk and potential that the IO injures some entity in one way or the other. The decisions of the WTO Dispute Settlement Body, for instance, may have grave economical effects for States parties to the dispute, and even indirectly for third parties.

No limit is set to the realms of activities of IOs or their scope. To borrow the expression used by *Amerasinghe* for referring to IOs as “ubiquitous phenomenon”<sup>17</sup>, thus, it maybe is only a matter of time before the IOs enter into all the activities undertaken at the international level, even those activities reserved to certain entities for the moment. By this statement, the main reference can be made to the governmental tasks, such as tax collection and wealth distribution. Maybe we are not that far from the moment where the IOs actually undertake governmental tasks, not only temporarily, such as in the case of International Administrations in transition periods, but on a permanent basis. The UN, as well as its predecessor the League of Nations, had previously been involved in the administration

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<sup>15</sup> Pellet, Alain, “The Definition of Responsibility in International Law”, in James Crawford; Alain Pellet; and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 3–16, at p. 3.

<sup>16</sup> Bothe, Michael, “Streitkräfte internationaler Organisationen”, Köln, München, 1968, pp. 53–149, cited in Mosler, Hermann, *The International Society as a Legal Community*, Sijthoff & Noordhoff, 1980, p. 170.

<sup>17</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at p. 10.

of territory. Whereas many of these former international administrations were envisaged either as a solution for territorial questions, or to facilitate transition towards independence in the decolonization era, the current use of international administration needs to be seen as a method of post-conflict peace-building.<sup>18</sup>

The above mentioned hypothesis should not necessarily be realized with the scenario in which IOs replace the State, but it could also end up in a scenario where they can simply act in parallel with the State. In this connection, reference can be made to tax unions for instance as one of the possible developments of the future enlargement of the realm of the activities of IOs. Sometimes IOs temporarily take over the internal tasks of a government in a State unable to perform these tasks. As an example, reference can be made to the involvement of ICAO in the airspace and airport control activities in Somalia as a result of the lack of a central national authority in this State since 1991.<sup>19</sup> At the same time, the enlargement of domains, where the cooperation of many parties at the international level is vital, does not seem to stop increasing. A prominent recent example is the challenge of encountering the threat of terrorism, a horrible phenomenon that leaves unfortunately no corner of the planet untouched. While terrorist attacks are far from being a new phenomenon, its intensification and frequency in our millennium raises serious concerns. We hear or witness every month, even every week the news or images of a new horrible terrorist act coming from different places in the world. In the era of collective action, the importance of IOs grows even more, since the IOs are the most appropriate and competent already existing candidates in the framework of which such collective action may best be effectuated.

In this connection, the question of accountability finds even greater relevance. States are increasingly giving way to non-State actors in international relations<sup>20</sup> in order to cope with different global problems to some of them we made briefly reference above. With the emergence of this phenomenon, it is necessary that the required shift and adaptation in the accountability also takes place. Some authors believe that by establishing international institutions the focus should be more on how to control and curb their power, rather than how to realize global justice.<sup>21</sup>

The major purpose of the secondary rules is to provide a remedy for the breach of obligations and possibly the injury or damage sustained by the benefi-

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<sup>18</sup> De Brabandere, Eric, "Human Rights Accountability of International Administrations: Theory and Practice in East Timor", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 331.

<sup>19</sup> Giorgetti, Chiara, "Fulfilling International Obligations by International Organizations in the Absence of State Control". Available on: [www.esil-sedi.eu/sites/default/files/Giorgetti\\_0.PDF](http://www.esil-sedi.eu/sites/default/files/Giorgetti_0.PDF) (last visited on 15.01.2015).

<sup>20</sup> Reinisch, August, "Governance without Accountability?", *German Yearbook of International Law*, Vol. 44, 2001, pp. 270–306, at p. 270–271.

<sup>21</sup> Langlois, Anthony J., "Is Global Justice a Mirage?", *European Journal of International Relations*, Vol. 17 (1), 2011, pp. 145–157, at p. 148.

ciaries and owners of the rights, damage that is one of the results of the violation of those rights. As it has been stated by *Oppenheim* a hundred years ago, “International law is not an end in itself; it is merely a means to certain ends outside itself”.<sup>22</sup> The international legal system was lacking secondary norms for a long time, and precisely for this reason, in the eyes of *Hart*, the international legal system has been comparable with a primitive legal system.<sup>23</sup>

Throughout the history, the development of international law has been influenced by the requirements of international life. The progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.<sup>24</sup> The interdependence between States has increased tremendously in the last century. In the era of governance, meaning that IOs such as EU or international law taking the place of government within a wider range of law-like regulatory activities, and the use of non-governmental actors to steer behavior, sitting alongside the ‘command and control’ of government through law,<sup>25</sup> the international organizations are at the heart of many global issues today.<sup>26</sup> Plurality of actors at the international level has been compared with middle ages, and some scholars have even coined the expression “new middle ages”.<sup>27</sup> It has been stated that international law has gained a whole new dimension following the increasing emergence of IOs in international relations.<sup>28</sup>

Hence, the disappearance of the monopoly surrounding the international responsibility at the international level was a direct result of the diversification of the subjects of international law.<sup>29</sup> Consequently, the same general principles that apply to the international responsibility of States shall also largely govern the international responsibility of IOs and these legal regimes share the same general characteristics.<sup>30</sup> In other words, the principle of State responsibility is widely accepted to be applicable to international organizations. According to this principle, a conduct of a subject of international law in breach of an international obli-

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<sup>22</sup> Oppenheim, L., “The Science of International Law – Its Task and Method”, *AJIL*, Vol. 2, 1908, pp. 313–356, at p. 314.

<sup>23</sup> Hart, H.L.A., *The Concept of Law*, Clarendon law series, second edition, p. 214, at p. 233 ff.

<sup>24</sup> International Court of Justice (ICJ), *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, 1949, p. 8.

<sup>25</sup> Cryer, R./Hervey, T./Sokhi-Bulley, B./Bohm, A., *Research Methodologies in EU and International Law*, Hart Publishing, Oxford and Portland, Oregon, 2011, p. 43.

<sup>26</sup> Hurd, Jan, *International Organizations, Politics, Law, Practice*, Cambridge University Press, Cambridge, 2011.

<sup>27</sup> Minc, Alain, *Le Nouveau Moyen Age*, Gallimard, 1994.

<sup>28</sup> Klabbers, Jan, “Book Review of ‘The Responsibility of International Organizations toward Third Parties: Some Basic Principles’ by Moshe Hirsch”, *EJIL*, Vol. 8 (2), 1997, pp. 385–386, at p. 385.

<sup>29</sup> Pellet, Alain, “The Definition of Responsibility in International Law”, in James Crawford; Alain Pellet; and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 3–16, at p. 6.

<sup>30</sup> *Ibid.*, at p. 7.



gation which is attributable to that subject of international law (a state or an IO) entails the international legal responsibility of that entity under international law, which in case of causing damages or injuries comprises also its liability in full reparation and compensation if necessary.<sup>31</sup>

Back in 1971 the ILC referred to the importance of the topic of the responsibility of other subjects of international law, *inter alia*, international organizations.<sup>32</sup> It has been stated that codification can further the development of new case law.<sup>33</sup> Although the issue of responsibility of international organizations had been touched upon even in the middle of the last century, we are still facing the lack of clarity concerning various important aspects of the issue of the responsibility of international institutions within the international legal order.<sup>34</sup> ARIO has admittedly crystallized some of the unclear and abstract angles of this matter. In the present dissertation one of the intentions is also to find and put forward, through the lens of our chosen hypothesis and its subsequent analysis that will be undertaken in order to examine it, the untouched points on which the ILC could have further shed light at the occasion of drafting ARIO.

Even at the time of the League of Nations, it was evident that when law is more emphasized in the international relations, there could be the hope that peace can be achieved and maintained.<sup>35</sup> Largely ignored until recently, particular focus is now directed at international organizations as human rights violators.<sup>36</sup> The international missions have gone more and more under scrutiny and scepticism. The lack of accountability for violations of human rights during UN territorial administrations is widely reported, together with the poor level of remedies adopted.<sup>37</sup> The institutionalising of this transitional authority is one of the factors why

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<sup>31</sup> UN Secretary-General Report, “Administrative and budgetary aspects of the financing of the United Nations peace-keeping operations”, UN Doc. A/51/389, at para. 6.

<sup>32</sup> Ago, R., “Third Report on State Responsibility”, *ILC Yearbook 1971*, Vol. II (1), pp. 199–274, at p. 200.

<sup>33</sup> Daillier, Patrick, “The Development of the Law of Responsibility through the Case Law”, in James Crawford; Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford University Press, first edition, 2010, pp. 37–44, at p. 37.

<sup>34</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 211.

<sup>35</sup> Schücking, W. (ed.), *Die Satzung des Völkerbundes*, Third edition, Berlin, Verlag von Franz Vahlen, 1931, at p. 51.

<sup>36</sup> Bergtora Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 287.

<sup>37</sup> Abraham, A., “The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo”, *American University Law Review*, Vol. 52(5), 2003, p. 1291.

the human rights accountability of peace missions attracts increasing interest.<sup>38</sup> The significance rises as generally recognized human rights norms are among the primary rules that bind international organizations.<sup>39</sup> The measures taken by peace missions in accordance with their international mandates are capable of having adverse effects on nearly all human rights guaranteed in contemporary international law.<sup>40</sup> The peace-keeping missions may be engaged in operations involving persons indicted for war crimes. These operations may take place in cooperation with relevant criminal institutions. In the course of these actions different human rights may be negatively affected.<sup>41</sup>

The expanded tasks which international organizations are entrusted with nowadays, lead them to play the role of government bodies in some parts of the world, which in turn introduces new possibilities for more destructive forms of harm over greater distances. As noted above, international territorial administration is one of the international institutions and activities that the IOs are involved in mainly.<sup>42</sup> A lot of interests may be implicated, affected or could be at stake in these situations, under certain conditions and constellations, *inter alia*, the lives of the people and the future of the territory under the international administration.<sup>43</sup> In this respect, reference has to be made also to the environment that may be inevitably affected in the course of these kinds of international interventions and under international administration.<sup>44</sup> As customary international law applies to all subjects of international law, it is clear that such customary human rights norms

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<sup>38</sup> Häußler, Ulf, "Human Rights Accountability of International Organizations in the Lead of International Peace Missions", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Oxford-Portland, 2010, p. 215.

<sup>39</sup> Wellens, K., *Remedies against International Organizations*, CUP, 2007; Kolb, R., et al., (eds.), *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales*, 2005, pp. 464–69; Reinisch, A., "The Changing International Legal Framework for Dealing with Non-State Actors", in P. Alston, (ed.), *Non-state Actors and Human Rights*, 2005, at p. 37; A. Clapham, *Human Rights Obligations of Non-state Actors*, 2006; T. Ahmed and I. de Jesus Butler, "The European Union and Human Rights: An International Law Perspective", 2006, *EJIL*, Vol. 17, 2006, p. 771.

<sup>40</sup> Häußler, Ulf, "Human Rights Accountability of International Organizations in the Lead of International Peace Missions", *op. cit.*, p. 229.

<sup>41</sup> *Ibid.*, p. 225–227.

<sup>42</sup> On the International Territorial Administration in general and its basis see: Pajuste, Tina, "Legality of International Territorial Administration by the United Nations", *Finnish Yearbook of International Law*, Vol. XVIII, 2007, Martinus Nijhoff Publishers, Leiden/Boston, pp. 195–215, especially at p. 196.

<sup>43</sup> *Ibid.*, at pp. 196–197.

<sup>44</sup> For the discussion of the repercussions of the international administrations on, *inter alia*, environment see: Keinänen, Katja, "International Law and the Interests of Liberal Market Economy: the Non-Issue of Environmental Protection in the Kosovo International Administration", *Finnish Yearbook of International Law*, Vol. XVIII, 2007, Martinus Nijhoff Publishers, Leiden/Boston, pp. 9–31, specially at pp. 9–13.

are, in principle, also binding upon international organizations.<sup>45</sup> Moreover, it is generally admitted that peremptory norms and rules *à fortiori* bind international organizations. Nevertheless, even if some obligations are already there, their scope and content with regard to IOs still remain to be clarified as well.

In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice has stated that:

“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”<sup>46</sup>

In this connection, the international legal personality of an organization is a precondition of the international responsibility of that organization and it needs to be distinct from that of its member States. Over the past decades, the competences and authority (powers) of international organizations have dramatically increased, leading to more centralization and also resulting in international organizations appearing more and more as actors in their own right rather than merely as forums or instruments in the hands of states for the realization of their objectives. One of many consequences of this is that the legitimacy of the decision-making of the international organizations has now been recognized as a fundamental problem of international governance that is not dissimilar to, or better said reflected in, the often-analyzed problems of legitimacy in the European Union.<sup>47</sup> Most often the question of legitimacy has been closely linked to the issues of responsibility and accountability gaps at the international level. For instance, in the specific case of the UN, it has been recurrently stated that there is a need to impose human rights obligations on the UN in order to take into account the new role of the UN as an organization entrusted with tasks of global governance and the administration of territories through quasi-sovereign powers.<sup>48</sup>

In addressing the issue of responsibility of international organizations, ARIO follows almost the same approaches adopted by the ILC with regard to the codifi-

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<sup>45</sup> Schermers, H. G., “The Legal Bases of International Organization Action”, in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales – A Handbook on International Organizations*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1998, p. 402; Tomuschat, C., “International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law”, *Recueil des Cours de l’Académie de Droit International*, 2001, pp. 134–135.

<sup>46</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, pp. 89–90, para. 37.

<sup>47</sup> Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 3–20, at p. 15.

<sup>48</sup> De Schutter, Olivier, “Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Oxford-Portland, 2010, pp. 98–99.

cation of various dimensions of the question of the State responsibility.<sup>49</sup> For instance, responsibility is a legal relation that arises between the responsible entity, on the one hand, and the parties, whose rights have been violated, on the other hand, giving rise to an international obligation of the responsible entity. In addition, ARIO provides for the international legal responsibility that occurs as a consequence of the commission of a wrongful act. However, it should be noted that ARIO is not the sole reference with regard to the relations between states and IOs in the context of international legal responsibility, since the ASR also covers, from certain perspectives, the relations between states and IOs. The ASR, for example, may be applied by analogy to the relation between a responsible state and an international organization.<sup>50</sup>

ARIO, similar to ASR, deals only with secondary rules, and is without prejudice to any particular primary rule that may or may not be binding on international organizations.<sup>51</sup> The fact that several of the ARIO provisions are based on limited practice moves the border between codification and progressive development in the direction of the later. It may also happen that a provision in the Articles on State Responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more of the nature of progressive development. In other words, the provisions of the ARIO do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the Articles on State Responsibility, their authority will depend upon their reception by those to whom they are addressed. As an example, article 49 of the ARIO may be referred to, that is the result of progressive development undertaken by the ILC.<sup>52</sup> This article is furthermore another proof of the still functional nature of international organizations in the present stage of development of international law, as in paragraph 3 of the article 49 of ARIO it is emphasized that the IOs can protect the interests of the international community only in the limits of their functions and mandates.

At the same time, even the ILC admits that it is hard to deny that international organizations are quite different from states and, in addition, present great diversity among themselves. IOs vary considerably along a number of dimensions, including the autonomy to carry out their tasks.<sup>53</sup> This fact raises rightly the concern as to whether the specificity of each international organization does not run counter to the establishment of a general system?

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<sup>49</sup> Articles on the Responsibility of International Organizations, with commentaries, 2011, p. 2, para. 3. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) (last visited on 07.04.2022).

<sup>50</sup> *Ibid.*, p. 6, para. 10.

<sup>51</sup> *Ibid.*, p. 2, Para. 3.

<sup>52</sup> Fitzmaurice, Malgosia, "Responsibility and Climate Change", *German Yearbook of International Law*, Vol. 53, Duncker und Humblot, Berlin, 2010, p. 96

<sup>53</sup> Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 14.

Another complicated problematic that exists around the phenomenon of IOs is the evasion by member States of their obligations by acting, in one way or another, through international organizations, which at the same time constitutes an abuse of the legal personality of an international organization.<sup>54</sup> Do the concept of accountability, in general, and international legal responsibility, in particular, have the potential to provide solutions to that problematic? And how those solutions may look like? Some of the scholars believe that the solution to such problematic is the piercing of the organizational veil. Such piercing of the veil would permit either holding top officials and/or collaborators of the organizations personally liable for human rights violations, and/or reaching (some of) the member states that are behind the decisions in question that result in human rights violations.<sup>55</sup>

Another related question and hypothesis that will be dealt with in the present thesis is the relationship between accountability and responsibility of IOs. For this purpose, the concept of accountability will be examined more in depth. It would be appropriate here to refer closely to certain cases, *inter alia*, UNHCR, an IO which leads a huge amount of field operations and a great number of its activities are in direct relation with the affected individuals. A prominent example in this regard is the findings on refugee status which directly determine the fate of the individual refugee. In connection with the issue of accountability and the great role it plays with respect to optimizing the effects of IOs, in the specific case of the UNHCR, several analysis have shown that a rational and transparent approach will, furthermore, strengthen the credibility of UNHCR in general and widen the confidence of their partners in the IOs, which in turn should help to ensure that the resettlement can be done efficiently and effectively.<sup>56</sup> Accountability may also be exercised by pressures from outside, as has happened with regard to international financial institutions. The World Banks “clean” and “dirty” loans means respectively those that respect the environment and have the least negative impact on it and the dirty loans are those having negative impact on the environment.<sup>57</sup> The latter ones have led to pressures from different groups on the Bank and ultimately have led to the institutional and administrative reforms.<sup>58</sup> In the context of the analysis of the concept of accountability in the second chapter of the thesis, focus will be turned especially to the Independent Accountability Mechanisms (IAMs) of, *inter alia*, regional development banks with the purpose of examining

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<sup>54</sup> *Ibid.*, p. 10.

<sup>55</sup> *Ibid.*

<sup>56</sup> UNHCR, Resettlement Handbook and Country Essays (2004) at p. 34 in Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 297.

<sup>57</sup> Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, Vol. 57, issue 1, 2003, pp. 241–276, at p. 271, fn. 120.

<sup>58</sup> *Ibid.*

whether and to what extent these accountability mechanisms impact the implementation possibilities and thus, the practical effectiveness of international legal responsibility mechanism.

Another point that will indispensably be elaborated on is the question of attribution of conduct in the context of IOs responsibility. Normally, the rules of the organization do not *per se* bind non-members. However, some rules of the organization may be relevant also for non-members. For instance, in order to establish whether an international organization has expressed its consent to the commission of a given act (art. 20 ARIO), it may be necessary to establish whether the organ or agent which gives its consent is competent to do so under the rules of the organization.<sup>59</sup> Furthermore, an organization or one of its organs may be considered as a State organ under article 4 of the ASR also when it acts as a *de facto* organ of a State, a situation that would exclude the incurrence of the international responsibility of the IO in question.<sup>60</sup>

There is no doubt that international organizations have the potential to breach their obligations and violate the rules and regulations of international law.<sup>61</sup> Even under well defined and limited conditions taking recourse to force and military measures is also an option for IOs.<sup>62</sup> Undoubtedly, an international responsibility regime can help to curb the exercise of such wide-reaching powers and authorities by IOs. Two conditions have been enumerated for a true law of responsibility to exist. The first one is the obligation to submit to third party settlement of disputes, and the second one is the required density of primary obligations. Further, it has been submitted that the non-fulfilment of these two conditions is simply an echo of the structure of the international system, which may still largely be characterized as an inter-State society.<sup>63</sup> It is also true that international responsibility covers a whole range of subjects which in developed national legal systems are dealt with by other means.<sup>64</sup> In the course of the different chapters of the dissertation, and especially in the last chapter, these characteristics of the international responsibility regime for IOs will be examined closer.

States and international organizations have observed in the Sixth Committee that the DARIO even on the second reading were rather a basis for the further

<sup>59</sup> Articles on the Responsibility of International Organizations, *op. cit.*, p. 3, para. 8.

<sup>60</sup> *Ibid.*, p. 5, para. 8.

<sup>61</sup> Janik, Cornelia, *Die Bindung Internationaler Organisationen an Internationale Menschenrechtsstandards*, Mohr Siebeck, *Jus Internationale et Europaeum* 66, 2012, pp. 29–134.

<sup>62</sup> Pemmaraju, Sreenivasa Rao, “International Organizations and Use of Force”, in Ando, Nisuke/McWhinney, Edward/Wolfrum, Rüdiger (Eds.), *Liber Amicorum Judge Shigeru Oda*, Vol. 2, Kluwer Law International, 2002, pp. 1575–1608, at p. 1576.

<sup>63</sup> Daillier, Patrick, “The Development of the Law of the Responsibility through the Case Law”, Crawford, James/Pellet, Alain/Olleson, Simon, *The law of International Responsibility*, Oxford University Press, 2010, pp. 37–44, at p. 44.

<sup>64</sup> Crawford, James, “The system of International Responsibility”, in James Crawford; Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford University Press, first edition, 2010, pp. 17–25, at p. 24.

development of the law on the responsibility of international organizations than a final set of established rules and principles.<sup>65</sup> The present research intends also to find and highlight some of the most problematic aspects and provisions adopted in the final version of the ARIO. There is no doubt that ARIO could indeed benefit in the future from further clarifications by scholars as well as in jurisprudence and in practice. This research work provides a theoretical account of the question of the international responsibility of international organizations not only in the ILC articles (ARIO), but also beyond these set of articles, as it can also be understood from the title of the present thesis.

Although multilateral agreements and forums are established for various reasons, partly to encounter the free rider problem in the international relations,<sup>66</sup> international organizations have entered the global political mainstream as first hand players. Nevertheless, the implementation and enforcement of the rules of international law is still to a great extent dependent on the self help by the States and subjects of this legal order. As is known, there is not a central executive organ competent for the implementation of the rules emanating from the different sources of this legal system. The reason is that the international legal order is still based on individual States interests. These interests lie at the center of the construct of international relations. But it cannot be ignored that apart from these areas, where the vital interests of the States lie, in other areas mechanisms are evolved which show to some extent a degree of centralism and can be regarded as considerable progress towards that direction. Of course, this development has not achieved its peak yet, but at least we have witnessed the appearance of cooperation beside coexistence and reciprocity in the relations between the subjects of international law.<sup>67</sup> In the realist theory of international relations, law is a means in the hands of politics and a tool for the realization of its aims. Therefore, law is in other words in the service of politics and the realization of the interests. The law is there to preserve and maintain the power balances. The more politics play a role in a certain area, the less the role of law would be present in that area of international relations and interactions.<sup>68</sup> In line with the supplementation of the law of coexistence by a law of cooperation and following the appearance of the necessity of more powerful sanctions in order to prevent the decline of international legal order,<sup>69</sup> not only is it important that a clear hierarchy of norms be established,<sup>70</sup>

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<sup>65</sup> International Law Association (ILA), The report of the ILA Study Group on the Responsibility of International Organizations, Sofia Conference 2012, at p. 4.

<sup>66</sup> Rixen, Thomas, "Bilateralism or multilateralism? The political economy of avoiding international double taxation", *European Journal of International Relations*, Vol. 16(4), pp. 589–614, at p. 607.

<sup>67</sup> Dupuy, Pierre-Marie, "International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions", *EJIL*, Vol. 9, 1998, pp. 278–286, at p. 280.

<sup>68</sup> Paulus, Andreas L., *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, pp. 84–85.

<sup>69</sup> Friedmann, Wolfgang G., *The Changing Structure of International Law*, Columbia University Press, New York, 1964, pp. 365–381.

but also it is required and necessary that there be a coherent and flawless set of secondary norms. Moreover, it would be completely in line with a tradition in international law according to which the facts are blamed for which are not conforming to the law.<sup>71</sup>

Based on the distinction between “Society” and “Community”, introduced by G. Schwarzenberger, it can be stated that the world has not yet reached the community stage, but is still relatively at the society stage.<sup>72</sup> The necessity and *raison d’être* of IOs in our days is partly also that these entities are the organized form of the embryonic international community and can handle – because of their independence<sup>73</sup> – in its place in the protection of the most important interests and fundamental values of the international community. The international community has in fact the primary mission and role of the recognition of the general principles of law and the *jus cogens* rules. This form of the organized international community is one of the preconditions for another necessary and fundamental concept, namely the *erga omnes* obligations that for its part contributes to the recognition of the international law as a legal system.<sup>74</sup>

It is clear that the IOs will be enormously affected by the ARIO, thus these have manifold interests in the way these set of articles are formulated and their content. For instance, organization shared (joint) responsibility may exist within several cases, in proportion to the degree of control exercised by the organization over the Member States concerned.<sup>75</sup> This research work has set as its aim to examine to what extent the present formulation of ARIO provisions can meet specific needs and deal with major challenges that exist with regard to the international responsibility of IOs at the international level. Our examination will be undertaken through the hypothesis of the dissertation, according to which international legal responsibility will not be practically effective without paying due attention and taking into account other levels of accountability. This requires an interaction of different concepts and mechanisms, which creates a procedure that ultimately would release a synergical effect that would in turn lead to the increase in practical effectiveness of international legal responsibility. Hence, we will have to give an account of IOs that would best explain these omni-present social constructions of our era. A synthesis of different

<sup>70</sup> Weiler, JHH and Paulus, Andreas, “The Structure of Change in international law or Is there a Hierarchy of Norms in International Law?”, *EJIL*, 1997, Vol. 8, pp. 545–565, at p. 546.

<sup>71</sup> Morgenthau, Hans J., “Positivism, Functialism, and International Law”, *AJIL*, Vol. 34, pp. 260–284, at p. 260.

<sup>72</sup> Baehr, Peter R., “Accountability of the United Nations: The Case of Srebrenica”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 279.

<sup>73</sup> Abbott, K.W. and Snidal, D., “Why States Act through Formal International Organizations”, *42 Journal of Conflict Resolution*, 1998, pp. 3–32, at p. 9.

<sup>74</sup> Paulus, Andreas L., *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 419.

<sup>75</sup> International Law Commission, Report of the Sixty – first session (4 May to 5 June and 6 July to 7 August 2009), UN Doc. A/64/10, p. 82 ff.



theories, especially constructivist and rationalist theories and approaches, will be able to provide a complete explanation of IOs and their roles at the international sphere.

As a last remark in the introduction, it should be mentioned that the reason behind choosing a vast palette of different problems and questions regarding the international responsibility of IOs is to give an outline of a cluster of interrelated challenges with all its aspects possibly besides each other that give rise to a unique problematic. Admittedly, each of these problems has been addressed separately but a complete picture of the whole scenario is still hard to find and is lacking in the existing literature

## I. Terminology

The scope of the present research work will be limited to the examination of the question of, and situations where intergovernmental organizations could be encumbered with responsibility, accountability and liability. Unless otherwise specified, whenever in this work the term “international organization (IO)” is used, the aim is to refer to intergovernmental organizations, known also as public international organizations. The two essential and common elements, to almost all the definitions presented for this kind of IOs, are first, the establishment by states by means of a treaty, or other instrument under international law, and the second, independence in legal personality, and actions, from their members. Thus, it is clear that the question of the possibility/or not of international responsibility and liability of non-governmental organizations is beyond the scope of this thesis.

Furthermore, the word “responsibility” which refers to a legal relation between two or more subjects of international law, is used in its strict sense to avoid any confusion of this concept with the other close concepts of accountability and liability. This is exactly the approach that the ILC has minutiously followed in drafting the two sets of articles on responsibility:

“Being obliged to accept the possible risks arising from the exercise of an activity which is itself lawful, or being obliged to face the consequences – which are not necessarily limited to compensation – of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is habitually used to designate both.”<sup>76</sup>

Everywhere in the text of the thesis the word responsibility is used, thereby international legal responsibility is meant, unless otherwise specified.

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<sup>76</sup> ILC 25<sup>th</sup> Session Report, *ILC Yearbook 1973*, Vol II, p. 161, para 38.

## II. Globalization and International Organizations

Globalization has manifested itself in, *inter alia*, appearance of new actors at the international scene.<sup>77</sup> Among these new actors are mainly counted the IOs, which have entered the international relations increasingly, not only in terms of quantity, but also in terms of the fields of activities. Apart from the conviction that membership in IOs prevents violent conflicts among the members, the IOs possess other properties – the major ones are independence and centralization – that make IOs the most attractive candidates for and as means of cooperation through which the states most often prefer to operate at the international level.<sup>78</sup>

### 1. Unprecedented Change in the Nature of the Activities of IOs

The focus of the analysis will be on two main aspects of the activities of IOs, namely the “unprecedented” and “change in the nature” of these activities, on which some elaboration will be made. Focus on these issues is of crucial importance for understanding of the concepts of accountability and responsibility of IOs and justifies even more the need for measures for their realization.

It has become a well-known fact that the tasks that international organizations are undertaking nowadays may vary a lot. These tasks may range from harmonization of regulations in different specialized fields, such as telecommunication and civil aviation to managing sanctions programs, and even to some quite expanded tasks in scope, such as governing a territory for a transitional period, which may necessarily not be short in time. In this latter context, IOs have even been involved in the implementation of the international obligations of national States, by providing substantial financial and technical support to essential governmental activities, where the national State has been incapable of or not fully capable of exercising these tasks. On a more theoretical level, the IOs are expected to play a major role in the realization of the theory of governance without government,<sup>79</sup> a theory that tries to predict the future situation of international relations. Exercises of public authority by international bodies to such vast degrees,<sup>80</sup> has even led some scholars, rightly or wrongly, to consider the IOs as an imperial global State

<sup>77</sup> Biersteker, Thomas J., “Globalization and the modes of operation of major institutional actors”, *Oxford Development Studies*, 26:1, 26 Nov. 2007, 15–31, DOI: 10.1080/13600819808424143.

<sup>78</sup> Abbot, Kenneth W. and Snidal, Duncan, “Why States Act through Formal International Organizations”, *The Journal of Conflict Resolution*, Vol. 42, No. 1, Feb. 1998, pp. 3–32, at pp. 3–4.

<sup>79</sup> Rudolf, Beate, “Governance without Government? Non-State Actors and International Law”, American Political Science Association (APSA), 2009 Annual Meeting, Toronto. Available on SSRN: <https://ssrn.com/abstract=1449182>; D’Aspremont, Jean, “Non-State Actors in International Law: Oscillating between Concepts and Dynamics”, in Jean D’Aspremont, *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law*, Routledge, 2011, pp. 1–21, at pp. 5–13.

<sup>80</sup> Klabbers, Jan, “The Paradox of International Institutional Law”, *International Organization Law Review*, Vol. 5(1), 2008, pp. 151–173, at p. 160.

in making.<sup>81</sup> Something which at least is sure in this regard is that the IOs are also in a certain way the guardians of common goods of mankind and the promoters of common interests.

The traces of the impacts of conducts of IOs can now be found everywhere, starting from personal damages and injuries in individual cases to the outbreak of an epidemic affecting thousands of people and costing many hundreds of lives.<sup>82</sup> A relatively recent case where many facts refer to the possibility of responsibility and liability of the UN being raised is the cholera outbreak in Haiti. Around eight thousand people are claiming compensation in that connection, the claim being based on negligence on the part of the UN generally, and its Nepalian peace-keepers particularly. Should there be a compensation provided to the victims and what form should the compensation take? Should the UN or its member States, in this case Nepal or the peace-keepers individually stand to the claims? At the end of 2016, former UN Secretary General Ban Ki Moon presented the “New UN System Approach on Cholera in Haiti”. This two-track approach marked the UN’s acceptance of responsibility for the introduction of cholera in Haiti and demonstrated its commitment to the eradication of the disease in Haiti. Since the 2016 admission of guilt, there has been increased coordination and goodwill between the government of Haiti and UN, resulting in great strides towards the elimination of cholera.

These and many other questions are all relevant questions that may be raised in the context of international accountability and international legal responsibility of IOs. Again, this and other examples remind us that the human rights violations by IOs may happen time and again. These violations are not always necessarily intentional, as witnessed by emergency actions that the IOs have to take or field operations of IOs that sometimes leave no other alternative than to derogate from certain human rights of affected populations.

## 2. The Impacts of the Changes on the Prominence of the Issue of Responsibility of IOs

It is among the most ordinary and expected matters that necessarily with the increase in the activities and tasks of IOs the issue of their legal responsibility comes under spotlight. It is even more so when these activities lead to grave negative impacts on and damages to others and third parties. As has been explained in detail in the introduction, the IOs have become important actors in international relations, at least since they influence the sovereignty of States.<sup>83</sup> Parallel to that

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<sup>81</sup> Chimni, B. S., “International Institutions Today: An Imperial Global State in the Making”, *EJIL*, Vol. 15, No. 1, 2004, pp. 1–37.

<sup>82</sup> Watson, Ivan and Vaccarello, Joe, “U.N. sued for ‘bringing cholera to Haiti,’ causing outbreak that killed thousands”. Available on: <http://edition.cnn.com/2013/10/09/world/americas/haiti-un-cholera-lawsuit/index.html> (last visited on 07.04.2022).

<sup>83</sup> Hurd, Jan, *International Organizations, Politics, Law, Practice*, Cambridge University Press, 2011, p. viii.

phenomenon, their potential for causing damages and injuries has arisen too. A practical example is with regard to the human rights of the persons residing in a territory under the administration of an international organization that may be affected by the actions and/or inactions of these institutions.<sup>84</sup> Such examples lead us to the conclusion that it is quite normal that also with regard to IOs the necessity has been felt to find new ways to accommodate the emerging need for a regime of secondary rules on reparation designed to complete and support the regime of primary rules.<sup>85</sup>

Before touching upon the concept of responsibility in detail in the following sections of the thesis – as our main topic, and accountability, as a subsidiary but highly relevant question – it is necessary that it be shown briefly and discussed here how and why the above described changes in the scope and fields of activities of IOs influence the question of international legal responsibility. Even though international law has not completely distanced itself from the conceptions of the late nineteenth and twentieth century, of which it is a product, but the twentieth century has witnessed the transition of international law from a “co-existence” legal regime to a “cooperation” legal regime.<sup>86</sup> As reaffirmed subjects of international legal order, and consequently, as bearer of rights and specially obligations under the rules of this legal order, it is quite logical that there be a consequence for those conducts of the IOs that are in disrespect of these rules and generally when an IO violates its international legal obligations. Hence, such consequence, in the international legal system known as the international legal responsibility, may be raised also with respect to IOs. ARIIO, while reaffirming the application of responsibility principle on IOs, makes an effort to crystallize and specify the different aspects of this legal principle in the form of legal rules. The present research intends to examine to what extent the ILC has succeeded in achieving the objective of specification of the law of international legal responsibility of IOs.

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<sup>84</sup> For a further discussion of the human rights of the persons residing in a territory under the administration of international organizations see: Knoll, Bernhard, “Rights without Remedies: The European Court’s Failure to Close the Human Rights Gap in Kosovo”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 68, 2008, pp. 431–451.

<sup>85</sup> Tomuschat, Christian, *Human Rights, Between Idealism and Realism*, Second edition, Oxford University Press, 2008, p. 356.

<sup>86</sup> Fassbender, Bardo and Aust, Helmut Philipp, „Einladung zum Völkerrechtsdenken”, in Fassbender, Bardo and Aust, Helmut Philipp (Hrsg.), *Basistexte: Völkerrechtsdenken*, Nomos Verlag, 1. Auflage, 2012, p. 10.

### III. Methodology

Before taking any steps in the context of a particular project, it should be explored and decided, which ‘theoretical tools’ best suit the analysis.<sup>87</sup> In other words, it is important to find the ‘accepted canon’ of theories and methodologies which we need to begin from.<sup>88</sup> It is also very important to determine the basis on which the legal analysis will be conducted.

The different approaches that could be followed with respect to a research work that deals with IOs as its main topic are mainly institutionalism, constructivism, functionalism and/or Neo-functionalism. These approaches attempt to provide explanatory accounts of changes in the social world and to test these against empirical evidence.<sup>89</sup> Furthermore, Constitutionalism is now a developing discourse in international law,<sup>90</sup> and no doubt it is also related to and should be taken into account in dealing with any aspect of external legal relations of IOs, among others their international legal responsibility. A further approach that is undoubtedly indispensable to our main analysis is Global Administrative Law (GAL), which specially will guide the arguments in support of accountability achieved by means of self-regulation trend and non-binding commitments of IOs.<sup>91</sup> This approach will in fact provide an additional foundation for the prominence of the broader concept of accountability and its relation to international legal responsibility.

Although comparative law is most often associated with the comparison of different *national* legal systems, a comparative method can also be used to analyze some aspects of EU and international law. This can be undertaken through comparison of these two latter legal systems either with one another, or with national systems. Scholars working in EU or international law domains may therefore envisage a comparative element in their research projects.<sup>92</sup> However, it should also be pointed out that the difficulty in the present research of comparing an international legal responsibility regime constructed and tailored for States with that of IOs lies in the comparison of two entities that are intrinsically and profoundly different from each other from numerous aspects.<sup>93</sup> Consequently, it is possible to

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<sup>87</sup> Cryer, R./Hervey, T./Sokhi-Bulley, B./Bohm A., *Research Methodologies in EU and International Law*, Hart Publishing, Oxford and Portland, Oregon, 2011, p. 20.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, p. 21; De Búrca, G., “Rethinking law in neofunctionalist theory”, *Journal of European Public Policy*, Vol. 12, 2005, pp. 310–326.

<sup>90</sup> Cryer, R./Hervey, T./Sokhi-Bulley, B./Bohm A., *op. cit.*, p. 20; Dunoff, J. and Trachtman, J., (eds.) *Ruling the World: Constitutionalism International Law and Global Governance*, Cambridge University Press, Cambridge, 2009; Klabbbers J./Peters, A./Ulfstein, G. (eds.), *The Constitutionalization of International Law*, Oxford University Press, 2009.

<sup>91</sup> Krisch, Nico and Kingsbury, Benedict, “Introduction: Global Governance and Global Administrative Law in the International Legal Order”, *EJIL*, Vol. 17, No. 1, 2006, pp. 1–13, at p. 1.

<sup>92</sup> Cryer, R./Hervey, T./Sokhi-Bulley, B./Bohm A., *op. cit.*, p. 30.

<sup>93</sup> *Ibid.*, p. 28.

overcome the methodological difficulties noted above, provided that borrowings and complementary interpretations are sensitive to the differences between the two regimes.<sup>94</sup> That has been the reason for starting the dissertation with an interdisciplinary and comparative examination of the nature of states and IOs. An interdisciplinary approach will accompany us throughout the entire thesis, resulting in the coherent use and infusion of all the different four methods of legal technique, legal theory, international legal sociology and philosophy.<sup>95</sup>

In article 1 of the ILC Statute, the promotion of the progressive development of international law and its codification have been specified as the principal objects of this UN organ. According to *Oppenheim*, a longstanding task in the science of international law is the criticism of its rules and its present scope. This task is the guarantee for the progressive development of international law and ensures that more and more international matters are brought to its sway.<sup>96</sup>

Therefore, in those parts of the ARIO where the ILC seeks to codify the law of the IO responsibility, the articles should reflect the state of international law in this field as it stands at present. Consequently, a positivist approach, as the most appropriate method for *lex lata* examinations, would best help us to identify the law. Since legal positivism is suited to research questions concerning the description and explanation of law as it is, including the analysis of (complex) legal texts to determine their meaning, it is *a priori* suited to “research projects that seek to systematize legal norms, and to understand the relationships between different bodies of legal norms, or to analyzing the output of courts and their coherence, or the accuracy of their application of sources of law.”<sup>97</sup>

In those parts where the ILC proceeds with the progressive development of international law of responsibility of IOs, it should specially be examined whether the peculiar nature of IOs renders the transfer of specifications and nuances of the concept of State responsibility to international organizations problematic. Therefore, initially the question would be raised as to what extent the ILC in the ARIO has put to use its competence with respect to the promotion of the progressive development of international law. It is clear that at this stage a positivist approach and method can no longer be helpful. In addition, it should be noted here that there is an opinion shared vastly among scholars according to whom it is indeed not possible to draw a clear and real line between these two tasks of the ILC.<sup>98</sup>

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<sup>94</sup> *Ibid.*, p. 30.

<sup>95</sup> Corten, Olivier, *Méthodologie du Droit International Public*, éditions de l'université de Bruxelles, 2009, pp. 40–41.

<sup>96</sup> Oppenheim, L., “The Science of International Law – Its Task and Method”, *AJIL*, Vol. 2, 1908, pp. 313–356, at p. 318.

<sup>97</sup> Cryer, R./Hervey, T./Sokhi-Bulley, B./Bohm A., *op. cit.*, p. 38.

<sup>98</sup> *Annuaire de la Commission du droit international*, 1956, II, p. 256, para. 26. In this regard see also: Corten, Olivier, *Méthodologie du Droit International Public*, éditions de l'université de Bruxelles, 2009,

The author is of course aware of the fact that, as in the words of *Oppenheim*, “it is easier to criticize than to make proposals which shall take the place of the rule which is objected to, and it is again easier to propose a new rule than to establish it in practice... The International jurist must remain on the ground of what is realizable and tangible.”<sup>99</sup>

All the Internet resources have been updated shortly before the publication of the dissertation. Those internet resources and web addresses that have been subject to changes due to site move with URL changes or those that were subject to site move without URL changes, have been traced and updated. In a few cases, in which websites or webpages have traceless disappeared the last date of access has, of course, been indicated in this dissertation.

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p. 169, footnote Nr. 138; And also see the references given therein: Herbert W. Briggs, “Reflections on the Codification of International Law by the International Law Commission and by other Agencies”, *RCADI*, 1969, I, tome 126, p. 243; Shabati, Rosenne, *Practice and Methods of International Law*, Oceana Publications, 1984, pp. 73–74; Corten, Olivier, “Les aspects idéologiques de la codification du droit international” in *Mélanges Jacques Vanderlinden*, Bruxelles, Bruylant, 2004, pp. 500–501.

<sup>99</sup> Oppenheim, L., “The Science of International Law – Its Task and Method”, *AJIL*, Vol. 2, 1908, pp. 313–356, at p. 318.





## **Chapter One**

### **Comparative study of the nature of State and IO**

To have a theoretical discussion on the international legal responsibility of IOs, it is first necessary to clarify the nature of IOs, and the important features that distinguish them from states, the other category of subjects of international law. The focus will be put on the main three extra-legal fields that have dealt with the IOs, to varying degrees. As in each field, sometimes contrasting or even at times opposite views exist with regard to IOs. Depending on the theory applied, reference will be made to the major schools of thought in this regard. Justification for such a holistic perspective is that to grasp a comprehensive and complete understanding of IOs, sometimes it is useful and even necessary to apply an eclectic approach, composing elements borrowed from different theories and their perspectives. Therefore, in the analysis of the IOs' nature and behaviour, both rationalist and sociological theories will be considered.

To this end, it is necessary to ascertain the crucial similarities, as well as the differences between IOs and states. The next step would then be to consider which of these distinctive features is or should be relevant for the question of international legal responsibility. The difficulty arises precisely in determining such relevance, as depending on which judicial policy or policies to follow, the relevance or not of a certain point of difference between IOs and states may vary accordingly. In addition, it can be argued that pursuant to the aims that the inter-

national legal responsibility may follow – that can be oriented towards various directions – the result of the decision on the relevance of specific differences or similarities may vary. The global intention of the thesis is not to recommend any judicial policy or specific aim or agenda that should be followed by the legal tool of international responsibility. Hence, the intention of this chapter is, mainly, limited to show that fundamental differences between States and IOs cannot still easily be denied, even though the IOs continue to conquer, one after the other, the exclusive domains of states at the international level.<sup>100</sup> By reading this title, one might ask why the comparative study of the nature of States and IOs has a critical importance for the purpose of the examination of the question of international legal responsibility of IOs, and more specifically, which additional value the present comparison could bring to the issue under study. The explanation is that as the major method used by the ILC in drafting its articles on responsibility of IOs (hereinafter ARIO) has been the analogical reasoning, it is clear that undertaking a comparative study and using its results for further argumentations, in the sense of finding the crucial differences and similarities between the two subjects of international law under question, are perfectly justified. Therefore, in the following sections, these points will be analysed from different perspectives, as mentioned above, with regard to states and IOs, the two principal subjects of international law which are both based on the rule of law.

## **I. The nature of State as primary subject of international law for the purpose of international responsibility**

It has always been stated that States are the main and primary subjects of international law. In this part of the thesis, a brief interdisciplinary examination of the nature and characteristics of States and IOs, as the two principal actors in today's international relations will be delivered. However, the intention is not to undertake a complete examination of all the features of these two subjects of international legal system, but the study will rather limit itself to the characteristics that distinguish these two categories of subjects in order to use the result achieved in this chapter as a basis for the arguments in the following chapters of the thesis. An interdisciplinary analysis of our two subjects from the perspectives and through the lens of social sciences, international relations and political science would allow us to examine whether the almost identical set of draft articles on the law of international legal responsibility is compatible with the characteristics and specific features of these two distinct subjects and players of international rela-

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<sup>100</sup> Kingsbury, Benedict and Casini, Lorenzo, "Global Administrative Law Dimensions of International Organizations Law", *International Organizations Law Review*, 6 (2009), pp. 319–358, at p. 333; Sarooshi, Dan, "The Role of Domestic Public Law Analogies in the Law of International Organizations", *International Organizations*, Vol. 5(2), 2008, pp. 237–239.

tions.<sup>101</sup> To the extent possible, the reciprocal impacts and interchanging influences of these fields on the international legal theory and understandings of these two subjects of international law will also be focused on.

### 1. From the perspective of International legal Theory

In the words of Mosler, the State is a form of social organism.<sup>102</sup> Citizenship and nationalism, in the sense of the bond between a state and individuals, who are governed by the State is one of the main points of difference that exists between state and IOs in cases where this latter is engaged in governance activities that cover a specific territory and a certain group of individuals. By nature and as a result of such characteristic, the states undertake a wide range of tasks with differing contents that implies necessarily more responsibility on the part of the state.

The socio-political concept of “people”, as one of the central points of reference to the legitimacy discussion,<sup>103</sup> counts also as a premium point of difference between States and IOs.

Presently, the structure of international legal order is such that there may be less scrutiny over the activities of States than any other subject of international law, of course, with the exception of truly democratic States, where domestic scrutiny is quite intensive at various levels of public and civil society organisms. This issue could be in some way relevant for the question of international legal responsibility, as the establishment of responsibility, a condition of which is that a wrongful conduct be committed, requires in any case a certain degree of transparency.

### 2. From the perspective of International Relations

Even in the age of globalization and “late sovereignty”,<sup>104</sup> the nation-state remains the primary actor at the scene of international relations, and thus, it retains its place as the primary subject of international law.<sup>105</sup> Even though the transfer of parts of state sovereignty from this preeminent actor to some IOs does not stop to rise in our era, “state sovereignty remains a normative and factual reality that, for a foreseeable future, will profoundly shape the international sphere”.<sup>106</sup> In

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<sup>101</sup> Noemi Gal-Or and Cedric Ryngaert, “From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN”, *German Law Journal*, Vol. 13, No. 5, 2012, p. 513, fn. 7.

<sup>102</sup> Mosler, Hermann, *The International Society as a Legal Community*, Sijthoff & Noordhoff, 1980, p. 19.

<sup>103</sup> Von Bogdandy, Armin, “Constitutionalism in International Law: Comment on a Proposal from Germany”, *Harvard International Law Journal*, vol. 47, Nr. 1, Winter 2006, pp. 223–242, at p. 235.

<sup>104</sup> Walker, N., “Late Sovereignty in the European Union”, in N. Walker, *Sovereignty in Transition*, Hart, Oxford, 2003, pp. 3–32.

<sup>105</sup> Slaughter Burley, A-M., “International Law and International Relations Theory: A Dual Agenda”, *AJIL*, Vol. 87, No. 2, 1993, pp. 205–239, at p. 205.

<sup>106</sup> Von Bogdandy, Armin, “Constitutionalism in International Law: Comment on a Proposal from Germany”, *Harvard International Law Journal*, Vol. 47, Nr. 1, Winter 2006, pp. 223–242, at p. 230.

addition, the exercising of “paradiplomacy”<sup>107</sup> by sub-state entities in different IOs’ fora is but only one proof of the increasingly expanding phenomenon of states losing their terrains of control gradually, an overt manifestation of which is, for instance, the active presence of sub-state units at the IOs headquarters, prominently in the framework of the EU in Brussels. The future version of sovereignty would rather be a “heavily compromised version of statehood which bears little resemblance to the traditional Westphalian model”.<sup>108</sup> Such conception of the notion of sovereignty, which is in its absolute or quasi-absolute form the major distinctive element between states and IOs, would distance the State from a primary subject of international law that owes its existence to its power, to a rather functional subject of international law and therefore closer to IOs. In other words, progressively the difference between these two subjects would lose its relevance and blur as the states transform into a layer of governance among other comparable layers which are not necessarily more limited in terms of the scope of their competences or territorial application. In some regions of the world, where supra-state integration is advancing with a higher speed than elsewhere, a direct relationship between weakening State power and changing identity patterns have been discerned.

### 3. From the perspective of Political Sciences

Despite examining the same phenomenon, the research questions, methods, and findings of scholars in the fields of international law and political science diverge widely.<sup>109</sup> Nevertheless, collaboration between them proves to be fruitful, a firm justification for the comparative examination of our main study object, namely IOs and the indirect but most related subject, the state, also from a political science perspective. Through the lens of politics, not limited to international politics of course, but also encompassing domestic politics,<sup>110</sup> the political science attempts to approach a subject by focusing on a different point than international law scholars do, namely, power. Precisely, this latter aspect of the character of the subjects of international law and its origins distincts states from IOs essentially. Any analysis of the question of international legal responsibility of the subjects of international law should also take this distinction into account, at the same time

<sup>107</sup> Michelmann, H. and Soldatos, P., (eds.) *Federalism and International Relations: The Role of Sub-units*, Clarendon Press Oxford, 1999, pp. 40–52.

<sup>108</sup> Tierney, Stephen, “Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State”, *ICLQ*, Vol. 54, Issue 01, January 2005, pp. 161–183, at p. 177.

<sup>109</sup> Hafner, E. M./Victor, D. G./Lupu, Yonatan, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 48; Arend, M., “Do Legal Rules Matter: International Law and International Politics”, *Virginia JInt’l L*, Vol. 38, 1998, p. 107.

<sup>110</sup> Hafner, E. M./Victor, D. G./Lupu, Yonatan, “Political Science Research on International Law: The State of the Field”, *op. cit.*, at p. 49.

paying attention also to different “faces of the power”<sup>111</sup>, which refers mainly to the extent, scope and domain where power is exercised in order to achieve more influence on a certain matter.

Wide-ranging debates are today ongoing with regard to the nature of statehood. According to different ideologies and following their various lines of thought there are different conceptions of State, which range from communitarian to liberal notions. Furthermore, the nature of state has undergone fundamental changes. Most importantly, absolute State sovereignty has long been threatened and to a great extent defeated by pressure from and at three different levels of sub-state, sectoral and supra-State.<sup>112</sup> From legislative and judicial perspectives, it has become impossible now to overlook the emergence of a postnational legal landscape, whichever final structure it may adopt, constitutionalist, pluralist, a synthesis of both or else, an evolution that at the end of the day will definitely leave increasingly less space to national jurisdictional manoeuvres.<sup>113</sup>

However, the understanding of the nature of State may vary depending on different philosophical perspectives adopted for that purpose. The conception of State is not the same when examined from the different perspectives of individualistic and pluralistic, or in other words collectivist points of view. While from the individualist perspective, the State is only a mean to reach a goal, from the collectivist perspective the State constitutes an aim for itself. In contrast to the individualist perspective, from the point of view of the collectivist theories, the State is an organism, a personality and a social reality.<sup>114</sup>

From a traditional communitarian perspective, the primary place reserved still to states originates from the bond of nationality and other attachments between a state and the entities linked to it. As early as in the first half of the last century, Scelle posits that “within the global community, states constitute the fundamental political element, for in the present historical stage, all individuals and groups are linked to one state or another”.<sup>115</sup>

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<sup>111</sup> Barnett, Michael/Duvall, Raymond, “Power in International Politics”, *International Organization*, Vol. 59, 2005, p. 39.

<sup>112</sup> Tierney, Stephen, “Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State”, *ICLQ*, Vol. 54, Issue 01, January 2005, pp. 161–183, at pp. 163–165.

<sup>113</sup> Dunoff, Jeffrey L., “Review: Beyond Constitutionalism: The Pluralist Structure of Postnational Law – By Nico Krisch”, *AJIL*, Vol. 107, No. 2 (April 2013), pp. 483–488, at p. 483.

<sup>114</sup> Wapler, Friederike, *Werte und das Recht: Individualistische und Kollektivistische Deutungen des Wertbegriffs im Neukantianismus*, Nomos Verlag, 2008, p. 20.

<sup>115</sup> Scelle, G., *Manuel de droit international public*, 1948, p. 18.

## II. Phenomenon of International Organizations from legal and non-legal perspectives

Very early the scholars had felt the necessity of a holistic and interdisciplinary examination of IOs as the basis for undertaking any further analysis, emphasizing on the specific characteristics of IOs by referring to them as the “new phenomenon”, which should be clearly distinguished from states in terms of the methods and theories used in examining them.<sup>116</sup> In this section, it will be tried to deliver an analysis of the nature of IOs, while it is also helpful to refer to the organizational theory in sociology. In this respect, the “open systems” school will be touched upon, “which regards organizations as possessing porous boundaries, and as constituted and reproduced through their interactions with their environment”.<sup>117</sup> Furthermore, IOs are in fact “institutions constituted and penetrated by the member States that largely make up its organizational environment”.<sup>118</sup> A closer look will also be taken at different theories in international relations (IR) to examine which theory can best capture and explain the complex nature of this newly emerged but promptly expanding phenomenon of the international legal order.

### 1. From the perspective of International Legal Theory

IOs have become indispensable for international life.<sup>119</sup> However, at the origin of the establishment of all IOs lies – also but not only – some kind of cost economizing intention which has been led by interest-oriented considerations:

“The move from decentralized cooperation to IOs occurs when the costs of direct state interaction outweigh the costs of international organization, including consequent constraints on unilateral action”.<sup>120</sup>

From sociological institutionalist perspectives, powers and authority delegation at the international level may not be adequately and exclusively explained by the motivation of transaction costs reduction, but rather on the ground of legitimacy considerations or for the reason of appropriateness, in the eyes of principals or

<sup>116</sup> Viñuales, Jorge E., “The Secret of Tomorrow’: International Organization through the Eyes of Michel Virally”, *EJIL*, Vol. 23, No. 2, 2012, pp. 543–564, at pp. 543–551.

<sup>117</sup> Katz, D./Kahn, R. L., *Social Psychology of Organizations*, Wiley and Sons, New York, 1966; Ansel and Weber, “Organizing International Politics: Sovereignty and Open Systems”, *International Political Science Review*, Vol. 20(1), 1999, pp. 73–93; Scott, Richard W., *Organizations: Rational, Natural, and Open Systems*, 5th ed., Upper Saddle River, NJ: Prentice Hall, 2003, in Lipson, Michael, “Peacekeeping: Organized Hypocrisy?”, *European Journal of International Relations*, Vol. 13 (1), 2007, pp. 5–34, at p. 9.

<sup>118</sup> Lipson, Michael, “Peacekeeping: Organized Hypocrisy?”, *European Journal of International Relations*, Vol. 13 (1), 2007, pp. 5–34, at p. 9.

<sup>119</sup> Klabbers, Jan, “Constitutionalism Lite”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at p. 44.

<sup>120</sup> Trachtman, Joel P., “The Theory of the firm and the theory of international economic organization: Toward comparative institutional analysis”, *Nw. J. Int’l L. & Bus.*, 470, Vol. 17, 1996–97, at p. 496.

their constituents.<sup>121</sup> From constructivist viewpoints, IOs are, above all, bureaucracies, and that feature explains, to a great extent, their behaviour and preferences, which goes further and beyond their relations with the states creating them and is not restricted to the principal-agent (PA) relationship with these founding and member states.<sup>122</sup> Most importantly, this feature gives the IOs authority to make rules and to exercise power, in sum, upgrading to actors in their own right, distancing them definitely from the widespread classical belief that IOs are little more than instruments of states.

What is an organization at all and what is an IO? Answers to such questions concerning the nature of IOs based on factual observations are manifold. International organizations have been considered as “the feature of everyday life in the world”, as *Amerasinghe* calls them,<sup>123</sup> and their role on the international scene has been firmly recognized, not always only as subordinates to, but sometimes on the same level as and beside States. “IOs are more than the reflection of state preferences and that they can be autonomous and powerful actors in global politics”.<sup>124</sup> International governance, one of the concepts often also brought in connection with IOs, and indeed a major field of activity of these entities, has upgraded the place of IOs and has permitted them to play a role in that proliferating global process.<sup>125</sup> IOs are a form of social organization, having functionalism as one of their fundamental features, which is a quality associated with suprateritorial concept of authority.

International lawyers often suffice in their understanding and definition of IOs to the common definition, according to which an “international organization is an entity created under international law and subject to its terms.”<sup>126</sup> On the contrary, from the sociological perspective, at the same time that the IOs are regarded as “social facts”, legitimacy and power are two questions that are mostly in the centre of attention and are brought in when analyzing IOs.<sup>127</sup> In addition, the “social

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<sup>121</sup> Pollack, Marc, “Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications and Empirical Disputes”, *European Political and Administrative Studies, Bruges Political Research Papers*, No. 2, February 2007, pp. 1–27, at p. 17.

<sup>122</sup> Barnett, Michael/Finnemore, Martha, *Rules for the World: International Organizations in Global Politics*, Cornell University Press, first edition, 2004, pp. 11–45.

<sup>123</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at p. 9; Elsig, Manfred, “Principal-agent theory and the World Trade Organization: Complex agency and ‘missing delegation’”, *European Journal of International Relations*, Vol. 17, Nr. 3, pp.495–517, at p. 496.

<sup>124</sup> Barnett, Michael N. and Finnemore, Martha, “The Politics, power, and Pathologies of International Organizations”, *IO*, Vol. 53, No. 4, 1999, pp. 699–732, at p. 700.

<sup>125</sup> Kratochwil, Friedrich, and Ruggie, Gerard, “International Organization: a state of the art on an art of the state”, *IO*, Vol. 40, No. 4, 1986, pp. 753–775, at p. 755–759.

<sup>126</sup> Grant, D. Thomas, “International Responsibility and the admission of States to the United Nations”, *Michigan Journal of International Law*, Vol. 30, No. 2, 2009, pp. 1095–1185, at p. 1132.

<sup>127</sup> Barnett, Michael N. and Finnemore, Martha, “The Politics, power, and Pathologies of International Organizations”, *op. cit.*, at pp. 702–703.

content” of the IO is of interest to sociology which means “its culture, its legitimacy concerns, dominant norms that govern behavior and shape interests, and the relationship of these to a larger normative and cultural environment.”<sup>128</sup> The functionalist and neo-functionalistic approaches<sup>129</sup> are relevant with respect to the functions, competences and consequently the international obligations of an IO. At the same time the “Agency” analysis of IOs helps to better understand the actions of IOs.<sup>130</sup>

There are different kinds of international organizations and, thus, arguably this entity cannot be considered a homogeneous kind. The question is to what extent this homogeneity plays a role in connection with the question of the international legal responsibility of IOs. The changing nature of IOs is also a relevant factor that should be taken into consideration.<sup>131</sup> What is the behavior pattern of member States, which are themselves independently the primary subjects of the international legal order, in the framework of the IOs of which they are member?

IOs are composite structures, composed of different and various members with different degrees of heterogeneity, depending on the nature of the IO (classical intergovernmental or supranational IOs) which makes the question of attribution of conduct and international obligations to one entity or the other in the framework of the IO from the point of view of international law sometimes complicated. In most supranational IOs, the implementation, application and the enforcement of the obligations, for which the IO has the exclusive competence, is entrusted to and imposed on the members and their authorities.<sup>132</sup>

The nature of IOs is, of course, not a totally ignored and overlooked question in the literature.<sup>133</sup> As the IO is the main subject of this study, it is of prime importance that the nature of this subject, called the major twentieth century phenomenon,<sup>134</sup> be analysed for the purpose of the assessment of the articles drafted with the purpose of codifying and regulating the issue of international legal re-

<sup>128</sup> *Ibid.*, at p. 706.

<sup>129</sup> Haas, Ernst B., *Beyond the Nation State: Functionalism and International Organization*, Stanford University Press, 1964; For a brief examination of theoretical premises underlying the neo-functional approach to integration see: Schmitter, Philippe, C., “Three Neo-Functionalist Hypotheses about International Integration”, *IO*, Vol. 23, Issue 1, Winter 1969, pp. 161–166.

<sup>130</sup> Wouters, Jan and Naert, Frederik, “Some Challenges for (Teaching) the Law of International Organizations”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 23–29, at p. 26.

<sup>131</sup> Kwakwa, Edward, *Globalization and International Organizations*, Ashgate, 2011, p. 45.

<sup>132</sup> On this point, further elaborations will be put forward in Chapter five of the dissertation. For a discussion of the example of the EU/EC see: Kuijper, P. J. and Paasivirta, E., “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 111–138, at pp. 113–116.

<sup>133</sup> Blokker, Niels, “International Organizations and Their Members: International Organizations Belong to All Members and to None— Variations on a Theme”, *International Organizations Law Review (IOLR)*, Vol. 1, 2004, pp. 139–161, at pp. 139–140.

<sup>134</sup> For the origins of the term “international organization” see: P. B. Potter, “Origin of the Term International Organization”, *American Journal of International Law*, Vol. 39, 1945, pp. 803–806.



sponsibility of this subject of international legal order. The issue of the nature of IOs and specifically, the question of the role of the members of the IOs as its constituents is of great relevance, specially, to the matter of the apportionment of the international legal responsibility between the IO and its members. Our understanding of the IOs and the place of members within the IO would affect the final decisions about the apportionment of such legal responsibility. The degree of independence of the IO from its members, which is a reflection of the relationship between the IO and its members, and at the same time the translation of the extent to which the powers have been conferred on the IO by the members, is the determinant factor in this regard. The members of an IO, even though principally and mostly sovereign states, are not free in their behavior when acting as the members of an IO. At least, they are always restricted to the limits set by the purposes and principles of the IO.<sup>135</sup> To this, the decentralization phenomenon in IOs should also be added.<sup>136</sup> However, it has been observed that the every day life of IOs and their effects on their external environment and generally on the world around them have not been enough at the centre of attention.<sup>137</sup>

As a final word in this subsection, it is worth referring to the observation of the International Court of Justice in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in which the Court notes that the IOs, even though subjects of international law, do not possess a general competence.<sup>138</sup> It goes without saying that from their bureaucratic authority results their autonomy from member states.<sup>139</sup> It appears that this peculiarity of IOs finally makes all the difference.

#### *a) The Nature of IOs: Independence and Autonomy within Dependence*

There is nothing new about the fact that from legal as well as non-legal perspectives, be it sociology or political science, one of the most interesting aspects about the nature of IOs that has mostly attracted the attention of scholars is the independence of these international institutions.<sup>140</sup> A feature that defines the IOs at most is their independence from their founding fathers, in case of the intergovernmental organizations the founding States and later the member States. Precise-

<sup>135</sup> Blokker, Niels, "International Organizations and Their Members: International Organizations Belong to All Members and to None – Variations on a Theme", *International Organizations Law Review (IOLR)*, Vol. 1, 2004, pp. 139–161, at pp. 145–146.

<sup>136</sup> Koremenos, B. *et al*, "The Rational Design of International Institutions", *International Organization*, Vol. 55, 2001, pp. 761–799; Abbott, K.W. and Snidal, D., "Why States Act through Formal International Organizations", *Journal of Conflict Resolution*, Vol. 42, 1998, pp. 3–32, at p. 679.

<sup>137</sup> Barnett, Michael N. and Finnemore, Martha, "The Politics, Power, and Pathologies of International Organizations", *IO*, Vol. 53, No. 4, 1999, pp. 699–732, at p. 726.

<sup>138</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports, 1996, p. 78, para. 25.

<sup>139</sup> *Ibid.*

<sup>140</sup> Hafner, E. M./Victor, D. G./Lupu, Yonatan, "Political Science Research on International Law: The State of the Field", *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 85.

ly, the independence and centralization that the phenomenon of IO can offer as among its key properties has attracted and continues to attract the States to use them widely as tools in managing international affairs.<sup>141</sup> It is true that, as in the words of *Blokker*, although an IO is the aggregate of its membership, it is, however, more than the sum of its members.<sup>142</sup> But, the character which distinguishes these from any other independent entity is their dependence on the very same States which are their members for many reasons, *inter alia*, financial reasons. In other words, this kind of independence that the IOs enjoy may best be described as independence within dependence. On this very same kind of independence is and should be based the principle of international legal responsibility of the international organizations. In other words, any codification of the law of international legal responsibility of IOs should take this important feature of IOs adequately into account. That is why whenever we are talking about the independence of IOs in the context of international legal responsibility it should be borne in mind that the member States are most of the time not only the founders,<sup>143</sup> but also very often the main funders of the IO. Definition of independence of IOs put forward in scholarship as “the ability to act with a degree of autonomy within defined spheres”<sup>144</sup>, with specially, the emphasis on the various degrees from a wide scale of autonomy spectrum that different IOs may enjoy, may best explain the complex and diverse phenomenon of IO. Tendency in the international legal scholarship to confuse the widely varying amount of the independence enjoyed by different IOs with its absolute form would be most misleading.

Another trend in approaches followed by social scientists in analyzing social behaviours that might be of relevance to our study is the focus on effectiveness, rather than compliance, which is also shared by political science, which considers that influence of international law on behavioral changes is larger than mere compliance.<sup>145</sup> Such an approach to an aspect of the life of IOs would require a review of the emphasis and importance of the legal obligations in the strict sense of the word, which obviously excludes soft law rules. With these latter categories of rules gaining more importance and relevance at the international level, the definition of international legal responsibility as the main general mechanism of secondary rule system at the international level may consequently be questioned. This would

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<sup>141</sup> Abbott, Kenneth W. and Snidal, Duncan, “Why States Act through Formal International Organizations”, *Journal of Conflict Resolution*, Vol. 42, No. 1 (Feb., 1998), pp. 3–32, at p. 3.

<sup>142</sup> Blokker, Niels, “International Organizations and Their Members: International Organizations Belong to All Members and to None – Variations on a Theme”, *International Organizations Law Review (IOLR)*, Vol. 1, 2004, pp. 139–161, at p. 154.

<sup>143</sup> Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, Vol. 6, 2009, pp. 319–358, at p. 339.

<sup>144</sup> Abbott, Kenneth W. and Snidal, Duncan, “Why States Act through Formal International Organizations”, *Journal of Conflict Resolution*, Vol. 42, No. 1 (Feb., 1998), pp. 3–32, at p. 5.

<sup>145</sup> Hafner, E. M./Victor, D. G./Lupu, Yonatan, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 90.

imply a larger definition of international law encompassing also soft law and ensuring the viability of such rules. The next chapters of the thesis seek to examine the different components of this hypothesis, as well as to investigate its global value as to whether it is true in its entirety.

*b) The nature of the members of IOs: Dédoublement Fonctionnel*

It should be kept in mind that the members of the IOs, definitely relevant subjects to our topic of study, have always a dual role to play. This dual role comprises of, on the one hand, that of the sovereign States, and on the other hand, that of the members of the IO.<sup>146</sup> The situation of member states, as described above, is very close to, and reminds us the theory of “dédoublement fonctionnel”, put forward by *G. Scelle*, a still valid theory given the present structure of the world community at large. The theory of role splitting, known also under the original French expression “dédoublement fonctionnel”, is the main part of the contribution of *G. Scelle* to the theory of international law.<sup>147</sup> His theory refers to the ‘dual role’ that state officials fulfil, depending on the level in which they act. The necessity of the exercise of a dual role by state officials at the internal and international legal order originates from lacuna and deficiencies of the international legal order, which manifests itself in the lack of legislative, judicial and enforcement organs acting on behalf of the whole community. It remains, indeed, still an interesting and relevant matter, among others for the question of attribution for the purpose of international legal responsibility, to “enquire into when and why they promote *metanational* values or long-term, communal objectives (peace, human rights, self-determination of peoples, etc.) or instead take action for the exclusive purpose of safeguarding *national* (or short-term, self-centred) interests”.<sup>148</sup> Therefore, in the *Scelle* understanding such role playing is temporary, and in the ideal situation will be replaced by elaborate international institutions.<sup>149</sup> Such dual role playing should not be confused with double roles which are fulfilled simultaneously. When different interests are at stake, the need arises to strike a balance between them, and the best approach would be to follow consistently the tendency to maintain the equilibrium between different, sometimes even conflicting interests.

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<sup>146</sup> Scelle, G., *Le Pacte des Nations et Sa Liaison avec le Traité de Paix*, 1919. p. 367; Scelle, G., “Le phénomène juridique du dédoublement fonctionnel”, in W. Schätzel and J.-J. Schlochauer (eds.), *Rechtsfragen der Internationalen Organisation – Festschrift Hans Weberg*, 1965, pp. 324–342.

<sup>147</sup> Cassese, Antonio, “Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law”, *EJIL*, 1990, Vol. 1, No. 1, pp. 210–231.

<sup>148</sup> Cassese, Antonio, “Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law”, *EJIL*, 1990, Vol. 1, No. 1, pp. 210–231, at p. 219.

<sup>149</sup> *Ibid.*, at p. 217.

## 2. From the perspective of International Relations

IOs were not the obvious subject of study in the field of International relations right from the outset. However, the international organizations, in the form mostly known to us today, have succeeded to become in less than one century from their inception, one of the major elements and players of international relations.<sup>150</sup> Therefore, it has now become quite normal that scholars of different IR theories mention IOs, though still with varying frequency of course. The weight given to IOs is also different from one theory to the other. However, none of these theories cast any doubts with regard to the IOs possessing power and authority, the difference is only about the degree of such authority.<sup>151</sup>

According to different paradigms and theories when considered altogether, there is a palette which ranges from considering the IOs as mere instruments of States' interests – that reflects the realist paradigm – through the neoliberal paradigm that considers the IOs as structural constraints on State behavior, to the belief that the IOs are completely autonomous actors.<sup>152</sup> In general, almost all international relations theories when examining IOs, to a great extent, focus on the behavioural patterns of the IOs, origins, causes and impulses of this behaviour and consequently, their outcomes and results for the IO, as well as its internal and external environments.<sup>153</sup>

The relevant notion and key words that we have chosen in our analysis of the nature of IOs, which will later be used for the purpose of the examination of IOs responsibility issue, is the international delegation of power and authority. Around this notion, many scholars have undertaken studies of the IOs, as common delegates at the international level. These studies have been all based on the Principal-Agent (PA) theory of international relations (IR). In the sub-sections (b) and (c), these matters will be discussed in detail.

### *a) The traditional Understanding: Catalysts of the cooperation between States*

In spite of the increasing importance of IOs, mainly as a result of their expanding participation in international governance, the tradition of developing theories on IOs has unfortunately not been established yet in the realm of international legal

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<sup>150</sup> Koremenos, Barbara/Lipson, Charles/Snidal, Duncan, "The Rational Design of International Institutions", *International Organization*, Vol. 55, pp. 761–799, at p. 761.

<sup>151</sup> Alter, Karen J., "Agents or Trustees? International Courts in their Political Context", *EJIR*, 2008, Vol. 14 (1), 33–63.

<sup>152</sup> Nielson, Daniel L., and Tierney, Michael J., "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform", *IO*, Vol. 57, issue 1, 2003, pp. 241–276, at pp. 243–244.

<sup>153</sup> Barnett, Michael N., and Finnemore, Martha, "The Politics, Power, and Pathologies of International Organizations", *IO*, Vol. 53, No. 4, 1999, pp. 699–732, at pp. 715–727.

science.<sup>154</sup> On the contrary, different IR schools of thought have attempted to approach this subject from their own perspectives and different angles, in order to give us insights into the nature of this phenomenon. In this section, the departure point will be the analysis of the nature of IOs from traditional and mainstream perspectives, which provides a rather rationalist perception and account of the IOs and their behavior. For instance, Neoliberal institutionalism and Neorealism are different theories and paradigms in international relations that try to describe and explain the behaviour of IOs. In the realist theories IOs are usually overlooked and reduced to instruments of the interest and power of States.<sup>155</sup> The classical view on IOs has been traditionally one of the means for the States to better realize the aims that they actually follow, very often imposed by the exigencies of international life, and even outside their own will. As these aims were also understood as the harmonization of the different interests of different States rather than those of the IOs, these latter entities were considered rather as a kind of passive forum than as an active player.

Another theoretical background that has come to the conclusion that IOs are little more than the instruments of states, devoid of their own independent interests and with no relevant autonomy is the regime theory. According to regime theorists, international law is the sum of independent regimes, without a single unified background of a single international legal system.<sup>156</sup> As regime theory deals explicitly with institutional factors affecting cooperation, regime scholars frequently mention IOs as among factors that may influence the cooperation at the international level, but always to a limited extent and certainly in a passive way. However, from the perspective of regime theory, IO is a sort of regime that encompasses only norms and collective choice procedures without having active and independent functions. In this school of thought, IOs are often referred to as “creations of states designed to further state interests”.<sup>157</sup>

Delegation is a major concept around which many studies have been undertaken in the field of IR with the result that they are not always relevant for international law as to providing solutions to the problems it faces, prominently the answers given to the question why states delegate powers and authorities to IOs.<sup>158</sup>

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<sup>154</sup> Klabbers, Jan, *An Introduction to International Organizations Law*, Third edition, Cambridge University Press, 2015, p. 3; Schermers, Henry G., and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, fourth revised edition, Martinus Nijhoff Publishers, Boston/Leiden, 2003, p. 8.

<sup>155</sup> Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, Vol. 57, issue 1, 2003, pp. 241–276, at p. 243.

<sup>156</sup> Weiler, JHH and Paulus, Andreas, “The Structure of Change in international law or Is there a Hierarchy of Norms in International Law?”, *EJIL*, 1997, Vol. 8, pp. 545–565, at p. 557.

<sup>157</sup> Barnett, Michael N. and Finnemore, Martha, “The Politics, Power, and Pathologies of International Organizations”, *IO*, Vol. 53, No. 4, 1999, pp. 699–732, at p. 704.

<sup>158</sup> Hafner, E. M./Victor, D. G./Lupu, Yonatan, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 75.

But the concept itself may deliver a criterion of distinction between IOs and states on the one part and among IOs on the other. With regard to IOs, this concept attains a central place since all the powers and related competences that IOs exercise have been initially delegated to them by states. Thus, the degree of delegation may change from one IO to the other, and with regard to the same IO from one period to the next. Based on the concept of delegation, its nuances and variations in practice, in the coming chapters of the thesis the argument will be put forward that it might have been desirable that ILC had made a distinction in the ARIO between different categories of IOs in terms of the scope of delegated powers to them.

In the eyes of realists, IOs are hardly more than simply the agents of states.<sup>159</sup> From another perspective, that of Principal-Agent theory (PA theory), the power and authority of IOs not only originates from the States establishing it, but also from the possession of knowledge and expertise accumulated over the years, which at the same time confers legitimacy on these international bodies.<sup>160</sup> In these theories “the IO dysfunction is traced back to the environmental conditions established by, or the explicit preferences of, states”.<sup>161</sup> Consequently, dysfunctional behavior of IOs may always lead to blaming the States for that and not the IO. Certain IOs are still the real instances of these theories because of the restricted amount of competences and authorities that these IOs possess, which is the result of the limited delegation of powers from founders of the IO to it. Because of the dominant place Principal-Agent theory occupies in theoretical discussions and analysis of the nature of IOs, the next sub-section will deal, albeit briefly, with the viewpoints of this theory on IOs.

#### *b) IOs in the mirror of Principal-Agent Theory of International Relations*

The intention of this sub-section is not to evaluate the theory of Principal-Agent in its entirety, which has naturally, like any other scientific theory, its proponents as well as opponents. As a result, here we will not touch upon all the arguments put forward in favour or against the appropriateness of the application of this theory to the analysis of IOs. Nevertheless, below we will only briefly refer to two points of criticism reflected on with regard to the theoretical and empirical aspects, as well as consequences of the application of this theory to the IOs studies. The reason for the choice of these two lines of criticism is that the questions of the necessity of making distinctions between different kinds of agents – the first criticism – as well as the issue of accountability of IOs – the second criticism – will reappear and will be dealt with in light of the issue of international legal re-

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<sup>159</sup> Strange, Susan, *The Retreat of the State*, Cambridge University Press, 1997, p. 67.

<sup>160</sup> Barnett, Michael N. and Finnemore, Martha, “The Politics, Power, and Pathologies of International Organizations”, *op. cit.*, at p. 707–710.

<sup>161</sup> *Ibid*, at p. 717.

sponsibility of IOs in the second and third chapters of the thesis. The arguments in those chapters are mainly built upon these theoretical criticisms.

The first and well-known point of criticism observed with regard to the use of Principal-Agent theory in the domain of IOs, is the necessity of making distinction between different kinds of agents in terms of their capacity, scope of discretion and their powers. In addition, the extent of the supervision and control exercised by the principals, namely the member states – or in much fewer cases the member IOs – should also be taken into account.<sup>162</sup> For instance, *Grant and Keohane* opine that a dichotomy, consisting of “discretionary authorities” and “instrumental agents”, is inevitable.<sup>163</sup> In the same spirit, according to another variant of this idea and in terms of the degree of discretion, a dichotomy should be made between “trustees” and “agents”.<sup>164</sup> In this thesis, it will be argued later that for the purpose of international legal responsibility of IOs, such distinctions made between different kinds of IOs make considerable sense and prove to be meaningful and useful, especially for finding solutions to the controversial question of joint or subsidiary responsibility of members of an IO. This argument is upheld, even though in terms of general applicability of Principal-Agent theory and for the purpose of identifying its scope of applicability, introduction of such dichotomies may seem needless to some scholars.<sup>165</sup> In other words, making distinctions between IOs is vulnerable to criticism from the point of view of those scholars who defend the general usefulness of Principal-Agent analysis for the examination of international delegation. Nevertheless, this thesis suggests that recourse could be taken to such differentiation for the purpose of more precision in regulating international legal responsibility of IOs in international law.

The second criticism observed by some scholars with regard to the usefulness, and especially, desirability of Principal-Agent theory for the study of IOs is that this theory has been used to undermine the independence of IOs by arguing that the autonomy of IOs is but a cover for the actual controlling powers of the states who are behind the decisions and conducts of these IOs.<sup>166</sup> Even though some

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<sup>162</sup> Pollack, Marc, “Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications and Empirical Disputes”, *European Political and Administrative Studies, Bruges Political Research Papers*, No. 2, February 2007, pp. 1–14.

<sup>163</sup> Grant, Ruth W./Keohane, Robert O., “Accountability and Abuses of Power in World Politics”, *American Political Science Review*, Vol. 99, Issue 1, 2005, pp. 29–43, at p. 31.

<sup>164</sup> Majone, Giandomenico, “Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance”, *European Union Politics*, Vol. 2 (1), pp. 103–121; Alter, Karen J., “Agents or Trustees? International Courts in their Political Context”, *European Journal of International Relations*, Vol. 14, Issue 1, 2008, pp. 33–63.

<sup>165</sup> Pollack, Marc, “Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications and Empirical Disputes”, *European Political and Administrative Studies, Bruges Political Research Papers*, No. 2, February 2007, pp. 1–14, at p. 14.

<sup>166</sup> Alter, Karen J., “Agents or Trustees? International Courts in their Political Context”, *European Journal of International Relations*, Vol. 14, Issue 1, 2008, pp. 33–63, at p. 34; Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank

amounts of supervision are desirable, in delegation, it can arguably be observed that vices and virtues may stand side by side. While enhancing cooperation, delegation may lead to accountability being ultimately lost in, sometimes rather endless, chains of delegations by one actor to the other:

“A standard problem whenever authority is delegated, however, is how to keep the agents to whom authority is delegated under control”.<sup>167</sup>

It should be borne in mind that the IOs never act totally in isolation from their members, and it is always the members that are ultimately behind the decisions of the IOs, even though often in the guise of organs of the IO and pretending to exercise *dédoulement fonctionnel*.<sup>168</sup>

### *c) New Generation of IOs: International Governance Undertakers*

It is totally normal that IOs have attracted the attention of international relations scientists who consider them as among important non-state actors, the attention they completely deserve after having sustained a period of being disregarded and neglected by neorealists and neoliberals.<sup>169</sup> That is because in our era IOs are considered among the main and principal actors that have undertaken international governance-related tasks.<sup>170</sup> As with regard to other concepts in the course of this research, the international governance undertaken by the IOs will be examined to the extent that it would be relevant to our topic, namely the international responsibility of IOs. This concept will be looked at from the perspective of the issue whether the acceptance and undertaking of governance tasks has approached the IOs to States, and if the answer is in affirmative, what are the repercussions of such a development for the international legal responsibility, and whether this development could be used as one of the justifications of the similarity of the law of responsibility with regard to States and that of IOs.

Undertaking these newly emerging tasks by IOs has theoretically broadened the scope of the application of international responsibility of IOs in practice without any doubts. And it follows that with new tasks there are new obligations that will follow for the IOs. In the next chapters of the thesis, the focus will be put on

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Environmental Reform”, *International Organization*, Vol. 57, issue 1, 2003, pp. 241–276, at pp. 271–272.

<sup>167</sup> Hafner, E.M./Victor, D.G./Lupu, Yonatan, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 76.

<sup>168</sup> Klabbers, Jan, “Constitutionalism Lite”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at p. 44.

<sup>169</sup> Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *IO*, Vol. 57, No. 2 (spring 2003), pp. 241–276, at p. 243.

<sup>170</sup> On the international governance and the IOs as among the main actors *see*: Delcourt, Barbara and Wilén, Nina, “International Administration of Foreign Territories and Sovereignty: An Impossible Equation?”, *Finish Yearbook of International Law*, Vol. XVIII, 2007, Martinus Nijhoff Publishers, Boston/Leiden, pp. 59–82, at pp. 75–82.



the question of the extent to which the new tasks of IOs have led these subjects of international law moving further towards resembling the States.

### 3. From the perspective of Political Sciences

As has been noted above in the context of examining state from the political science perspective, this field is, first and foremost, concerned with the notion of power and the modalities of its use by different actors. IOs exercise power especially through agenda-setting and the expertise they enjoy in various issues.<sup>171</sup> Furthermore, IOs influence behavior by codifying and shaping norms, social as well as legal. Some scholars have gone even further by denying the dependence of the power of IOs on the states creating them:

“... the rational-legal authority that international organizations embody, gives them power independent of the states that created them, and channels that power in particular directions; also that bureaucracies make rules but in so doing create social knowledge, define shared tasks, develop and define new types of actors, create new interests for actors, and transfer models of political organization around the world.”<sup>172</sup>

Power that almost all IOs possess, to different degrees of course, and that these entities exercise on multiple levels is the result of their authority in guiding decisions and actions.<sup>173</sup> Nature of this power is different from a great deal of powers that states enjoy. The neo-functionalistic approaches are also relevant in this connection.<sup>174</sup>

Furthermore, the phenomenon of IOs should be examined from the two different individualistic and collectivist perspectives. Consequently, these understandings should be compared with the relevant understandings of States. The IOs, from the individualistic perspectives, can only be means to realize the aims of individuals and member States, whereas, from the collectivistic points of view, the IOs may be regarded as organisms in themselves, as aims on their own and with their own international legal personality. It appears that from the collectivistic perspective, the importance that is given to IOs is much higher than the importance given to these entities from the individualistic points of view. But is the importance and independence given to States and IOs in the collectivistic perspec-

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<sup>171</sup> Hafner, E. M./Victor, D. G./Yonatan Lupu, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 53.

<sup>172</sup> Barnett Michael N./Finnemore, Martha, “The Politics, Power, and Pathologies of International Organizations”, *IO*, Vol. 53, 1999, p. 699.

<sup>173</sup> Barnett, Michael/Finnemore, Martha, *Rules for the world: International Organizations in Global Politics*, Cornell University Press, 2004, p. 6.

<sup>174</sup> Haas, Ernst B., *Beyond the Nation State: Functionalism and International Organization*, Stanford University Press, 1964; For a brief examination of theoretical premises underlying the neo-functional approach to integration see: Schmitter, Philippe, C., “Three Neo-Functionalist Hypotheses about International Integration”, *IO*, Vol. 23, Issue 1, pp. 161–166, Winter 1969.

tives of the same nature or not? It seems that the positions held by States and IOs from the viewpoint of the individualism-collectivism cleavage<sup>175</sup> are unsurprisingly close to each other.

The international organizations have assumed the task of international governance or to a certain degree they have assumed this activity. The concept of IOs is very close to the concept of international governance.<sup>176</sup>

### III. Conclusion

The study of IOs in the field of international relations, as well as in political sciences follows a multitude of goals. As we witness in the reviews of the literature in both fields, various theories have been employed in order to achieve the aims of these studies. One of the major theories applied for that purpose is the Principal-Agent (PA) theory, that seeks, *inter alia*, to predict the major reasons for delegation of power and authority to agents – in our case the IOs – by the Principals, on the one hand, and the behavior of the agents and their influence in domestic and international politics, on the other hand. A number of scholars, while criticizing the Principal-Agent theory and its application in empirical cases, believe that in the dyadic delegation relationships, distinctions should be made between agents and trustees who represent two different categories of delegates. Such notions may even be supported by real examples, as it is true that certain IOs correspond more to the description of agents, and other IOs to the description of trustees. If such distinctions prove to be useful and necessary for the studies of delegates, one should ask why such distinctions should not also be made for the purpose of international legal responsibility of different categories of delegates. Nevertheless, some other scholars do not believe in the necessity of such distinction. Such extra-legal discussions for us can be the results we may achieve concerning the nature of IOs, and as a result such characteristics and features may have influence on the question of international legal responsibility of IOs and its regulation under international law.

In sum, three major theories – Principal-Agent theory, sociological institutionalist approaches and Constructivism – seek to analyze the nature, behaviour, powers and influence of IOs at the domestic, as well as international level. Each and every one of these theories succeeds in giving a precise account of one or more

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<sup>175</sup> Individualism-collectivism cleavages are broadly used in the domain of sociology and more specifically, in cross-cultural studies and related psychological analysis. In this connection see: Gorodnichenko, Yuriy and Roland, Gerard, “Understanding the Individualism-Collectivism Cleavage and its Effects: Lessons from Cultural Psychology”. Available on: <http://eml.berkeley.edu/~groland/pubs/IEA%20papervf.pdf> (last visited on 05.04.2022).

<sup>176</sup> On the concept of international governance and its relation with IOs see: Kratochwil, Friedrich and Ruggie, John Gerard, “International Organization: a state of art on an art of the state”, *IO*, Vol. 40, 1986, pp. 753–775.

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aspects of such nature and features of IOs. In order to have a complete and whole picture, it is necessary to apply all of them, as they rather complement each other. Our intention in this chapter was far from judging which of these theories best succeeds in giving an account of IOs and is most appropriate for the study of these actors. Rather, we seek to obtain a most complete and precise understanding of IOs, as actors in international relations and subjects of international law, in order to, consequently, design a tailor-made set of regulations for their international legal responsibility. At the same time, the interdisciplinary study of the nature of states in the first part of this section has allowed us to conclude that, despite all the communalities between these primary subjects of international law and the IOs, the states remain distinct from IOs. This conclusion serves as the basis of our argument that the question of international legal responsibility of states and that of IOs should not be approached and treated identically. Rather, a more suitable regime should be sought which takes into account ideally all these features described by the results of theoretical and empirical studies of IOs from interdisciplinary perspectives.



## Chapter Two

# The General Principle of International Responsibility in International Law and international legal discourse

As with regard to States, there is a general legal principle of international responsibility with regard to IOs, which can hardly be denied. According to this principle, the IOs have the potential to incur international legal responsibility. The general principle of international legal responsibility in fact specifies the general conditions necessary for international responsibility to arise. The ICJ has also pointed out the application of general principle of responsibility to international organizations in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. In this advisory opinion, the court reaffirmed the responsibility of United Nations, like any other subject of international law, for the damages arising from its acts.<sup>177</sup> But it remains to be seen whether the content of this principle and the conditions of its application are exactly the same as the principle applicable on States, in terms of its legal basis, scope and content (I) furthermore, the nature of such principle of responsibility of

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<sup>177</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, pp. 88–89, para. 66.

IOs should be focused on (II) what sort of approach do this principle of international responsibility applicable on IOs adopts, namely whether it is bilateralist or rather international community oriented (III) In addition, where is the place of responsibility in the whole picture of international accountability of IOs? (IV) Subsequently, the focus will turn on the intrinsic features of international legal responsibility of IOs (V), in the framework of which further specific questions will be dealt with in a closer manner, namely, which role does the international legal personality of IOs play in this whole context? (1); would a notion of international criminal responsibility of IOs be desirable and at the same time also feasible (2); attribution of conduct to an IO (3); fragmentation of the law of international legal responsibility (4); the theory of abuse of rights and its relevance to the international legal responsibility of IOs (5).

## I. The Legal Basis of the general principle of International Responsibility in the International Legal Order

The intention of this chapter is to examine the different dimensions of the general principle of international legal responsibility, with a view to examine its applicability on the IOs. The present section will focus on the legal basis of a principle of international legal responsibility of IOs.<sup>178</sup> The basic principle of international legal responsibility has been described as the skeleton of the entire regime of international legal responsibility.<sup>179</sup> In other words, a fundamental concept of international legal responsibility exists, which forms a structural foundation for, and gives birth to the general principles of international legal responsibility of all the subjects of international law, regardless of their origins and specific features. Such

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<sup>178</sup> In general, with regard to the general principle of international responsibility see: Amerasinghe, Chittharanjan, “The Essence of the Structure of International Responsibility”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 3–6; Reinisch, A., “Securing the Accountability of International Organizations”, *Global Governance*, Vol. 7(2), 2001; Brunnée, Jutta, “International Legal Accountability through the lens of the law of state responsibility”, *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 21–57; Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 3–20; Dekker, Ige F., “Making sense of accountability in international institutional law, An analysis of the Final Report of the ILA Committee on Accountability of International Organizations from a conceptual legal perspective”, *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 83–119; Suzuki, E. and Nanwani, S., “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks”, *Michigan Journal of International Law*, Vol. 27(1), 2005, pp. 177–225; Dupuy, Pierre-Marie, “Dionisio Anzilotti and the Law of International Responsibility of States”, *EJIL*, Vol. 3, 1992, pp. 139–148.

<sup>179</sup> Generally, with regard to the status and significance of general principle of international legal responsibility see Amerasinghe, Chittharanjan, “The Essence of the Structure of International Responsibility”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 3–6, at p. 6.

concept is of course broader than any principle of state responsibility or responsibility of IOs, but is at the origin of these principles. The first dimension that has to be examined in every legal analysis of a legal principle is to find out the legal basis of such principle that has found its way into a legal order, and often has been developed and incorporated as an independent legal system of such order. There is no doubt that a general principle of international legal responsibility is applicable to international organizations as active participants in the international intercourse, and thus, undeniable subjects of international law.<sup>180</sup> The legal basis of the general principle of international legal responsibility also explains the reason of its application on any subject of international law, from which IOs would not, of course, form an exception.

It has been stated that the relations between States is guided, first and foremost, by the fundamental legal concept of sovereignty.<sup>181</sup> However, it is interesting to reflect on the question about which legal concept guides, first and foremost, the relations between States and IOs. Can the answer still be the legal concept of sovereignty, as the guiding principle of the relations between states and IOs? In this category of international relations, while one side of the story, the State, enjoys sovereignty, the other, namely, the IO lacks this fundamental feature. Instead, IOs are endowed with competences and powers conferred upon them by their founders, often the very same States, which may also be the members of the IO at the same time. The conferral of powers and competences may take place in different degrees, according to which the relations between states or member States and IOs can be divided into different categories. While states are free in their conducts and interactions, unless they encroach on the interests and rights of other States, from the above mentioned feature of IOs it is clear that IOs are not as free as States in their conducts at the international level.

With the appearance of IOs besides States as actors at the scene of international relations, it is obvious and even logical that this principle extends to these international players as subjects of international law. If international organizations owe their international legal personality to the international legal system, it is a corollary that they abide by almost all the rules of the game. There is no doubt that the IOs would be likewise covered by the principle of international legal responsibility, as one of the most important and essential principles of this legal order. The survival and continuance of the international legal order, and generally the legitimacy of the activities and actions of the subjects of every legal order, depends on the realization of the accountability of those subjects. It is necessary for the continuance of the legal order that there are legal sanctions for the viola-

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<sup>180</sup> Butkiewicz, Ewa, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, Vol. XI, 1981–1982, pp. 117–140, at p. 117–118.

<sup>181</sup> Gehring, Thomas and Jachtenfuchs, Markus, "Liability for Transboundary Environmental Damage, Towards a General Liability Regime?", *European Journal of International Law*, Vol. 4, 1993, pp. 92–106, at p. 92.

tion of the obligations arising from that legal order. Therefore, the survival of the international legal order itself is dependent on the applicability of the principle of responsibility to all the subjects of international law. As has been referred to earlier, one of the fruits and results of globalization has been the multiplication and diversification of international actors. The dominance enjoyed by the nation-State at the international scene has been replaced by a multiplication and diversification of the decision-makers and executors at the international level. Beside States, IOs have established themselves as actors. Thus, the international legal order has to adapt itself to these fundamental changes and the new constellations established and restored in international relations.

As to the recognition of the general principle of international legal responsibility of IOs, the ICJ has opined in its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*:

“... compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.”<sup>182</sup>

This statement is the manifestation of the fact that the ICJ has recognized the general principle of the international legal responsibility of IOs. The case law of the other judicial instances that have recognized the further responsibility of member States of an IO with respect to the field of activity covered by attribution of powers and competences to these IOs, neither does exclude the possibility of the international legal responsibility of the IO.<sup>183</sup>

In connection with the content of the principle of international legal responsibility, a question may be raised about whether the international responsibility may also arise from the breach of norms deriving from soft law rules. This question will be dealt with in detail in the chapter four. In order to find an answer to this question it is necessary to examine, in the first place, the nature of the soft law rules. This issue will be further elaborated on in the fourth chapter of the thesis dealing with the obligations of IOs. This matter may be specifically interesting with regard to IOs, since the traditional sources of international law may not always be accessible to IOs. In this regard, the international conventions should be referred to specifically. Thus, new sources of international legal obligations, with often a new nature, may specially be interesting in this regard in order to fill the gap that exists with respect to the obligations of IOs. With respect to States, in the arbitral award in the case “Rainbow Warrior”, the arbitral tribunal has stated that “any violation by a State of any obligation, of whatever origin, gives rise to State

<sup>182</sup> *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* (Advisory Opinion), [1999] ICJ Rep 62, p. 30, para. 66.

<sup>183</sup> For an opinion to the contrary see Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 703.



responsibility”.<sup>184</sup> In these circumstances, to what extent is it possible to interpret the words “any obligation, of whatever origin” in a way to include the obligations arising from the soft law? With respect to interpretation, reference should be made to the Vienna Convention on the Law of Treaties. In addition, it should be asked which legal relevance this arbitral award could have for our argumentation in this matter. Or maybe to look at this issue in another way and from another perspective asking what kind of responsibility could follow from the breach of soft law obligations. This question is the same as asking whether other forms of international responsibility may also exist. It seems that the answer to this question may be the international accountability and its manifold nuances and levels. Thus, it can be asserted that the result of a breach of a soft law obligation could be the international accountability of IOs. And in addition, it must be born in mind that in some cases the breach of a soft law obligation may be accompanied by a damage incurred by a third party. In such cases, the fairness would be disregarded if the result of the breach of a soft law obligation would have no consequence for the violator of the obligation.

Denial of international responsibility would lead to the denial of the international legal order.<sup>185</sup> Some believe that State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States.<sup>186</sup> From the moment that the right of the separate and equal existence of states was admitted, it became necessary to set up rules to guard these rights.<sup>187</sup>

As a concluding observation in this subsection, it should be stated that today there is no doubt that international law also endows international organizations with the quality of imputability for the same purpose as it endowed States with this quality, namely conferring on these entities rights and duties which are in fact the rights and duties of their organs or their officials.<sup>188</sup> The result of this logical<sup>189</sup> or intellectual<sup>190</sup> operation is that IOs are able to incur responsibility at the international level.

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<sup>184</sup> Case concerning the difference between New Zealand and France concerning the interpretation and application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93. V.3), p. 215 (1990).

<sup>185</sup> Ago, R., Third Report on State Responsibility, *ILC Yearbook 1971*, Vol. II (1), p. 205, para. 31.

<sup>186</sup> *Ibid.*

<sup>187</sup> Eagleton, Clyde, *The Responsibility of States in International Law*, 1970 Kraus Reprint Co., New York, 1970, p. 5.

<sup>188</sup> Starke, J. G., “Imputability of International Delinquencies”, *British Yearbook of International Law*, 1938, pp. 104–118, at p. 105.

<sup>189</sup> Eustathiades, C. Th., „Les sujets du droit international et la responsabilité internationale – Nouvelles tendances », *Recueil des Cours de l’Académie de droit internationale*, 1953-III, t. 84, p. 422.

<sup>190</sup> Starke, J. G., “Imputability of International Delinquencies”, *op. cit.*, pp. 104–118, at p. 105.

## II. The Nature of the Principle of International Legal Responsibility

The notion of international legal responsibility from the beginning of its existence has made a long journey from the Law of Nature, through the realm of logics as the corollary of equality of sovereign states, into a more restricted concept of objective responsibility adopted by the ILC in its draft articles.<sup>191</sup> From the consequence of harm sustained, consisting in reparation for the damage, the definition of the notion of responsibility was diminished into a more limited one which consists in the consequence of breach of an obligation, independent of any harm or damage. Without any doubt, violation of an international obligation represents harm to the holder of rights emanating from that obligation, but it is far from being all that harm may signify. International responsibility, in its current understanding, is indeed the combination of all the new international relationships that arise following and as a consequence of a wrongful act by an IO, between the IO and the other parties, to whom the obligation breached, is due. The first jurisprudential reference to this principle by the PCIJ relates to a case, known as *Phosphates in Morocco case*.<sup>192</sup> Another case, in which the PCIJ further elaborated on the different aspects of the principle of international legal responsibility, is the *Factory at Chorzów case*.<sup>193</sup> At the same time, the general principle of international legal responsibility is, indeed, the indirect affirmation for the existence of an international legal order. It refers to the fact that violation of the obligations under international law is followed by sanctions under this legal order. Therefore, this distinguishes the international legal order from a mere moral or ethical order.

It should be examined whether the law of international responsibility is neutral or goal- and policy-oriented.<sup>194</sup> In other words, the important question is whether the law of international responsibility seeks to realize certain community values. And if the answer is in affirmative, what are these values? Are these values absolute or relative? It appears that depending on the position and approach taken, the definition of international responsibility would be different. In other words, the different elements of the definition of international responsibility have a direct relation with the approach taken and the understanding of the nature and aim of the international responsibility. It may have an important consequence, for exam-

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<sup>191</sup> Pellet, Alain, "The Definition of Responsibility in International Law", in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 3–16, at p. 5.

<sup>192</sup> *Phosphates in Morocco Case*, Italy v. France, Preliminary objections, judgment, PCIJ Series A/B No 74, 14<sup>th</sup> June 1938.

<sup>193</sup> *Factory at Chorzów*, jurisdiction, Judgment No. 8, 1927, PCIJ, Series A No 9, p. 21.

<sup>194</sup> Weiler, JHH and Paulus, Andreas, "The Structure of Change in international law or Is there a Hierarchy of Norms in International Law?", *European Journal of International Law*, 1997, Vol. 8, pp. 545–565, at pp. 550–551.

ple, for the place and role that the elements of damage or fault would have in the definition of international legal responsibility.

At the international level, because of the lack of the legal organization of the relations between States and the community, international responsibility, which has been defined as obligatory legal relationship between the author of the wrongful act and the injured parties, would appear to be the only effect that can be attached to the wrongful act.<sup>195</sup> Furthermore, in connection with the nature of the international legal responsibility, it cannot arguably be stated that the general principle of international legal responsibility, as was envisaged and adopted by the ILC in its articles, is of a civil character, equivalent to the same category usually found in domestic legal system.<sup>196</sup> In connection with the approach of the ILC in its articles, it will only be observed here that the ASR neither incorporates a distinction between contractual and quasi-delictual responsibility, and consequently, nor any separation of the consequences between the two. This is not to suggest that such a distinction does not have a place in public international law; it is rather merely due to the fact that the rules of public international law may be too elementary to usefully support a distinction.<sup>197</sup>

International legal responsibility is related to the realm of the secondary rules. However, this function-oriented differentiation between the norms, rules and obligations arising from them in the international legal system, like many other concepts in the international legal theory, has its proponents as well as opponents.<sup>198</sup> This division and categorization of international obligations into primary and secondary rules and obligations is very closely related to the concept of *lex specialis*.<sup>199</sup> This distinction may be used as a parameter, and it can establish where specific provisions of a treaty or bilateral regime should prevail over general international law and define the consequences of a breach of an international legal obligation by a subject of international legal order in cases where it is established that the conduct is attributable to that subject.

With respect to the function that international legal responsibility regime may have for the international community, and the contribution that it may make to this cause, it has rightly been observed that “the law of international responsibility

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<sup>195</sup> Ago, R., “Third Report on State Responsibility”, *ILC Yearbook 1971*, Vol. II (1), pp. 199–274, at p. 206–207.

<sup>196</sup> Verhoeven, Joe, “The Law of Responsibility and the Law of Treaties” in James Crawford; Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford University Press, first edition, 2010, pp. 105–113, at p. 106.

<sup>197</sup> Verhoeven, Joe, “The Law of Responsibility and the Law of Treaties”, *op. cit.*, at p. 110.

<sup>198</sup> Gourgourinis, Anastasios, “General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System”, *EJIL*, Vol. 22, No. 4, 2011, pp. 993–1026, at pp. 1020–1026.

<sup>199</sup> Gourgourinis, Anastasios, “General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System”, *op. cit.*, Vol. 22, No. 4, 2011, pp. 993–1026, at pp. 1020–1026.

contributes to the activation of the non-organized Community of States to realize the interests of this Community, in a situation where the degree of institutionalization of the Community of States does not suffice for the implementation of the values of the Community.”<sup>200</sup>

According to the general principle of international legal responsibility, only the wrongful conducts of IOs at the international level will incur the international legal responsibility of these entities. With respect to the states, normally the wrongful conducts are of a public nature, rather than a private nature, which usually takes place at the national and municipal levels and thus is regulated by the national legal systems and is under the application of the rules and regulations of those legal orders. It has been observed that:

“The international responsibility of sovereign nations and international organizations is, namely, tied up with sovereign acts of these subjects of international law (so-called *acta iure imperii*).”<sup>201</sup>

### III. A ‘bilateralist’ or an ‘international community interest’ standpoint?

As has been demonstrated, there is a general principle of international legal responsibility applicable on IOs under the international legal order. But does this general principle purport to ensure the bilateral interests of different parties of a legal relationship, be it states or IOs, or to guarantee a broader scope of interests which its area is not limited to the direct parties to a legal responsibility relationship? Briefly, this is a translation of the contrast between the objective and traditional bilateral legal relationships. To this aim, it is necessary to clarify at the first stage the two general concepts of “bilateralism” and “international community”, in their connection with the question of international legal responsibility.

Of course, the issue of the transformation of the interstate society to an international community and the new role that the international institutions may play in this new world order is relevant to this discussion. Thereby, the role of the international responsibility and its possible contributions to this transformation process may be taken under review. It should not be ignored that new developments are still appearing on the basis of traditional bilateralist international law.<sup>202</sup> International law has still maintained its “relative” character, and there is still no prospect of its evolvement into a completely general legal order. The question that

<sup>200</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 423.

<sup>201</sup> Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *LJIL*, Vol. 4, No. 2, 1991, pp. 171–183, at p. 177.

<sup>202</sup> Simma, Bruno, “From Bilateralism to Community Interest in International Law”, *RDADI*, 1994, vol. 250 (VI), pp. 216–384, at p. 230.

should be asked at this stage is whether the law of international legal responsibility is formulated with a “bilateral-minded approach” or a “Community-interest” approach?<sup>203</sup> To answer this question, it should be made clear at the first instance, what are the inherent aims of the law of international responsibility? Does each State and international legal person have to protect its own rights? Does only the injured party have the right to bring the claim for the illegality of the conduct, and thus, the due reparation? Do the international responsibility draft articles represent an attempt to overcome bilateralism, in favor of embodying community interests in international law? Is the definition of responsibility, namely the occurrence of an internationally wrongful act, which is the breach of an international legal obligation, a manifestation of the adoption of an “international community” approach? It should be noted that in this definition, the important element is the commitment of a breach of an obligation under international law, and not the occurrence of an injury or damage. But on the other hand it should not be forgotten that being a party to a treaty does not necessarily mean being a party to any breach of obligation under that treaty.<sup>204</sup> The ICJ has stated in the *Reparations Case*: “Only the party to whom an international obligation is due can bring a claim in respect of its breach”.<sup>205</sup> Therefore, in these cases, principally, the injured party can claim the breach of obligation. Thus, it cannot really be claimed that the aim of the regime of international legal responsibility, right from the outset, was to guarantee the respect for, and implementation of the rules and regulations of international law, and safeguarding the integrity of this legal order. ARIO has also adopted the same approach, and has followed the same path as the ASR, which reflects once again the “relative normativity” in international law.<sup>206</sup> However, the new challenges for international law, for instance climate change, may push the regime of international legal responsibility from bilateralism towards community interest approaches. The regime of international legal responsibility could not stay indifferent towards fundamental changes in the international legal order, as it could not remain untouched by the intrinsic developments undergone by international law, particularly the transformation from relational international law into an institutional legal order. A prominent example is the international legal responsibility arising from the breaches of obligations having the character of *erga omnes*. According to Mosler, the rules with the character of *jus cogens* and *erga omnes* are the manifestations of the existence of a public order of the international communi-

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<sup>203</sup> Riphagen, W., “Third Report on State Responsibility”, *Yearbook of the International Law Commission*, 1982, Vol. 2, part 1, p. 38.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Reparation for Injuries suffered in the Service of the United Nations*, 1949 ICJ Reports, at p. 174, pp. 181–182.

<sup>206</sup> Weil, P., “Towards Relative Normativity in International Law?”, *American Journal of International Law*, Vol. 77, 1983, pp.413–442.

ty,<sup>207</sup> which expands definitely beyond the bilateral reciprocal international relations between the subjects of international law.<sup>208</sup> Given these developments, is the time ripe to observe with certitude that the prime objective of the law of international legal responsibility is to safeguard the values underlying and constituting the foundations of international law?

In addition, from another perspective, could this legal regime be considered as an illustration of the evolution of international society towards an international community or at least an international legal community, the scenario of the transition from the society of States law to the community of States law or international community law? Simma has enumerated some prominent areas which are now the manifestations of the change from the bilateralist to the community paradigm. These regimes are international peace and security, solidarity between developed and developing countries, protection of the environment, the “common” heritage concept, international concern with human rights.<sup>209</sup> Scholars have presented different theories with respect to whether and how this transition will take place, and what results will ultimately come out of these discussions. However, at least one aspect is directly relevant and critical to the understanding of the different links existing between these discourses, namely, the nature of international law of responsibility.

Accordingly, could the international responsibility regime be considered an expression of the change from the bilateralist to the community paradigm? If we accept that the structural change in international legal order transforms it into “a system that increasingly accommodates the notion of obligations owed to an international community of states and ultimately all humankind, and enforceable by (or on behalf of) this community”, then the ARIO could be considered a manifestation of such transformation under way, as such notion of obligations owed to an international community of states is already envisaged in ARIO. To offer a clear formulation of our main question, could the international responsibility regime be still considered a bilateralist regime that aims at safeguarding the individual interests of States, or manifestations of a communal regime have already appeared clearly enough in the horizon?

In this connection, there are some other dimensions that could be reflected on. A relevant aspect that could be touched upon in this connection is the role that the concept and project of shared responsibility could play in this regard, specially, with respect to the environmental damages and claims arising out of the losses sustained? Are the community interest approaches only with regard to *jus*

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<sup>207</sup> Mosler, Hermann, *The International Society as a Legal Community*, Sijthoff & Noordhoff, 1980, pp. 17–20.

<sup>208</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 91.

<sup>209</sup> Simma, Bruno, “From Bilateralism to Community Interest in International Law”, *RDADI*, 1994, vol. 250 (VI), pp. 216–384, at p. 236–243.

*cogens* rules and the concept of the international crime of the State and IO imaginable or is it with respect to the other dimensions of the international legal responsibility regime, arising out of the breach of the other international legal obligations also relevant?

It has been held that it is useful to take a broader and more forward looking perspective on responsibility. International legal responsibility forms part of a larger concept, which has not necessarily a legal nature in all its facets, but rather may have financial, administrative, political, etc. manifestations. International legal responsibility, in the words of *Yarwood*, forms part of the accountability matrix.<sup>210</sup> A thesis on the basis of the results of the researches on the accountability of States<sup>211</sup> is that this notion may be the concept that seeks the respect and realization of common interests and community interests, and therefore, it goes far beyond satisfying the objective of provision of bilateral reparations. As international legal responsibility is, principally, a kind of accountability towards beholders of rights under international law, in the following section the concept of accountability will be focused on, with a view to clarifying the relation between these two close concepts, at the same time explaining the place of the international legal responsibility in the broader spectrum of accountability.

#### IV. The Place of Responsibility in the General Framework of Accountability of IOs

Some scholars are of the opinion that “accountability” is the more modern heading in comparison with the traditional heading of “responsibility”.<sup>212</sup> But it appears that there is a lot more than just the question of era or the element of time that separate and distinguish these two concepts. Accountability may, in a way, be considered the prior stage that may or may not lead to international legal responsibility. Now that the legal basis and the approach taken by the general principle of international legal responsibility with regard to IOs have been set out in the preceding sections, in the next stage we will examine the place of this general principle in the general framework of the accountability of IOs. International responsibility is one of the forms by which the accountability of IOs can take place.

Although the concepts of accountability and responsibility are sometimes used interchangeably in the international legal literature,<sup>213</sup> they are two different and distinct concepts each having its own features. While responsibility doctrine may leave a gap in answerability, the concept of accountability is broader in scope than

<sup>210</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, Routledge, 2011, p. 88.

<sup>211</sup> *Ibid.*, p. 153.

<sup>212</sup> Klabbbers, Jan, “Constitutionalism Lite”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at p. 36.

<sup>213</sup> Loibl, Gerhard, “Theme III: Global Governance: Institutions – Co-operation and Transparency between International Legal Institutions”, *LJIL*, Vol. 16, No. 4, 2003, pp. 900–901, at p. 901.

responsibility. At the same time, accountability that may also be called answerability lays the foundations for responsibility, and was also at the origin of the necessity of the ILC codification project dealing with responsibility of IOs. With respect to the origins and necessity of the accountability or answerability, it suffices to mention that accountability is one of the cornerstones of good governance.<sup>214</sup>

Some scholars believe that given the present normative deficiencies with respect to IOs, in different international legal systems, specifically, and in the international legal order, generally, the concept of accountability may even better realize the goals that the concept and principle of international legal responsibility follows and tries to realize.<sup>215</sup> This possible appropriateness of the concept of accountability for the IOs in the context of the examination of the question of international legal responsibility of IOs justifies broaching the concept of accountability, in a more than brief manner, in the present dissertation. At least, as has been rightly observed in the scholarship, in areas, in which the principle of international legal responsibility cannot reach, because of its definition and its *sine qua non* conditions and elements, the concept of accountability may fill the remaining gap.<sup>216</sup>

Accountability seeks to realize good governance, in its ideal form of course, and not merely in its understanding as a process of reviewing the respect towards a set of static norms defined by the entity itself, as may be the case of accountability that certain Independent Accountability Mechanisms (IAMs) of international financial institutions are competent to implement. In contrast, international legal responsibility which is the consequence of the commission of a wrongful conduct – a conduct in violation of obligations emanating from the rules of international law – is aimed at providing reparation due from the responsible party. Clearly, such notion of accountability may, at least for the moment, be even more suitable to IOs, since it can be more responsive in a more expedient way than other concepts that are dependent on traditional sources and institutions of the international legal order.

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<sup>214</sup> Sheng, Yap Kioe, “What is good governance?”, United Nations Economic and Social Commission for Asia and the Pacific. Available on: <http://www.unescap.org/pdd> (last visited on 20.02.2015).

<sup>215</sup> Richard, Vanessa, “Les Organisations Internationales entre *Responsibility* et *Accountability*: Le Régime de Responsabilité Esquissé par la CDI est-il adapté aux organisations internationales?”, *Revue Belge de Droit International*, 2013(1), Éditions Bruylant, Bruxelles, pp. 190–205.

<sup>216</sup> Richard, Vanessa, “Les Organisations Internationales entre *Responsibility* et *Accountability*: Le Régime de Responsabilité Esquissé par la CDI est-il adapté aux organisations internationales?”, *Revue Belge de Droit International*, 2013(1), Éditions Bruylant, Bruxelles, pp. 190–205, at p. 191.



### 1. Historical and initial Optimism towards IOs or normative ideas of IOs disillusioned

Whereas states are suspected of acting for self-serving motives, international organizations were considered selfless, neither representing the interests of particular states, nor pursuing any self-interested objectives other than what is for the benefit of the so-called ‘international community’ as a whole.<sup>217</sup> Until recently, few thought of an international organization as a human rights violator.<sup>218</sup> Even the ILC was not immune from such beliefs. As a prominent example, the argument of the then special rapporteur Mr. Ago may be referred to, with respect to the reluctance to consider the question of the international legal responsibility of IOs, on the ground that he doubted the capacity of IOs to commit internationally wrongful acts.<sup>219</sup> In the eyes of *Virally*, such attitudes were mainly due to the absence of adequate conceptual tools for the analysis of IOs.<sup>220</sup> These ideas towards IOs have basically delayed the discussion and establishment of accountability and oversight mechanisms for supervising the activities of IOs. For example, the disregard for the Trusteeship Council when UN administration was planned for East Timor underlines the normative distinction between states and international organizations.<sup>221</sup> In that same context, it has been rightly observed that “now that the administering actor is the United Nations – the very actor that would safeguard the interests of the people through supervising the conduct of administration by individual states – the need for a supervisory mechanism is obviated. While with states, good faith and selflessness is questioned, with the United Nations it is assumed”.<sup>222</sup>

However, and to some extent rightly, illusionary positive presumptions about the IOs did not endure very long. As soon as the eighties, the criticism on IOs

<sup>217</sup> Wilde, Ralph, “Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 327; Klabbers, Jan, “The Changing Image of International Organizations”, in: Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations*, Tokyo, United Nations University Press, 2001, pp. 221–255; Klabbers, Jan, “The Life and Times of the Law of International Organizations”, *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317, at p. 288 and 300; Rochester, Martin J., “The Rise and Fall of International Organization as a field of Study”, *IO*, Vol. 40, No. 4, 1986, pp. 777–813.

<sup>218</sup> Mégret, F. & Hoffman, F., “The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities”, *Human Rights Quarterly*, 2003, p. 334.

<sup>219</sup> *Yearbook of International Law Commission*, 1963, vol. II, document A/CN.4/161 and Add.1, appendix I, intervention by Ago, p. 229.

<sup>220</sup> Viñuales, Jorge E., “The Secret of ‘Tomorrow’: International Organization through the Eyes of Michel Virally”, *EJIL*, Vol. 23, No. 2, 2012, pp. 543–564, at p. 549.

<sup>221</sup> Wilde, Ralph, “Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 328.

<sup>222</sup> *Ibid.*, p. 328.

was raised to the effect that they are aggravating the very same problems they have been created to tackle.<sup>223</sup> Later on, as the range of the activities of the IOs expanded and negative results appeared, little by little this optimism disillusioned to the point that the IOs were described as the global Frankensteins getting out of the control of their creators as soon as they were brought to life.<sup>224</sup> Optimism was replaced, specially, by the accusations of hypocrisy following the failure of the United Nations to act in accordance with the ideals it espoused.<sup>225</sup> IOs were increasingly associated with organized hypocrisy, which referred to inconsistent rhetoric and action resulting from conflicting material and normative pressures. As its roots, the neo-institutionalist school of organizational sociology, known as ‘sociological institutionalism’ in the international relations literature, was developed.<sup>226</sup>

It is a well-known fact that the IOs were considered at the outset the guarantors of “Salvation of Mankind”.<sup>227</sup> A more moderate view regarded whatever serving the functioning of IOs as necessarily contributing in one way or the other to the advancement of international law.<sup>228</sup> However, the IOs were not able to continue standing on their pedestals for ever and had to step down to the world of mortals.<sup>229</sup> Meanwhile, criticizing IOs in the scholarship has gone to the point that *Chimni* vehemently emphasizes on the neo-imperial character of IOs, describing them as means of realizing the interests of a group of states to the detriment of the others,<sup>230</sup> indeed very much far from seeing in them the guarantors of “salvation of mankind”. Among the different demands that were expressed in connection with improvement and reforms in global institutions, the call for more trans-

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<sup>223</sup> Kratochwil, Friedrich, and Ruggie, Gerard, “International Organization: a state of the art on an art of the state”, *IO*, Vol. 40, No. 4, 1986, pp. 753–775, at p. 755.

<sup>224</sup> Barnett, Michael N. and Finnemore, Martha, “The Politics, Power, and Pathologies of International Organizations”, *International Organization*, Vol. 53, Number 4, 1999, pp. 699–732, at p. 699.

<sup>225</sup> Slaughterhouse, D. R., *Bosnia and the failure of the West*, New York, Simon, 1996, pp. 25–32; Barnett, M., *Eyewitness to a genocide: the United Nations and Rwanda*, Ithaca, NY, Cornell University Press, 2002, pp. 140–155; Polman, Linda, *We did nothing: why the truth doesn't always come out when the UN goes in*, New York, Penguin, 2003; Lipson, Michael, “Peacekeeping: Organized Hypocrisy?”, *European Journal of International Relations*, Vol. 13 (1), 2007, pp. 5–34, at p. 6.

<sup>226</sup> Lipson, Michael, “Peacekeeping: Organized Hypocrisy?”, *European Journal of International Relations*, 13 (1), 2007, pp. 5–34, at p. 6.

<sup>227</sup> Singh, Nagendra, *Termination of Membership of International Organizations*, Stevens and Sons, London, 1958, at p. vii.

<sup>228</sup> Collins, Richard and White, D. Nigel, “Moving Beyond the *Autonomy-Accountability* Dichotomy: Reflections on Institutional Independence in the International Legal Order”, *IOLR*, Vol. 7, No. 1, 2010, pp. 1–8, at pp. 1–2.

<sup>229</sup> Klabbers, Jan, “The Life and Times of the Law of International Organizations”, *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317 at p. 311.

<sup>230</sup> Chimni, B. S., “Theme III: Global Governance: Institutions – International Organizations Today”, *LJIL*, Vol. 16, No. 4, 2003, pp. 897–899, at p. 897–898.

parency and openness are prominent.<sup>231</sup> As the widespread idea formulated in a famous phrase emphasizes, good intentions are not enough to ensure accountability.

Yet, there are many reasons to believe that IOs are the positive actors at the international level. Among others, because there is membership conditionality in some of IOs nowadays, encouraging the States to change policies, introduce regulations and improve enforcement and implementation in the matters such as human rights and environmental protection.<sup>232</sup> *Klabbers* describes this evolution as the shift from large-scale optimism towards a more modest pragmatism.<sup>233</sup>

Briefly, the virtue of IOs has lost its presumptive value. It appears that a realistic point of view has emerged and presently dominates the normative impression about the IOs. As has been observed, with regard to IOs in the scholarship, specially, in the nineties:

“... for all their desirable qualities, bureaucracies can also be inefficient, ineffective, repressive, and unaccountable”.<sup>234</sup>

## 2. The categorization presented in the ILA Berlin final Report

The ILA Berlin final report, containing an extensive set of Recommended Rules and Practices (RRPs), does not set out any definition or description of an accountable IO,<sup>235</sup> but it provides some principles and recommendations for an IO to become and remain accountable. The ILA had set as its objective the formulation of a pragmatic and feasible set of recommended rules and practices.<sup>236</sup> The result of the work of ILA Committee from 1996 to 2004 on the question of accountability of IOs is a large spectrum of relations of IGOs with various actors dealt with through the lens of accountability in a relatively general manner. However, the typologies presented and the categorization undertaken in the work of

<sup>231</sup> Chimni, B. S., “Theme III: Global Governance: Institutions – International Organizations Today”, *op. cit.*, at p. 899; Loibl, Gerhard, “Theme III: Global Governance: Institutions – Co-operation and Transparency between International Legal Institutions”, *LJIL*, Vol. 16, No. 4, 2003, pp. 900–901, at p. 901.

<sup>232</sup> Kelley, Judith, “International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions”, *International Organization*, Vol. 58, Number 3, pp. 425–459, at pp. 428–431.

<sup>233</sup> Klabbers, Jan, “The Life and Times of the Law of International Organizations”, *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317, at p. 299.

<sup>234</sup> Barnett, Michael N. and Finnemore, Martha, “The Politics, power, and Pathologies of International Organizations”, *IO*, Vol. 53, No. 4, 1999, pp. 699–732, at p. 726.

<sup>235</sup> An accountable IO has been defined and described as an IO that fulfils the purposes of its charter while delivering higher benefits to the world community than whatever costs are exacted. For more on the measurement of accountability of IOs see: Charnovitz, Steve, “Accountability of Public and Private International Organizations”, in Bob Reinalda (ed.), *The Ashgate Research Companion to Non-State Actors*, Ashgate, 2011, pp. 333–346, at p. 339.

<sup>236</sup> International Law Association (ILA), “Accountability of International Organizations”, *London Conference Report*, 2000, p. 2.

the ILA on the accountability of IOs, and the clear-cut distinctions made between various levels of accountability, seem to be illuminating for further research or any closer examination of the question of accountability of IOs.

With regard to the issue of the responsibility of international organizations, the ILA Committee seems to take a somewhat broader approach to the subject than the International Law Commission has done. The ‘recommended rules and practices’ of the ILA Committee cover all kinds of responsibility to be assumed by international organizations and not only those towards Member States and IOs and other States or IOs, which seem to be the main focus of the International Law Commission.<sup>237</sup> The shifts in governance and public authority in recent decades away from the territorial state towards different forms and levels of governance, within and beyond the parameters of the traditional nation state, has not been matched by a shift in accountability relationships beyond that applicable within the confines of the territorial state. This results in gaps in the accountability of (public) actors for the exercise of public authority.<sup>238</sup> In other words, the shift in international governance has raised the question of accountability at that level.

At the international level, where the principle of democracy has made only a limited entry at the level of the international legal order itself as well as with regard to the institutionalization of international organizations, a broad concept of ‘accountability’ is less familiar. International lawyers have traditionally focused on well-established legal principles such as state responsibility, while the operationalization of a broader concept of accountability in the sense of an actor being held to account in an iterative and interactive process is still nascent.<sup>239</sup> ‘Accountability’ involves the justification of an actor’s performance *vis à vis* others, the assessment of judgment of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to them.<sup>240</sup> ‘Notwithstanding its increasingly frequent invocation by international lawyers, the concept of ‘accountability’ has not acquired a clearly defined legal meaning’.<sup>241</sup>

The dominant form of ‘accountability’ in international law has traditionally been the mechanisms of (state) responsibility and (state) liability, characterized by a claim by injured parties against a wrongdoing state (or organization) with a view to obtaining reparation for the injury caused by wrongful acts. This legal form of state accountability dominates, for example, the work by the International Law

<sup>237</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 27, Fn. 24.

<sup>238</sup> Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 3–20, at p. 6.

<sup>239</sup> *Ibid.*, at pp. 4–5.

<sup>240</sup> Grant, R. W. and Keohane, R. O., “Accountability and Abuses of Power in World Politics”, *American Political Science Review*, Vol. 99, 2005, pp. 29–43, at pp. 29–30.

<sup>241</sup> Brunnée, Jutta, “International legal accountability through the lens of the laws of state responsibility”, *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 21–56, at p. 22.

Commission on the responsibility of states (ASR) and the responsibility of international organizations (ARIO). Although this mechanism is certainly of continuing importance, it currently reflects only a small fraction of what can be termed (evolving) accountability processes in contemporary international law. Indeed, there are an increasingly rich variety of other modes of international legal accountability. The rise of these alternative modes “is a reaction both to the limits of the conceptual structure that anchors the state responsibility regime and to the fact that states only rarely take the formal steps of invoking it”.<sup>242</sup>

Already the provocative question “Which form of accountable government for the European Union?” has been asked with regard to the Union by European legal scholars. But in the opinion of some scholars, one can hardly envisage asking an equivalent question for any other international organization.<sup>243</sup>

This section will not put forward a comprehensive analysis of the whole notion of accountability and its levels and forms by the International Law Association (hereinafter ILA). Rather, in the course of the following chapters and sections of the thesis, the relevant specific principles relating to accountability will be dealt with.

According to the ILA final report, ‘accountability’ of international organizations has to be conceived in terms of legal and non-legal forms and mechanisms, without *per se* considering the issue of the traditional legal concepts of liability and responsibility of these organizations for the damages caused and/or breaches of international law. In other words, ‘accountability’ is presented in this report as a notion encompassing legal, political, administrative and financial forms of internal and external scrutiny and monitoring of activities and omissions of international organizations, of which liability and responsibility are important, but separate components.<sup>244</sup>

Furthermore, accountability of international organizations according to national law is a study of one aspect of the broad concept of accountability of international organizations as it was developed by the International Law Association: the question whether and to what extent international organizations are bound by national law and may become accountable in the event of non-compliance with such law. Could International organizations as creatures of the international legal system be held accountable at a different level of governance – the domestic legal order?<sup>245</sup> Some scholars, prominently Dekkar, have expressed doubts whether the ILA Committee has really succeeded in conceptualizing the concept of accounta-

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<sup>242</sup> Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *op. cit.*, at p. 5.

<sup>243</sup> *Ibid.*, at p. 5.

<sup>244</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 23.

<sup>245</sup> Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *op. cit.*, at pp. 17–18.

bility as an actual or potential part of the existing legal system of international organizations. In order to examine the precision of such evaluations, it is necessary to first focus on the different levels of accountability conceptualized in ILA final report.

*a) Different Forms and levels of Accountability*

Apart from many different elaborated definitions presented for the concept of accountability and its vocabulary meaning,<sup>246</sup> a very brief and proper definition seems to be ‘responsiveness’, which implies transparency, responsibility and its consequences.<sup>247</sup> This definition reflects very well the fact that accountability is an element of human rights-based approaches. State accountability, a concept which is comprised of two limbs, namely, determination of liability and redress – as any sort of reparation and making good any harm – understood in relatively broad sense, is evolving into a legal principle.<sup>248</sup> The questions of accountability and responsibility have moved into the centre of international attention, and have reached major focus among scholars and practitioners both resulting in discussions in theory and doctrine, and leading to the establishment of different mechanisms in practice. Effective accountability is an increasing preoccupation for the international community.

Parties to accountability relationships may be unlimitedly different and manifold; a fact that leads to the existence of a large variety of the forms of accountability. However, some main forms of accountability may be distinguished, which in turn provide for the possibility of categorization of different forms of this concept into principal categories and divisions. The three types of accountability (legal, political and administrative) do not pretend to cover the entire spectrum of possible accountability mechanisms. One could also include mechanisms of financial, institutional or reputational accountability.<sup>249</sup> In another categorization, arguably from international relations perspective, the legal, political and moral accountability has been distinguished.<sup>250</sup> In any way, accountability is always a mixture of different measures with various natures, the result of which ultimately is

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<sup>246</sup> Keohane, Robert O., “The Concept of Accountability in World Politics and the use of Force”, 24 *Mich. JIL*, 2003, pp. 1121–1141; Slaughter, “Accountability of Government Networks”, 8 *Ind. J Global Legal Stud* (2000–2001), p. 347.

<sup>247</sup> For a survey of the vocabulary roots and meaning of the concept of “accountability” see: Maldonado Pyschny, Nicole, *Good Governance: Begriff, Inhalt und Stellung zwischen allgemeinem Völkerrecht und Souveränität*, Carl Heymanns Verlag, 2013, at pp. 50–55.

<sup>248</sup> For a comprehensive study of the concept of State accountability as determination of liability entailing a broad range of redress see Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, Routledge, 2011.

<sup>249</sup> Grant, R. W., and Keohane, R. O., “Accountability and Abuses of Power in World Politics”, *American Political Science Review*, Vol. 99, 2005, pp. 29–43, at pp. 29–30.

<sup>250</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms, op. cit.*, p. 150.

that the entity is held accountable and gives account for its conduct and behaviour that also include the entity's own measures that are taken for the purpose of the realization of accountability.

A very important point that has to be made clear from the outset, before any other analysis of the aspects of accountability, is whether the accountability is an *ex post facto* or the promotion of accountability is a constant happening that covers even the period before the conduct has been performed. It appears that "accountability represents a continuum of answerability."<sup>251</sup> The view has been held that in international law, dominated by traditional concepts and principles, there is a need and room for innovation and adaptation and also for contextual 'learning' from different international organizations, among others the European Union, and other disciplines. In this connection, the view is also held that the traditional concepts of responsibility and liability to control the activities of international organizations are too formal and limited, as already appears from the fact that they are rarely applied in practice.<sup>252</sup> To put it differently, it is contended that the formal and limited models of controlling international organizations underlying the notions of responsibility and liability should be replaced by the less formal and more open model of which is called the 'accountability' of international organizations.<sup>253</sup> The view has been held that on the basis of a more modern and realistic view of the plurality of legal phenomena in present day legal systems, a coherent legal concept of the 'accountability' of international organizations can be developed.<sup>254</sup> Accountability is one form of answerability, composed of two constituent elements, namely, determination of liability and redress;<sup>255</sup> an understanding that makes it difficult indeed to distinguish the notion from the very similar concept of responsibility, which anyhow is a legal concept, whereas accountability is a generic notion referring to different forms of answerability. In the words of *Yarwood*, accountability is a tool for regulating and responding to the abuse of power.<sup>256</sup>

Let us imagine that there is a legal norm that does not entail a legal obligation. What should happen if such a legal norm that is not representative of a legal obligation<sup>257</sup> is breached? It seems that in such cases the concept of accountability would be helpful since the doctrine and concept of international legal responsibility alone is not responsive for such cases. In addition, the distinction between obligation and the norm entailing the obligation is also helpful for the purpose of the argument that the breach of the norm and the obligation are two things that

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<sup>251</sup> *Ibid.*, p. 155.

<sup>252</sup> Dekker, Ige F., "Accountability of International Organizations: An Evolving Legal Concept?", *op. cit.*, p.21.

<sup>253</sup> *Ibid.*, p. 22.

<sup>254</sup> *Ibid.*, p.23.

<sup>255</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, *op. cit.*, p. 32.

<sup>256</sup> *Ibid.*, p. 32.

<sup>257</sup> *Ibid.*, p. 83.

happen maybe by means of the same conduct but should be looked at separately. Importance of this issue becomes clear when the question of the reparation comes into play. Highly doubtful is the statement that the international legal responsibility is able to wipe out not only all the consequences of the breach of obligation, but also repair the entire negative impacts of the violation and disrespect of the norm. For removing all the consequences of the violation, the notion of accountability could be of relevance and help.<sup>258</sup> Accountability has the capacity to fill the gap of answerability, taking into account the cases of the succession of entities, being it States or IOs, where often a bridge is needed to overcome the impunity that results from the discontinuance that takes place in succession cases.

From another perspective, accountability has a major place in the interactions between legitimacy – democratic legitimacy – and the governance.<sup>259</sup> As a component of legitimacy, in this sense the accountability could provide the legitimacy to the decisions and actions of IOs, as it has been observed that the legitimacy encompasses several elements.<sup>260</sup> Whenever we search for a democratic model, it is indispensable to have accountability, since accountability is one of the elements of democratic model.<sup>261</sup> Nevertheless, it is noteworthy to mention that with regard to accountability what matters the most and renders this concept a productive principle for the conduct and functioning of a body, is that accountability should be to the right people and in a proportionate measure.<sup>262</sup>

Accountability may be generally understood as responsiveness. The question that may in any case be posed in the context of present analysis is whether accountability has any normative standing. In the sense that is there any norm prescribing international accountability. *Yarwood* points out that:

“...there is no express legal obligation to ensure states are held accountable and that it cannot be assumed that when states respond to a breach of international law, the objective is to seek accountability”.<sup>263</sup>

“State accountability may not yet be *lex lata* under public international law but just a few examples taken from state practice have shown that the concept has increasing support as *lex ferenda*”.<sup>264</sup>

Some hold the idea that international organizations are very different from one another, and also face different kinds of challenges and practical problems.<sup>265</sup> As

<sup>258</sup> *Ibid.*, p. 84–85.

<sup>259</sup> Weiler, J. H. H., “The Geology of International Law – Governance, democracy and Legitimacy”, *ZaöRV*, 64, 2004, pp. 547–562.

<sup>260</sup> *Ibid.*, p. 552.

<sup>261</sup> *Ibid.*, p. 560.

<sup>262</sup> Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, 6 (2009), pp. 319–358, p. 334.

<sup>263</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms, op. cit.*, p. 28.

<sup>264</sup> *Ibid.*, p. 154.



has been observed, the type of accountability for each IO should be tailor-made and developed by the IO itself in order to fit the culture of the organization.<sup>266</sup> To what extent this observation is implemented in practice with respect to legal accountability in general and international legal responsibility specifically, will be dealt with closer in the next chapters.

One important aspect of accountability is the interlocutor of the accountability, the so-called account-holders which raises the question of vis-à-vis whom is the accountability demanded or taking place. It is in connection with this aspect that the issue of democratic accountability has also been put forward as a necessary characteristic of accountability. It can be said that the concept of accountability is wider than the more limited concept of responsibility – which is furthermore restricted to states and IOs as account-holders – thus more suitable to IOs, at least temporarily. However, it is expected that mechanisms, including IOs, are not naturally and automatically keen to be brought to accountability and it may also be true that preceding every case of yielding to accountability and quitting the resistance to accountability is normally a pressure, social or other, that encourages the body to submit to accountability, as long as accountability is not a legal rule giving rise to a legal obligation in itself. In the next section, primarily the legal accountability and its relations to international legal responsibility will be dealt with, and it will be made clear whether and how this notion could be useful for our purposes.

#### *b) Legal Accountability*

The relationship between responsibility and accountability that may also be called answerability,<sup>267</sup> lays the foundations for responsibility and its importance and the necessity of the ILC codification project dealing with responsibility of IOs. Legal accountability, equal with legal control,<sup>268</sup> is the cumulative result of a range of measures,<sup>269</sup> an issue that has nowadays penetrated and entered into almost all areas of international law.<sup>270</sup> In the thoughts of Edmund Burke, the principle of

<sup>265</sup> Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *op. cit.*, at p. 18.

<sup>266</sup> Trebilcock, Anne, “Implications of the UN Convention against Corruption for International Organizations: Oversight, Due Process, and Immunities Issues”, *International Organizations Law Review*, Vol. 6, 2009, pp. 513–540, at pp. 517–518 and 536.

<sup>267</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, *op. cit.*, p. 5.

<sup>268</sup> Reinisch, August, “International Organizations and National Law”, *Netherlands Yearbook of International Law*, Vol. XXXVI, 2005, p. 119–167, at p. 121; Reinisch, August, “Governance without Accountability?”, *German Yearbook of International Law*, Vol. 44, 2001, pp. 270–306, at p. 271.

<sup>269</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, *op. cit.*, p. 141.

<sup>270</sup> For the discussion of the accountability of the prosecutor in ICC see Danner, Allison Marston, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court”, *AJIL*, Vol. 97, 2003, pp. 510–552, especially pp. 522–552.

accountability as a concept is inherent in the idea of trust.<sup>271</sup> Legal accountability is a widespread call and aspiration that has been expressed and aspired by commentators and scholars with respect to all the different actors and players in international relations.<sup>272</sup> Sometimes in the scholarship the concepts of accountability and liability have been used interchangeably. For instance, accountability in the Understanding of Grant is a stage that follows responsibility:

“Even where responsibility arises, however, there remains the matter of holding the responsible party accountable.”<sup>273</sup>

Accordingly, accountability cannot be imagined without a mechanism installed precedingly for this purpose. In this sense, accountability is the stage of the implementation of responsibility. However, it is interesting to witness the establishment of accountability mechanisms in the internal structure of financial institutions, for instance, which assume both tasks. As it has been referred to above, the concept of accountability is extremely vast and can take different forms and formalities in its conception, which maybe explains why the ILC, by nature a body having the mission of contributing to the development of international law, has chosen the concepts of responsibility and liability, two main forms of legal accountability, for its work and not the more broader notion of legal accountability in general. International legal responsibility may be considered as a kind of, one of the many facets of, and finally, a manifestation of accountability, in general and legal accountability, specifically, that is a guarantee for and ensures the rule of law, which is comprised of those sets of standards that are accepted and recognized as legal norms. However, in this context important and a relevant matter that remains to be made clear is whether the account-holders, and their satisfaction through justice done to them, are the main objectives, or is it the respect for the legal norms, a major consequence of which would inevitably be the strengthening of the legal system and order. In other words, what aim does the legal accountability concept and mechanism follow? The answer to this question would necessarily shed also light upon the objective of international legal responsibility, which is essential and conclusive for the evaluation of the formulations of any sets of articles that deal with the question of responsibility of subjects of international law. A

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<sup>271</sup> Rauschnig, Dietrich, “Article 75”, in Simma, Bruno/Khan Daniel-Erasmus/Nolte, Georg/Paulus, Andreas, *The Charter of the United Nations, A Commentary*, third edition, OUP, pp. MN 3.

<sup>272</sup> Christenson, Gordon A., “*Jus Cogens*: Guarding Interests Fundamental to International Society”, *Virginia Journal of International Law*, Vol. 28, No. 2, Spring 1988, pp. 585–648, at pp. 589 and 648; Lauterpacht, Elihu, “Judicial Review of the Acts of International Organizations”, in Laurence Boisson de Chazournes and Phillippe Sands, (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, pp. 92–102.

<sup>273</sup> Grant, D. Thomas, “International Responsibility and the admission of States to the United Nations”, *Michigan Journal of International Law*, Vol. 30, No. 2, 2009, pp. 1095–1185, at p. 1131.

hardly contestable point, however, is that the establishment of a legal system seeks as one of its goals the “accountability in the exercise of power”.<sup>274</sup>

The researches on the juridical support of the concept of accountability, at least with regard to States, has been positive, concluding that the international legal order is accommodating the notion that a State be held accountable.<sup>275</sup>

The legal accountability is only a form of accountability, the other forms varying from moral, political, administrative and so on. It appears that the most simplistic definition of legal accountability based on the understanding of accountability as answerability of an entity, would be the answerability of a subject of international law with respect to its behavior evaluated with international legal norms and rules as the measurements and parameters of the assessment.

The concept of accountability is generally based on the idea that actors have obligations to act in ways that are consistent with accepted standards of behaviour and that other actors will sanction them for failures to do so. Legal Accountability refers to the requirement that agents abide by formal rules and are prepared to justify their actions in those terms, in courts or quasi-judicial arenas.<sup>276</sup> Michael Dowdle suggests that international regimes operate with an idea of accountability inherited from Anglo-American ideas of public accountability.<sup>277</sup> Because of the imbalance in the power relationship between every ruler and its subjects, the accountability presents itself as an indispensable requirement, which at the same time also provides for legitimacy. Therefore, wherever the power relationship between the parties is manifestly asymmetrical, the accountability requirement presents itself.

It is not enough to humanize forms of foreign domination to ensure that they operate for the benefit of the local population; there must also be mechanisms to ensure that the humanitarian standards are adhered to.<sup>278</sup> Demands for judicial reviews at the international level are increasing, demands that are also sometimes

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<sup>274</sup> Roth, Brad R. *Sovereign Equality and Moral Disagreement. Premises of a Pluralist International Legal Order*, Oxford University Press, 2011, p. 11.

<sup>275</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, *op. cit.*, p. 93.

<sup>276</sup> Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 292.

<sup>277</sup> Dowdle, M. W., “Introduction: on the crisis in public accountability”, in M.W. Dowdle (ed.), *Public Accountability, Designs, Dilemmas and Experiences*, Cambridge Studies in Law and Society, Cambridge, 2006, at p. 6.

<sup>278</sup> Wilde, Ralph, “Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 318.

associated with constitutionalism.<sup>279</sup> The imposition of accountability may take place in two ways: either “bottom up” or “top down”, or even both simultaneously, depending on the legal person subjected to accountability and the structures of the international legal order at a certain point of time.

One of the most important points that can be regarded as the distinguishing characteristic of international responsibility doctrine from the broader concept of accountability, is the fact that accountability may be the subject of invocation by different actors, not only and primarily limited to States, while the invocation of international legal responsibility is actually reserved to and restricted to States, on the first place, and IOs as subsidiary subjects of international law, on the second.<sup>280</sup> Thus, *Yarwood* rightly believes that the scope of accountability is larger than responsibility.<sup>281</sup> With respect to accountability, and the preconditions of its incurrance, a very essential question comes to mind as to whether the breach of any international obligation or norm raises accountability, or is it only the consequence of the breach of certain norms with special characters, as *jus cogens* for instance; and more importantly and generally, whether there has always have to occur a breach of an international norm, or a damage and harm inflicted would suffice to raise accountability.

In case the former conditions would suffice to trigger accountability mechanisms, that concept could then fill the gap the responsibility and liability would leave behind, and that is with regard to the cases in which a harm and damage has been inflicted following a lawful conduct that does not form part of the conducts that would raise liability for non-prohibited conducts. As the final word, it remains to observe that the notion of accountability and the doctrine of international legal responsibility are two sides of the same coin.

At present, the notion of accountability still suffers from conceptual indeterminacy, even if three characteristics have been identified, namely, a mix of motivations, a mix of accountability seekers and a mix of responses,<sup>282</sup> in the eyes of some scholars, it can even be a strong point for the accountability, making it more flexible and giving some space for the consideration of contextually relevant factors.<sup>283</sup> Given the flexibility of the concept of accountability – also a main reason for its attractiveness, particularly, for IOs – in the next section, the modalities of accountability of IOs will be examined.

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<sup>279</sup> Klabbers, Jan, “Constitutionalism Lite”, *JOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at pp. 32–33 and 35.

<sup>280</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, *op. cit.*, p. 74.

<sup>281</sup> *Ibid.*, p. 129.

<sup>282</sup> *Ibid.*, p. 162–163.

<sup>283</sup> *Ibid.*, p. 158.

c) *Accountability of international organizations*

Call for more accountability on the part of IOs is no more news to international law scholarship.<sup>284</sup> However, it has been stated that only from 1990 the issue of the accountability of IOs has come in the focus of international attention.<sup>285</sup> IOs may, and should be held accountable, at least in terms of the content and provisions of their mandates, namely to what extent have they undertaken efforts to implement their mandates.<sup>286</sup>

The intention of this section is not at all to present accountability as a substitute for responsibility, nor to compare the two concepts in order to draw a conclusion at the end to the effect that one or the other concept should have been accepted and specified on an exclusive basis. But rather the intention is to present the accountability as a complement to responsibility. In a world, in which, to borrow the words of professor Zemanek, the effectiveness of the institution of responsibility of states for promoting and assuring the observance of international law, if not completely doubted, is at best not adequate,<sup>287</sup> let alone to the responsibility of IOs under existing circumstances, any other mean to achieve that aim, to the extent brought in harmony with the whole legal order, should be welcomed. Unanimous calls for greater accountability of IOs among the scholars and practitioners have reached a level that is no more to overlook. Building on the understanding of the accountability as a tool for regulating and responding to the abuse of power, no doubt the notion is also applicable and relevant with respect to IOs, since as it has been explained earlier, the IOs are increasingly the holders of power at the international level, thus making it not only desirable, but also necessary to apply this notion with regard to these subjects of international law. The need for

<sup>284</sup> Nye, Joseph S. Jr., "Globalization's Democratic Deficit: How to Make International Institutions More Accountable", *Foreign Affairs*, Vol. 80, July/August 2001, at p. 2; Magnusson, Finnur, "Targeted Sanctions and Accountability of the United Nations Security Council", *ARIEL*, Vol 13, 2008, pp. 35–78; Franck, T., *Fairness in International Law and Institutions*, Oxford University Press, Oxford, 1995; Reinisch, A., "Securing the Accountability of International Organizations", *Global Governance*, Vol. 7(2), 2001; Hafner, G., "Accountability of International Organizations – A Critical View", in R St J Macdonald and DM Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, Martinus Nijhoff, 2005, 585; Bradford, Colin I. JR., and Linn, Johannes F. (eds.), *Global Governance Reform. Breaking the Stalemate*, Brookings Institution Press, Washington D. C., 2007, pp.115–131; Bassiouni, C. M., "Searching for Peace and Achieving Justice: The Need for Accountability", 1996, *Law and Contemporary Problems*, Vol. 59, p. 9, at p. 19; Pallis, M., "The Operation of UNHCR's Accountability Mechanisms", *New York University Journal of International Law and Politics*, Vol. 37, 2005, pp. 869–918.

<sup>285</sup> Reinisch, August, "International Organizations and National Law", *Netherlands Yearbook of International Law*, Vol. XXXVI, 2005, p. 119– 167, at p. 120.

<sup>286</sup> Garms, Ulrich, "Promoting Human Rights in the Administration of Justice in Southern Sudan. Mandate and Accountability Dilemmas in the Field Work of a DPKO Human Rights Officer", *International Organizations Law Review*, 2009, Vol. 6, pp. 581–600, at p. 587.

<sup>287</sup> Zemanek, Karl, "Does the Prospect of Incurring Responsibility improve the Observance of International Law?", in Maurizio Ragazzi(ed.), *International Responsibility Today*, Martinus Nijhoff Publishers, 2005, pp. 125–134, at p. 130.

accountability of IOs arises from the fact that different and various parties from States, other IOs to individuals and other entities may be affected, injured and damaged by the activities of IOs.<sup>288</sup> Accountability is not only judicial, but it also encompasses other forms of accountability of IOs, the most common forms are known under the titles: “The power of purse” and the “power to withdraw from the IO”.<sup>289</sup> Responsibility and liability of IOs are two legal forms of accountability at the second and third level. In this section, it will be tried to depict a comprehensive schema and picture of the accountability with respect to the IOs.

In the area of human rights, a recurring question is how the organization should deal with alleged breaches of human rights obligations of its subsidiary organs in practice. The immunity system will often bar individuals from directly addressing claims to national judicial bodies. Often alternative mechanisms need to be put in place concomitantly to address alleged human rights violations. The possibility of creating such mechanisms in post-conflict societies, however, is not an easy task.<sup>290</sup> In practice, the applicable law in territories under UN administration, for instance, must be taken into account when considering the available review mechanisms. One of the recurrent problems in international administrations is the definition of the applicable legal framework. Apart from defining the human rights obligations of the official institutions, for instance, the first UNTAET regulation also adopted the principle that the whole body of Indonesian law would apply in East Timor, provided that it did not conflict with the enumerated internationally recognized human rights standards.<sup>291</sup> In another case, while UNMIK’s mandate was to rebuild an entire public administration in Kosovo, it is questionable whether the fulfilment of such a mandate must tolerate violations of individual’s human rights.<sup>292</sup>

The accountability issue has to be analyzed from various perspectives.<sup>293</sup> One of the trends towards the realization and implementation of accountability is the

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<sup>288</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemmer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 700.

<sup>289</sup> Klabbers, Jan, “Constitutionalism Lite”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at p. 41.

<sup>290</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 344.

<sup>291</sup> *Ibid.*, p. 345.

<sup>292</sup> Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 361.

<sup>293</sup> Scott, C., “Accountability in the Regulatory State”, *Journal of Legal Studies*, 38, 2000, p. 38; The report of the ILA Study Group on the Responsibility of International Organizations, Sophia Conference, 2012, p. 25.

self-regulation measures, which may partly include human rights obligations for IOs. Through the practice of self-regulation, the IOs try to incorporate international obligations generally, and sometimes even human rights obligations, in their internal legal systems. In this connection, the question will be raised as to whether these regulations and obligations deriving from these documents would have any kind of binding effect, and in any case, how high is their effectiveness? In this regard, another question that also comes to the mind is whether self-regulation is a better alternative for ultimately binding the IOs to the international legal instruments. In other words, could self-regulation be a replacement for the traditional sources of international law for the purpose of commitment of the IOs to different international legal obligations? At least a negative effect of such trend would be the diversification of the primary rules applicable on IOs, and as a result, the fragmentation of the law of international organizations. An interesting aspect with regard to the self-regulation trend, which is believed to be in part a reaction to the criticisms echoed against the practice of the IOs, is their effectiveness in influencing the behavior of IOs and their employees.

With respect to the content of the international accountability of IOs, it appears that it depends to a large extent on the scope of competences, tasks and activities of each IO individually. In other words, the content of accountability of IOs may be as varied as the scope of the activities of different IOs. For instance, with regard to the practical case of fund management, accountability of the Office of the United Nations High Commissioner for Human rights with regard to the use of the trust funds (mismanagement of trust fund) for the victims of torture may be mentioned. The contestation of sovereignty within international organizations, following the conferral of governmental powers on these bodies, is a manifestation of one of the forms of the accountability of IOs.<sup>294</sup>

Accountability is not limited in time or restricted to a certain period. In connection with different activities and stages of the life of an IO, the question of accountability may become relevant. For example, it has been stated that other principles that should be taken into account and followed during the membership process are democratic or accountability principles.<sup>295</sup> It has been argued by some commentators that the key to respect for and action in accordance with the principles of democratic accountability in the course of decision making in IOs is the realization of democracy in the internal affairs and system of member States.<sup>296</sup> However, this opinion is not general and some other commentators, on the con-

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<sup>294</sup> Sarooshi, Dan, *International Organizations and Their Exercise of Sovereign Powers*, Oxford University Press, first edition, 2005, p. 7.

<sup>295</sup> Duxbury, Alison, *The Participation of States in International Organizations, The Role of Human Rights and Democracy*, Cambridge University Press, 2011, p. 299.

<sup>296</sup> *Ibid.*, pp. 300–301.

trary, believe that participation of democratic States in IOs do not necessarily lead to the improvement and augmentation of democracy within IOs.<sup>297</sup>

It has been observed that institutional channelling of societal demands may be essential to IO accountability.<sup>298</sup> Among the major elements that in the realization of accountability should be taken into account, are the societal demands and environmental values. Some authors believe that institutional reforms towards more accountability results from different stages of pressures exercised by principals.<sup>299</sup> In other words, the IOs respond to the pressures by the principals ultimately by reforming their policies, behaviours and practices.

It has been observed that the governance has been transferred from national to international level, or the governmental tasks are increasingly performed at the international level without a compatible and necessary accountability regime being installed or transferred consequently. In this situation some scholars remind us of the situation of “individuals finding themselves at the fault lines of emerging multi-level international governance”.<sup>300</sup> At the same time, the demands of accountability from IOs may clash with the need for effectiveness and may try to resist the need to accountability.<sup>301</sup> An interesting observation in this connection is that the mechanisms of the mutual accountability between universal and regional organizations, a possible way to fill the accountability gap of IOs, manifest themselves insufficient:

“In the context of increased interaction between universal and regional organizations, the question of mutual accountability between such organizations also deserves to be raised. The current mechanisms of accountability requiring each organization to account for its activities are not sufficient to support the proposition that there are checks and balances among these organizations. These are crucial for strengthening partnerships and solidarity among organizations.”<sup>302</sup>

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<sup>297</sup> *Ibid.*, p. 302.

<sup>298</sup> Keohane, Robert O. and Nye Jr., Joseph, “Global Governance and Accountability: It’s Not the Democratic Deficit”, Paper Presented at IGCC Conference on Globalization and Governance, March, La Jolla, California; Nielson, Daniel L. and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, 57, issue 1, 2003, pp. 241–276, at p. 266.

<sup>299</sup> Nielson, Daniel L. and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, 57, issue 1, 2003, pp. 241–276, at p. 266.

<sup>300</sup> Simma, Bruno, “Universality of International Law from the Perspective of a Practitioner”, *EJIL*, Vol. 20, No. 2, 2009, pp. 265–297, at p. 265.

<sup>301</sup> Ruiz-Fabri, H. and Sicilianos, L. A. and Sorel, J. M. (eds.), *L’Effectivité des organisations Internationales*, Pedone, 2000, p. 75.

<sup>302</sup> Boisson de Chazournes, L., “Relationships and interfaces between regional and universal organizations: room for new developments”, *International Organizations Law Review*, vol. 9, 2012, pp. 263–265, at p. 265.



Another concept that could provide an answer to accountability gap is Global Administrative law (GAL). GAL could also provide an answer to another reality of the today's world, which complicates further the question of the accountability of IOs, namely the expanded use of public-private partnerships (PPPs) by the IOs as the practical framework in performing their functions.<sup>303</sup> At a later stage, when we discuss the ARIO specifically we will return to the PPPs and their implication for the attribution of conduct for the purpose of international legal responsibility.

Accountability of IOs, further strengthened by the existence of accountability mechanisms, such as standing claims commissions in the framework of the U.N. peacekeeping missions, may also have a preventive effect for these actors as well as their agents:

“By holding itself accountable to those it injures, the U.N. and its peacekeepers will be less likely to harm people in the future.”<sup>304</sup>

In another place, specifically with regard to the preventive effect of the standing claims commissions it has been observed that:

“A true standing commission would not only avoid the need to set up a claims commission after injuries occur, but would also encourage the U.N. to take greater care when deploying of peacekeepers.”<sup>305</sup>

aa) Constitutionalism: A possible solution for the realization of Accountability?

Since the notion of accountability, in comparison to the concept of legal responsibility, is a relatively flux concept, before undertaking any analysis it is essential to investigate the preconditions that pave the way, and even sometimes their presence is vital for accountability to be realized. Such inquiry would then serve as the link between accountability and constitutionalism discourse. For this purpose, in the following a definition of the “constitutionalism” as a concept and in light of its relevance for the accountability should be delivered briefly, and subsequently its content as a (legal) concept, containing a certain vision of world order and the role of international law, should be made clear.

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<sup>303</sup> Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, vol. 6, 2009, pp. 319–358, at p. 346.

<sup>304</sup> “Peacekeeping without Accountability – The United Nations’ Responsibility for the Haitian Cholera Epidemic”, Final report prepared by Transnational Development Clinic, Jerome N. Frank, Legal Services Organization, Yale Law School, Global Health Justice Partnership of the Yale Law School and the Yale School of Public Health, and Association Haïtienne de Droit de l’Environnement, 2013, p. 57.

<sup>305</sup> *Ibid.*, p. 58.

### 1) The concept of Constitutionalism

While a thorough discussion of various definitions of constitutionalism is beyond the scope of the present thesis, it will be tried to give a definition through the lens of the links between constitutionalism and accountability. Hardly any branch of international law may nowadays be found where the “constitutionalism” has not been discussed in its context.<sup>306</sup> For this reason, but also because the main concern of constitutionalism is the rule of law, it may be appropriate to look at this concept in the context of accountability to see in what relation this concept stands in connection with the accountability of IOs, including whether there could be a kind of interaction between these two concepts and demands.

As *Kennedy* puts it, Constitutionalism seeks to: “reinvent at an international level the sovereign authority it was determined to transcend”.<sup>307</sup> Constitutionalism can be considered as a theory, originating from the twentieth century continental Europe’s thoughts, that devises the use of power in a certain direction exclusively for certain purposes, and for that reason it has been equalized with the efforts to establish a legal community at the international level. In the same spirit, the constitutionalism has been regarded as “striving for a global legal community that frames and directs political power in light of common values and a common good.”<sup>308</sup> For *Klabbers*, constitutionalism represents a response to the challenge of fragmentation in international law; a system, a matrix that manages the contradictions between the opposing sets of rules and regimes.<sup>309</sup> As the same scholar puts it, constitutionalism is the state of “being flexible between change and stability but without being too flexible in one direction”.<sup>310</sup> In the opinion of the proponents of the feasibility of constitutionalism at the international level, “international constitutionalism is simply a complement to municipal constitutionalism and a further step in the progress of civilization.”<sup>311</sup> Constitutionalism is the final stage of development of a legal system where it has reached full development.<sup>312</sup>

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<sup>306</sup> Kennedy, David, “The Forgotten Politics of International Governance”, *European Human Rights Law Review*, Vol. 2, 2001, p. 117–125 in Klabbers, Jan, “Constitutionalism Lite”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at p. 47; De Wet, Erika, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, *Leiden JIL*, Vol. 19, 2006, pp. 611–632; Paulus, Andreas L., “The International Legal System as a Constitution”, in Dunoff, Jeffrey L. and Trachtman, Joel P., *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, pp. 69–109.

<sup>307</sup> Kennedy, David, “The International Style in Postwar Law and Policy”, *Utah Law Review*, 1994, p.14; Klabbers, Jan, “Constitutionalism Lite”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 31–58, at p. 46.

<sup>308</sup> Von Bogdandy, Armin, “Constitutionalism in international law: Comment on a Proposal from Germany”, *Harvard International Law Journal*, Vol. 47, Nr. 1, Winter 2006, pp. 223–242, at p. 224.

<sup>309</sup> Klabbers, Jan, “Constitutionalism Lite”, *op. cit.*, at p. 49.

<sup>310</sup> *Ibid.*, at p. 58.

<sup>311</sup> Von Bogdandy, Armin, “Constitutionalism in international law: Comment on a Proposal from Germany”, *op. cit.*, at p. 240.

<sup>312</sup> Hart, H.L.A., *The Concept of Law*, second edition, 1994, pp. 213 et seq.

In this connection, a relevant question that may be raised here is which level of accountability, including the second and third levels of liability and responsibility may better contribute to achieving and maintaining this balance between change and stability? And in the same spirit, how constitutionalism, once established, may contribute to the cause of accountability through its different levels? It is clear that all the levels of accountability, conceived by ILA in its final report, in one way or another, make part of the notion of constitutionalism. But more importantly for our main question relating to the necessity of accountability, once established the constitutionalism is a guarantor for the continuance of accountability. Accountability and the process of its implementation is part of the principle of rule of law.

Another relevant question in this context is whether accountability is one of the constituent elements of constitutionalism or a result of it, or both? Accountability is close to the concept and principle of rule of law, but may not only be limited to seeking account with respect to the legal rules. It is around this principle that the relationship of accountability and constitutionalism should be examined. In this respect, the relation between rule of law and constitutionalism is of relevance. Debates around constitutionalism are all in one way or another about proving or not, of whether we have passed the threshold necessary to say we possess over an international constitution, while even the coordinates of such threshold is not set yet. As constitutionalism may manifest itself in various models, for instance foundational constitutionalism, it is without doubt further useful to discern the most appropriate version that would contribute most to accountability purposes.

## 2) Constitutionalism and Accountability of IOs: A possible interaction?

In this section, the intention is to focus on constitutionalism in order to find an answer to the question of whether this theory, if realized in its entire and complete form, can contribute to the accountability of IOs. In general, the intention is to find out in which relationship these two concepts stand vis-à-vis each other.

Constitutionalism, as a vision of international governance, necessarily relates to accountability, as this latter concept not only forms part of the concept of good governance, but is also one of its cornerstones,<sup>313</sup> and at the same time a fundamental requirement of it.<sup>314</sup> The case law from the international administrative tribunals also shows tendencies towards reconciliation between functional necessity and constitutionalism.<sup>315</sup> The emphasis of the international administrative tri-

<sup>313</sup> Stapenhurst, Rick/O'Brien, Mitchell, "Accountability in Governance". Available on: <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> (last visited on 08.05.2015).

<sup>314</sup> <http://www.goodgovernance.org.au/about-good-governance/what-is-good-governance/> (last visited on 17.07.2014).

<sup>315</sup> In this respect see only Bustani Case at ILOAT: *In re Bustani Case ILOAT Judgment No. 2232*, of 16 July 2003; For comments on the case and the proponent opinion towards constitutionalist approach

bunals on the rule of law and the attempt to interpret the functional necessity in the direction of rule of law is a manifestation of constitutionalist trends in international administrative law. For instance, by way of introducing a higher degree of rule of law, the ILOAT tries to indirectly limit the arbitrary decisions of the organs of the IOs.

Constitutionalism manifests itself partly through judicial control.<sup>316</sup> For the realization of constitutionalism, the judicial control with respect to different areas of international law, for instance, human rights may be exercised.<sup>317</sup> Furthermore, constitutionalism may guarantee the principles and structures that effectuate checks and balances that lead to accountability:

“A constitutional reading of international law should avoid the parochial view of domestic law, but also of the international legal subsystems; rather, it should strive for a more comprehensive balancing of rights and interests beyond the narrow confines of a specific subsystem. It should use the potential for the checks and balances to hold all holders of public power accountable, whether state representatives or international civil servants.”<sup>318</sup>

Some scholars believe that pluralism is even more appropriate than constitutionalism in the postnational domain<sup>319</sup>, since it can offer a more compatible framework to realize accountability of subjects of international law, *inter alia*, international organizations that are among the main actors at the postnational domain. This position is mainly based on the potential that pluralism provides for constant checks and balances and its flexibility for rapid adaptation to changes. It is true that in a pluralist scenario, theoretically, accountability may be better served, simply because there are many sites of authority and wider scope of participation covering more marginal groups which result in multiple layers of account-holders. Checks and balances in the framework of pluralist approaches satisfy the necessity of flexibility in rapid establishment of responsiveness, as “pluralism represents a hybrid between rigid hierarchical structures and looser network forms of governance”.<sup>320</sup>

Another neighbouring approach seemingly appropriate would be the constitutional pluralism,<sup>321</sup> definitely offering stability and certainty in the legal order, but less arguably ensuring flexibility because of the same reasons preventing constitutionalism to be considered as a rapidly changing order, thus finally much more

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taken by the ILOAT *see* Klabbers, Jan, “The *Bustani* Case before the ILOAT: Constitutionalism in Disguise?”, *ICLQ*, Vol. 53, 2004, pp. 455–464, at pp. 461–463.

<sup>316</sup> Paulus, Andreas L., “The International Legal System as a Constitution”, *op. cit.*, at p. 76.

<sup>317</sup> *Ibid.*, at p. 104.

<sup>318</sup> *Ibid.*, at p. 109.

<sup>319</sup> *Ibid.*; Krisch, Nico, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, 2010.

<sup>320</sup> Dunoff, Jeffrey L., “Review: Beyond Constitutionalism: The Pluralist Structure of Postnational Law – By Nico Krisch”, *AJIL*, Vol. 107, No. 2, April 2013, pp. 483–488, at p. 485.

<sup>321</sup> *Ibid.*, at p. 487.

vulnerable than pluralism for being defenceless in facing the same criticism observed with regard to foundational constitutionalism.

bb) The present status of the accountability of IOs in the mirror of implementation mechanisms

Accountability, or better said unaccountability of IOs, is not an unknown or an unfamiliar matter. It can be easily deduced from the widespread criticism levelled against IOs at different occasions,<sup>322</sup> from the part of academia as well as practitioners.<sup>323</sup> Anxieties and some concerns relating to corrupt behaviours of some of the officials and agents of public international organizations have given rise to calls for more up to date accountability systems.<sup>324</sup> It is impossible to give a full description of the status of the accountability of all the different and various IOs existing at the international level – around five hundred governmental IOs to this date; neither is it the intention of this section to do so. From a theoretical perspective, as is the case with other subjects of international law, the power of international organizations entails their accountability.<sup>325</sup> Accountability as a notion is inherent in the nature of IOs. Even by the time of the London Conference of the ILA, it was admitted that international organizations are generically acquiring increasing responsibilities which required mechanisms of accountability. An increase in regulation is a global phenomenon with regard to IOs of all kind.<sup>326</sup> The situations in which the accountability of international organizations may arise concern always situations in which an international organization allegedly does not comply

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<sup>322</sup> Zemanek, Karl, “Is the Security Council the Sole Judge of Its Own Legality”, in Yakpo, Emile and Boumedra, Tahar, *Liber Amicorum Judge Mohammed Bedjaoui*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 629–645; Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, pp. 355–372; Wood, M. C., “Security Council Working Methods and Procedure: Recent Developments”, *International and Comparative Law Quarterly*, vol. 45, 1996, pp. 150–161; Dunworth, Treasa, “Towards a Culture of Legality in International Organizations: The Case of the OPCW”, *IOLR*, Vol. 5, No.1, 2008, pp. 119–139; Boorman, Jack, “IMF Reform: Congruence with Global Governance Reform”, in Colin I. Bradford JR. and Johannes F. Linn (eds.), *Global Governance Reform. Breaking the Stalemate*, Brookings Institution Press, Washington D. C., 2007, pp. 15–31.

<sup>323</sup> Abraham, Elizabeth, “The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in Its Mission to Kosovo”, *American University Law Review*, Vol. 52, pp. 1291–1337, at pp. 1292–1293.

<sup>324</sup> Trebilcock, Anne, “Implications of the UN Convention against Corruption for International Organizations: Oversight, Due Process, and Immunities Issues”, *International Organizations Law Review*, Vol. 6, 2009, pp. 513–540, at pp. 517–518 and p. 530.

<sup>325</sup> ILA, Report of the Seventy-first Conference, Berlin 2004 (London, International Law Association 2004) pp. 164–234, at p. 168.

<sup>326</sup> ILA, Report of the Seventy-first Conference, London 2000 (London, International Law Association 2000), p. 1.

with a legally valid – but not necessarily also legally binding – rule or principle of international law.<sup>327</sup>

Different levels and forms of accountability could be distinguished: legal, political, administrative and financial. It goes without saying that an international legal concept of ‘accountability’ is only applicable to those international organizations that possess ‘international legal personality’.<sup>328</sup> However, nowadays the *presumption* of international legal personality seems to be in theory and practice generally accepted for every entity which is established by states (or other international legal subjects) under international law and is entrusted with legal powers of its own.<sup>329</sup>

Making use of the insights of the so-called institutional legal theory, an alternative concept of accountability is presented covering in principle all situations of claims of non-compliance by international organizations with legally valid – but not necessarily also legally binding – rules and principles of international law.<sup>330</sup> Such a concept is governed by a set of basic principles, but within this legal regime a lot of different forms of accountability are possible, depending on the nature of the infringed norm concerned. Such a concept of accountability seems to reflect in a more adequate way than the traditional notions of responsibility and liability the character, development and needs of the complex legal systems of international organizations. Most importantly, it may improve the protection of the international rule of law and the compensation and satisfaction of victims of violations of these rules and principles, whether they are states, international organizations, peoples, private entities or individuals.

As far as the characterization of the wrongful act is concerned, the idea of the breach of a rule might also be misleading because there are cases of the invalid exercise of faculty or power which have nothing to do with a wrongful act, but which nevertheless consist essentially in conduct which is at variance with what the rule would require, namely, to produce certain effects. The concept of accountability for international organizations may be extended well beyond the principles of responsibility and liability for international wrongful acts, embracing the notion of general answerability in the exercise of lawful powers by any kind of authority.<sup>331</sup>

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<sup>327</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 33.

<sup>328</sup> *Ibid.*, p. 34.

<sup>329</sup> Klabbers, Jan, *An Introduction to International Institutional Law*, Cambridge University Press, Cambridge, 2002, pp. 42–69.

<sup>330</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, *op. cit.*, p. 36.

<sup>331</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 176.

Accountability starts with primary rules, but its realization also necessitates appropriate and efficient mechanisms. For instance, in the domain of human rights, accountability requires not only that certain human rights obligations be recognized to exist. It also requires mechanisms to be established that provide remedies to potential victims, whether before national or international courts.<sup>332</sup>

The dread of rendering international organizations too independent from Member States could also lead the latter to finally set up external and autonomous claims settlement bodies that may secure access to justice for third parties (individuals and legal persons) while being truly independent of the international organizations concerned.<sup>333</sup> The primary subject of responsibility under international law remains the nation-state, but over the past two decades humanitarianism has undergone an explosive normative and institutional expansion, as well as an intensive legalization of routines and technical operations.<sup>334</sup> With regard to interventionist humanitarianism, accountability tries to allay political and popular concerns about such practice.<sup>335</sup> Accountability measures are governance tools with complex effects, devised as means to achieve greater legitimacy for bureaucratic interventions – by way of installing institutional cultures of human rights.<sup>336</sup> Democratic legitimacy for international organizations increasingly hinges on designing appropriate accountability structures and integrating these into programming.<sup>337</sup>

Accountability demands originate from beliefs about the expanding governance roles of IOs, according to which a parallel international governance structure has appeared which at once *cooperates* and *competes* with domestic government ministries and civil society organizations in the Global South.<sup>338</sup> Having become an institutionalized practice, with an ever-increasing number of countries partaking in the resettlement program, resettlement is a particularly illustrative example of the growing regulatory power of international “soft governance” regimes.<sup>339</sup> Today,

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<sup>332</sup> De Schutter, Olivier, “Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 54.

<sup>333</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, *op. cit.*, pp. 211–212.

<sup>334</sup> Goldstein, J. and Kahler, M. and Keohane, M. O., and Slaughter, A., “Introduction: Legalization and World Politics” *International Organization*, Vol. 54(3), 2000, pp. 385–399.

<sup>335</sup> Bergtora Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 289.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

<sup>338</sup> Kennedy, D., “Challenging Expert Rule: The Politics of Global Governance”, *Sidney Law Review*, Vol. 27(1), 2005.

<sup>339</sup> Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, *op. cit.*, p. 291.

for instance, UNHCR holds many administrative, judicial, or quasi-judicial powers over refugee populations.<sup>340</sup> *Camps* are invariably located in states, but camp management and many other activities of core importance for the welfare of hundreds of thousands of people take place according to UNHCR guidelines, and do not engage with municipal law.<sup>341</sup> As an international organization, UNHCR is not a *de jure* sovereign authority with territorial jurisdiction.<sup>342</sup> Yet, in practice UNHCR is widely understood to operate with a ‘sovereign face’, managing the lives of millions.<sup>343</sup> To manage and secure legitimacy for this evolving transnational structure, the international community promotes the idea of administrative accountability for material and procedural operations.<sup>344</sup> Asylum seekers in that system are entitled to have their refugee claims determined through an administrative or legal process.<sup>345</sup> However, the tension between UNHCR’s managerial mode and its humanitarian ideals are reflected in the shift away from administrative accountability towards the credibility of the client group.<sup>346</sup> In general, the political rationale of humanitarian organizations is constituted according to a matrix of converging and diverging institutional and individual interests.<sup>347</sup>

Whereas UNHCR defines and communicates the standards of protection as universal across geographical boundaries, the organization has in practice come to inhabit a dual role as advocate in the North and adjudicator in the South.<sup>348</sup> In response to criticism from past instances of mismanagement and corruption, enhanced internal monitoring systems have been developed, and the merits of material resettlement decisions are reviewed in regional hubs.<sup>349</sup> Nevertheless, administrative practices remain largely outside organizational oversight, and country operations largely lack effective channels for hearing and addressing the grievances of

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<sup>340</sup> *Ibid.*, p. 290.

<sup>341</sup> Wilde, R., “Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of ‘Development’ Refugee Camps Should be Subject to International Human Rights Law”, *Yale Human Rights and Development Law Journal*, Vol. 1(5), 1998, pp. 110–111.

<sup>342</sup> Betts, A., “International Cooperation between North and South to Enhance Refugee Protection in Regions of Origin”, *Oxford RSC Working Paper*, 2005, No. 25, at p. 2.

<sup>343</sup> Barnett, M., “Humanitarianism with a sovereign face: UNHCR in the global undertow”, *The International Migration Review*, Vol. 35(1), 2001, at pp. 244–76; B. S. Chimni, “From Resettlement to Involuntary Repatriation-Towards a Critical History of Durable Solutions”, *Refugee Survey Quarterly*, Vol. 23(3), 2004, pp. 55–73 in Bergtora Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, *op. cit.*, 2010, p. 291.

<sup>344</sup> Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, *op. cit.*, p. 291.

<sup>345</sup> *Ibid.*, p. 298.

<sup>346</sup> *Ibid.*, p. 302.

<sup>347</sup> *Ibid.*, p. 306.

<sup>348</sup> *Ibid.*, p. 292.

<sup>349</sup> Browne, P., *The Longest Journey, Resettling Refugees From Africa*, UNSW Press, 2006 in Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, *op. cit.*, p. 292.



client groups.<sup>350</sup> Studies have shown that the risk of procedural failure during the refugee status determination procedure is not merely a theoretical possibility.<sup>351</sup> With the past decades of institutional expansion, the distributive consequences of the encounters between humanitarian staff and marginalized groups in the Global South have greatly reinforced the need to address questions of accountability and democratic participation.<sup>352</sup>

As another example, when the UN took on the role of territorial administrator in Kosovo and East Timor in 1999, attention was initially focused mostly on the formidable practical challenges raised by these missions.<sup>353</sup> Over time, and particularly in relation to the activities of the United Nations Interim Administration Mission in Kosovo (UNMIK), commentary shifted into the normative terrain of accountability.<sup>354</sup> There is a widely-held assumption that International Territorial Administration (ITA) should be made fully accountable, particularly through domestic institutions.<sup>355</sup> It is submitted that International Territorial Administration is a form of trusteeship because of the two similar objectives that these two institutions strive for, namely protection and care on the one hand, and advancement and development on the other. In the UN Territorial Administration language, these two objectives have been referred to as providing governance and building up local capacities.<sup>356</sup> Therefore, it must be submitted to the same and equivalent accountability mechanisms as the trusteeship. Thus, it could be proposed that the Trusteeship Council of the UN assume some or major parts of responsibilities for the administrated territories presently under the UN administration, since the Mandates and Trusteeship systems had both a supervisory organ, namely the Permanent Mandates Commissions and Trusteeship Council, which possibly filled the accountability gap. Ideas have been put forward, in the scholarship, which propose that Trusteeship Council should be revived to provide oversight to International Territorial Administrations (ITA).<sup>357</sup> This was the result of the move of

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<sup>350</sup> Pallis, M., "The Operation of UNHCR's Accountability Mechanisms", *New York University Journal of International Law and Politics*, Vol. 37, 2005, at pp. 869–918.

<sup>351</sup> Kagan, M., "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination", *Georgetown Immigration Law Journal*, Vol. 17(3), 2003, p. 371.

<sup>352</sup> Reinisch, A., "Securing the Accountability of International Organizations", *Global Governance*, Vol. 7, 2001, p. 131.

<sup>353</sup> Wilde, R., *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, 2008.

<sup>354</sup> Wilde, Ralph, "Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 311.

<sup>355</sup> Wilde, Ralph, "From Danzig to East Timor and Beyond: the Role of International Territorial Administration", *American Journal of International Law*, Vol. 95, 2001, p. 583.

<sup>356</sup> UN Charter, Art. 73 for Non-Self-Governing Territories and Art. 76 for Trust Territories.

<sup>357</sup> Ruffert, M., "The Administration of Kosovo and East Timor by the International Community", *International and Comparative Law Quarterly*, Vol. 50, 2001, pp. 613–631; Parker, T., *The Ultimate Interven-*

the focus beyond the basis for administration to include a regime of accountability. In this place and with respect to UNMIK or similar other presences, one could properly refer to the famous expression ‘who guards the guardians’. In other words, to whom should international trusteeships be accountable?<sup>358</sup> It is evident that with respect to UNMIK and the like, a form of independent international supervision is required. It is especially so as effective accountability mechanisms concerning and exercising scrutiny over corruption, mismanagement and human rights abuses, are not incompatible with the idea of International Territorial Administration.<sup>359</sup> On the other hand, it has been frequently submitted that accountability mechanisms operated by third parties in relation to International Territorial Administrations have been inadequate.<sup>360</sup>

The accountability of international organizations raises also many questions in relation to effective implementation of possible responsibility of international actors engaged in the administration of foreign territory.<sup>361</sup> For instance, with respect to the immunity question, in cases of reported serious criminal offences, immunity has been waived, or has been declared inapplicable because the conduct was considered to have taken place ‘off-duty’.<sup>362</sup> Parallel to these developments, ongoing debates in international law discuss whether a move from absolute to functional/proportionate immunity for international organizations would be desirable.<sup>363</sup> It is highly desirable that United Nations field missions establish human rights mechanisms to address the mission’s human rights accountability for all alleged violations that occurred while present on the related territory in question.<sup>364</sup>

The argument has also been put forward that careful monitoring may cause international organizations either to maintain or to adjust their course of conduct, without entailing any further consequences at all. But these processes may also bring to the surface acts or omissions which in turn may give rise to liability and/or responsibility of international organizations.<sup>365</sup> According to the ILA Committee, the importance of less formal remedies to control international organ-

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*tion: Revitalising the UN Trusteeship Council for the 21<sup>st</sup> Century*, Norwegian School of Management, Sandvika, 2003, pp. 43–50.

<sup>358</sup> Wilde, Ralph, “Understanding the International Territorial Administration Accountability Deficit: Trusteeship and the Legitimacy of International Organizations”, *op. cit.*, p. 318.

<sup>359</sup> *Ibid.*, p. 320.

<sup>360</sup> *Ibid.*, p. 320.

<sup>361</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, *op. cit.*, p. 354.

<sup>362</sup> *Ibid.*

<sup>363</sup> Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, *op. cit.*, p. 293.

<sup>364</sup> Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, *op. cit.*, p. 359.

<sup>365</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, *op. cit.*, p. 27.

izations can hardly be overestimated, not only because of its preventive potential but also because of the procedural obstacles facing in particular non-state actors to bring international organizations before international and domestic courts.<sup>366</sup> In addition, accountability in the opinion of the ILA Committee seems to function not only as a retrospective mechanism but also as a proactive instrument for controlling international organizations' conducts.<sup>367</sup>

As a well-known example, by interpreting article 25 of the UN charter in a specific way, some authors believe that the member States of the UN have an indirect controlling role over the SC resolutions and decisions.<sup>368</sup> By this way, the members of the UN could implement the accountability of the SC. The various reviewing bodies established in the framework of different IOs serve in one way or other the purpose of accountability, even though they do not often realize the international legal responsibility, for the fact that in most of the cases these bodies are merely competent to review reports and issue recommendations, rarely having any judicial function and powers leading to the deliverance of a binding judgement on the culpable party or the wrongdoer. Nevertheless, in a more skeptical manner with respect to IOs, *Chimni* believes that given the lack of any equal direct access to IOs by those directly affected belonging to some regions:

“Accountability is not even theoretically envisaged today.”<sup>369</sup>

It is true that a gap still consists, for instance, with regard to the application of human rights law to UN personnel in interim administrations.<sup>370</sup> The problem is not the immunities systems itself, but the availability of alternative means and mechanisms to protect human rights under international territorial administration.<sup>371</sup> In addition to the institution of the Ombudsperson, a certain role can be played by national courts and tribunals in the judicial review of official acts issued by the administration.<sup>372</sup>

It is possible that at the end of this section the reader may expect to find an answer to the question whether accountability is a more appropriate concept for

<sup>366</sup> *Ibid.*, p. 28.

<sup>367</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, *op. cit.*, p. 28.

<sup>368</sup> Angelet, Nicolas, “Protest against Security Council Decisions”, in Wellens, Karel (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Martinus Nijhoff Publishers, 1998, pp. 277–285, at pp. 278–279.

<sup>369</sup> Chimni, B. S., “Theme III: Global Governance: Institutions – International Organizations Today”, *LJIL*, Vol. 16, No. 4, 2003, pp. 897–899, at p. 898.

<sup>370</sup> With respect to the UN accountability with regard to human rights see Abraham, Elizabeth, “The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in Its Mission to Kosovo”, *American University Law Review*, Vol. 52, pp. 1291–1337.

<sup>371</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, *op. cit.*, p. 346.

<sup>372</sup> *Ibid.*, p. 349.

the international organizations than responsibility. But the aim of the analysis undertaken in this section from the beginning was not to choose one of the concepts as more appropriate, but rather to show the feasibility of accountability in practice and its capacity to fill the gaps that would be left behind by the stricter concepts and mechanisms of international legal responsibility and liability. At least, it is clear that in terms of scope, accountability is far broader than legal responsibility. An important point, which can be regarded as the conclusion of this section is that responsibility may not be formulated and ideally applied without taking into account the issue of accountability. For this reason, in the following sub-sections the mechanisms of implementation of accountability at different levels will be examined.

### 1) At the International level

Accountability should accompany competences and powers in order to prevent any misuse of these powers and competences by the holders, in our case the IOs. As an important part of the activities of IOs takes place at the international level, it is necessary that the accountability of IOs be adequately implemented at the international level.

#### i. The Functional Necessity Doctrine as a limit to the implied Powers Doctrine

The functional necessity may be considered as a kind of check and balance tool, a brake against the exaggerations in the name of implied powers. In this sense, it appears that the doctrine of Functional Necessity may indirectly contribute to the accountability of IOs. This doctrine prevents the abuse of the powers of the IO or their unnecessary expansion.<sup>373</sup> Of course, this doctrine cannot implement the accountability by itself, but it provides an effective parameter and threshold. But in order that this notion can lead to the restriction of unnecessary powers, an independent internal or external supervision and scrutiny mechanism seems to be always useful. The functional necessity has indeed its place, according to the ILA final report, in the first level of accountability, which consists of internal and external scrutiny irrespective of subsequent liability and/or responsibility.

#### ii. Ombudsman Institution: A closer look into the specific case of Kosovo

In a nutshell, from the methodological perspective, for the appraisal of UN presence in Kosovo in terms of its accountability in light of ILA final report on IOs' accountability, it is necessary to assess this institution with regard to the existence and implementation of all the three levels of accountability enumerated and classified by ILA. In this subsection, the intention is not at all to deliver a complete

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<sup>373</sup> Klabbers, Jan, "Constitutionalism Lite", *op. cit.*, at pp. 39–40.

examination of the ombudsman institution,<sup>374</sup> but the actual intention is to see whether and to what extent this institution may serve accountability. The parameter of assessment would naturally be the definition delivered by the ILA of the notion of accountability, according to which we understand that notion as the duty to account for the exercise of power.<sup>375</sup> How an entity or subject of international law may implement its accountability duty, in our case an IO, is through the realization of the three-level duties categorized and described by the ILA. Following ILA classification, the ombudsman institution is located at the first and third levels of accountability as, on the one hand, it guarantees internal and external scrutiny and monitoring, and on the other hand, it deals with the consequences of the violation of certain rules of international law, specifically human rights and fundamental freedoms. Thus, the ombudsman institution indirectly contributes to the first level of accountability, while this institution directly realizes the third level of accountability, namely international responsibility, even though the term international legal responsibility is not used explicitly in the mandate or employed in the terminology of the Ombudsman. The next paragraphs of this subsection are aimed at further elaborating on these two major points while at the same time verifying the assertion that the Ombudsman Institution satisfies the necessity of accountability of the international administration in Kosovo.

First and foremost, if the ombudsman institution is aimed at being an observer and reflects the facts, it serves the aim of transparency which forms a major part of first level accountability in the ILA understanding. Thus, the institution of ombudsman may, undisputably, serve the aim of transparency and have preemptive function at the same time. In terms of human rights obligations, representing the second level of accountability, the United Nations mission in Kosovo (UNMIK) has had until now the vastest duties.<sup>376</sup> Given its governmental tasks, it is normal that there be more scrutiny over its actions and the measures it takes in fulfilling its functions, also justified by the control it exercises over the territory.<sup>377</sup> This may justify the necessity that has led UNMIK to establish an ombudsperson institution and a Human Rights Advisory Panel, the organs aiming at implementing third level accountability. As it has been referred to earlier, the scope of the tasks

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<sup>374</sup> For the historical development of the ombudsman institution see: Haas, Julia, *Der Ombudsmann als Institution des Europäischen Verwaltungsrechts. Zur Neubestimmung der Rolle des Ombudsmanns als Organ der Verwaltungskontrolle auf der Grundlage europäischer Ombudsmann-Einrichtungen*, Mohr Siebeck, 2012, pp. 29–123.

<sup>375</sup> International Law Association, “Accountability of International Organizations”, *Berlin Conference Final Report*, 2004, p. 5.

<sup>376</sup> Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *op. cit.*, pp. 355–372.

<sup>377</sup> Maus, Sylvia, “Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?”, in H. J. Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin, Heidelberg, 2011, pp. 103–128, at p. 116.

and activities of IOs in the framework of international territorial administrations can be truly vast. The expressions like “Unmikistan” used as a nickname for the territory of Kosovo after the UNMIK,<sup>378</sup> is indirectly the reflection of this fact. For instance, in the framework of the United Nations a recently re-emerged method of enabling individuals to bring claims against the IO’s staff or the organization itself is the institution of the ‘ombudsperson’.<sup>379</sup> To refer to the more specific case of Kosovo, the Ombudsperson’s general mandate in Kosovo is to protect and promote human rights and fundamental freedoms as are provided for in international standards, specially, in the ECHR and its Protocols and the IC-CPR.<sup>380</sup> Moreover, with the UNMIK Regulation 2006/6 the ‘Kosovarisation’ of the Ombudsperson Institution has taken place in Kosovo.<sup>381</sup> The main task of the Ombudsman institution in Kosovo is to address issues concerning alleged human rights violations or abuse of authority by the Interim Civil Administration or any emerging central or local institution in Kosovo.<sup>382</sup> The most important issue with regard to the ombudsman institution for the purpose of the evaluation of the implementation of accountability of IOs is its efficacy. An effective Ombudsperson can play an important role in upholding primary rules and obligations relating to human rights during international territorial administration.<sup>383</sup>

The creation of such an Ombudsperson at the level of UN, solely responsible for considering alleged human rights violations by UN staff in transitional administrations, can be a possible alternative if a national ombudsperson proves to be ineffective. Nevertheless, this kind of universal institution at the UN level also comprises certain difficulties, as the threshold will be even higher than at the national level. Equally, ombudspersons are generally nationals of the territory concerned or of neighbouring states and are familiar with local custom, speak the language of the territory and are, as local actors, independent *vis-à-vis* the interna-

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<sup>378</sup> Delafrouz, Ghazal, “Vetevendosje: a minor field study of the Kosovo Albanian resistance movement”, Lund University, Department of Political Science, at p. 1. Available at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOID=1405441&fileOID=1414996> (last visited on 04.04.2022).

<sup>379</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 349.

<sup>380</sup> UNMIK, Regulation No. 2000/38 on the establishment of the Ombudsperson in Kosovo, 30 June 2000 in Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, at p. 363, fn. 38

<sup>381</sup> *Ibid.*, p. 364.

<sup>382</sup> Keinänen, Katja, “International Law and the Interests of Liberal Market Economy: the Non-Issue of Environmental Protection in the Kosovo International Administration”, *Finnish Yearbook of International Law*, Vol. XVIII, 2007, Martinus Nijhoff Publishers, Leiden/Boston, pp. 9–31, at p. 20 and the related footnotes.

<sup>383</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, *op. cit.*, p. 350.

tional administration and the international organization in charge of administering the territory.<sup>384</sup>

According to the assessment of some of the authors, although the Ombudsperson has a very important role in human rights protection and promotion it cannot become an effective remedy as provided in international human rights standards.<sup>385</sup> Generally, in many cases the conflict between human rights and justice in practice causes the inadequacy of the review mechanisms. For example, the intervention of the Special Representative of the Secretary General by issuing an ‘administrative direction’ for cancellation of the public hearing that was scheduled on 4 June 2009 in Kosovo can be referred to.<sup>386</sup> This SRSG’s undertaking demonstrates again that the right to an effective remedy for Kosovars against UNMIK is infringed.<sup>387</sup> Some authors also propose a role of prosecutor general for the Ombudsperson in Kosovo. Furthermore, with regard to the proposed UN Commission for Kosovo, it has been proposed that both the individuals as well as the Ombudsperson Institution should be authorized to submit applications to the Commission.<sup>388</sup>

In general, with regard to the ombudsman institution different questions should at the first place be answered. Where is the ombudsman institution located and situated in the whole picture of an IO? The ombudsman institution is an independent institution. In this situation, the accountability of the ombudsman may also be a point that is noteworthy. What measures can the ombudsman undertake? Another point that may be in this regard relevant to the comparison of accountability with responsibility is about the consequences that may arise for the entity giving account.

Ombudsman institution is not a uniform institution in terms of mandate and the scope of its jurisdiction. Whether the ombudsman institution may fill the accountability gap in a certain situation depends to a large extent to the scope of the competence *ratione personae* and *ratione materiae* of the ombudsman. This competence may be determined at the time of the establishment of the ombudsman and is potentially subject to amendment and changes. In some cases the limitation and

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<sup>384</sup> *Ibid.*

<sup>385</sup> Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, *op. cit.*, p. 346.

<sup>386</sup> Press Conference, 4 June 2009, at the Grand Hotel in Prishtina on the cancellation of the Human Rights Advisory Panel’s public hearing in the case of the deaths and serious injuries inflicted by UNMIK police on 10<sup>th</sup> February 2007.

<sup>387</sup> Istrefi, Remzije, “Should the UN Create an Independent Human Rights Body in a Transitional Administration?”, *op. cit.* p. 367.

<sup>388</sup> *Ibid.*, at p. 370.

restriction of the scope of the jurisdiction of ombudsman has led to the appearance of accountability gaps.<sup>389</sup>

Another comparable category of accountability mechanisms, even though with limited scope, are local claims commissions or local claim review boards, often established by the UN for its peacekeeping operations.<sup>390</sup> But still there is an urgent necessity for independent and impartial international courts and tribunals to deal with the claims of injured individuals. This is especially so because these commissions or boards consist of internal administrative processes that take decisions that can be challenged by the claimant only through administrative review within the organization or arbitration.<sup>391</sup>

### iii. Accession of the international organizations to treaty-based regimes

The peculiarity of treaty based regimes which makes them interesting from the point of view of accountability of IOs lies in the creation of a monitoring and compliance review and implementation mechanism competent within the scope of the treaty in question. It goes without saying that the precondition of these mechanisms being applicable also to the IOs is that the IOs should become parties to the treaties these mechanisms are based on. At this point, all the discussions with regard to the accession of the IOs to international treaties and the obstacles that exist on their way seem to be relevant. That there are treaty-based regimes created at the international or regional level which do not provide for the accession of IOs to these regimes and their mechanisms, is in itself a manifestation of accountability gap with regard to IOs. This missed opportunity, which has partly been the result of the lack of the necessity of the accession of IOs to treaty-based regimes, can be corrected by amending the treaties in question. There has already been some progress in that direction for the regional integration organizations by the clauses inserted in newly adopted or already existing conventions under the same title. Conventions in the framework of the Council of Europe which provide for the possibility of the accession of the EU to these treaties in the domains in which competences have been transferred by the member states to the EU, are precursor example in this regard.<sup>392</sup> There are examples of the review of conducts of IOs by

<sup>389</sup> Keinänen, Katja, “International Law and the Interests of Liberal Market Economy: the Non-Issue of Environmental Protection in the Kosovo International Administration”, *op. cit.*, pp. 9–31, especially at p. 21.

<sup>390</sup> Schmitt, Pierre, *Access to Justice and International Organizations – The Case of Individual Victims of Human Rights Violations*, Leuven Centre for Global Governance Studies, Edward Elgar Publishing, 2017, at pp. 55–120.

<sup>391</sup> Rashkow, Bruce, “Remedies for Harm Caused by UN Peacekeepers”, *ASIL, AJIL Unbound*, April 2, 2014 – 3:55 pm. Available on: <https://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers> (last visited on 04.05.2015).

<sup>392</sup> De Schutter, Olivier, “Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility”, in Jan Wouters et al. (eds.), *Accountability*



treaty-based regimes, notably in the sphere of human rights. For instance, international administration in Kosovo has submitted reports to the Human Rights Committee on human rights in Kosovo.<sup>393</sup>

#### iv. Quasi-judicial control in the framework of International Arbitration

Another common mechanism of implementation of accountability is without any doubt arbitration. Many headquarter agreements or other agreements between states and IOs provide for arbitration as the means of dispute settlement for the disputes that arise involving IOs. Otherwise, recourse to this alternative avenue, in the form of an ad hoc *compromis*, depends on the willingness of the organization to submit to arbitration.

It has been argued that given certain fundamental similarities between states and IOs, “the ‘ideal’ dispute settlement procedure from the perspective of IOs is likely to be similar to the ‘ideal’ procedure from the perspective of states.”<sup>394</sup> A positive point is that there are already two sets of optional rules that have been elaborated for the application to the arbitral proceedings involving IOs in their disputes with states or private parties, in the framework of the Permanent Court of Arbitration, known as PCA’s 1996 Optional Rules for Arbitration Involving International Organizations and States (IO Rules) and Permanent Court of Arbitration’s 1996 Optional Rules for Arbitration between International Organizations and Private Parties.<sup>395</sup>

With regard to specificities of these Rules, above all it should be stated that these Rules are optional and emphasize flexibility and party autonomy. According to the Rules, the arbitral tribunal has potentially, and in principle, the competence to deal with a large range of disputes arising from ‘any agreement’, including the constituent instrument of the organization. This latter specification relates, in the first place, to the disputes between the IO and its member states or member organization. Such situations have been envisaged in article 1 according to which arbitral proceedings involving two IOs as the opposing parties have been enumerated as falling under the scope of these Rules. It should, however, be noted that in terms of promptness, the arbitral procedure under PCA may not be satisfying.

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*for Human Rights Violations by International Organizations*, Intersentia, Antwerp, 2011, pp. 55–129, at p. 103.

<sup>393</sup> Human Rights Committee, “Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999”, UN Doc. CCPR/C/UNK//1, 13 March 2006, paras. 123–124.

<sup>394</sup> Katselas, Anna T., “International Arbitration vs. International Adjudication for the Settlement of Disputes Between States and International Organizations”, A seminar paper, International Legal Studies, LL.M. Candidate, University of Vienna Law School, The Accountability of International Organizations, Professor August Reinisch, Summer Term 2011, p. 9.

<sup>395</sup> The PCA’s Optional Rules are available on <http://www.pca-cpa.org/upload/files/IGO2ENG.pdf> (last visited on 04.04.2022).

2) At the national level: Judicial Control by national courts over the decisions and conducts of IOs

As has been observed in the context of the analysis of the theory of *dédoublement fonctionnel* exercised by the members of the IOs, and precisely for the lack of international adjudicative bodies, it is occasionally the state organs that provisionally, fill the accountability gap.<sup>396</sup> Therefore, the present section will specially take a look, among others, at the appropriateness of national courts as accountability mechanisms for IOs.

At the national level within states normally the most common way and method of ensuring accountability for human rights violations is judicial review of official acts before national courts and tribunals. But with respect to IOs, there is no such automatic duty for IOs to submit to the jurisdiction of national courts, at least as long as the IO has no legal personality under national law – a situation which is, however, near to impossible having regard to the presence and activities of the IO on the territory of the states, which on their part have the obligation to provide their subjects with access to courts and tribunals in order that they may bring their claims to these tribunals.<sup>397</sup> This latter consideration may be a motor for the implementation of accountability of IOs. But the real jurisdictional obstacle for dealing with the contentious cases of IOs by domestic courts is the immunity of IOs, which should in principle be overturned because of denial of justice. In order to guarantee a proper balance between the conflicting interests of independent functioning of IO on the one hand, and the realization of the right to a forum for individuals in a state, on the other, the most appropriate means seems to be the competence of national courts and the creation of special instances within national legal systems, where the competence of the court is defined with regard to different claims brought against IOs, as is the case with regard to administrative law and adjudication. Of course, such procedures may differ a lot according to the stage of development, authority and independence of each national legal system. Another solution may be the establishment of hybrid chambers created within the internal legal systems of states, member or non-members of IO, which would be under international review and supervision. However, such proposition may possibly face the opposition of a number of states having fears for their sovereign adjudicatory rights.

At the same time, national courts are gradually abandoning their traditional policy of deference to the executive branches in the field of foreign policy, and beginning more aggressively to engage in the interpretation and application of

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<sup>396</sup> Nollkaemper, André, “Internationally Wrongful Acts in Domestic Courts”, *AJIL*, Vol. 101, No. 4, pp. 760–799.

<sup>397</sup> Reinisch, August, *International Organizations before National Courts*, Oxford University Press, 2000, p. 323.

international law.<sup>398</sup> They attribute this phenomenon to the ‘increasing permeability of the domestic legal system to external regulatory efforts’.<sup>399</sup>

This trend is definitely in line with the realization of the accountability, *inter alia*, of IOs as subjects of international law. In addition, as has been mentioned above, the judicial control of IOs by domestic courts or regional tribunals also serves the purpose of constitutionalism through the realization of accountability. Even though at the same time maybe diminishing the functionality of the IO, judicial control of IOs by national courts has enough virtues from theoretical point of view in order to justify its usefulness, consequently its necessity. But its appropriateness for disputes involving IOs, from a practical perspective, is another matter.<sup>400</sup> In addition, the role of national courts in this respect may have been increased again as a result of the phenomenon of public-private partnerships, in the literature usually referred to as PPPs, since suing the IOs may be easier than these PPPs.<sup>401</sup>

Even if, theoretically, there could be a possibility of a judicial control over the activities of IOs, in practice the national courts have declined to do so, based on different lines of reasoning and by means of taking recourse to different avoidance techniques, the major ones are jurisdictional immunity, non-recognition of the IO under the forum state’s domestic law, non-recognition of *ultra-vires* acts of the organization, abstention doctrines such as act of state, political questions and non-justiciability, absence of subject matter jurisdiction, respect for a competent forum within the organization or the acceptance of a choice of forum clause providing for arbitration.

Judicial oversight over the conducts of IOs, like any other proposition, has its proponents as well as opponents.<sup>402</sup> At the present stage of the development of international law and its adjudicatory as well as implementing mechanisms, the lack of such mechanisms, at the international level, having jurisdiction on IOs is so well-known that defending the quasi-judicial review and control would not be so difficult a task. This question is, of course, closely related to the more vast issue of the reception of international law in domestic courts, as the main issue in direct

<sup>398</sup> Benvenisti, E. and Downs, G., “National Courts, Domestic Democracy and the Evolution of International Law”, *European Journal of International Law*, Vol. 20, 2009, pp. 59–72, at p. 59.

<sup>399</sup> *Ibid.*, at p. 60.

<sup>400</sup> Reinisch, August, *International Organizations Before National Courts*, Cambridge University Press, 2000, pp. 317–328.

<sup>401</sup> Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, 6 (2009), pp. 319–358, at p. 347.

<sup>402</sup> Duxbury, Alison, *The Participation of States in International Organizations, The Role of Human Rights and Democracy*, Cambridge University Press, 2011, pp. 297–298; For an opinion in favor of judicial control see Magliveras, Konstantinos, *Exclusion From Participation in International Organizations – The Law and Practice Behind Member States’ Expulsion and Suspension of Membership*, Kluwer Law International, 1999, p. 269. For the opinion in opposition to the idea of judicial review of the conduct of IOs see Fawcett, J. E. S., “The Place of Law in an International Organization”, *British Yearbook of International Law*, Vol. 36, 1960, at p. 328.

judicial review is the assessment of the conduct of the IOs with the rules of international law as assessment parameters. But the first and foremost condition for challenging the conducts of IOs in domestic courts, is that such courts have jurisdiction over IOs, *ratione personae*, and the issues under dispute, *ratione materiae*. Another relevant aspect of this question is the politically motivated reluctance of the domestic tribunals to adjudicate the cases relating to IOs, which can also be sometimes because of the lack of expertise or based simply on considerations of convenience.

However, as a concluding remark, the experience with regard to the final result of the cases brought so far to different national jurisdictions<sup>403</sup> has shown that the adjudication of private claims against IOs for the violation of international legal rules brought in domestic courts, which would eventually be followed by legal remedies as a result of the adjudicative procedure, may not be considered a widespread practice of national courts, and thus may not be truly counted among viable mechanisms of accountability or responsibility of IOs.

### 3) At the Internal Level

There is no doubt that the most common, developed and vast channel of implementation of legal accountability of IOs inside their own legal systems are the administrative tribunals that review the implementation and interpretation of the rules and regulations of the IO, in almost all cases competent in proceeding the recruitment and employment disputes and claims that arise between IO and its staff. However, as this channel is often closed to the aggrieved third parties external to the IO system, this study will not focus on them specifically. On the contrary, there has been a remarkable trend in establishing Independent Accountability Mechanisms (IAMs), to which the third parties may have differing degrees of access. The following sub-sections have set as their objective the examination of these mechanisms, especially in the framework of the in this regard pioneer IOs, namely International Financial Institutions (IFIs).

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<sup>403</sup> For an overview of the cases involving the UN organs see: Wouters, Jan/Schmitt, Pierre, “Challenging Acts of Other United Nations’ Organs, Subsidiary Organs, and Officials”, in Reinisch, August (ed.), *Challenging Acts of International Organizations before National Courts*, Oxford University Press, 2010, pp. 77–110, at pp. 81–83.

i. Independent Accountability Mechanisms (IAMS) in the Framework of International Financial Institutions – Multilateral Development Banks

It is clear that any independent accountability mechanism established within an IO in order to really serve the purpose of accountability must go beyond the internal compliance review and undertake problem-solving functions.<sup>404</sup> The emergence of the independent accountability mechanisms in general may be, to a great extent,<sup>405</sup> a reaction to the trend in the jurisprudence of national courts that:

“When the organization does not provide for any review at all, in any case, a court will be hard-pressed to uphold the immunity of the organization.”<sup>406</sup>

And as a corollary of the right of the individuals to a remedy and also right to access to a court:

“There is undeniably a tendency in domestic courts to make the immunity of an international organization dependent on its putting in place effective internal complaint mechanisms, or taking recourse to administrative tribunals available.”<sup>407</sup>

But even as the reaction to the criticism of IOs and their impunity resulting from enjoying immunity, dispute settlement mechanisms, internal or external, without any doubt may contribute to the aim of accountability of IOs:

“International organizations ought to provide for internal or external mechanisms of dispute settlement so as to make sure that aggrieved individuals can somehow have their day in court. Those mechanisms should be put in place for *any* complaint, not only in case of functional necessity. If they are not, or they are inadequately provided, organizations forfeit their right to immunity. Only this will ensure that international organizations are subject to the rule of law, and accountable for their wrongful acts.”<sup>408</sup>

Briefly, concerning these mechanisms the important point that primarily has to be established is whether these fora and their standards provide reasonable and just

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<sup>404</sup> Suzuki, E. and Nanwani, S., “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks”, *Michigan Journal of International Law*, Vol. 27(1), 2005, p. 220.

<sup>405</sup> Bradlow, D., “Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions”, 36 *Georgetown Journal of International Law*, 403, 2004; Guy S. Goodwin-Gill and Stefan Talmon, *The Reality of International Law: Essays in Honour of Ian Brownlie*, OUP, 1999; Reinisch, A., “Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts”, *IOLR*, Vol. 7, No. 1, 2010, pp. 63–77, fn. 10.

<sup>406</sup> Ryngaert, Cedric, “The Immunity of International Organizations before Domestic Courts: Recent Trends”, *IOLR*, Vol. 7, No. 1, 2010, pp. 121–148, at p. 140.

<sup>407</sup> *Ibid.*, at p. 144.

<sup>408</sup> *Ibid.*, at p. 147.

substitutes for otherwise possibly competent national or international tribunals. Furthermore, an issue with regard to Independent Accountability Mechanisms in the context of international responsibility is to what extent the practice of these mechanisms could fall under the ambit of Art. 64 ARIO, namely has the potential to be considered as *lex specialis*. The fact that Independent Accountability Mechanisms are in principle open to individuals or groups of individuals as requestors closes the possibility of the applicability of ARIO because of the simple reason that the latter are not applicable but only between IOs or IOs and States. Furthermore, such mechanisms are at first place established to ensure that the operational policies and procedures of these institutions are complied with, thus again limiting the scope of review to certain rules and regulations which maybe are far from general international law.<sup>409</sup>

In praising the Independent Accountability Mechanisms for trying to overcome the obstacle of the immunity of IOs and the lack of competent international fora for dispute settlement, it has been observed that “Multilateral Development Banks have now at least opened windows of access, through their accountability mechanisms, to private individuals seeking to file complaints directly.”<sup>410</sup> Therefore, the Independent Accountability Mechanisms are there to correct certain defaults of the international legal system which subsist with regard to the international legal responsibility of IOs.

It should not be forgotten that in most of the cases the constituent documents of the multilateral development banks include a partial waiver of immunity from jurisdiction with the aim of attracting the confidence of their clients.<sup>411</sup> But this waiver of course does not extend to the immunity from execution. Even to this extent a way is open to implement the accountability and international legal responsibility of these institutions. With this regard, the question that may be posed here is whether the jurisdiction exercised with regard to the rules and regulations of the internal legal systems does also extend to the norms of the international legal system the respect of which these institutions have consented to or is binding on them on some other basis than consent.

As a simple and well-known example the lending practices and projects financed by international institutions may lead in parallel to environmental disas-

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<sup>409</sup> Daniel D. Bradlow and Andria Naudé Fourie, “The Evolution of Operational Policies and procedures at International Financial Institutions: Normative Significance and Enforcement Potential”, *International Law Association*, The report of the ILA Study Group on the Responsibility of International Organizations, Part Two, Sofia Conference 2012, p. 12.

<sup>410</sup> Suzuki, E. and Nanwani, S., “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks”, *op. cit.*, at p. 203.

<sup>411</sup> Dominicé, Christian, “L’immunité de Juridiction et D’Exécution des Organisations Internationales”, *RCADI*, Tome 187(IV), 1984, pp. 145–238, at pp. 207–208.

ters.<sup>412</sup> Deficiency is the most often raised criticism with regard to IOs internal dispute settlement mechanisms.<sup>413</sup> Some scholars have proposed the mechanism of submitting and checking of an annual statement of accounts by an independent auditor and its subsequent publication.<sup>414</sup>

Qualifications of the judges or members sitting in these bodies, procedures for their appointment are also of great importance, among others their independence, objectivity and impartiality, qualities which are essential to the realization of the rights of the third parties to access to a tribunal or forum in order to bring their claims. Sometimes the administrative tribunals like ILOAT take recourse to the aid of these internal mechanisms for the gathering of evidence.<sup>415</sup> Another important point is the publication of the awards, judgments and court files which renders assessments possible.<sup>416</sup>

“A compliance review panel’s substantive jurisdiction is limited to the review of compliance by an MDB. It may take remedial action, but its competence does not extend to the making of monetary indemnity or compensation for any material harm”.<sup>417</sup>

From this it can be concluded that even if Independent Accountability Mechanisms may somehow realize the accountability of IOs, these Independent Accountability Mechanisms may not be proper means for the implementation of international legal responsibility as long as the scope of their competence does not extend to decide about and expelling reparational measures. For this purpose, the Administrative Tribunals could come into play, in case of necessity even functioning as arbitral tribunals with the judges deciding on their personal and individual capacity as arbitrators.<sup>418</sup>

One thing can be said with certitude, namely that Independent Accountability Mechanisms, in spite of all imperfections, have undoubtedly paved the way for more accountability of financial institutions vis-à-vis private parties, a concept

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<sup>412</sup> Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, Vol. 57, issue 1, 2003, pp. 241–276, at p. 241.

<sup>413</sup> Rios, Greta L. and Flaherty, Edward P., “International Organization Reform or Impunity? Immunity is the Problem”, *ILSA Journal of International and Comparative Law*, Vol. 16, Nr. 2, 2009–2010, p. 441.

<sup>414</sup> Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *LJIL*, Vol. 4, No. 2, 1991, pp. 171–183, at p. 180.

<sup>415</sup> Reinisch, August and Weber, Ulf Andreas, “In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, The Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 59–110, at pp. 107–108.

<sup>416</sup> *Ibid.*, at p. 109.

<sup>417</sup> Suzuki, E. and Nanwani, S., “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks”, *op. cit.*, p. 224.

<sup>418</sup> *Ibid.*

though not identical with international responsibility,<sup>419</sup> but anyway following some common objectives vis-à-vis a larger spectrum of account-holders.

More light may also have to be shed on the question of sources of financing the accountability mechanisms, since their funding through the budget of the organization would lead to their dependence, at least, on the budget approving body of the IO.

In this section at first the two universal financial institutions, namely the World Bank (1) and International Financial Corporation (2) will be dealt with thoroughly. In the following, the analysis of the regional development banks among others the Inter American Development Bank (IBD) – Independent Consultation and Investigation Mechanism (3) Asian Development Bank (ADB) – Accountability Mechanism (4) European Bank for reconstruction and Development (EBRD) Project Complaint Mechanism (PCM) (5) and finally African Development Bank (AfDB) – Independent Review Mechanism (IRM) (6) will be undertaken.

#### (1) World Bank – WB’s Inspection Panel

With regard to the capacity of the Inspection Panel to satisfy and ensure the right of individuals to be heard and their right to a remedy,<sup>420</sup> which amounts to the implementation of second level of accountability as understood by the ILA it has been observed that:

“The Panel is the first international forum with the mandate to use complaints from private actors to supervise the activities of an international organization. Its establishment sets a precedent that has a potential to influence three areas of international law: the law of international organizations, substantive areas of international law such as international human rights and environmental law, and international administrative law.”<sup>421</sup>

As to the qualifications of the judges or members sitting in the Inspection Panel and the procedures for their appointment, which are guarantees for their objectivity and impartiality, qualities which as noted above are also at the same time essential to the realization of the rights of the third parties to access to a tribunal or forum in order to bring their claims, the following arrangements have been conceived:

<sup>419</sup> Richard, Vanessa, “Les Organisations Internationales entre *Responsibility* et *Accountability*: Le Régime de Responsabilité Esquissé par la CDI est-il adapté aux organisations internationales ?”, *Revue Belge de Droit International*, 2013(1), Éditions Bruylant, Bruxelles, pp. 190–205, p. 200.

<sup>420</sup> Boisson de Chazourmes, L., “Le panel d’inspection de la Banque Mondiale : à propos de la complexification de l’espace public international”, *Revue Générale de Droit International Public*, tome 105, 2001, pp. 145–162.

<sup>421</sup> Bradlow, Daniel D., “International Organizations and Private Complaints: The Case of the World Bank Inspection Panel”, *Virginia Journal of International Law*, Vol. 34, 1993–1994, p. 553, at p. 601.



“The Inspection Panel consists of three members who are appointed by the Board for nonrenewable periods of five years. As provided for in the Resolution that established the Panel, members are selected on the basis of their ability to deal thoroughly and fairly with the Requests brought to them, their integrity, their independence from Bank Management, and their exposure to developmental issues and to living conditions in developing countries. The Panel is functionally independent of Bank Management, and reports solely to the Board. Panel members are prohibited from ever working for the Bank after their term ends.”<sup>422</sup>

Most relevant to the questions of liability and responsibility in connection with the Inspection Panel specifically and the Independent Accountability Mechanisms in general is that they would discuss and review only those material adverse effects that have totally or partially resulted from serious Bank failure of compliance with its policies and procedures. It means that the Bank would not sustain liability for damages that are the result of activities that according to policies and procedures are considered lawful. In addition, the incorporation of the principle of complementarity in the procedure of these accountability mechanisms transforms the Inspection Panel into a sort of second alternative after the Management as the first instance to deal with the claim, as the necessity of ‘prior consent’ of the Executive Directors as well as the Developing Member Country may potentially hamper the inspection. The character of the Inspection Panel as a comprehensive and adequate accountability mechanism is further questionable because of the fact that it does not make any recommendations about remedial measures, only it investigates the alleged non-compliance of the Bank with its policies and procedures. Furthermore, the possibility of submitting a review request is subject to lapse of time limitations not always depending on a time frame but sometimes conditioned on happening before a certain stage of the financing of the project.<sup>423</sup> Concerns still exist that the Inspection Panel is more of an internal supervising and review organ than an accountability mechanism that is responsive towards outsiders and third parties.<sup>424</sup>

Accountability of the Bank in the framework of the Inspection Panel is far from unlimited. According to the Resolution establishing the Panel,<sup>425</sup> the accountability of the Bank may only arise vis-à-vis those private actors who are directly and materially affected by those conducts of the Bank that are inconsistent with its operating rules and procedures. Wrongfulness, or some kind of wrongful-

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<sup>422</sup> See, <https://www.worldbank.org/en/programs/accountability/brief/meet-the-inspection-panel-members> (last visited on 04.04.2022).

<sup>423</sup> Suzuki, E. and Nanwani, S., “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks”, *op. cit.*, p. 217.

<sup>424</sup> *Ibid.*, p. 219.

<sup>425</sup> The World Bank Inspection Panel, Res. 93-10, International Bank for Reconstruction and Development, Res. 93-6, International Development Association, Sep. 22, 1993.

ness, which is the result of a conduct contrary and in violation of a certain obligation is a necessary element of such accountability to arise. The distinctive element from responsibility is here the necessity of the fact that the private actors should have been materially and directly affected in order to gain standing before the Panel and having the ability to invoke the accountability of the Bank.

Closely related to the concept of accountability is the concept of transparency, which is a fundamental pillar of accountability as it has the potential to generate responsiveness, even if in practice the relationship of these two concepts is not completely direct. As has been rightly argued in scholarship, a more precise statement that better reflects the practical realities is that different forms of transparency respecting certain conditions may contribute to various kinds of accountability.<sup>426</sup> The World Bank has proved to be no exception to this observation. Even if human rights questions in general have remained a marginal issue at the Bank<sup>427</sup>, it did not prevent a new line of policy to gradually evolve at the World Bank and being implemented by it. This line of policy is known under the “access to information policy”,<sup>428</sup> replacing the former Bank’s Information Disclosure Policy and is, in sum, about making information more available to the public. Interested stakeholders will be able to follow projects step by step through each stage of a project lifecycle with the possibility to take recourse to an appeal process in case access is denied to certain information. Relevance of this policy to this section on accountability is that the adoption of such policy on the part of the Bank should be, in principle, a contribution to its transparency and accountability through facilitating public oversight of Bank-supported operations during their preparation and implementation, thus further strengthening the position of the Bank as a leader in transparency and accountability among international institutions. However, a major obstacle to this goal is that the Inspection Panel is exempt from this access to information policy because there is a ‘separate disclosure system’ which is applicable to this specific organ of the Bank.<sup>429</sup>

Different organs have different understanding of these Operational Policies and Procedures. In a certain way, the efficacy of the Independent Accountability Mechanisms depends on the content of the Operational Policies and Procedures. However, third parties can not expect something comparable with reparation as a final result of the inspection procedure, because it is simply not in the competence of the Inspection Panel to decide about corrective measures, these being merely at the discretion of the direction of the Bank. However, if at the end of the day the pressure through the findings of the Inspection Panel should be such that would

<sup>426</sup> Fox, Jonathan, “The uncertain relationship between transparency and accountability”, *Development in Practice*, Vol. 17, Numbers 4–5, Routledge Publishing, August 2007, pp. 663–671.

<sup>427</sup> Sarfaty, Galit A., “Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank”, *AJIL*, Vol. 103, No. 4 (Oct. 2009), pp. 647–683, at p. 650.

<sup>428</sup> Latest amendment adopted on April 3, 2013.

<sup>429</sup> See World Bank Board Report, “The World Bank Policy on Access to Information”, Report Nr. 79034, July 1. 2013, paragraph A13.

encourage the IO, in this case the World Bank, to change its behavior, more than any judgment on reparation could ever do, why not then considering the Inspection Panel as a *de facto* kind of remedial channel or mechanism.

The World Bank has undergone three human rights opening phases.<sup>430</sup> As mentioned above, by means of the provisions on the election of the panel members and the requirements and conditions applied to them after the termination of their term as panel members, it has been tried to guarantee their independence.<sup>431</sup> However, one of the most important criticisms observed with regard to the independence of the panel concerns its procedure which ‘leaves final decisions to the relatively more politicized Board of Executive Directors’, and even more so because “the Bank’s staff is allowed to play a role in its own supervision.”<sup>432</sup>

An important question that should be raised in this connection is whether the inspection panel is from the point of view of the applicants and complainants an effective procedure? There are different technical and procedural obstacles for the applicants, which cause the Inspection Panel to be considered as an ineffective and burdensome remedial procedure.<sup>433</sup>

There are also independent inspection panels that are established *ad hoc* to hear complaints from groups that are directly affected by the Bank’s projects.<sup>434</sup> In order to find out to what extent these inspection panels actually realize the aspirations, the needs and necessities towards accountability, it is necessary to review and examine what consequences can be drawn from the result achieved by these panels and to examine what measures, if any at all, can be taken by these panels and what effects the conclusions of these panels would have on the policy making, decisions and practice of the Bank. In this regard, the reference may be made to the checks and balances established in the World Bank. The tactic was indeed in hiring an additional agent beside the original agent and the introduction of administrative procedures.<sup>435</sup>

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<sup>430</sup> Janik, Cornelia, *Die Bindung Internationaler Organisationen an Internationale Menschenrechtsstandards*, Mohr Siebeck, Jus Internationale et Europaeum 66, 2012, pp. 252–296.

<sup>431</sup> *Ibid.*, p. 283.

<sup>432</sup> Bradlow, Daniel D., “International Organizations and Private Complaints: The Case of the World Bank Inspection Panel”, *Virginia Journal of International Law*, Vol. 34, 1993–1994, p. 553, at p. 602.

<sup>433</sup> Janik, Cornelia, *Die Bindung Internationaler Organisationen an Internationale Menschenrechtsstandards*, *op. cit.*, p. 286.

<sup>434</sup> Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, 57, issue 1, 2003, pp. 241–276, at p. 262.

<sup>435</sup> *Ibid.*, at pp. 264–265.

## (2) International Finance Corporation – Compliance Advisor Ombudsman (CAO)

“While the World Bank Inspection Panel is focused on compliance review, problemsolving is the cornerstone of IFC and MIGA’s Compliance Advisor/Ombudsman (CAO).”<sup>436</sup> Thus, it can be observed that the CAO, an independent recourse mechanism shared by IFC and MIGA established in 1999, serves the ideal, while at the same time also the necessity of accountability in an even more advanced manner and tries to deal with the challenges arising from conflicting interests involved in the realization of accountability in a holistic way. Fostering social and environmental outcomes, through lending an ear to the project-affected communities and enhancement of public accountability are set as the main goals of this organ, and are realized through the possibility to submit complaints and requests to audit.

Terms of reference of the CAO promises, among others, the independence of the Ombudsman from operational management and clearly established and enforced policies, procedures and guidelines, which can, from an optimistic viewpoint, in principle be considered as founding the pillars of the rule of law. From a skeptical and pessimistic point of view, however, it may be argued in the opposite direction by observing that commitment to and political statements followed up by the establishment of non-legal or semi-legal implementation review mechanisms is a cover for escaping any kind of legal supervision.

Even if there is no doubt about the significant progress achieved in the positive direction through the creation of the CAO position, some aspects make it difficult to consider the CAO a real remedy provider. First concern is with respect to the determination of actions which are required based on the conclusions arrived at by CAO. As such determination lies in the hands of the President, complete independence, and specially, the effectiveness of the review mechanism in practice may be questioned. In addition, according to the same terms of reference, the Ombudsman is appointed by and reports to the President. Another problematic point with regard to the relationship of the Ombudsman with the IFC or MIGA is that he/she should be a full-time employee of IFC and MIGA, appointed for a relatively short period of three to five years exposed to premature termination at the discretion of the President, of course upon determination of the fact that the Ombudsman can no longer exercise the function with the required level of independence and authority, which again raises doubts as to the real independence of the Ombudsman.

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<sup>436</sup> Suzuki, E. and Nanwani, S., “Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks”, *op. cit.*, p. 220.

### (3) Inter-American Development Bank (IBD) – Independent Consultation and Investigation Mechanism

The Independent Consultation and Investigation Mechanism (ICIM)<sup>437</sup> as the Independent Accountability Mechanism of the IDB, is like its counterparts, also mainly focused on the compliance of the Bank-financed projects with the Bank's operational policies. This reflects once more the crucial role of the Operational Policies and Procedures, the sources and the expression of the heightened expectations of International Financial Institutions,<sup>438</sup> for the realization of the accountability of this category of IOs. Arguably, these Operational Policies and Procedures belonging to the internal laws of the International Financial Institutions can be considered as having acquired until now, as a maximum grade, the *lex ferenda* status, although some scholars support the idea of the evolution of Operational Policies and Procedures into global administrative law.<sup>439</sup> Normative nature of these prescriptions, consisting in rules, guidelines and procedures, is however beyond any doubt. In addition, the accountability of the IBD through MICI, as the case is with other Independent Accountability Mechanisms of International Financial Institutions, is focused on and limited to operations and projects of the Bank, and thus, not encompassing all the other decisions and conducts of that IO. The emphasis of the MICI is mainly on heightening the environmental and social standards and on achieving sustainability in these spheres.<sup>440</sup>

Certain matters not covered by the MICI limit the scope of the process to the extent that this mechanism cannot really be considered as an alternative to international legal responsibility mechanism. Prominently, specific actions of Bank employees, as well as administrative or financial matters of the Bank are issues that are absolutely excluded from the review process by the MICI. These constraints are to some extent also due to the limits put on the scope of Operational Policies and Procedures of multilateral development banks, despite their unprecedented coverage of a large span of social and environmental issues. The explana-

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<sup>437</sup> The ICIM is effective as of September 9, 2010 and addresses complaints filed by individuals or groups who feel affected by projects financed by the IDB. It is to be added that in the framework of ICIM project ombudspersons are nominated who lead the consultation phase, during which claims are addressed by negotiations or mediation. The approach followed by the ombudsperson is mainly problem-solving through offering opportunities for resolution of complaints in a flexible and consensual way. In the course of the process of dialogue among all the parties involved, various possibilities and opportunities for remedying the aggrieved parties are assessed and proposed. The consultation phase is always succeeded by a monitoring phase.

<sup>438</sup> Bradlow, Daniel D. and Fourié, Andria N., "The Evolution of Operational Policies and Procedures at International Financial Institutions: Normative Significance and Enforcement Potential", *op. cit.*, p. 3.

<sup>439</sup> Kingsbury, B./Krisch, N./Stewart, R. B./Wiener, J. B., "Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law", *Law and Contemporary Problems*, Vol. 68, Numbers 3 and 4, 2005, pp. 1–15.

<sup>440</sup> For a description of MICI and its scope of competences see: <http://www.iadb.org/en/mici/home,1752.html> (last visited on 07.04.2022).

tion for it is that the Independent Accountability Mechanisms are basically triggered when there is an alleged case of non-compliance with Operational Policies and Procedures on the part of the multilateral development banks in the course of the conception or implementation of a development project or program which as a result inflicts or would inflict harm or threatens to inflict harm or damages on individuals or groups of individuals

#### (4) Asian Development Bank (ADB) – Accountability Mechanism (AM)

The Asian Development Bank (ADB) has been among the six International Financial Institutions that have established Independent Accountability Mechanisms following the footsteps of the World Bank in the fifteen years succeeding the operationalization of its Inspection Panel.<sup>441</sup> The Accountability Mechanism of the ADB has been “the first mechanism of its type established by a MDB to transcend a pure inspection function through combining problem solving and compliance review.”<sup>442</sup> ADB’s accountability mechanism provides people adversely impacted by ADB-assisted projects with a forum for: airing grievances that have inadvertently arisen as a result of project operations and requesting review of alleged noncompliance by ADB with its operational policies and procedures that may have caused, or are likely to cause direct or material harm to people affected by ADB-assisted projects. However, it should be noted that the AM monitors the remedial actions agreed by the ADB’s Board of Directors. This feature of the compliance review process of AM emphasizes the consensual character of the solutions found.<sup>443</sup> This quality assimilates the AM compliance review process to arbitration rather than any kind of judicial remedial process comparable to mechanisms invoking international legal responsibility of the Bank. At best, the notion of shared responsibility is taken into account and sought to be implemented. According to the famous slogan of most Independent Accountability Mechanisms of multilateral development banks, the earlier a problem is detected and addressed, the fewer the remedies required, and the lower the cost of the overall intervention.<sup>444</sup>

In spite of all these efforts and advancements, the ADB has been accused of absence of transparency and charged with unaccountability in its process, decisions and operations. Furthermore, the Bank has been blamed for playing a role in and catalyzing the political instability of some of the countries of the region as a

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<sup>441</sup> Bissell, Richard E. and Nanwani, Suresh, “Multilateral Development Bank Accountability Mechanism: Developments and Challenges”, *Manchester Journal of International Economic Law*, Vol. 6, Issue 1, 2009, pp. 2–55.

<sup>442</sup> Asian Development Bank, “10 Years of Accountability Mechanism”, *Publication Stock No. ARM146892-2*, 2014, p. 6.

<sup>443</sup> *Ibid.*, p. 12.

<sup>444</sup> *Ibid.*, p. 16.

result of its failed development interventions.<sup>445</sup> In late 2005, however, it appears that due to the amended version of its disclosure policy the ADB ranked high in all categories of the International Financial Institutions Transparency Indicators.<sup>446</sup> Nevertheless, criticism continues to be expressed on the part of civil society as to the lack of neutrality and impartiality of the review and accountability mechanisms.<sup>447</sup>

(5) European Bank for Reconstruction and Development (EBRD) – Project Complaint Mechanism (PCM)

One of the major criticisms expressed with regard to EBRD is the absence of a real and fair participatory decision-making as a result of dissemination of voting powers.<sup>448</sup> In response to the criticisms regarding democracy, transparency and accountability deficits, the EBRD has taken some steps consisting in the establishment of accountability and review mechanisms. EBRD's Independent Recourse Mechanism also used to provide for both problem-solving and compliance review functions, though it houses them in one unit.<sup>449</sup> Independent Recourse Mechanism (IRM) served as the EBRD's accountability mechanism from 2004 and has been replaced by the Project Complaint Mechanism (PCM) in 2010. The main difference between Problem-solving function and Compliance Review function is that the former seeks to resolve the issue(s) underlying a Complaint without attributing blame or fault, whereas the latter seeks to determine whether the EBRD has complied with relevant EBRD Policy in respect of an approved project.<sup>450</sup> That feature approximates the Compliance Review function – in comparison to Problem-solving function – to international legal responsibility mechanism. Only that the compliance review is undertaken and assessed with regard to the internal set of norms and rules of the International Financial Institution in the framework of Operational Policy and Procedures, rather than the rules of international law as is the case with respect to international legal responsibility. The repa-

<sup>445</sup> Carrasco, Enrique R./Carrington, Wesley/Lee, HeeJin, "Governance and Accountability: The Regional Development Banks", *Boston University International Law Journal*, Vol. 27(1), 2009, pp. 1–60, at pp. 17–32.

<sup>446</sup> McIntosh, Toby, "Best Practices on Transparency Among IFIs", IFTI WATCH, Sept. 12, 2005, <http://www.freedominfo.org/2005/09/best-practices-on-transparency-among-ifis/> (last visited on 01.05.2022).

<sup>447</sup> Press Release, NGO Forum on ADB, CSOs Hit ADB Communication Policy on Bishkek Heating Plant (June 19, 2008), <http://www.forum-adb.org/Press-Releases/20080619-CA.htm> (last visited on 17.07.2014).

<sup>448</sup> Roper, Stephen D. & Barria, Lilian A., *Policy Preferences Among Multinational Banks* 20 (Studies in Post-Communism Occasional Paper, No. 5, 2003). Available on: <https://people.stfx.ca/cpcs/studies-in-post-communism/Roper-Barria2003.pdf> (last visited on 07.04.2022).

<sup>449</sup> Suzuki, E. and Nanwani, S., "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *op. cit.*, p. 222.

<sup>450</sup> *Rules of Procedure of Project Complaint Mechanism*, Introduction and Purpose. Available on: <http://www.ebrd.com/pages/project/pcm/about.shtml> (last visited 14.02.2014).

rations that are recommended under the EBRD regime of Independent Accountability Mechanism are known as “remedial changes” and will be subject to a three-time exchange of viewpoints between Bank Management and the Complainant with the intermediation of Project Complaint Mechanism Officer, before being sent to the Bank Board of Directors or President for final decision consisting in either acceptance or rejection of the Management Action Plan. In the latter case, the Management Action Plan drafted following the Compliance Review report of the Project Complaint Mechanism expert will be amended by the Management of the Bank. Some measures – comparable to assurances and guarantees of non-repetition under the international legal responsibility mechanism<sup>451</sup> – may be adopted by making recommendations to address the findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences. However, in the context of the Compliance Review task of the PCM, the sub-paragraph “monitor and report on the implementation of any recommended changes”<sup>452</sup>, with regard to the “changes” it should be stated that the changes may be an adequate remedy depending on the case. For example, in cases where restitution is considered an adequate remedy and can be considered full reparation, it would be less problematic than with respect to the cases where compensation is also needed in order to give effect to full reparation. The attention should in this connection be specially paid to paragraph 41 of the RPs which stipulates that the Compliance Review may not recommend the award of compensation to the complainant beyond that which may be expressly provided for in the Relevant EBRD Policy.

A noteworthy point with regard to the interpretation of Operational Policies and Procedures by the accountability mechanism of the Bank (Project Complaint Mechanism) is that even during the latest Rules of Procedures (RPs) review in 2013–2014, the EBRD has shown reluctance with regard to enlarging the scope of policies subject to the Project Complaint Mechanism to the effect that, for instance, the Project Complaint Mechanism could be able to make recommendations on adequacy or suitability of EBRD policies and procedures.<sup>453</sup> Furthermore, the Bank has refused, for instance, to enlarge the scope of Project Complaint Mechanism complaint review competences to the complaints relating to Public Information Policy (PIP). The Bank has put forward for its response the argument that the Project Complaint Mechanism was designed to review Complaints about Bank-financed Projects only, and thus, it cannot include in its scope provisions of the PIP that are outside of the project-related information.<sup>454</sup>

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<sup>451</sup> *ARJO*, article 30(b).

<sup>452</sup> *Rules of Procedure of Project Complaint Mechanism, op. cit.*, para. 40. Available on: <http://www.ebrd.com/pages/project/pcm/about.shtml> (last visited on 19.07.2014).

<sup>453</sup> EBRD Documents, “*Project Complaint Mechanism (PCM) Rules of Procedure, Report on the Invitation to the Public to Comment*”, p. 3. Available on: [http://www.ebrd.com/downloads/integrity/pcm\\_comments.pdf](http://www.ebrd.com/downloads/integrity/pcm_comments.pdf) (last visited on 10.04.2022).

<sup>454</sup> *Ibid.*



## (6) African Development Bank (AfDB) – Independent Review Mechanism (IRM)

African Development Bank disposes of its own administrative tribunal, which is not the case with all the other regional development banks. The administrative tribunal is principally competent to proceed with employment relationships between the Bank and its personnel. In addition, another body with compliance review function has been established by the Bank in order to provide an avenue for people affected by projects financed by the Bank to seek redress. Independent Review Mechanism (IRM) of the AfDB,<sup>455</sup> however, provides mainly an avenue to request the Bank to comply with its own policies and procedures with, among others, the aspiration of heightening the credibility of the Bank. The AfDB's Independent Review Mechanism is a combined compliance review and problem-solving mechanism, consisting of a Compliance Review and Mediation Unit (CRMU).<sup>456</sup> Like the other IAMs examined above, one advantage that the CRMU may have over the international responsibility mechanism is that it can be triggered preventively. Put differently, any group of two or more people or any organization of the people likely to be harmed by the Bank's project may file a request in order to start a mediation or compliance review procedure.<sup>457</sup>

Although it seems that the IRM of the AfDB has a relatively enhanced role in the post investigation and remedial phase of the review process,<sup>458</sup> according to the purposes of the IRM its' functions are undertaken in a way that does not place blame on any party involved, neither following a compliance review nor as a result of the problem-solving measures. Another argument that can be put forward for the inability of CRMU, particularly, and IAMs generally, in replacing the international legal responsibility mechanism under international law, is the still persisting dissatisfaction of the requestors by the time of the termination of the compliance review process.<sup>459</sup> The civil society has repeatedly criticized the Independent Review Mechanism of the CRMU for its incapacity and insufficiency of providing

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<sup>455</sup> The AfDB's IRM has been Operational since 2006.

<sup>456</sup> Suzuki, E. and Nanwani, S., "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *op. cit.*, p. 220.

<sup>457</sup> Operating Rules and Procedures, paragraph III b. 6. (a), January 2015, available on <https://www.afdb.org/en/documents/document/revise-irm-operating-rules-and-procedures-2015-52239> (last visited on 04.04.2022).

<sup>458</sup> Paragraphs 52(c) and 60, the Independent Review Mechanism, Operating Rules and Procedures, paragraph VII 60., January 2015, available on <https://www.afdb.org/en/documents/document/revise-irm-operating-rules-and-procedures-2015-52239> (last visited on 04.04.2022).

<sup>459</sup> Paragraph 60 of the Operating Rules and Procedures of the Independent Review Mechanism of the AfDB with regard to the compensation award ban provides as follows: "The Compliance Review Report may not recommend the award of compensation or any other benefits to the Requestors or any other person, entity or government beyond that which may be expressly contemplated in a relevant Bank Group Policy." The Independent Review Mechanism, Operating Rules and Procedures, January 2015, available on <https://www.afdb.org/en/documents/document/revise-irm-operating-rules-and-procedures-2015-52239> (last visited on 04.04.2022).

for the remedy sought.<sup>460</sup> Already implied in its appellation, the most the Independent Review Mechanism can achieve is to incite the AfDB to amend or change certain dimensions of the project planned or already under implementation, in order to comply with the AfDB rules.

### 3. Conclusion

In order to complete the cycle of accountability, the international legal responsibility, that constitutes the third and an essential level of accountability – as classified by the ILA report described above – should become operational. IAMS established within the IFIs, intrinsically may not be able to fill the accountability gaps completely, even though without any doubt pioneer in their genre and praiseworthy advances in the road to optimal realization of accountability. As the results of the examinations in the subsections of this chapter have shown, these mechanisms, based on self-regulation – that will be dealt with more comprehensively in the next chapters – are concerned with procedural regulation aimed, to a great extent, at improving procedural legitimacy, that has prompted these IOs to undergo some changes to varying degrees. Therefore, the argument will not hold that these mechanisms in combination with the related regulations – self-regulations, to be more accurate in using terminology – may replace the general international legal responsibility regime of IOs. Furthermore, another relevant conclusion that can be drawn from our analysis with regard to the application of ARIO is that these accountability regimes may not be considered as *lex specialis* in the meaning used in article 64 of ARIO, and therefore, cannot replace the general regime of international legal responsibility put in place by ARIO.

Nevertheless, it should be added that, as often is the case, the IOs do not dispose of enough funds to discharge all the obligations arising from their international legal responsibility. The development of the concept of accountability and its implementation mechanisms, which aim at prevention and mitigation of negative impacts and damages through dialogue and engagement of those persons and communities who might potentially be affected by their activities, have to be doubtlessly regarded as desirable evolutions. Such progress at the international level would contribute, in an indirect way, to a more complete realization of the implementation of international legal responsibility of IOs, whenever it is raised, by means of alleviating the burden on the IOs as a result of international legal responsibility. At the same time, as will be more elaborated on in the coming sections, this could fill the gap in the provision of remedy to affected communities in cases where there can be no wrongful conduct established on the part of the IO, simply because there is no international legal rule or regulation, in the strict sense

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<sup>460</sup> Bank Information Center, Examining the African Development Bank: A Primer for NGOs 14 (2007). Available on: <https://archive.internationalrivers.org/sites/default/files/attached-files/examiningtheafricandevlopmentbank04.08.pdf> (last visited on 04.04.2022).

of the term, applicable on the IO prohibiting the conduct that has been at the origin of the damage or injury caused by such conduct.

The final conclusion that can be drawn from all the arguments set out above that also serves as the synthesis of our analysis in this subsection, is that the realization of international legal responsibility and accountability – in its entirety – is interdependence. More emphasis on this conclusion serves as a means to attract the attention to the necessity of greater interactions and cross-references between the rules and regulations deriving from these two concepts and their related mechanisms. Parallel development and improvements in both areas, which is equal to the advances in all levels of accountability, are the key to the operationalization of international legal responsibility, which in turn, as has been described above, contributes its share to the realization of accountability. This also explains, why at the beginning of this concluding subsection, the attribute of cycle has been used for referring to the status of full implementation of accountability.

## V. The intrinsic features of international legal responsibility

Any assessment of articles seeking to regulate the regime of international legal responsibility of IOs should take into account the specific characteristics of such regime, that distinguishes it from, *inter alia*, the adjacent and very close regime of international legal responsibility of states.

### 1. Legal personality as a precondition of accountability generally and responsibility specifically

Certain basic foundations of international institutional law have been so often repeated, in jurisprudence and doctrine, that there is no room for any doubts about them.<sup>461</sup> So is the situation of direct relationship between international legal personality and international legal responsibility of IOs. It goes without saying that the responsibility under international law depends on legal personality under international law:

“[Legal Personality] provides a means by which an actor can be held responsible and/or liable under applicable laws, based on its power, compe-

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<sup>461</sup> *Case Concerning Pulp Mills on the River Uruguay*, Argentina v. Uruguay, ICJ, Judgment 20 April 2010, para. 85 et seq.; Zemanek, K., *Das Vertragsrecht der Internationalen Organisationen*, Springer, 1957, p. 37; Reinisch, August, *International Organizations before National Courts*, Oxford University Press, 2000, p. 137.

tence and functions. Only legal personality can have a legal authority to exist in law and the means to remain accountable.”<sup>462</sup>

Nevertheless, it does not mean that its different nuances and dimensions cannot anymore undergo analytical examinations. In the doctrine, the international legal responsibility of IOs is the result of deduction from international legal personality.<sup>463</sup> If an organization would not have its own legal personality, it can by definition have no obligations of its own, and therefore it cannot be *itself* responsible for a violation of obligations. Therefore, the statement holds that there is no responsibility without personality.<sup>464</sup>

A constitution shall give *volonté distincte* to an international organization. Otherwise, there will not be a constitution creating a separate institution, but a treaty laying down rights and obligations of the parties. Powers, therefore, have to be given to a collectivity that has a certain status. This status is created by giving the organization legal personality.<sup>465</sup> As stated by the ICJ in 1996, the object of constituent instruments of international organizations is “to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals”.<sup>466</sup> Moreover, an international organization needs international legal personality in order to perform its functions. This will give it the necessary status in its relations with States and other international organizations as well as the capacity to conclude treaties within the scope of operation of the organization. In addition, it will make it possible to give the necessary legal status, privileges and immunities to the staff of the organization.<sup>467</sup>

Practice has demonstrated that international organizations need international legal personality in order to be able to perform their functions as independent actors. At times States may find it difficult to accept this, for political reasons. But time and again it becomes clear that this is also something they can no longer control, something more powerful than themselves.<sup>468</sup> As it has been rightly observed:

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<sup>462</sup> Patel, N. Bimal, “The Accountability of International Organizations: A Case Study of the Organization for the Prohibition of Chemical Weapons”, *LJIL*, Vol. 13, 2000, pp. 571–597, at p. 577.

<sup>463</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemmer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 708.

<sup>464</sup> Blokker, Niels M., “International Organizations as Independent Actors: Sweet Memory or Functionally Necessary”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 37.

<sup>465</sup> *Ibid.*, p.42.

<sup>466</sup> ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, ICJ Rep. (1996), pp. 97–100.

<sup>467</sup> Blokker, Niels M., “International Organizations as Independent Actors: Sweet Memory or Functionally Necessary”, *op. cit.*, p.45.

<sup>468</sup> *Ibid.*, p.46.

“Responsibility and rights are two sides of the same coin. From that it follows that international organizations are capable of being held responsible for their acts to the same extent as they are capable of taking an active part in international relations.”<sup>469</sup>

It has been established that if the members of an IO are incorporated in the legal personality of the organization and constitute the integral parts of it, then it will be the IO that will bear the responsibility for the decisions taken by its organs. Otherwise, the member States could bear the responsibility for the decisions taken by the organizations’ organs. This result can be arrived at by way of analogy with the international responsibility that a central federal state would incur even for the wrongful conducts of its constituent federated states.<sup>470</sup>

Among the primary issues that every legal order has to determine and specify is its legal subjects. In other words, entities considered legal persons under that order and thus, enjoy rights and obligations under the rules and regulations stemming from the sources of that order.<sup>471</sup> The international legal personality that ILC recognizes as the precondition for international legal responsibility of IOs is a personality “distinct”<sup>472</sup> from that of its member States.<sup>473</sup> As it has been justly and rightly submitted, however, the required and expected comparative assessment of the international legal personality of IOs has not been carried out satisfactorily.<sup>474</sup>

#### *a) The Nature of the Legal Personality of International Organizations*

Although the nature of the international legal personality of IOs has not been the subject of any changes from the initial stages of its recognition, the degree of such international legal personality of IOs, as well as the number of IOs enjoying legal personality at the international level, have gone through an enormous evolution only during the last century. Theoretically, *Kunz* has briefly, but at the same time very comprehensively, described the situation of the international legal personality of IOs from a classical point of view:

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<sup>469</sup> Mosler, Hermann, *The International Society as a Legal Community*, Sijthoff & Noordhoff, 1980, p. 170.

<sup>470</sup> Accioly, Hildebrando, “Principes généraux de la responsabilité internationale d’après la doctrine et la jurisprudence”, *RdC*, 1959(I), t. 96, pp. 347–441, p. 391.

<sup>471</sup> Capotorti, Francesco, “Cours Général de Droit International Public”, *RCADI*, Vol. 248 (IV), 1994, pp. 9–343, at p. 30.

<sup>472</sup> Seyersted, Finn, “*Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend on the Conventions Establishing Them?*”, Krohns Bogtrykkeri, Copenhagen, 1963.

<sup>473</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 9, Para. 10 (last visited on 07.04.2022).

<sup>474</sup> Ahlborn, Christiane, “The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations. An Appraisal of the ‘Copy-Paste Approach’”, *International Organizations Law Review*, Vol. 9, No. 2, 2012, pp. 53–66, at p. 62.

“...an IO is not *ipso facto* a person in international law, and, if it is, its legal status is not necessarily identical with that of a sovereign state.”<sup>475</sup>

In contrast to this author’s time, where there was a presumption towards the lack of international personality for IOs, in our time this presumption has reversed to the opposite.<sup>476</sup> Apart from some IOs whose international legal personalities have been the subject of some controversies in the past,<sup>477</sup> in general it is assumed that the IOs enjoy international legal personality either explicitly by way of a provision in their constituent document, or impliedly through the tasks and functions bestowed on them by their founding members. According to the understanding of the ICJ in its advisory opinion on the *Reparation for the Injuries suffered in the Service of the United Nations*,<sup>478</sup> if it is intended to examine the international legal personality of an entity in international law, first and foremost the substantive and international procedural rights and entitlements of this entity should be examined.<sup>479</sup> The reason is that in the opinion of ICJ having international legal personality is the same as having the capacity to hold rights and obligations under international law. The procedural rights and entitlements of IOs provide for and clarify to which tribunals and authorities do the IOs have access to sue their claims. In this regard, one can of course indefatigably discuss about different dimensions and nuances of that understanding. For example, it can be examined whether the possession of only one obligation under international law would suffice for an IO to enjoy international legal personality or whether other elements would also be necessary.<sup>480</sup>

However, it is impossible to ignore one of the special characteristics of the international legal personality of IOs, which is the fundamental reason of the distinction of the international legal personality of IOs from that of the States, namely, that IOs’ international legal personality is limited in nature and scope. As has been rightly observed:

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<sup>475</sup> Kunz, Josef L., “Privileges and Immunities of International Organizations”, *AJIL*, Vol. 41, Issue 4, 1947, pp. 828–862, at p. 849.

<sup>476</sup> Kunz, Josef L., “Experience and Technique in International Administration”, *Iowa Law Review*, Vol. XXXI (November, 1945), pp. 40–57.

<sup>477</sup> Seidl-Hohenveldern, I., “Internationale Organisationen aufgrund von Soft Law”, in U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt*, 1995, pp. 229–239, at p. 233.

<sup>478</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, ICJ Rep, p. 174 ff.

<sup>479</sup> Dominicé, Christian, “Observations sur la Personnalité juridique de droit interne des organisations internationales”, Hafner, Gerhard et Al. (ed.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern*, Kluwer Law International, 1998, pp. 85–96, at p. 86.

<sup>480</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 7, Para. 8 (last visited on 07.04.2022). For a discussion of the international legal personality of European independent community bodies see Schusterschitz, Gregor, “European Agencies as Subjects of International Law”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 163–188, specially from p. 179 ff.

“... the international legal personality of international organizations is generally considered to be functionally limited. In other words, international organizations enjoy legal personality only to the extent required to perform their functions. In a legal sense, they are unable to act beyond their functional personality. Any acts not covered by such a limited personality are *ultra vires*.”<sup>481</sup>

Some authors believe that since the birth of IOs depend on the will and consent of States, the IOs are secondary phenomena in comparison to States, and that is the result of the lack of sovereignty by IOs.<sup>482</sup> The question of the probability and prospect of attributing sovereignty to IOs, or exercising sovereign rights by the IOs, which could be considered the two sides of the same coin, will be further elaborated in the course of this section.

*b) A Right to Legal Personality for International Organizations?*

It should be kept in mind that this issue is rather a technical and political matter than a legal one, but anyhow it seems to be appropriate to touch upon it at this point, albeit briefly. As different national legal systems have different approaches and attitudes to this question, it appears that from a methodological viewpoint, at first relevant national legal provisions should be investigated. Subsequently, it should be made clear what stance international law takes with this regard. In case the IOs would enjoy a right to legal personality under a significant number of internal legal systems of states, it could be argued that a general principle of law exists as to the right of IOs to having legal personality under domestic law. That is of course not the same as international legal personality of the IOs, which is the reflection of the legal status of IOs under international law. In order to establish whether there is a right to legal personality for IOs under international law, above all, the formal sources of this legal order in that connection should be examined.

From the perspective of international legal sociology, arguments could be brought forward for or against the necessity of the existence of such a right for IO. These arguments would mainly be based on political as well as international sociological considerations.<sup>483</sup> A further and closer examination of that question would have to be subject to a separate research.

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<sup>481</sup> Reinisch, August and Weber, Ulf Andreas, “In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individuals’ Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement”, *IOLR*, 2004 (1), pp. 59–110, at p. 63.

<sup>482</sup> Dupuy, René-Jean, “Etat et Organisation Internationale”, in Dupuy, René-Jean (ed.), *A Handbook on International Organizations*, 2<sup>nd</sup> edition, 1992, Martinus Nijhoff Publishers, pp. 13–30, at p. 14.

<sup>483</sup> Corten, Olivier, *Méthodologie du Droit International Public*, éditions de l’université de Bruxelles, 2009, pp. 20–45.

*c) Different degrees of international personality and its impact on the international responsibility of IOs*

There is not an exact threshold or measurable criteria in the process and stages of institutionalization of an IO, at which it can be claimed that the IO has started, from that point onwards, to enjoy international legal personality. It appears, however, that even after the IO has surpassed the threshold of becoming an international legal person the process of institutionalization should not necessarily stop. In theoretical terms, it could give rise to different and varying degrees of international legal personality of the one and the same IO during different phases of its existence. Now, the question that arises is whether the subsequent advances and progresses in this process could have an impact on the content of the international legal responsibility of that IO or not. It is evident that as soon as an IO is conferred with international legal personality, the possibility of potential and eventual international legal responsibility will be transmitted from the constituting members to the IO. Assuming that there are different degrees of international legal personality, which is, precisely, the result of the continuance of the process of institutionalization referred to above, as a corollary there should be equivalent and corresponding general rules of international legal responsibility. It is obvious that this proposition would require – for the purpose of avoiding ambiguity and confusions in the application of legal rules – clear and precise identification and definition of each and every level which is distinguishable from its preceding and succeeding levels.

As another, to some extent different and unexpected subject of international law the reference can be made to European Schools.<sup>484</sup> These subjects of international law can arguably be considered IOs in the meaning of the ARIO, and thus, the ARIO provisions would be applicable. Therefore, as a result of this fact the issue of the primary rules applicable to them is important. Now, it is not clear which primary rules are applicable to these subjects of international law. It is clear that for these schools, the question of the precedence of European law or international law does not arise, since they are not under the applicability and realm of European law. It seems from the description of the legal basis of this institution that international law would have precedence.<sup>485</sup> Another issue that may be of relevance is the question of the recognition of intergovernmental public international entities as IOs, which is not always an uncontroversial issue. This debate also exists with regard to European Schools. If ARIO becomes binding one day, its provisions would be applicable to European Schools. Then, the internal dispute settlement body of this institution will be affected with regard to the respect for

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<sup>484</sup> On the legal nature of the European Schools see Gruber, Joachim, “Europäische Schulen: Ein in die EG integriertes Völkerrechtssubjekt“, *ZAÖRV*, Band 65, 2005, pp. 1015–1032, especially at pp. 1024–1025 and 1032.

<sup>485</sup> *Ibid.*, pp. 1015–1032, especially at p. 1032.



the human rights for instance of the employees with respect to their employment relationships.

As *Hafner* has put it, the international legal personality of IOs is a reflection of the diversity of these subjects of international law.<sup>486</sup> IOs are manifold, in terms of almost every aspect of their character.<sup>487</sup> According to the typology *Seyersted* has brought forward, IOs can be categorized into different groups according to their size (membership), purposes, functions and powers and duration.<sup>488</sup> Thus, arguably the IOs can be described as an actually heterogeneous species.<sup>489</sup> Therefore, some authors believe that generalizations with regard to IOs may be accompanied by some risks.<sup>490</sup> On the basis of this fact, these scholars believe that a general approach with regard to IOs is not adequate, specially, what relates their international legal personality and also in relation to their establishing documents and basis.<sup>491</sup> For instance, a limited degree of international legal personality has been recognized for Independent Community Bodies.<sup>492</sup> Furthermore, it can be argued that the doctrine of attributed power finds in this regard relevance as the international legal personality of IOs is to the extent of the powers attributed to them by sovereign States founders of the IOs.<sup>493</sup>

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<sup>486</sup> Hafner, Gerhard, "Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks", in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, p. 704.

<sup>487</sup> Bernhardt, Rudolf, "Europäisches Gemeinschaftsrecht und Das Recht Internationaler Organisationen: Gemeinsamkeiten und Unterschiede", in Hafner, Gerhard et Al. (ed.), *Liber Amicorum Professor Ignaz Seidl-Hobenveldern*, Kluwer Law International, 1998, pp. 25–35, at p. 35.

<sup>488</sup> Seyersted, Finn, *Common Law of International Organizations*, Martinus Nijhoff Publishers, Leiden/Boston, 2008, pp. 9–10.

<sup>489</sup> For the variety of the IOs in terms of their functions, structures, membership and etc. see Mendelson, Maurice, "The Definition of 'International Organization' in the International Law Commission's current Project on the Responsibility of International Organizations", in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 371–389, at p. 372–373; For a general typology of IOs see Seyersted, Finn, *Common Law of International Organizations*, Martinus Nijhoff Publishers, Leiden/Boston, 2008, pp. 9–21.

<sup>490</sup> Mendelson, Maurice, "The Definition of 'International Organization' in the International Law Commission's current Project on the Responsibility of International Organizations", *op. cit.*, at p. 373.

<sup>491</sup> *Ibid.*

<sup>492</sup> Schusterschitz, Gregor, "European Agencies as Subjects of International Law", *IOLR*, Vol. 1, Issue 1, 2004, pp. 163–188, at p. 175.

<sup>493</sup> The doctrine of attributed powers is also referred to as the doctrine of speciality. For more on this doctrine see Klabbers, Jan, "The Life and Times of the Law of International Organizations", *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317, at pp. 296–297.

*d) Sovereignty of IOs?*

IOs exercising sovereign rights seems no more so strange, as this already happens time and again at least in the framework of international territorial administrations, even though until this date temporarily. In this section, the question will be discussed whether in the present status of the international relations and by way of the observance of the decisions taken by the IOs, may we speak of sovereign IOs at all. For this purpose, it must first be made clear what sovereignty means and to answer the question whether and what difference would it make for the regime of international responsibility of IOs should these subjects of international law possess sovereignty. Unsurprisingly, for a concept and institution such as sovereignty, which has permanently been challenged, there is more than one consensual definition. It is more than clear that all the resulting various and controversial definitions put forward in the literature can not be exhaustively gone through in a subsection of this thesis. However, it does not prevent us from referring to major aspects of any definition of the institution of sovereignty which might be relevant for our main question. One of the essential aspects of the definition of sovereignty, which is at the root of its diversity, is the determination of its constituent elements. Another relevant dimension relates to the beholders of sovereignty which raises the question of who owns sovereignty. One of the answers given to this latter question in the framework of constitutional federalist theories relating to internal legal systems is that the true sovereignty lies only in the people of a State.<sup>494</sup>

Theoretically, integration oriented IOs could be the most apt candidates to enjoy a sovereignty of their own separate from the sovereignty of their member states, given their vast scope of powers, functions and competences. As a meanwhile famous example, in certain contexts already it has been spoken of a “European sovereignty”.<sup>495</sup> However, from a general point of view it seems that the constitutional structures of member states are not still open and ready for such radical transformations. For instance, the answer given impliedly by Article 24 of the German Basic Law is that at the furthest the German legal space opens itself to regulation by international organizations, and this Article does not provide for a “transfer of sovereignty to international organizations in the proper sense of the term”.<sup>496</sup>

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<sup>494</sup> Akhil Reed, Amar, “Of Sovereignty and Federalism”, *Yale Law Journal*, Vol. 96, 1987, pp. 1425–1520, at p. 1427.

<sup>495</sup> Paulus, Andreas, “Das Verhältnis der nationalen Verfassungsgerichte zum Gerichtshof der Europäischen Union und dem Europäischen Gerichtshof für Menschenrechte”, Tartu, 9 September 2011, p. 5.

<sup>496</sup> Randelzhofer, Art. 24, Abs. 1, Para. 55, in Maunz and Dürig (eds.), *Grundgesetz: Kommentar*, Beck Verlag, München, 2007.

*e) The International Responsibility of IOs not enjoying International Legal Personality?*

The intention in this subsection is far from seeking to analyze the entire issue of whether there is any possibility that the IOs not possessing international legal personality – separate from those of their members – may incur international responsibility and the different aspects and features of that possibility at the international sphere. However, in drawing on the admission made by ILC in the paragraph 2 of the commentary to article 2 of the ARIO destined to determine the scope of the application of ARIO provisions,<sup>497</sup> it will be argued that certain articles of ARIO may find applicability under certain circumstances involving IOs described in this subsection, even though these categories of IOs may not, in principle, incur international responsibility. For instance, the article 61 on the circumvention of international obligations of a state member of an IO would be applicable to the case of IOs under examination, as there is no need of a wrongful act being committed by the IO in question in order that the state would incur international responsibility under that article.

The most important element, which is required in the case of international legal responsibility, as the definition of the responsibility principle stands presently, is the possession of an obligation under international law. For that, it is clear that an IO should have legal personality under international law. It is clear that not all intergovernmental organizations enjoy international legal personality. Moreover, the instances of international bodies lacking international legal personality are not rare. The prominent examples are Benelux, Arctic Council<sup>498</sup> and the Organization for Security and Cooperation in Europe. The first hypothesis that deserves being examined in this context is the case where an IO lacks international legal personality but possesses obligations under international law. Such cases may easily exist where an IO lacks, explicitly according to its founding instrument, international legal personality, but is bound by peremptory norms and rules of general international law. The theoretical question that prompts here is whether on the basis of the existence of an international legal obligation, automatically the potential of incurring international responsibility on the part of the IO may be asserted, or always beforehand the international legal personality of the IO should be established first in order that there is the possibility for its international responsibility? It seems that the obligation is more vital for international responsibility than international legal personality, should the possession of international obligation not suffice for the ascertainment of international legal personality.

The ILC has decided to exclude these IOs from the scope of its work. But the reason is not that the wrongful conducts committed in the framework of these

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<sup>497</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p.7, Para.2 (last visited on 07.04.2022).

<sup>498</sup> Bloom, E. T., “Establishment of the Arctic Council”, *AJIL*, Vol. 93, 1999, pp. 712–722, at p. 721.

bodies will not have any consequences, but rather that with regard to these IOs it is the members that will bear the responsibility for the conducts undertaken in the framework and under the name of the IO and not the IO that will incur international legal responsibility. The reason why IOs lacking international personality would not incur international legal responsibility is that the responsibility is the correlative duty to the right.<sup>499</sup> Lacking international legal personality means that the IOs lack rights and duties under international legal system. Thus, it cannot be expected that these IOs may incur international responsibility. But the question that with regard to these kinds of IOs may come to the mind is whether these IOs are bound by general international law rules and regulations or not. The corollary and logical result from the statement that these IOs lack international legal personality, and therefore, the fact that these are not the subjects of international law, is that these bodies are not bound by any rules and regulation and thus do not have any obligation under international law. But it is a bit difficult to accept that, for example, the Organization for Security and Cooperation in Europe is not bound by any rules of general international law, *inter alia*, human rights.

The difference between IOs with international legal personality and those IOs lacking this characteristic is in fact that the former are the structured form of international cooperation while the latter are less structured forms of international cooperation.<sup>500</sup> It seems that there should be a threshold of being structured where by passing that certain limit the entity would possess international legal personality and thus incur international responsibility. In the less structured forms of cooperation, the role of members is much more prominent. In these IOs the scope of functions, tasks and powers of organs of the IO is to a much greater extent limited in comparison with the other more structured IOs. The institutionalization of these entities is generally a process that leads to the emergence of a structured body.

A prominent category of international entities not possessing international legal personality, following the expression epitheted by Adam, are the so-called “International Public Establishments”.<sup>501</sup>

Activities committed by entities lacking international legal personality instituted by the State can easily be attributed to States, since there is no shield in between these States and the act.<sup>502</sup> Another question that is worth being posed here is the situation of the international legal responsibility of IOs whose international

<sup>499</sup> Bindschedler, Rudolf L., “International Organizations, General Aspects, Legal Personality”, *Encyclopedia of Public International Law*, Bernhardt, R. (ed.), pp. 119–140, at p. 130.

<sup>500</sup> Schermers, Henry G., and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, fourth revised edition, Martinus Nijhoff Publishers, Boston/Leiden, 2003, p. 23, § 30.

<sup>501</sup> For a comprehensive study and examination of “international Public Establishments” see H.T. Adam, *Les Organismes Internationaux Spécialisés. Contribution à la théorie générale des Etablissements Publics Internationaux*, Tome 5, L.G.D.J., 1992, pp. 1–341.

<sup>502</sup> Grant, D. Thomas, “International Responsibility and the admission of States to the United Nations”, *Michigan Journal of International Law*, Vol. 30, No. 2, 2009, pp. 1095–1185, at p. 1135.

legal personality is not clear. In any case, it seems that demanding first level accountability, from entities deprived of international legal personality, is compatible with the logic, spirit and purpose of international law. International legal personality is the precondition of international legal responsibility, because it provides the possibility of holding rights and obligations under international legal order, which is in turn the prerequisite of international legal responsibility of any subject of international law. As has been explained above, the first level accountability do not necessarily require that the entity from which account is demanded to possess international legal personality as the principles forming the basis of this level of accountability are not necessarily legal obligations in the strict sense of the term, but rather norms with legal effects.

## 2. International Criminal Responsibility for IOs?

Before entering into our main discussion, it is important to note that, without any doubt, the international and national criminal responsibility of the officials of IOs is quite conceivable and has also been discussed in different contexts.<sup>503</sup> With regard to the attribute criminal for international responsibility, a distinction has to be made between two separate concepts of the crimes of a subject of international law, on the one hand, and international criminal responsibility, on the other hand.<sup>504</sup> The issue under examination is rather the possibility of an international criminal responsibility for IOs, since as with regard to States, the IOs may commit international crimes the result of which being international responsibility for that IO, but not necessarily international criminal responsibility.<sup>505</sup> This latter notion is, above all, related to the functional field of the responsibility in international law.

### *a) The Concept of the international Criminal Responsibility of States*

Given the stage of the development of international law and the situation of international relations at the time of the preparation of the draft of the Articles on State responsibility, it was decided to rule out the idea that as a result of an internationally wrongful act, general international law can create a legal relationship between the guilty State and the international community as such, just as munic-

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<sup>503</sup> For a discussion of criminal responsibility of the agents and officials of IOs in the context of corruption see Trebilcock, Anne, "Implications of the UN Convention against Corruption for International Organizations: Oversight, Due Process, and Immunities Issues", *International Organizations Law Review*, Vol. 6, 2009, pp. 513–540; Clapham, A., "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups", *Journal of International Criminal Justice*, Vol. 6, 2008, pp. 899–926.

<sup>504</sup> Ollivier, Antoine, "International Criminal Responsibility of the State", in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 703–715, at p. 703.

<sup>505</sup> Gounelle, M., "Quelques remarques sur la notion de 'crime international' et sur l'évolution de la responsabilité internationale de l'Etat", in J Makarczyk & K Skubiszewski, (eds), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Paris, Pedone, 1981, p. 318.

pal law creates a relationship between the person committing an offence and the State itself.<sup>506</sup> It had been argued mainly that international law can have no such effect, so long as it does not recognize a personification of the international community as such.<sup>507</sup> A criminal responsibility would involve a public law relationship between the State committing a violation and the community as a whole. This kind of responsibility would involve and provide for punitive damages.<sup>508</sup> The position adopted by the ILC has also been shared by the doctrine. As *Paulus* has observed:

“...criminalizing the States does not correspond to the present state of international law...”<sup>509</sup>

That was the main reason why this concept, initially incorporated in article 19 of the draft of 1996, was omitted from the final draft of ASR in the 2001 second reading and final version adopted by the General Assembly.

*b) International Criminal Responsibility of IOs: A possibility?*

It seems that the same distinction may be made between the two notions of the commission of international crimes by IOs, on the one hand, and the international criminal responsibility of IOs, on the other hand. The former would necessarily lead to individual criminal responsibility as the main and expected form of reparation – in the case of IOs it would implicate, for instance, the criminal responsibility of civil servants of no matter which grade or status, or the agents of the IO – whereas the latter notion, on the contrary, would mean and essentially imply the international criminal responsibility of the IO itself.<sup>510</sup> In ARIO neither, there is not any criminal connotation, and none of the two notions of *International Crime* or *international criminal responsibility* do appear.<sup>511</sup> Instead, another notion is to be found

<sup>506</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, pp. 390; Weiler, J., and Cassese, A. and Spinedi, M., *International Crimes of State*, Berlin, New York, Gruyter, 1989; Crawford, James, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 224–240; Gilbert, Geoff, “The Criminal Responsibility of States”, *ICLQ*, Vol. 39, 1990, pp. 345–369.

<sup>507</sup> Ago, R., “Third Report on State Responsibility”, *ILC Yearbook*, Vol. II (1), 1971, p. 210, at para. 40.

<sup>508</sup> Koskeniemi, Martti, “Doctrines of State Responsibility”, in James Crawford; Alain Pellet; and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 45–51, at p. 48.

<sup>509</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, pp. 431.

<sup>510</sup> Nollkaemper, André, “State Responsibility for International crimes: a review of principles of reparation”, in Constantinides, Aristotle, and Zaikos, Nikos (eds.), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa*, Brill/Martinus Nijhoff, 2009, pp. 487–518.

<sup>511</sup> Spinedi, M., “La responsabilité de l’Etat pour ‘crime’: une responsabilité pénale?”, in H. Ascencio, E. Decaux, A. Pellet, (eds.), *Droit international pénal*, Paris, Pedone, 2000, 103–113 ; De Hoogh, A. J.

in the final result of the second reading, namely, the notion of “Serious Breaches of Obligations under peremptory norms of general international law”.<sup>512</sup> The interesting point is that in articles 41 and 42 the concept of international community does not appear, while the concept of general international law has been used. In contrast, in paragraph 2 of article 49 dealing with the states or IOs that may invoke international responsibility of an IO that has committed a wrongful conduct, reference has been made to the international community as a whole as the main holder of the rights deriving from obligation breached. Thus, it can be noticed that violation of certain rules embodying *erga omnes* obligations creates special conditions as to the standing bestowed on subjects of international law in order to invoke international responsibility. From the entirety of all the above mentioned points it can be concluded that it cannot be asserted that a regime of criminal responsibility applicable on IOs in international law exists or can firmly be established. The next step would be to examine whether the creation of such regime would be possible and desirable at all.

The questions of the feasibility, and more importantly the usefulness of international criminal responsibility of IOs have been less a matter of discussion in scholarship than has been the issue of international criminal responsibility of states. Corporate criminal liability, a concept with national law origins and for a long time resisted against in certain legal systems by upholding the classical maxim *societas delinquere non potest* but finally accepted following factual changes and practical necessities,<sup>513</sup> may be of use in this context by means of comparative analysis. It seems that legal policy considerations which prevented and barred the codification of international criminal responsibility of states, partly, find justification also when the international criminal responsibility of IOs is in question. The reluctance and suspicion of criminal lawyers towards collective guilt and criminal responsibility,<sup>514</sup> as well as the possibility and practicability of subjecting IOs which have perpetrated an internationally wrongful act to a sanction or punishment, or the controversies over the modalities of such sanction,<sup>515</sup> cannot easily be overcome. Another difficult question in this respect would remain the threshold beyond which the breach of international legal rules should be considered a crime. And also another ambiguous point in applying the concept of international criminal responsibility to IOs may be the establishment of *mens rea*, notably, in which cases

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J., “The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective”, *AJPIIL*, Vol. 42, 1991, pp. 183–214.

<sup>512</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), Part three, Chapter III, articles 41–42. (last visited on 07.04.2022).

<sup>513</sup> Stessens, Guy, “Corporate Criminal Liability: A Comparative Perspective”, *ICLQ*, Vol. 43, April 1994, pp. 493–520, at p. 493.

<sup>514</sup> Nollkaemper, André, “State Responsibility for International crimes: a review of principles of reparation”, *op.cit.*, at p. 514.

<sup>515</sup> Ollivier, Antoine, “International Criminal Responsibility of the State”, *op.cit.*, at p. 704.

the *mens rea* of certain employees of IO may be considered as that of the IO itself. Another aspect of this issue is the question of the modality of the implementation of such criminal responsibility or liability which may be discussed extensively.

If international criminal responsibility of IOs would only be equal to a further invention of a new concept in the domain of international responsibility, devoid of any further consequences that would distinguish it from international legal responsibility, in the classical sense, then what would be the benefit drawn from such undertaking. Thus, ideally the distinction should at best manifest itself at the stage of implementation of such responsibility as a ‘sanction’ in addition to ‘reparation’, or better said ‘full reparation’. Some interesting, however difficult to answer, questions would arise from this idea, which are mainly related to the form of this sanction, the authority that could order such sanctions and their modality of execution, the beneficiaries of such sanctions, should these take merely the form of pecuniary punishments and fines, and similar questions. Of course, in opposing to this proposition the policy consideration of financial deficit in the budget of IOs that would further discourage the participation of members, thus diminishing international cooperation would inevitably be the result. Nevertheless, the famous counter argument could be put forward, namely that such risks would lead to more careful and crime avoiding behaviour on the part of the IO and its organs and agents. It should be added that the strongest motive behind inflicting sanctions would be a deterrent, and consequently, preventive function these could perform, not at all any psychological corrective goals. Countermeasures<sup>516</sup> – arguing on the basis of some deeper and less visible layers of motivations of the party who takes resort to countermeasures – or reprisals have by some scholars been regarded as being able to fall under the category of punitive sanctions, an approach that ILC has not adopted in drafting its articles on responsibility, neither with regard to States nor with respect to IOs.<sup>517</sup> The ILC has decided to limit the scope of countermeasures to a means of ensuring the implementation of secondary obligations, thus, keeping them away from any criminal legal connotations or nature.<sup>518</sup>

Generally speaking, the content or implementation of a criminal responsibility regime would have as its main aim and objective, above all, to ‘punish’, which has as its premise the irreversibility of the violation of a rule of international law.<sup>519</sup>

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<sup>516</sup> Alland, D., *Justice privée et ordre juridique international – Etude théorique des contre-mesures en droit international public*, Paris, Pedone, 1994, pp. 190–191, para. 141.

<sup>517</sup> Barboza, Julio, “Legal Injury: The Tip of the Iceberg in the Law of State Responsibility”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 7–22, at p. 11.

<sup>518</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), Part four, Chapter II, article 51m para.1. (last visited on 07.04.2022)

<sup>519</sup> Combacau, J. and Sur, S., *Droit International Public*, 6ème édition, Paris, Montchrestien, 2004, p. 520.



Such punishment might have taken the form of pecuniary sanctions and fines, dissolution of the IO<sup>520</sup> or a less realist form of liberty limitations and sanctions in the case of IOs proper. As to its possibility of implementation, criminal responsibility of IOs could be implementable by way of fines and pecuniary punishment. Definitely, this form of pecuniary punishment would have some aspects completely different from the pecuniary punishment in national legal systems in which normally the fines would end up in public funds and resources. A major problem would then appear with respect to IOs, such as UN, which are believed to be representing international community in a way making its budget a kind of public fund of international community that would benefit all, by way of being apportioned and used in principle for activities that would benefit the common interests. Demanding payment of fines from public sources for repayment in public sources would seem like a circular act devoid of any added value. Nevertheless, except the UN and some other universal IOs with the same public nature and functions, with regard to other IOs of differing size and nature, such criticism and argument seems to be less justified.

In any case, from another angle it has been observed that the redress in the framework of other forms of accountability has the potential and may compensate the lack of legal “punishment”,<sup>521</sup> as it concerns the IO, its organs, civil service or its agents – here an exception exists with regard to peace-keeping operations’ personnel, as they are in principle under the contingent’s national disciplinary and criminal jurisdictions.<sup>522</sup> For that to happen, precisely those potentials of accountability mechanisms that may contribute to this purpose should be promoted and strengthened. Among these inherent capacities are latent remedial and reparational abilities. It is true that the concept of accountability and its specifications are still at the stage of evolution and not yet completely flourished or established. However, there is no doubt about the flexibility and potential capacities that this notion may have in order to realize the objectives aspired by different regimes of international law. As drafting ARIO could not be an appropriate occasion or means to introduce the international criminal responsibility of IOs as such, which would serve the purposes of international justice and the respect for the rules of international legal system, other forms of accountability may substitute or temporarily alternate the concepts of international criminal responsibility of IO in providing a tool to achieve the latter concept’s end results. As the final word, it is not clear why the international criminal responsibility of IOs could gain acceptance at the international level, while the same notion does not have had until this day any

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<sup>520</sup> Berliá, G., “De la Responsabilité Internationale de l’Etat”, in G. Scelle and C. Rousseau (eds.), *La technique et les principes du droit public-Etudes en l’honneur de G Scelle*, Paris, LGDJ, Vol. II, 1950, at pp. 875–889.

<sup>521</sup> Yarwood, Lisa, *State Accountability under International law. Holding states accountable for a breach of jus cogens norms*, Routledge, 2011, p. 157.

<sup>522</sup> Ryngaert, C., *Jurisdiction in International Law*, Oxford University Press, 2008, p. 88.

considerable success as to its acceptance with regard to states. In preventing the discourses that interpret the absence of criminal international responsibility of the subjects of international law as a deficiency of the legal regime, the most appropriate approach to be followed seems to be the one which admits and emphasizes the specificities of the characters of international law when compared to the national legal systems.<sup>523</sup>

### 3. Attribution of Conduct to an IO

Obviously, the intention of this sub-section is not to go through all the different aspects and dimensions of the issue of attribution of a wrongful act to an IO, which is one of the two constituent elements of the international responsibility of IOs. Even the most controversial discussions around the question of attribution, for instance, multiple attribution issue need a thorough and extensive examination.<sup>524</sup> Neither will the question of ‘piercing the veil’ be touched upon here, since the issue of joint or subsidiary responsibility of members of an IO are the subjects of a thorough examination in one of the subsections of chapter five. In general, what has been stated with regard to the attribution of conduct to States and which appears to be the general principle and rule applicable likewise to IOs in this regard,<sup>525</sup> is that with respect to attribution the point which is crucial is that a given event is sufficiently connected to conduct – be it an act or omission – which is attributable to the State under one or other of the rules set out in Chapter II of ASR.<sup>526</sup> However, it has attracted the attention of scholars that the codified rules and provisions dealing with the question of attribution of conduct are more extensive with respect to the states than with respect to IOs – this can be noticed in the fewer number of attribution articles in ARIIO in comparison to those of the ASR.<sup>527</sup> The general rules of attribution, summarized in the trio of: a) institutional links b) factual links c) adoption of conduct, correspond suitably also to the IOs, even though with respect to agents of the IO, the first two elements seem to have been fused into one. This leads to the expansion of the spectrum of the conducts

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<sup>523</sup> Pellet, Alain, “Vive le crime! Remarques sur les degrés de l’illicite en droit international”, in A. Pellet, (ed), *International Law at the Dawn of the Twenty-First Century-Views from the ILC/Le droit international à l’aube du XXIème siècle-Réflexions de codificateurs*, New York, United Nations, 1997, pp. 302–303, para. 17.

<sup>524</sup> An extensive study has been undertaken on the issue of multiple attribution in the framework of SHARES Project in Messineo, Francesco, “Multiple Attribution of Conduct”, *SHARES Research Paper No. 2012-11*. Available on: <http://www.sharesproject.nl/publication/multiple-attribution-of-conduct/> (last visited on 05.04.2022).

<sup>525</sup> Klein, Pierre, “The Attribution of Acts to International Organizations”, in Crawford, James/ Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 297–315, at p. 297.

<sup>526</sup> Crawford, James, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, first edition, 2002, p. 83.

<sup>527</sup> Messineo, Francesco, *op.cit.*, p. 7.

of agents attributable to IOs, notably the *ultra vires* acts, with regard to which in the doctrine there is also an opposing opinion to the effect that the attributable conducts should be limited to those conducts of the agents that are in conformity with instructions and directives received from the organs of the IO.<sup>528</sup>

The importance of ARIO provisions, the only set of comprehensive codified rules so far at hand on the different aspects of international responsibility of IOs, which can serve as the principal source of determination of attribution, cannot be emphasized enough. As *Anzilotti* has in the early twentieth century clearly observed with regard to the nature of attribution of a conduct to a subject of law in a legal system, legal attribution is, above all, a pure result of the law.<sup>529</sup> “Legal imputation is thus clearly distinguishable from causal relationship; an act is legally deemed to be that of a subject of law not because it has been committed or willed by that subject in the physiological or psychological sense of those words, but because it is attributed to him by a rule of law.”<sup>530</sup> The scholars succeeding him have almost all adopted the same approach on the question of attribution:

“The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State.”<sup>531</sup>

There has been no doubt that all these descriptions fit very well also the question of attribution in the case of the IOs and with regard to the conducts that the organs or agents of these subjects of international legal system undertake. Furthermore, they seem to be helpful to solve the more or less complicated question of the attribution of conduct of state organs to IOs when the former act in the implementation of binding decisions of the IO, an imminent example of which is the case of the EU. However, it should be noted that the solution adopted by ARIO in this matter is to recognize additional responsibility for the IO even though the conduct is attributable to the member state while implementing a non-binding decision of the IO, on the condition that the IO has the intention thereby to circumvent one of its international legal obligations.<sup>532</sup> The question of circumvention of legal obligations by an IO or by a state in the framework of participation in an IO will be further elaborated on in the fifth chapter of the present dissertation.

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<sup>528</sup> Messineo, Francesco, *op.cit.*, p. 8.

<sup>529</sup> *Ibid.*

<sup>530</sup> Anzilotti, D., *Corso di diritto internazionale*, 4<sup>th</sup> ed., Padua, CEDAM, 1955, Vol. I, p. 222 in Ago, R., “Third Report on State Responsibility”, *ILC Yearbook 1971*, Vol. II (1), p. 210, para. 40. (translated by the United Nations Secretariat).

<sup>531</sup> Starke, J. G., “Imputability of International Delinquencies”, *British Yearbook of International Law*, 1938, pp. 104–118, at p. 105.

<sup>532</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), Part two, Chapter IV, article 17, para.2. (last visited on 07.04.2022).

A point that is noteworthy in this context is the fact that given the increasing tendency of IOs to cooperate closer in operational and other activities, resulting mainly from the observation of the lack of coherent application of available resources, the question of attribution of conduct may become even more complicated than it is. The different criteria, such as various nuances around the concept of “effective control” elaborated on in the international jurisprudence, would get even harder to apply on the facts of the activities in the framework of the missions of IOs. The example of integrated missions<sup>533</sup> evolving around the necessity of harmonization and integration among different and several actors involved in a mission can be mentioned as a point of reference.

Before moving on to another debate in the next subsection, focus will be put here also on a certain aspect of the question of attribution of conduct which is related to the situations in which an organ or agent of an IO acts beyond the overall functions of the IO and thereby injures or inflicts damages on a third party. To which entity such conduct should be attributed is a question that has not been explicitly referred to in ARIO. In answering that question, an argument that can be put forward is to consider such conduct being undertaken in a private capacity, on the basis of the premise that it can not be considered as having been undertaken in an official capacity. In other words, the two attributes of “in an official capacity” and “beyond the overall functions of the IO” may not be synchronous or coexist with regard to the one and the same conduct of an organ, official or agent of an IO. The latter entities may not act in an official capacity beyond the overall functions of the IO, for the reason that the realm of action in official capacity is limited to the overall functions of the IO. The characteristic of “official” for a certain conduct is derived from the functions conferred on the IO, because such conduct is, in principle, performed in order to give effect to those functions. Nevertheless, from a political perspective, considerations relating to third party’s access to remedy and redress militate against such line of arguments – this statement is especially true in cases where the conduct in question can not be attributed to another state or IO.

Attribution of conduct in classical cases where an organ of an IO commits an act or an omission is not a matter to be concerned of, but the problem starts when some more complex structures are in play, such as organizations that are established in the framework of other IOs, in the sense that they cannot any more be considered the organs of this latter. As example, we can refer here to the International Agency for Research on Cancer that has been established in 1965 as an

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<sup>533</sup> The concept of integrated missions will be touched upon in more detail in chapter four. For a thorough account of integrated missions *See* Eide, E.B./Kaspersen, A.T./Kent, R./Von Hippel, K., “Report on Integrated Missions: Practical Perspectives and Recommendations”, *Independent Study for the Expanded UN ECHA Core Group*, May 2005, pp. 9–35. Available on: [https://docs.unocha.org/sites/dms/Documents/Report\\_on\\_Integrated\\_Missions\\_May\\_2005\\_Final.pdf](https://docs.unocha.org/sites/dms/Documents/Report_on_Integrated_Missions_May_2005_Final.pdf) (last visited on 05.04.2022).

“extension” of World Health Organization (WHO). It seems that the most prominent criterion for ascertaining attribution of wrongful conduct is the exercise of effective control.<sup>534</sup> It is also important to note here that another matter that may have an impact on the question of attribution of conduct, and consequently, the international responsibility of IOs, is the nature of the relationship between the IO and its member States. To put it differently, the nature of the conferral of powers is an element that should be taken into account whenever the responsibility of an IO is discussed.

Another matter that with regard to attribution of conduct to IOs gains importance is the definition of the “organs” of the IOs which is in turn a question closely related to the matter of the rules of the IO and the impacts these rules could have on the question of determination and ascertainment of attribution. This is important because it is, first and foremost, the conduct of the organs of the IOs that are attributed to it. It goes without saying that in cases in which there are some internal rules of the IO that provide differently with regard to the question of attribution than the general rules (also provided for in ARIO), the internal rules of the IO should be regarded as *lex specialis* and thus, should be given preference and priority.<sup>535</sup> Now, another issue would rise as to the extent of invocability of such internal rules against third parties. It seems that except the questions which the general rules refer to internal law of the IO, other questions of attribution arranged in a specific manner in the internal law of the IO or in the agreements of the IO with other parties, are not invocable towards all the other subjects of international law.

As the final word, a conduct is under certain circumstances attributable to an IO, a situation which is the other necessary element for the incurrence of the international legal responsibility of IO that has to be satisfied in order that the mechanism of responsibility can be triggered – direct responsibility is meant here which is distinct from indirect responsibility of an IO that can be raised in connection with the wrongful acts of another state or IO. Otherwise, even if a breach of an obligation has been occurred the responsibility will not arise,<sup>536</sup> as long as there is not any organic tie or exercise of control on the part of the IO over the wrongful conduct.<sup>537</sup>

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<sup>534</sup> Hirsch, Mosche, *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles*, Dordrecht, Nijhoff, 1995, p. 64.

<sup>535</sup> *Articles on the Responsibility of International Organizations with Commentaries*, UN Doc. A/CN.4/650 (2011), Commentary to article 32, at p. 58, para. 4.

<sup>536</sup> Ueki, Toshiya, “Responsibility of International Organizations and the Role of the International Court of Justice”, in Ando, Nisuke and McWhinney, Edward and Wolfrum, Rüdiger (Eds.), *Liber Amicorum Judge Shigeru Oda*, Vol. 2, Kluwer Law International, 2002, pp. 237–249, at pp. 242–243.

<sup>537</sup> Klein, Pierre, *op. cit.*, p. 298.

#### 4. Fragmentation of the law of International responsibility

When we think about the fragmentation in international law, omnipresent phenomena of our era,<sup>538</sup> in the context of the international responsibility of IOs we should necessarily ask ourselves to what extent the law of international responsibility of international organizations could resist and has remained immune to this threat. In other words, it should be examined whether the fragmentation phenomenon has also reached the law of international responsibility of IOs. It has been observed that one of the causes of fragmentation in the law of international legal responsibility, which has manifested itself in the loss of conceptual unity of the very notion of responsibility in international law, has been the entrance of criminal responsibility, through the introduction of individual international criminal responsibility in the realm of international law.<sup>539</sup> Furthermore, the omission of damage which had been so far a necessary condition for the international legal responsibility to arise has been another factor playing a major role in the loss of the unity of the concept of responsibility.<sup>540</sup> With regard to the law of international responsibility, should one ever speak of fragmentation, it would be in fact a normative fragmentation in this area of international law.<sup>541</sup>

The law of international legal responsibility of IOs has indeed sustained fragmentation, however, for major reasons different from that of the law of state responsibility. In this field of international law, this phenomenon is the result of the existence of various international responsibility regimes that have originated from the proliferation of the international and regional IOs, each having their own secondary rules and responsibility regimes. Whether and to what extent article 64 of ARIIO concerning the *Lex specialis* could further be considered an accomplice to this situation is questionable and is worth being reflected on.

In this context, an important issue that has to be made clear is whether this phenomenon has to be considered as a blessing in disguise, thus beneficial to the international legal order, or a bad omen and undesired, thus a situation that has to be challenged and resolved. Without any doubt one of the consequences of such proliferation of secondary rules resulting in the fragmentation of the law of international legal responsibility, is the multiplication of conflicts between different

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<sup>538</sup> Koskenniemi, Martti, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", *Report of the Study Group of the International Law Commission*, A/CN.4/L.682, Fifty-eighth session, 2006.

<sup>539</sup> Pellet, Alain, "The Definition of Responsibility in International Law", in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 3–16, at p. 8.

<sup>540</sup> *Ibid.*, at p. 11.

<sup>541</sup> In general, on fragmentation *See* Gourgourinis, Anastasios, "General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System", *EJIL*, Vol. 22, No. 4, 2011, pp. 993–1026.

secondary rules.<sup>542</sup> It has even been acclaimed by certain scholars that such diversity may threaten the very unity of international law.<sup>543</sup> It is true that the proliferation of IOs, many of them possessing their own sub-system – comprising of secondary rules and implementation mechanisms – applicable not only on their members but also on their relations with third parties having consented to these sub-systems, is a major factor in the creation of the situation under question. In several cases, the degree of elaboration and comprehensiveness of sub-systems' secondary rules are so high that raises doubt with regard to the function and utility of secondary rules of general international law. With regard to the law of international legal responsibility of IOs the number of such examples is even much higher than in the domain of state responsibility.

ARIO articles may be the subject of such criticism, as they represent the secondary rules of general international law on the question of responsibility of IOs, while there are several IOs having their own internal system of secondary rules and implementation mechanism. However, it appears that the existence of general rules is inevitable, as in the cases of defect sub-systems such general rules may apply by default to prevent the dysfunctionement of particular secondary rules systems. Further to drawing the conclusion that the importance and main function of general international law of responsibility of IOs is to fill the gap of the special secondary rules regimes, it would be interesting to investigate whether ARIO, which claims to provide for such general international legal rules, is drafted properly and is efficacious enough in order to satisfy such expectations.

In connection with the issue of the fragmentation of the law of international legal responsibility and the responsibility of IOs, in and beyond ARIO, one of the main questions would be the role that the law of responsibility of IOs plays in the fragmentation of the law of international responsibility. In other words, should the law of responsibility of IOs be considered itself as an additional element that contributes to the fragmentation of the law of international legal responsibility? When we look at the manner ARIO has been drafted, the answer is definitely negative. But would there be other choices? Weren't they in that case maybe even more compatible with the characteristics of IOs, despite the possible threats to the unity of general international law of responsibility? Would the threat to the unity of this law necessarily have impacts on its efficacy? The coming chapters of the thesis will try to find answers to these questions.

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<sup>542</sup> Marschik, Axel, "Too much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System", *EJIL*, Vol. 9, 1998, pp. 212–239, at p. 225.

<sup>543</sup> Barnhoorn, L.A., and Wellens, K.C. (eds.), *Diversity in Secondary Rules and the Unity of International Law*, 1995, pp. 147–163.

## 5. The Theory of Abuse of Rights and its relevance to responsibility of IOs

To use a liberty and right that has been conferred by the objective rules of international law for the other purposes than those for which the rule has been set is considered to be a relatively consensual and an uncontroversial understanding of the principle of abuse of rights under international law.<sup>544</sup> In almost all the cases this process accompanies with damage inflicted on another party.<sup>545</sup> Relevant to our discussion of the question of international legal responsibility of IOs is, above all, to inquire into the consequences of the abuse of rights for the content and implementation of the institution and mechanism of international legal responsibility. In this connection, it can be asked whether the consequence is the invalidating of the act or will the conduct be considered equal to a wrongful act. Guggenheim believed that such cases of abuse of right could raise the responsibility of the author, on the basis of which restitution or compensation should be accorded.<sup>546</sup> At present, according to the ILC 2001 ASR Articles, these cases fall under the category of international liability. The theory and general principle of abuse of rights has found its manifestation also in article 61 of ARIO.<sup>547</sup> In other words, the theory of abuse of rights has been recognized with regard to the circumvention of a State member of an IO of its international obligations. Another case is the article 17 of ARIO where the abuse of rights by an IO is envisaged.

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<sup>544</sup> Taylor, G. D. S., "The Content of the Rule against Abuse of Rights in International Law", *BY-BIL*, Vol. 46 (1972–1973), pp. 323–352; Guggenheim, P., "La validité et la nullité des actes juridiques internationaux", *RCADI*, t. 74, 1949(I), pp. 191–268, at pp. 250–268; Politis, N., "Le Problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *RCADI*, 1925, t. 6 (I), pp. 1–121, at pp. 5 et seq.

<sup>545</sup> Guggenheim, P., "La validité et la nullité des actes juridiques internationaux", *RCADI*, t. 74, 1949(I), pp. 191–268, p. 253.

<sup>546</sup> *Ibid.*, p. 254.

<sup>547</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to article 61, para. 2, at p. 93.



## Chapter Three

# ILC Articles on Responsibility of International Organizations

According to a vastly propounded theory, “international legal community” is the concept and element that, among others, has the mission to realize the transition from a “society” to a “community” conception and understanding of international order.<sup>548</sup> This statement refers to the role of the law in building a community at the international level. Therefore, the more the legal systems of such order are developed, the faster this long desired transition would take place. Furthermore, from a practical perspective, there are various considerations in favor of the codification of legal rules applicable on the relations between legal subjects in a legal order, among others, predictability which in turn leads to more stability in the relations. In the case of secondary rules, one of the most important ramifications of codification would be the contribution in the eradication of impunity, through further clarity in the legal rules. Therefore, no wonder that since 2002, the International Law Commission (ILC) has been engaged in drafting a set of draft articles on the responsibility of IOs that later became known as ARIIO, the abbreviation

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<sup>548</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 89.

of Articles on the Responsibility of International Organizations.<sup>549</sup> For the purpose of facility, throughout the entire dissertation we have also used the same appellation. The Commission itself has admitted that the provisions of the ARIO do not necessarily yet have the same authority as the corresponding provisions on State responsibility.<sup>550</sup> In the doctrine, the status of ARIO as the evidence of *lex lata generalis* on the issue of responsibility of IOs has been firmly contested.<sup>551</sup> This is another indication for the fact that these articles have not yet achieved the degree of reception that ASR enjoys.

An interesting point concerning *ratione personae* of these articles which deserves being referred to here is the ambiguous exclusion of a certain category of public international organizations. It is not clear why an IO established merely by some other IOs, and consequently having as members exclusively IOs, shall not fall under the scope of ARIO. The exclusion of this kind of IOs from the scope of ARIO can be deduced from the definition of “international organization” in article 2(a), which explicitly provides that IOs may include as members, in addition to states, other entities. From this article, it can be inferred that ARIO do not apply to IOs which do not include states as their members. As these IOs, provided that they are established by a treaty or other instrument under international law, would in principle possess international legal personality, as any other public international organization does, and thus, able to be holder of rights and obligations under international law, there is no reason to exempt them from the scope of applicability of ARIO. All the more so as, *à fortiori*, the principle of international legal responsibility is undoubtedly also applicable on them. The fact that treaty-bodies, or other organs established by two or more IOs, in order to pool the resources, or to foster harmonization of efforts, generally have not been created as international legal persons, shall not lead to the complete ignorance of the possibility of the establishment of IOs consisting of other IOs as members and at the same time possessing international legal personality.

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<sup>549</sup> For a brief chronological description of a part of stages of drafting of ARIO up to 2004 see Kuijper, P. J. and Paasivirta, E., “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations”, *JOLR*, Vol. 1, Issue 1, 2004, pp. 111–138, at pp. 111–113.

<sup>550</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), at p. 2.

<sup>551</sup> Ryngaert, Cedric, “The European Court of Human Rights Approach to the Responsibility of Member States in Connection with Acts of International Organizations”, *ICLQ*, Vol. 60, Issue 4, October 2011, pp. 997–1016, at p. 999.

## I. Private Codification efforts

Probably the most important effect of private codification efforts on the development of international law is facilitating its process by way of researches done and proposals already formulated that could provide a starting point in subsequent and more official codification efforts.<sup>552</sup> It is generally true that with the advent of the United Nations, generally, and the ILC specifically, the influence of the non-governmental societies and institutions, private entities engaging in codifying international law has diminished.<sup>553</sup>

The subject of responsibility of international organizations initially evoked little interest. Not until 1995 were there any drafts prepared similar to those on the issue of State Responsibility.<sup>554</sup> This draft was prepared by the International Law Institute on the specific topic and title of ‘The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligation toward Third Parties’.<sup>555</sup> As is clear from the title, the main concern in that research and codification undertaking was the question of responsibility of states rather than IOs. Such lacunae clearly have had its negative effect on the preparation of ARIO, namely the lack of abundant reflection or any previous works on the different aspects of the question of international legal responsibility of IOs. Experience has shown that cooperation between different private and more official codification institutions at the international level has definitely constructive impacts on the final result.

## II. Drafting the ARIO following the model of the ASR

The topic of the responsibility of the international organizations is the logical and probably necessary counterpart of that of State responsibility. It is therefore particularly appropriate that it should follow on from the topic of State responsibility, just as the topic of the law of treaties between States and international organizations or between international organizations followed on from that of the law of treaties (between States) in 1969. Otherwise, the general topic of responsibility, which is, together with the law of treaties, one of the pillars of the Commission’s

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<sup>552</sup> Laithier, Lucie, “Private Codification Efforts”, in James Crawford; Alain Pellet; and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 53–59, at p. 53.

<sup>553</sup> Abi-SAAB, G., “La Commission du droit international, la codification et le processus de formation de droit international”, in United Nations, *Making Better International Law : The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, 1998, p. 189.

<sup>554</sup> Laithier, Lucie, “Private Codification Efforts”, *op. cit.*, at p. 53.

<sup>555</sup> Higgins, R. (Rapporteur), “The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of their Obligations towards Third Parties”, *Annuaire de l’Institut de Droit International*, Vol. 66-I, 1995, p. 254.

work and probably its “masterpiece”, would be incomplete and unfinished.<sup>556</sup> Furthermore, the consideration of the topic of the responsibility of international organizations will be facilitated by the work carried out on State responsibility, which provides a conceptual framework into which it will have to be fitted.<sup>557</sup> In other words, there is no doubt that the ASR should have been, and indeed has been a legitimate starting point for drafting ARIO.

As has been noted earlier the ARIO is actually to a great extent built on the experience of the ILC in drafting ASR,<sup>558</sup> following exactly the same tracks left behind by the latter.<sup>559</sup> Prominent feature is the focus in both sets of articles on the definition of general rules governing the establishment and implementation of international responsibility, which can be considered as a whole the skeleton of the international legal responsibility articles put forward by the ILC, rather than concentrating on different primary rules and substantive regulation areas in international law and formulating for each and every field a tailor-made set of secondary rules of international legal responsibility. Having already realized the difficulty of the task of drafting a code containing primary as well as secondary rules in the context of drafting ASR, the ILC soon admitted the desirability of adopting a realistic attitude, as was eventually the case with ASR, and not to engage in the over-ambitious and almost impossible undertaking of drafting the provisions that would contain old and new obligations for IOs.<sup>560</sup> However, ARIO intended also to fill the gap that ASR had left behind, namely the question of the responsibility under international law of a State for the conduct of an international organization.<sup>561</sup>

It should be noted that some IOs in their comments on the second draft of ARIO have welcomed the approach of the ILC in preparing the ARIO following the model of ASR. But the question that will necessarily be raised in this connection is whether it will then be possible to take into account and reflect sufficiently the specificities of the different categories of IOs in the articles of international responsibility of IOs. In other words, would the approach taken by ILC in drafting the articles on responsibility of states, a category of subjects of international law having no doubt numerous common features with IOs, but at the same time

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<sup>556</sup> Pellet, Alain, “Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of Work of the Commission”, *ILC Yearbook 2000*, Vol. II, Part two, p. 135–140, at p. 135.

<sup>557</sup> *Ibid.*, at p. 136.

<sup>558</sup> For a comprehensive chronological review of the different stages of the drafting of ASR see: Simma, Bruno, “The Work of the International Law Commission at Its Fifty-Second Session (2000)”, *Nordic JIL*, Vol. 70, 2001, pp. 183–250.

<sup>559</sup> Paparinskis, Martins, “Investment Treaty Arbitration and the New Law of State Responsibility”, *EJIL*, Vol. 24, No. 2, 2013, pp. 617–674, at p. 618.

<sup>560</sup> Crawford, James, “Articles on Responsibility of States for Internationally Wrongful Acts”, *United Nations Audiovisual Library of International Law*, 2012, p. 3. Available on: <http://www.un.org/law/avl> (last visited on 05.04.2022).

<sup>561</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), at p. 2.

also fundamentally different from them with regard to some other aspects, permit those draft articles to suit all kinds of IOs? For instance, the formulation of secondary rules for certain categories of IOs, such as the EU, needs a special treatment. In the framework of such IOs the potential and possibility is very high that member States might be responsible for the acts and omissions that have been committed in the framework of the IO and following the commands of the IO. It has been argued that the ARIO could make clear and regulate precisely the situation of the potential and possible responsibility of the IOs similar to the EU or their member States in comparable situations.

In drafting ARIO, the commission has mainly consulted the States and international organizations and has benefited from the comments and suggestions received from States and international organizations.<sup>562</sup> In this regard, a point which can be rightly criticized is the lack of the participation of civil society in the drafting of ARIO, although, for instance, the NGOs are very often actively involved in identifying the negative effects of the activities of IOs on the ground, and also in spite of the general policy of UN in promoting and fostering civil society participation in international governance.<sup>563</sup>

Attention should also be paid to this point that *Ago* back in 1971 mentioned in his statements to the Commission his preference for an essentially inductive method, rather than for the deduction of theoretical premises, whenever consideration of State practice and judicial decisions made it possible to follow such a method.<sup>564</sup> In case this method has been constantly applied throughout the preparation of the draft Articles on State responsibility, and thus it can be concluded that the Articles are the final result of the inductive analysis of the State practice and judicial decisions, their general and massive transposition to the topic of international organizations could be considered problematic given the still scarcity of the practice of international organizations and judicial decisions involving the question of international legal responsibility of these subjects of international law. Furthermore, with regard to the codification of the law of international responsibility with regard to States it has been observed that the interdependence of the various sources of law in the complex process of the formulation of the law on international responsibility is undeniable.<sup>565</sup> It seems that with regard to the international organizations, the transposition of the Articles on State responsibility to

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<sup>562</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc.A/CN.4/650 (2011), at p. 2.

<sup>563</sup> Steffek, Jens and Kissling, Claudia, "Civil Society Participation in International Governance: The UN and the WTO Compared", *TranState Working Papers*, No. 42, 2006, Bremen, pp. 7–18. Available on: <https://www.econstor.eu/bitstream/10419/24955/1/514659831.PDF>. (last visited on 05.04.2022).

<sup>564</sup> Ago, R., "Third Report on State Responsibility", *ILC Yearbook 1971*, Vol. II (1), pp. 199–274, at p. 202.

<sup>565</sup> Daillier, Patrick, "The Development of the Law of Responsibility through the Case Law", in James Crawford; Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford University Press, first edition, 2010, pp. 37–44, at p. 38

IOs renders this interdependence artificial or deficient. In other words, it cannot be arguably claimed that the Articles have been formulated and adopted on the basis of the practice of the IOs and relevant international judicial decisions and arbitral awards. It is noteworthy that even the ASR did not stay immune from facing the criticisms with regard to the legal sources consolidating its provisions. It has been stated that the ASR provisions are based principally on case law precedents, to a far greater extent than on State practice and doctrine, references to which are far less systematic.<sup>566</sup> And the references to case law in the commentaries are relatively few in number and not particularly diverse, given the existing body of case law.<sup>567</sup>

During almost fifty years that the Articles on State responsibility were under the drafting process, different private and public research institutes, scholars and authorities purported to prepare draft articles and draft conventions on the topic. This added to the representativeness and enrichment of the ILC articles from the point of view of the different opinions and positions that existed with this regard around the globe. This fact led to the situation that the draft articles very well reflected the synthesis of different positions and points of view. In this respect, it is clear that the same or comparable amount of efforts has not been undertaken by different authorities and entities in order to prepare private drafts representative of the existing positions and tendencies. Another point that has been raised is the scarcity and lack of practice in the different areas covered by the ARIO, which according to some authors, may be an indication that the particular situation cannot be covered by a general rule due to the diversity of international organizations, and the differences with the responsibility of States.<sup>568</sup>

The ILC admits that there are conceptual and pragmatic reasons and considerations for the transposition of the ASR into the ARIO.<sup>569</sup> In several places in the commentary to ARIO it has been stated that there is no reason to depart from the text of corresponding article in the ASR.<sup>570</sup> Sometimes it has merely been stated that the word “State” is replaced by the word “International Organization”.<sup>571</sup>

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<sup>566</sup> Daillier, Patrick, “The Development of the Law of Responsibility through the Case Law”, *op. cit.*, at p. 41.

<sup>567</sup> *Ibid.*, at p. 42.

<sup>568</sup> The Report of the ILC Study Group on the Responsibility of International Organizations, Sophia Conference, 2012, p. 8.

<sup>569</sup> *Ibid.*, p. 9 et seq.

<sup>570</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc.A/CN.4/650 (2011), commentary to art. 36, para. 4, at p. 62; Commentary to article 38, p. 63; Commentary to article 41, para. 1 and 2, p. 66; commentary to article 47, para. 1, p. 75; commentary to article 49, para. 13, p. 80; Commentary to article 51, para. 5, p. 83; commentary to article 54, para. 1, p. 86; commentary to article 60, para. 2, p. 93; commentary to article 67, para. 1, pp. 103–104.

<sup>571</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN. 4/650 (2011), commentary to art. 37, para. 7, at p. 63; commentary to article 39, para. 1, p. 63; commentary to article 42, para. 1, p. 66; commentary to article 43, para. 2, p. 69; Commentary to article 44, para. 1, p. 71; commentary to article 45, para. 1, p. 71; commentary to article 46, para. 1,

And sometimes there has been to a minor extent the initiative of the ILC applied and used to draft new provisions that are tailored to IOs.<sup>572</sup> ARIO not only follow the ASR in most places in terms of content of the provisions, but also in terms of the form and the structure of the draft, with respect to which we witness a few initiatives that deviate from the form and pattern that has been adopted in ASR. It is somehow understandable that ASR has been employed as the source of inspiration for the drafting of the ARIO. However, with regard to certain articles, for instance, article 5 ARIO (article 6 ASR) the international legal doctrine has not hesitated to express its criticism in relation to the methodological approach of the Commission.<sup>573</sup>

The critics of the ARIO both among the academics and practitioners go in their criticisms as far as considering the ARIO a mere copy of the ASR.<sup>574</sup> The major criticism and positions against the transposition of ASR into ARIO are based on the important differences between States and international organizations and also between different IOs.<sup>575</sup> As has been admitted by ILC in different occasions, both implicitly and explicitly, in drafting ARIO analogy has been used vastly as an accepted legal technique to fill existing lacuna.<sup>576</sup> Another point, on which ARIO has been vastly criticized, is the lack of the statements regarding the justification of the utilization of analogy in many parts of the ARIO.<sup>577</sup> For example regarding the question of consent given by an international organization to the act of a State as a circumstance precluding wrongfulness, it has been noted that a distinction has to be drawn between the consent given between two autonomous subjects of international law and the consent given by an international organization with regard to the acts of its members.<sup>578</sup>

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p. 74; commentary to article 48, para. 4, p. 77; commentary to article 49, paras. 1, 2 and 6, p. 78; commentary to article 55, para. 1, p. 87; commentary to article 56, para. 2, p. 88; commentary to article 58, paras. 1 and 3, p. 90; commentary to article 59, paras. 1, 3 and 5, p. 92; commentary to article 60, paras. 1 and 4, pp. 92–93; commentary to article 63, paras. 1, 2 and 4, pp. 99–100; commentary to article 65, para. 2, p. 102; commentary to article 66, para. 1, p. 103.

<sup>572</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN. 4/650 (2011), commentary to art. 53, para. 1, at p. 85; commentary to article 64, para. 7, p. 102.

<sup>573</sup> Kuijper, P. J., and Paasivirta, E., “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 111–138, at p. 127.

<sup>574</sup> The Report of the IIA Study Group on the Responsibility of International Organizations, Sophia Conference, 2012, p. 9.

<sup>575</sup> *Ibid.*, p. 10.

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*

<sup>578</sup> *Ibid.*, p. 11.

### 1. Direct Applicability of the provisions of ASR on IOs

Examination of the possibility of direct applicability, or indirect applicability by means of analogy, of the ASR articles to the cases of IOs' international responsibility, is partly prompted by an indication made by ILC in paragraph 7 of the commentary to article 1 of ARIO.<sup>579</sup> In that paragraph, the applicability of ASR provisions on the relations between states and IOs by means of analogy – apparently without even the necessity of a separate codification *mutatis mutandis* – has been mentioned as a possibility or a logical and defensible argument. In the words of the ILC, the codification of ARIO articles dealing with the question of the responsibility of a state for aiding, directing or coercing an IO by the commission of a wrongful conduct, is in a way a second alternative or option if it is not accepted that the ASR articles dealing with the same cases only between states, are not directly applicable. It is true that following this line of argument would equalize ARIO to a so-called plan B in case the applicability of ASR on IOs is not tenable, or only destined for encompassing the cases where the specific situation of IOs is not covered by the relevant provisions of ASR. In the same way it can be argued, however, in favour of direct applicability of ASR provisions on the IOs' responsibility – or at least its main skeleton, keeping in mind that ARIO adopts in its entirety almost the identical structure and content as of the ASR.

Before starting with the ARIO's closer analysis it may first be interesting to reflect on the question whether and if the answer is in affirmative on which basis ASR, a successful project of the ILC on the issue of international legal responsibility in describing whose success Bordin speaks of a paradoxical relationship between form and authority,<sup>580</sup> could indeed possibly be applied directly to the facts concerning IOs that may engage the international legal responsibility of IOs and not the responsibility of states. Could this application rise to the extent that it would totally challenge the necessity of drafting new articles on responsibility of IOs in addition to the existing articles on international responsibility of states? Definitely not, at least with regard to those dimensions of the question of international legal responsibility that necessarily are exclusive to responsibility of IOs simply because of the different nature and characteristics of the IOs. Having observed this, it is not very hard to admit that in fact ARIO is not so rich in these latter specific kinds of provisions that deal with the questions that arise as a result of the specificities of IOs. Thus, the question that will be raised in this regard is whether the rules on the responsibility of States would not apply directly to the IOs. The customary rules would apply without any hesitation to the extent com-

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<sup>579</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 5, para. 7. (last visited on 08.04.2022).

<sup>580</sup> Bordin, Fernando Lusa, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law", *ICLQ*, Vol. 63, Issue 03, July 2014, pp. 535–567, at p. 536.



patible with the characteristics of the IOs thus justifying analogical arguments. This is how ILC has proceeded in drafting those ARIO provisions where it is mentioned in commentaries that the ASR applies *mutatis mutandis* to IOs. But then, how about those other rules of ASR that would not have yet achieved customary status? With regard to the issue of treaties concluded between States and IOs or between two or more IOs, as we may call it the law of treaties relating to IOs, the General Assembly resolution recommends the ILC to study this issue as an important question, without explaining in more detail the importance of the question and the issue why there is a need for further draft articles.<sup>581</sup> This question is related to the more general question of whether, to what extent and under which conditions and modalities the rules and regulations of international law concerning States and applicable on them could possibly be applicable to IOs too. This issue will be further elaborated on in the fourth chapter of the present dissertation.

## 2. ARIO or the end product of a legal transplantation in the law of international Responsibility

While observing that ARIO provisions broadly correspond to similar provisions in ASR,<sup>582</sup> it should not be overlooked and must be admitted that this set of draft articles dealing primarily with the responsibility of IOs, also contains some innovative provisions. To name just two important examples, articles 17 and 61 with respect to, in the words of *Kuijper*, controversial issue of the direct “attribution” of responsibility can be referred to, although it seems that the appellation “indirect attribution of responsibility” would be more appropriate.<sup>583</sup>

In the following sections we will focus on two questions regulated in ARIO, namely the issue of responsibility of IOs in connection with aid and assistance to the commission of a wrongful act, on the one hand, and direction and control of such an act, on the other, that raise concerns respectively by International Financial Institutions and with respect to some aspects of Peace Support missions. In the following it will be examined in detail where the most problematic points are.

As has been observed by Austria:

“The differences between States and international organizations with regard to their legal and political nature and their procedures demand that the utmost care be taken when it comes to elaborating a regime for responsibility. Whereas States are, in principle, independent actors on the international

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<sup>581</sup> G.A. Res. 2501 (XXIV) of 12 November 19, para. 5.

<sup>582</sup> Hafner, Gerhard, “The Draft Articles on the Responsibility of States for Internationally Wrongful Acts. The Work of the International Law Commission”, *ARIEL*, Vol. 5, 2000, pp. 189–270.

<sup>583</sup> Kuijper, Pieter Jan, “Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?”, *IOLR*, Vol. 7, No. 1, 2010, pp. 9–33, at p. 12.

stage, the actions of international organizations are controlled by their member States...<sup>584</sup>

It is undeniable that it would be hard to find any deviation of ARIO provisions relating to fundamental postulates defining the basic features of responsibility of IOs from the related ASR provisions. The following parts dealing with the content of the international legal responsibility of IOs, as well as its implementation are hardly an exception to this observation. In such circumstances, it seems that the expression of “legal transplantation” would properly describe the process of undertaking of ARIO drafting and the final result put forward by the ILC. The situation is not so much different with respect to the commentaries to ARIO provisions which have also attracted some criticism and have even been accused of being very sparse.<sup>585</sup>

*a) Negligence of the notion of Accountability and its elements in ARIO provisions*

There are scattering cases of reference to ILA RRP (Recommended Rules and Practices) in ARIO commentaries. In this subsection, as in several other concluding observations at the end of relevant subsections, the core of our argument will be the idea that in several places in ARIO, the absence or scarcity of making reference to the ILA’s accountability conception diminishes the consistency and integrity of the construct and regime of accountability, of which international legal responsibility forms an essential part. In turn, without parallel progress and development in former levels of accountability, the international legal responsibility system, which is aligned at the hindmost stage, will not be able, at least in many cases, to step up from the realm of theory into that of practice. Adopting this approach is inevitably accompanied by pushing public law into the international domain, and a vital role that the relatively new international administrative law project plays in these expanded exchanges between legal orders.<sup>586</sup> Moreover, international legal responsibility, which is a system comprised of rules with secondary nature forming part of general international law, should keep in line with the new trends in domain of accountability, which propose innovative regulatory frameworks distinct from primary rules as understood in the classical international responsibility discourse.<sup>587</sup>

<sup>584</sup> UN Doc, A/CN.4/636 (14 February 2011), p. 6.

<sup>585</sup> Wood, Michael and Vicien-Milburn, Maria, “Legal Responsibility of International Organizations in International Law”, *Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011*, p. 3.

<sup>586</sup> Farrall, Jeremy/Rubenstein, Kim, “Introduction: Filling or falling between the cracks? Law’s potential”, in Farrall, Jeremy/Rubenstein, Kim, *Sanctions, Accountability and Governance in a Globalised World*, Cambridge University Press, 2009, pp. 1–23, at p. 9.

<sup>587</sup> Hitoshi, Nasu, “Who guards the guardians? Towards regulation of the UN Security Council’s Chapter VII powers through dialogue”, in Farrall, Jeremy/Rubenstein, Kim, *Sanctions, Accountability and Governance in a Globalised World*, Cambridge University Press, 2009, pp. 123–142, at p. 128.

For example, the prerequisite of the realization of the second level of accountability, namely the promotion of primary rules binding on IOs, breeding clear international legal obligations for these subjects of international law, for the feasibility of the definition of international legal responsibility is hard to ignore. In general, the whole machine and framework of IOs accountability – which, in a sense gives meaning to international legal responsibility – destined for channelling the power of IOs and avoiding its uncurbed exercise, will not start working without a parallel advancement of all parts of its body.

A point that is, regrettably, reproachable in drafting of ARIO, is the absence of attention to the notion of accountability. As has been discussed in detail in the earlier sections of the thesis, the status of the different levels of accountability with regard to IOs is in embryonic stage. Dealing with the question of responsibility of IOs in abstract, meaning without taking into account the larger concept of accountability, that responsibility forms part of it, would result in the conception of an unfeasible and unrealistic set of rules that would not match the cases they are destined for. As a result, international legal responsibility considered as a tool will not be successful in its task of restricting, ordering and limiting the actions of subjects of international law, which constitutes an underlying mission of international law.<sup>588</sup> Drawing upon the ILA report and the concept of accountability, it is argued here that a broader view of the concept of responsibility, which would take into account all the other aspects of the accountability issue within one framework, would help bridge the divide and fill the existing – or precisely from the traditional segregative approach resulting – gaps in each of these systems.

*b) Responsibility of IOs in cases of Aid or Assistance or Direction and Control*

In this subsection, two important aspects related to the issue of the deliverance of aid or assistance or exercise of direction and control by an IO and the possibility of the international legal responsibility as the consequence of involvement in such conducts by that IO in light of provisions of ARIO in this respect will be touched upon. Of course, the intention here is not, as it would also not be possible, to enter into the whole discussion of all the aspects of aid or assistance or direction and control. The first aspect that will be treated here is the question of the frontiers and the thresholds of the terms “aid”, “assistance”, “control” and “direction”, in view of the importance these may have, especially, in the question of the international legal responsibility of a specific category of IOs, namely, the International Financial Institutions. The second aspect that will be touched on next to this point is the issue of international legal responsibility of an IO member of another IO for deliverance of aid or assistance or directing or controlling the latter

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<sup>588</sup> Farrall, Jeremy/Rubenstein, Kim, “Introduction: Filling or falling between the cracks? Law’s potential”, in Farrall, Jeremy/Rubenstein, Kim, *Sanctions, Accountability and Governance in a Globalised World*, Cambridge University Press, 2009, pp. 1–23, at p. 11.

IO in committing a wrongful conduct. With regard to this latter point, it will be argued that the consecutive changes of approach by the ILC throughout the whole period of drafting the ARIO has ultimately resulted in an unreasonable deficiency in the content of the final provisions.

The first aspect that will be treated in this subsection is with regard to the threshold of these four undertakings by an IO, specially the cases of direction and control, and thereto related circumstances which may, under certain conditions, lead to the international legal responsibility of the aiding or controlling IO. This issue may best be discussed by referring to a major criticism observed by International Financial Institutions with respect to the threshold adopted in the relating ARIO provisions. The International Financial Institutions have persistently asked the ILC to make it clear that in the ARIO as in the ASR, “oversight” is neither “control” nor “direction”. The roots of that concern on the part of the IFIs are associated and closely linked to the modes of involvement of these IOs in different projects or programme activities that the IFIs finance.<sup>589</sup> In the opinion of these IOs, one of the points in which the adoption of analogy by the ILC in drafting ARIO would entail negative effects – in the words of the World Bank even seen as having “chilling effect”<sup>590</sup> – on the economic assistance rendered by the international financial institutions, is the content and method through which the question of the aid or assistance or direction and control by an IO in the commission of an internationally wrongful act of another subject of international law have been codified. The concern has been expressed by the financial institutions that merely “the knowledge of circumstances” would be a too less a threshold for international legal responsibility in the financial contexts. The prominent examples in this context, as mentioned above, are the cases of economic and development assistance delivered by international financial institutions to different states. For these reasons, articles 14 and 15 of ARIO have been a matter of concern not only to international financial institutions, but also to other specialised agencies, which provide financial and technical assistance to their members and third parties – particularly the UN Specialised Agencies that have an enlarged scope of competences, resulting in an extensive spectrum of powers and thereto related activities, and thus play a considerable role in this respect. For instance, UNESCO which delivers assistance to its member states in the areas of education, science and culture has reflected serious concerns about the potential of incurring liability.<sup>591</sup>

As is clear from the provisions of the articles 14 and 15 of ARIO, similar to their counterpart ASR articles 16 and 17, the aim is prohibiting the facilitation of the commission of an internationally wrongful act by another international legal

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<sup>589</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 28, para. 2.

<sup>590</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 27, para. 1.

<sup>591</sup> Wood, Michael and Vicien-Milburn, Maria, “Legal Responsibility of International Organizations in International Law”, *Summary of the International Law Discussion Group meeting held at Chatham House* on Thursday, 10 February 2011, p. 8.

person, be it a State or another IO.<sup>592</sup> It is worth being noted here that the content of this provision is also repeated in the second paragraph of article 42 in the context of the more specific question of particular consequences of a serious breach of an obligation under peremptory norms of general international law.<sup>593</sup> It is conceivable that under certain circumstances described in that article, namely, a situation created by a serious breach by a state<sup>594</sup> or an IO, the content and threshold of aid and assistance may be critical for the consequences of the activities of International Financial Institutions. At the occasion of the review of the draft during the first reading, the ILC sought to remove the reasons for these concerns from the provisional text. Nonetheless, the austere commentary to former article 13 on aid or assistance by an IO which was adopted on the first reading by the ILC and the sole key phrase “The application to an IO of a provision corresponding to article 16 on the responsibility of States for internationally wrongful acts *is not problematic*”,<sup>595</sup> to which the ILC had limited itself in the commentary sounded of utmost insufficiency, and thus unconvincing to these financial institutions.<sup>596</sup> It

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<sup>592</sup> Kuijper, Pieter Jan, “Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?”, *IOLR*, Vol. 7, No. 1, 2010, pp. 9–33, at p. 23.

<sup>593</sup> Reinisch, A., “Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts”, *IOLR*, Vol. 7, No. 1, 2010, pp. 63–77.

<sup>594</sup> In this place, it seems appropriate to refer to another deficiency in the ARIO articles. With regard to the specific case of the obligation of an IO to not to recognize as lawful and not rendering aid or assistance in a situation created by a serious breach of an obligation arising under a peremptory norm of general international law by a state, there is also a lacunae and flaw in the codified provisions of the articles of ASR and ARIO, in their entirety, namely, even when considered together as the rules regulating international legal responsibility of states and IOs. However, most probably the obligation to avoid recognition as lawful and rendering aid or assistance in the situations under question exists also for the IOs. There is no reason why the IOs should be exempt from such important international obligations which results from the serious breaches of obligations arising under peremptory norms of general international law, whereas the states are under those obligations, first and foremost, towards and for the benefit of the international community as a whole. In addition, abundant practice of IOs in reaction to the similar unlawful situations created by a serious breach of an obligation arising under a peremptory norm of general international law are at hand that strengthen the statement of the previous sentence. In addition, in paragraphs 6 and 7 of the commentary to article 42 of ARIO two well-known cases – the practice of the UN with regard to the construction of a wall in the Occupied Palestinian Territory and the case of annexation of Kuwait by Iraq – have been referred to.

<sup>595</sup> Report of the International Law Commission, Sixty-first Session, 4 May–5 June and 6 July–7 August 2009, UN Doc A/64/10, Supplement No. 10, p. 84. It is also interesting to note that the origin of this provision is the ILA final Report results, referred to in the second chapter of the thesis. International Law Association, Report of the Seventy-first Conference, Berlin Conference, Accountability of International Organizations (2004), pp. 200–201.

<sup>596</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 27, para. 1.

seems that in reaction to these continuous concerns the ILC has drawn up and adopted a more clarifying and illustrative commentary to the 2011 draft.<sup>597</sup>

Now, it would be interesting to enquire into whether the new commentaries to these two articles (especially article 14) accomplish the assignment of defining the intended scope of application of this article and delimiting the boundaries of its provisions adequately, so that, *inter alia*, the causes of unease of International Financial Institutions are eliminated. It has to be admitted that the commentaries remain austere comparing to those adopted for the parallel article regarding the responsibility of a state for aiding or assisting in ASR. This is due to the shortage of practice available and paucity of case law and jurisprudence at hand with regard to aid or assistance delivered by IOs which would entail their international legal responsibility. The first parameter provided for in paragraph (a) of article 14 is the “knowledge” of the aiding or assisting IO of the circumstances of the internationally wrongful act. ILC has further elaborated on this factor by seeking to explain that if the assisting or aiding IO is *unaware* of the circumstances in which its aid or assistance is intended to be used by the state or other IO, it bears no international responsibility. At first sight, the explanation may appear to be clear-cut and illuminating for the establishment of international responsibility of International Financial Institutions in very limited cases where all the enumerated conditions are present. However, the problems may arise when it should be determined until which moment the International Financial Institutions can be considered unaware. It is clear that – for this assumption of unawareness to hold and continue to be valid – there is a certain burden and obligation on these institutions to gain knowledge of the uses that will be made of their aid or assistance, and also the circumstances of utilization under which such aid or assistance are benefitted from. But again controversy may arise over the expanse of the measures directed at obtaining knowledge of utilization of aid or assistance. In such situation, ILC has envisaged another factor that may be decisive and could show the way out of these controversies, namely the parameter of “intent”, referred to in paragraph 4 of the commentary to article 14. In fact, the ILC has raised and elevated the threshold even higher than where it stood according to and in line with the wording of the provisions of these articles, by means of referring to intent as a prerequisite of international legal responsibility for aid or assistance. Equivocal remain the reasons why these factors are not directly incorporated in the provisions of the article.

From another perspective, namely that of the accountability of International Financial Institutions in their decision-making and in the course of the implementation of their projects, and on the basis of accountability-oriented considerations, however, the question may arise as to whether the reference to “intent” would not needlessly restrict the scope of the provisions of articles 14 and 15. According to the hypothesis that will be supported here, the confinement of the scope of arti-

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<sup>597</sup> Report of the International Law Commission, Sixty-third Session, 26 April–3 June and 4 July–12 August 2011, UN Doc A/66/10, Supplement No. 10, pp. 104–105.

cles on aid or assistance and direction and control, would take place at the cost of accountability, in the sense that the smaller the risk of incurring international legal responsibility for aiding or controlling a wrongful conduct, the less the conviction about the necessity of accountability – first and second level accountability as classified by ILA. Supporting this idea is not in contradiction with the awareness that the conviction about necessity of accountability and the measures taken for its realization and implementation are not reducible to merely a set of reactions to attenuate the risk of international legal responsibility. Yielding to accountability measures as well as submitting to accountability mechanisms may have manifold rationales; one of them is definitely avoidance of incurring international legal responsibility and therefrom resulting liability. It is clear that, in principle, the financial institutions do not have the intention to aid or assist a member State or entity in the commission of a wrongful conduct. As a result, the possibility that a conduct by an International Financial Institution may fall under the ambit of application of these two articles approximates to zero. Therefore, based on deterrent effects and emphasizing on preventive function of international legal responsibility, provisions having broader scope on responsibility for aid or assistance would eligitly lead to more accountability on the part of International Financial Institutions, since these IOs could incur international legal responsibility even when unintentionally, but negligently they would facilitate the commission of wrongful conducts by another subject of international law. In addition, in the same spirit, it can be argued that the result can as well be the desirable stricter control on the part of the International Financial Institutions on their borrowers to respect their international obligations, specially, those obligations with a human rights nature. It is clear that with this argument we leave the pure judicial theoretical realm, and step in the realm of judicial policy. Assuming that – a reasonable amount of – such control on the part of the International Financial Institutions is realistic and eligible, one can arguably speak in favour of a provision with broader scope that would enhance accountability of these IOs. To put it differently, it can be observed that as one of the consequences of a broader understanding of aid or assistance or direction and control for the purpose of responsibility, a more accountable behavior on the part of the International Financial Institutions and a stricter, stronger and careful oversight on and review of the projects and programmes that these institutions finance, can be expected. This is a counterargument against the claim of inactivity of International Financial Institutions as a result of the augmentation of risk of responsibility. However, we are not facing two opposing arguments so that the right method to cope with them would be to put the two arguments and considerations on the balance to see in which one's side it would tilt. Rather, in order to make our case and assert the argument we are intending to support, a way would be through showing that cooperation and activities of International Financial Institutions are inevitable – and would continue even at the same pace, and in spite of higher risks of international legal responsibility resulting

from broader rules. For that aim, it would suffice to observe that international institutions play an important role in the process of globalization. Then, the last task to accomplish would be to find a way in which accountability is so conceived and designed that it would not hamper cooperation in the framework of IOs or the activity and dynamism of International Financial Institutions. To resume, the argument put forward here is that in any codification effort with respect to responsibility rules, the considerations of accountability should be taken into account as much as possible.

The second aspect of the issue of the aid or assistance or direction and control which will be addressed in this subsection is the issue of responsibility of an IO for the acts of another IO of which the former IO is a member. During the drafting phases of ARIIO, the place and where this question will be dealt with and its possible formulations in the draft articles has undergone several changes. In this subsection it will be argued that these recurring changes have ultimately led to a substantive deficiency in the related provisions in the final version adopted covering specific cases of an IO member of another IO and aiding or assisting or directing and controlling that latter IO in committing a wrongful conduct. The shortage and gap contains in an unexplained difference in a concept and customary international rule adopted in ARIIO following the initial model in ASR, between the formulation, and thus the content of the two comparable sets of articles dealing with aid and assistance or direction and control delivered on the one hand by a state, namely, articles 58 and 59, and on the other hand by an IO, namely, articles 14 and 15. It is interesting to note that the paragraph 2 of articles 58 and 59, which will be at the center of the discussion here, did not initially form part of the formulation of these articles at the time when these two articles were proposed for the first time by the special Rapporteur (as articles 25 and 26 at that time), but rather that qualification has been added later.<sup>598</sup> And former articles 12 and 13 (articles 14 and 15 in the final text adopted by the GA) were not at the beginning and originally intended to cover the question of responsibility of an IO member of another IO for the wrongful acts of the latter. This was the case even until the first reading of the draft articles, which for the question of responsibility of members, was making reference to the responsibility of member states envisaged in former articles 28 and 29. Article 28 was a differently formulated antecedent of the present article 61 on the circumvention of international legal obligations by a member of an IO by means of the abuse of the separate legal personality of the IO.<sup>599</sup>

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<sup>598</sup> Fourth Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/564 and Add. 1–2, 28 February, 12 and 20 April 2006, pp. 103–124, at p. 116.

<sup>599</sup> Draft article 28 was proposed by the special Rapporteur as follows:

“Article 28. Use by a State that is a Member of an International Organization of the separate personality of that organization

1. A state that is a member of an international organization incurs international responsibility if:



Having in mind that the articles 14 and 15 of ARIO are also destined – as has been explained in article 18 ARIO and also in general commentary paragraph 5 to Part Five of ARIO – to cover the cases where an IO member of another IO aids or assists or directs and controls the latter IO in the commission of an internationally wrongful act, it is not clear why the paragraph 2 of articles 58 and 59 had to be omitted from the almost identical articles 14 and 15 of ARIO. This point gains further importance as ARIO is logically the last chance for the ILC to formulate regulations that are destined to apply on this aspect of the relationship between an IO and its IO members – in contrast to the situation of the gaps in ASR that has been filled at the occasion of drafting ARIO and in the framework of the articles on responsibility of IOs.

As to the reasons for the adoption of a partly different formulation for the provisions dealing with the aid or assistance or direction and control delivered by an IO to a state or an IO from the provision dealing with the deliverance of aid or assistance or direction and control by a state to an IO, the special rapporteur in its third report recommending articles 14 and 15, does not provide any explanation.<sup>600</sup> Neither is any specific explanation to be found in the ILC report on the work of the fifty-seventh session in 2005, during which the texts of these two articles were discussed.<sup>601</sup> The reason for the absence of explanation of this point is that it is only in 2006 that the ILC examines the question of responsibility of states for the wrongful acts of the IOs of which they are members. This choice by

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(a) it avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and

(b) the organization commits an act that, if taken by that state, would have implied non-compliance with that obligation.

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

See: Fourth Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/564 and Add. 1–2, 28 February, 12 and 20 April 2006, pp. 103–124, at p. 119. And the text adopted provisionally at the end of that session by the ILC was as follows:

“Article 28. International Responsibility in case of provision of competence to an international organization

1. A state member of an International Organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that state, would have constituted a breach of that obligation.

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

See: Report of the International Law Commission, Fifty-eighth Session, 1 May–9 June and 3 July–11 August 2006, A/61/10, p. 262.

<sup>600</sup> Third Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, A/CN.4/553, 13 May 2005, pp. 7–11.

<sup>601</sup> Report of the International Law Commission, Fifty-seventh Session, 2 May–3 June and 11 July–5 August 2005, A/60/10.

the ILC can be explained by one of the two hypotheses and thereto related arguments set up below:

Either the ILC considers that the acts done by the IOs member of another IO and in the framework of the latter IO and leading to a wrongful act of the latter IO should be considered in all cases aid and assistance or direction and control. As a result, the member IO always incurs international legal responsibility under these conditions. It would mean that the participation of an IO in a practice in the framework of another IO – including participation in the decision making procedures – of which the former IO is a member, while the conduct would conform to the rules of the latter IO, would as such incur the international legal responsibility of the former IO, because this conduct is either aid or assistance, or direction and control of the wrongful conduct of the latter IO. As a consequence, the assumption of the causal contribution of the participation of an IO member of another IO, in the wrongful conducts of the latter, is stronger and wider than the same assumption of causal contribution with regard to the participatory conducts of the states member of IOs.

Or, as the second possible explanation for the adoption of such formulation, the IOs member of another IO enjoy an inferior membership status, comparing to states member of an IO that it is not necessary to envisage situations for avoiding their exercise of influence that reaches the circumstance of the abuse of international legal personality of the IO. In other words, the IOs member of another IO are not capable of exercising enough influence and control over the acts and decisions of an IO, that could be amounted to the causal contribution to the commission of the wrongful act. It is true that the Special Rapporteur has in its 2009 report evoked, in the context of the responsibility of an IO for the conduct of another IO when there is the membership relation between them, the assumption that IOs are not frequently members of other IOs in order to explain why the discussion is centred on the responsibility of the member States. But following these observations, the Special Rapporteur admits that the responsibility of an IO for the acts of an IO of which it is a member, are identical to that of member States for the acts of the IO. On that basis he proposes that a separate article be adopted with regard to IOs member of another IO, which makes reference to the conditions for responsibility of member States for the acts of an IO of which they are member.<sup>602</sup> It is not clear why the ILC later abandons this proposition of Special Rapporteur which seems to have been the most suitable approach.

The first hypothesis lacks reasonability. The second hypothesis and explanation is also hardly tenable and defensible, given the actual strong positions held by some IOs as members of other IOs. As a leading example, it would only suffice to refer to IOs such as EU member of other IOs, such as WTO and the role the

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<sup>602</sup> Seventh Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/610, 4 May–5 June and 6 July–7 August 2009, p. 19.

former IO plays in the latter.<sup>603</sup> The weight of the official and unofficial influence of the IOs such as EU in the decision-making and operational activities of other IOs is not any more negligible.

Proposition had been made at a certain phase of drafting as to the adoption of a single set of provisions on the matter of member responsibility, using the word “member”, instead of member state or member IO, having in view also the necessity of a commentary excluding entities member of an IO, other than states and IOs.<sup>604</sup> The choice of formulation may have seemed not to be the most appropriate one, at least in terms of the place where the question of the international legal responsibility of an IO member of another IO for the wrongful conducts of the latter is dealt with in the ARIO. It seems that the more appropriate way of proceeding with the codification of these issues could have been through adding the same paragraph 2 to the articles 14 and 15, whereby the ILC would give the same importance to the question as the issue of responsibility of a state member of an IO for the wrongful conducts of the IO. An argument in favour of this proposition is that the ARIO is the set of articles dealing directly with the question of international legal responsibility of IOs. Therefore, regulating an aspect of this question by way of drafting articles dealing with the responsibility of states in similar circumstances and referring the situation of responsibility of IOs through analogy to those articles appears loyal to a method that does not find justification. However, such approach could have mitigated the ambiguities resulting from the alternative and subsequent approach the ILC has taken.

A concluding observation that can be made here is that the ILC has apparently abandoned the first approach explained above which consisted in referring the question of responsibility of an IO member of another IO to the question of responsibility of a state member of an IO, in the hope that it can avoid criticism as to the form. Nevertheless, the actual approach adopted in formulating articles 14 to 16 covering the case of the responsibility of an IO member of another IO, would not be immune from criticism as to the substance, so long as the ambiguity discussed above is not removed from the provisions dealing with the issue under question here.

### *c) Brand new concept of Circumvention of Obligations in ARIO*

Given the existence of the potential of exercising influence intrinsic in the membership relationship between IOs and their members, by one side on the other, this may tempt one side to use its influence on the other side to achieve specific

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<sup>603</sup> Farah, Paolo D., “Five Years of China’s WTO Membership: EU and US Perspectives on China’s Compliance with Transparency Commitments and the Transitional Review Mechanism”, *Legal Issues of Economic Integration*, Vol. 33, No.3, 2006, pp. 263–304, at p. 266.

<sup>604</sup> Fourth Report on Responsibility of International Organizations, by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/564 and Add. 1–2, 28 February, 12 and 20 April 2006, pp. 103–124, at p. 114.

goals and realize certain interests by means of the commission of a wrongful act by the other side. In order to prevent that the actual party behind the wrongful act can easily escape with a so-called white collar, by drafting the duo of circumvention related articles in ARIO the ILC has attempted to prevent irresponsibility in such situations.

Even though from many aspects, the introduction of articles 17 and 61 in ARIO and their formulation is rather welcome, there are some problematic issues in the formulation of these two articles which deserve reflection and may demand reconsideration. One major aspect relates to the causation required by the provisions of the two articles as an essential element of responsibility arising following the establishment of circumvention. In this connection, it may briefly be argued that, as the results of various political science researches may have rightly shown, causation is highly complex and often indirect.<sup>605</sup> Neither in the articles nor in the commentaries to the provisions on circumvention is there any further explanation with regard to that element or any elaboration on this issue. Given the lack of practice and case law at this stage, the absence of elaborations in this connection can not only be a critic merely addressed to ILC.

As a concluding word to this subsidiary section discussing the role and parallel responsibility of an IO in connection with a wrongful act of a State or another IO, a mentionsworthy point still remains to be referred to. What is the substantive and material difference between responsibility arising from aid or assistance and the responsibility arising out of direction and control? This question may be raised equally with respect to the question of the State responsibility and the ASR. A possible distinction may be in the responsibility of the assisted entity and the absence of responsibility of the controlled and directed entity. If the control is to the point that the conduct can already be attributed to the directing and controlling IO then it is more about the original international legal responsibility of the latter IO.<sup>606</sup>

### 3. Sparse Opinio Juris

As is apparent from the ARIO and the commentaries relating to the provisions of its different articles, universally expanded and firm *opinio juris* is not the foundation of many of these articles. As has been known, lack of relevant practice, a real obstacle for the codification of articles on responsibility of IOs by the ILC, was not the only hurdle to encounter by the ILC in its undertaking of the ARIO project, but also finding out the *opinio juris* with regard to different questions has been

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<sup>605</sup> Hafner, E. M./Victor, D. G./Yonatan Lupu, "Political Science Research on International Law: The State of the Field", *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 94.

<sup>606</sup> Reinisch, A., "Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts", *IOLR*, Vol. 7, No. 1, 2010, pp. 63–77, at pp. 76–77.

quite burdensome.<sup>607</sup> On this all the fault of course does not lie with the ILC. Not all the IOs reacted actively to the drafts in different stages of its progress.<sup>608</sup> Official and unofficial consultations between Commission – or the special rapporteur personally – and different IOs and bodies often provide little substantive input into the Commission’s work, upon which the Commission could build, at least, some parts of the content of its reports.<sup>609</sup> Otherwise, the ILC could at least rely on the feedback from the IOs on their position with regard to different aspects of the question of IOs’ international legal responsibility.

However, some of the IOs by the occasion of delivering their comments in reaction to the drafts of ARIO have expressed their concerns with regard to the lack of *opinio juris* as the foundation of articles. For instance, on the comments of the IOs to the draft articles preceding the second reading, the ILO has stated that the views expressed by the IOs with regard to ARIO are the manifestation of the lack of *opinio juris*.<sup>610</sup> The lack of international courts and tribunals that would have competence to proceed with the contentious cases, to which at least one IO would be a party, constitutes a factor that leads indirectly to the absence of an entity who would establish relevant *opinio juris* and the customary rules.

#### 4. Scant Case Law

There is no doubt that the international system is still weakly institutionalized. This structural deficiency has also affected the richness of the case law relating to the question of the international legal responsibility of IOs. In contrast to ASR provisions that have already been frequently referred to by scholars and cited by courts in numerous and various cases, ARIO provisions are yet much more behind such degree of reference and application in practice, unsurprisingly to a great extent as a result of above mentioned institutional deficiency of the international judicial system, specially with regard to jurisdiction over contingencies with IOs’ involvement.

The case law relating to the issue of the responsibility of IOs suffers from considerable scanty in comparison with the international responsibility of States which has been the main subject of numerous proceedings before the various international courts and tribunals almost from the beginning of the last century. The problem lies in the fact that in the first place, the plaintiffs who are parties to the disputes with IOs must find a forum which has jurisdiction over the case and which is prepared to adjudicate his/her claim. Until now, no international court or

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<sup>607</sup> Noemi Gal-Or and Cedric Ryngaert, “From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN”, *German Law Journal*, Vol. 13, No. 5, 2012, pp. 511–541, at p. 514.

<sup>608</sup> McRae, Donald, “The Work of the International Law Commission, 2007–2011: Progress and Prospects”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 322–340, at pp. 331–332.

<sup>609</sup> *Ibid.*, at p. 333.

<sup>610</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 15.

tribunal has been established that would have jurisdiction to proceed with the contentious cases of which one of the parties is an IO. And with respect to national courts, one of the main obstacles standing in the way of an action claiming reparation for the damages sustained as a result of the encroachment of rights is the traditional principle of immunity of IOs. In addition, there are not a lot of third-party dispute settlement procedures in which at least one of the parties to the dispute is an international organization. Consequently, the cases where potentially the matter of the responsibility of international organizations could arise are not brought before international courts and tribunals. This jurisdictional obstacle necessarily leads to the lack of relevant case law. The deficit that existed almost one hundred years ago with regard to States related case law and the role of the international courts in the determination of customary law<sup>611</sup> is now for the moment applicable to the situation with regard to IOs.

The available case law relied upon by the ILC in its drafting of ARIO are indirectly related to some aspects of the issue of the international responsibility of IOs.<sup>612</sup> There is to this moment relatively rare number of cases which directly examine the question of international legal responsibility of IOs. The deficiency of the case law in this regard can be attributed to different factors. One of the major factors is the lack of jurisdiction of international tribunals to deal with the contentious cases of which, at least, one of the parties is an IO. In other words, the scarcity in case law dealing with the responsibility of IOs can be traced back to the lack of *ius standi* of IOs before international judicial instances. But can this fact and deficiency solely render the question of the international legal responsibility of IOs unripe<sup>613</sup> for codification? In other words, would it be desirable to let the legal rules set and linger behind the institutional developments and mechanisms? The development in the rules could on its part push the procedural development.

##### 5. Limited Available Pertinent and Relevant Practice

The European Union has raised the question whether there are enough international practice and identifiable *opinio juris* to support the draft articles as they have been formulated by the ILC.<sup>614</sup> It should be born in mind that the ILC in drafting the ARIO was confronted with different obstacles, *inter alia*, the limited availability of state as well as institutional practice, which afterwards has been observed as

<sup>611</sup> As Oppenheim put it: "... there are no international courts in existence which can define these customary rules and apply them authoritatively to cases which themselves become precedents..." in Oppenheim, L., "The Science of International Law – Its Task and Method", *AJIL*, Vol. 2, 1908, pp. 313–356, at p. 315.

<sup>612</sup> Hafner, Gerhard, "Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks", in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at pp. 700–704.

<sup>613</sup> *Ibid.*, pp. 695–717.

<sup>614</sup> See UN Doc. A/CN.4/637 (2011), at p. 22, para. 2.

one of the main points of criticism with respect to the resulting articles.<sup>615</sup> The origin of the limited availability of the pertinent practice with regard to the different aspects of the international legal responsibility of IOs goes back partly to the fact that the IOs have entered the international scene relatively late in comparison to the much longer history of the existence and involvement of the States in the international relations. Therefore, it is logical and understandable that the relevant practice with regard to the responsibility of IOs is not that much expanded and developed. Another point is that the involvement of IOs in the different fields of international relations and various activities of international life has also been gradual at least in the beginning years. On the contrary, this expansion is now growing at an unprecedented pace. Much of this phenomenon is owed to the trust grown in the international institutions and optimism towards globalization. The belief seems to be that the new appeared international and trans-frontier problems that have emerged in the present international life can only be removed and dealt with through international institutions and in the framework of multilateral and supranational structures, organisms and systems.

On different occasions in the commentaries to the ARIO articles the ILC has admitted the lack of practice with regard to different matters and aspects that these draft articles cover.<sup>616</sup> Given the fact that the authority and normative character of ASR results to a considerable extent from the relevant established practice of states, which is also at the origin of its provisions, the lack of practice to such an extent with regard to ARIO may affect the origin of authority of ARIO and its provisions. Even if in many parts, as has been referred to earlier, the ILC has admitted the sparseness of practice and case law, still we witness that the ILC has in some places, exactly where the practice was far from being abundant, used inductive methods of argument.<sup>617</sup>

In the precedents of the ILC, especially with regard to the work of this body on the ASR, in some places the ILC has left some questions “without prejudice”. A prominent example is the question of the possibility and admissibility of taking recourse and resorting to countermeasures by a non-injured State against a responsible State. As the reason for this formulation and decision the Commission has argued that State practice relating to countermeasures taken in the collective

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<sup>615</sup> Ryngaert, Cedric, “The European Court of Human Right’s Approach to the Responsibility of Member States in Connection with Acts of International Organizations”, *ICLQ*, Vol. 60, Issue 04, October 2011, pp. 997–1016, at p. 1011.

<sup>616</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to Chapter IV, para. 1, at p. 35; Commentary to Art. 14, para. 1, p. 36; Commentary to article 18, para (2), p. 43; Commentary to chapter V Circumstances Precluding Wrongfulness, para (2), p. 44; Commentary to article 24, para. 2, p. 50; Commentary to article 25, para. 2, p. 51; Commentary to article 30, para. 4, p. 56; commentary to article 49, para. 9, p. 79; commentary to article 51, para. 4, p. 82.

<sup>617</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to article 52, para. 7, at p. 85.

or general interest was “sparse” and involved “a limited number of States”.<sup>618</sup> In this situation, the Commission has left the resolution of the matter to the further development of international law. Therefore, we witness a more careful and conservative approach adopted by the Commission in the cases where the practice suffers from sparseness. Thus, it seems that generally the Commission in drafting articles on responsibility, in cases where it is confronted with lack of practice prefers to leave the matter “without prejudice”. In other words, the Commission prefers to leave the question open wherever it confronts the rarity of practice with regard to a specific matter or one or more specific aspects of it. In fact the Commission takes no position with regard to the matter, and prefers not to interfere by way of taking recourse to “progressive development” instrument that it has, in principle, at its disposal.

In this situation and with regard to the scarcity of the relevant practice, some of the IOs in their comments to the second reading of the DARIO have doubted the legal basis of the proposition of the rules by the ILC in the circumstances where such practice is missing and has not developed yet.<sup>619</sup> In this regard, the discussion of the legal basis of the propositions of the ILC in its draft articles and the relevance of the pertaining practice may be of importance. In addition, the cases should be examined where the ILC is proceeding with progressive development and it should be investigated in such cases whether the relevant practice is also necessary for such drafting. It is clear that when the ILC is preparing a set of draft articles that has to be proposed further in the form of a treaty or convention,<sup>620</sup> the practice may not be of great relevance and importance, since the States have the possibility and may agree on rules that have not any practical precedence and are not based on some previous practice.

Another criticism in this context, brought forward by some of the IOs in their comments to the DARIO preceding its second reading, is that the ILC has not precisely determined the boundary between the codification and progressive development in the draft articles. Even in cases where the articles are instances of codification, it is not clear what the relevant practices are on which the Commission has based its codifications.<sup>621</sup>

In this connection, UNESCO has for instance observed as follows:

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<sup>618</sup> *Yearbook of International Law Commission*, 2001, Vol. II, part two, A/CN.4/SER.A/2001/Add.1 (art. 2), p. 139, para. 6. Also referred to later by the Commission in: Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to art. 57, para. 2, at p. 89.

<sup>619</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 8.

<sup>620</sup> This fact has also been admitted by the ILC in its statements at different occasions. Available on: <http://untreaty.un.org/ilc/ilcintro.htm#methods> (last visited on 05.05.2022).

<sup>621</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 14.



“Even if there may be some limited practice with regard to e.g. peacekeeping operations, there is virtually none for organisations such as UNESCO.”<sup>622</sup>

Some scholars also seem not to be completely satisfied with the result of the progressive development undertaken by the ILC in ARIO, which in their view is due exactly to the lack of pertinent practice:

“There is, therefore, very little practice on which to base the rules. The Articles on State Responsibility, on the other hand, were adopted after a 45 year long process of reflection upon existent practice, whereas the current Draft Articles represent a rather hypothetical development of international law.”<sup>623</sup>

Nobody can indeed arguably deny the fact that practice has not still matured on many aspects of the issues dealt with by ARIO provisions. One of the consequences of the lack of pertinent practice of states and IOs on the issue under consideration, namely the international legal responsibility of IOs and its various aspects and all potential dimensions, is that the articles prepared by the ILC should be interpreted as progressive development, rather than codification of customary international law.<sup>624</sup> Scarceness of material from which to induce legal rules, which is a result of scant relevant practice, as well as the generalist approach adopted by the ILC are two major factors that prevent ARIO from being recognized as codification of international law of responsibility of IOs. This situation, however, could be changed by emergence of practice relevant to the various aspects of responsibility of IOs reflected in different provisions of ARIO.

A question that comes to mind, having regard to the above analysis of the approach and strategies of the ILC in drafting ARIO and the end result of the project, is why the Commission did not risk drafting more radical provisions, which would, among others, touch upon most controversial and critical issues? Being conscious that the articles would not attain, in any event, the universal recognition as the codification of customary law status, the ILC would maybe not risk much in doing so. On the contrary, if it had been more inventive in drafting the articles, at least some of the criticisms could probably be alleviated. For example, the critical observations concerning the adoption of so-called one-size-fits-all approach could be mitigated, which refer to the generalist approach of ARIO which do not take into account the diversity of IOs. For instance, the question of international criminal responsibility of an IO could be the subject of a provision, or a sub-chapter. Another issue that could be dealt with more in detail is the issue of the responsibility of members of the IO for the acts of the IO of which they are members.

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<sup>622</sup> Wood, Michael and Vicien-Milburn, Maria, “Legal Responsibility of International Organizations in International Law”, *Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011*, p. 5.

<sup>623</sup> *Ibid.*, pp. 5–6.

<sup>624</sup> See Sixth Committee, Summary Record of the 19<sup>th</sup> Meeting, paras. 9–12, UN GAOR, 66<sup>th</sup> Sess., UN Doc. A/C.6/66/SR.19 (2011).

## 6. The Role of Policy Considerations in the formulation of Articles

International law, despite the critics put forward by the realists' theories, has its own existence independent of politics.<sup>625</sup> However, the formation and formulation of legal rules and regulations is based on interests, and therefore, it is quite normal that at times this legal system tries to harmonize different interests too. In this sense, the legal systems are not much far and distanced from politics and political considerations. International law as a legal system is no exception to this rule, and has its legal policies that lie behind and at the root of its rules and regulations. Therefore, like in other fields of law, in international law too, the policy considerations continue to play a role in the formulation of drafts and legal rules. However, in the practice of codification and progressive development of international law, there are always some political choices that have to be made that should be, in the ideal situation, a harmonious political compromise between various value systems that could overcome technical limits.<sup>626</sup>

In this subsection, some examples will be delivered in which the ILC has explicitly referred to political considerations as a weighty element of its argumentation. Before referring to the instances of policy considerations in ARIO, it is important to note that the ILC has generally referred to policy considerations by adopting negative or positive approaches. The first approach is the places where the ILC bases its argument in favour of a proposition on the absence of any policy reasons militating against the proposition it is putting forward. Article 9 relating to the attribution of a wrongful conduct to an IO following its having acknowledged and adopted the conduct at issue, is a prominent example. Paragraph 5 of the commentary to this article clearly emphasizes the lack of any opposing policy considerations. The other approach taken by the ILC consists in proposing a certain formulation for the provisions of certain ARIO articles on the basis of desirable outcomes that such provisions would result in. One of the places where such positive policy consideration has played a role and affected the formulation and the scope of the articles is with regard to necessity as one of the circumstances precluding wrongfulness of the conduct of an IO. In the commentary to article 25 of ARIO that deals with the question of necessity as one of the circumstances that precludes the wrongfulness of the conduct of an IO, it has been stated that because of the risk that a wide invocability of necessity would entail for compliance with international obligations, the scope of the invocability of necessity by IOs should be stricter than the scope of the invocability of this condition by States.

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<sup>625</sup> For a defence of the independent existence of international law from politics see Georgiev, Dencho, "Politics or Rule of Law: Deconstruction and Legitimacy in International Law", *EJIL*, Vol. 4, No. 3, 1993, pp. 1–14, at pp. 1–7.

<sup>626</sup> Abi-SAAB, G., "La Commission du droit international, la codification et le processus de formation de droit international", in United Nations, *Making Better International Law: The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, 1998, p. 189.

Unfortunately, with regard to certain other provisions, the ILC has not continued this welcome approach, and therefore, it is not clear from which legal policy perspective the ILC is looking at the specific questions and on which legal political considerations the final formulations of the provisions are possibly based. With regard to ARIO this matter is of great importance because in drafting ARIO the ILC, to a great extent, engages progressive development.

The ILC, in choosing its topics and approaches – which is at the same time a reflection of its revision and redefinition of its roles – should not too much encroach into political realms, a certain extent of political consideration and position taking is inevitably justified. It is true that the Commission is not a forum for political negotiations and should avoid entering into politically controversial issues.<sup>627</sup> However, in exercising codification and progressive development, it should be allowed to follow, at least to a limited extent, a certain degree of judicial policy based primarily on the interests of the international community. The justification for this is that the ILC is representing the international community in its entirety.

Some observations have been made in the scholarship as to the disproportionate role of policy considerations in drafting ARIO. For instance, Stumer believes that the exclusion of joint or secondary liability of member States by the ILC was, above all, based on political reasons rather than analytical legal reasons.<sup>628</sup> Furthermore, it has been stated that the reason for the adoption of this approach by the ILC in drafting ARIO has mainly been the absence – presently and temporarily – of the social basis of responsibility, namely issues of control as well as the legal qualification of the relationships between an IO and other entities, with which the IO is somehow in contact or interaction.<sup>629</sup> Undoubtedly, such examinations would have enriched the result of the codification and progressive development by the ILC on the question of international legal responsibility of IOs. This is also the reason why in the preceding subsections, the two cases of agency relationship and the cases of transfer of powers by state members to the IOs have been distinguished, in order to consider the relevance of such categorization for the purpose of international legal responsibility of an IO and joint or subsidiary responsibility of its members.

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<sup>627</sup> McRae, Donald, “The Work of the International Law Commission, 2007–2011: Progress and Prospects”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 322–340, at p. 338.

<sup>628</sup> Stumer, A., “Liability of Member States for Acts of International Organizations; Reconsidering the Policy Objections”, *Harvard Intl LJ*, Vol. 48, No. 2, 2007, p. 566.

<sup>629</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 717.

## 7. ILC's Working Methods

It should be noted that the Commission has not only received criticism from the outside with regard to its working methods, but also among the members of the Commission some have expressed their concerns in this respect.<sup>630</sup> Most criticism regards its relationship with other organizations and entities – inside as well as outside the UN – in particular, the relationship with the Sixth Committee. It is true that the Commission and its members in their deliberative process and consultations shall strike a balance between various considerations, among them, its independence, and loyalty to their consistent legal positions – sometimes indirectly the basis of their election by the General Assembly.<sup>631</sup> At the same time, the Commission in drafting rules of international law – be it its engagement in codification or progressive development – has to seek as much as possible relevant legal expertise and even expertise in other domains.

The important task of criticizing international law is connected with another task of the science of international law, namely, that of preparing codifications.<sup>632</sup> As Oppenheim has put it: “There is no better way of preparing a codification of international law than, first, an accurate exposition of and a minute research into the existing rules; secondly, the bringing into view of their historical growth and development; and, thirdly, their reasonable criticism”.<sup>633</sup> The codification that Oppenheim had in mind, as he outlined and described it, “is a codification of the body of the existing rules of international law on the basis of the, at present, existing international order, with such modifications and additions as are necessitated by the conditions of the age and the very fact of codification being taken in hand”.<sup>634</sup> Codification creates agreement and unanimity.<sup>635</sup> In addition, it has been

<sup>630</sup> Pinto, M.C.W., “The International Law Commission: Representative of Civilizations, Agent of Change”, in Yakpo, Emile and Boumedra, Tahar, *Liber Amicorum Judge Mohammed Bedjaoui*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 595–602; Nolte, Georg, “The International Law Commission Facing the Second Decade of the Twenty-first Century”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 781–792; For a comprehensive examination of the procedure of the selection of the topics for the codification projects of the ILC see: Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 698–699; Tomuschat, C., “The International Law Commission: An Outdated Institution?”, *GYIL*, Vol. 49, 2007, p. 91; McRae, Donald, “The Work of the International Law Commission, 2007–2011: Progress and Prospects”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 322–340, at p. 335.

<sup>631</sup> McRae, Donald, “The Work of the International Law Commission, 2007–2011: Progress and Prospects”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 322–340, at p. 335.

<sup>632</sup> Oppenheim, L., “The Science of International Law – Its Task and Method”, *AJIL*, Vol. 2, 1908, pp. 313–356, at pp. 318–319.

<sup>633</sup> *Ibid.*, at p. 319.

<sup>634</sup> *Ibid.*

<sup>635</sup> *Ibid.*, at p. 320.

observed by some scholars that one of the desired characteristics of a good international law expert is to have vision with regard to the future norms of international law and the evolutions and changes that the present norms of international law will undergo in the course of time.<sup>636</sup>

In order to be able to look into the future of international law, the most appropriate technique to be used is the evolutionist technique of legal reasoning that has also been used and applied, and thus can also be attributable to Walther Schücking, which is comprised of a thorough historical analysis of the system of international relations and subsequently exploring the existing and emerging trends of international law in order to find out what the future of international law may look like.<sup>637</sup> By this means we determine the law how it should be, and the result of this process would be the *lex ferenda*. That makes this way of reasoning appropriate for the task of progressive development of international law.<sup>638</sup>

The ILC, even though far from being an international legislator, due to its composition, which is a gremium of numerous experts of international law, represents almost all major legal systems of the world. This especially grants authority to the drafts this organ prepares. Different factors of authorship, representation, procedure and form are behind the authority that the articles prepared by ILC generally enjoy.<sup>639</sup> The two sets of articles prepared and adopted by ILC are not exceptions in this regard. Without any doubt the codification of ASR and ARIO had many positive consequences for the implementation and application of the secondary rules of general international law on the question of international legal responsibility.

Nevertheless, the method of ILC in drafting ARIO has been criticized by far by the IOs that have delivered their opinions to the ARIO preceding its second reading. These IOs believe that the analogy used extensively by the ILC with the ASR in drafting ARIO does not find justification given the major differences between States and IOs. Some of these IOs believe that the principle of specialty that finds application with regard to IOs – in contrast to States – makes the situation of IOs different from States as regards the international legal responsibility and reparation.<sup>640</sup>

Another organ – a subsidiary organ of the General Assembly – in the UN that also seeks to contribute to the progressive development and codification of public

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<sup>636</sup> Bodendiek, Frank, “Walther Schücking and the Idea of International Organization”, *EJIL*, Vol. 22, Nr. 3, 2011, pp. 741–754, at p. 743.

<sup>637</sup> *Ibid.*, at p. 744.

<sup>638</sup> Oppenheim, L., “The Science of International Law – Its Task and Method”, *AJIL*, Vol. 2, 1908, pp. 313–356, at p. 319.

<sup>639</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *ICLQ*, Vol. 63, Issue 03, July 2014, pp. 535–567, at p. 558.

<sup>640</sup> The concerns of some of the IOs have been reflected in their comments to the ARIO before the second reading: UN Doc. A/CN.4/637 (14 February 2011).

international law is the Office of Legal Affairs of the Secretariat.<sup>641</sup> Not only the working methods of ILC, but also its relationship and lack of interaction with this organ have been subject of criticism for being unsatisfactory.<sup>642</sup> It would be interesting to take a look, albeit briefly, at how these two bodies cooperate and where the limit and delimitations of their tasks is.

The ILC has in its previous projects proceeded to leave the content of some of the concepts to later practice and development, principally by means of and through the jurisprudence of international tribunals.<sup>643</sup> In this way, the Commission paves the way for the future developments of a concept coined by itself or in the international legal doctrine. If the ILC decided to proceed in the same way with regard to the project on the international legal responsibility of IOs, could the ILC withhold formulating the content and leave some space for future development through practice and international jurisprudence? Would it be at all desirable if the ILC had proceeded in that way? In the words of *Hafner*, one of the members of the ILC from 1996–2001, the criteria necessary for a topic to satisfy the conditions in order to be appropriate for the codification work by the ILC are:

“... the existence of a need, sufficient state practice, as well as concreteness and feasibility for progressive development and codification”.<sup>644</sup>

Progressive development of international law is often based on and built upon borrowing a legal principle from another field of international law, in order to consequently introduce it into the new field under examination, which also makes it very similar to analogy, but in fact the Commission undertakes the incorporation of principles of international law from one system to another system of international legal order. Sometimes the transfer of principles takes place between the general – or more general – system and a particular sub-system of international law, namely, through the transplanted of a legal principle from a general system into a particular sub-system of international law or vice versa – although in fewer cases.

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<sup>641</sup> On the Office of Legal Affairs see Corell, Hans, “United Nations Office of Legal Affairs”, in Wellens, Karel (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Martinus Nijhoff Publishers, 1998, pp. 305–322, at pp. 309–310.

<sup>642</sup> Dugard, J., “How Effective is the International Law Commission in the Development of International Law? A Critique of the ILC on the Occasion of Its Fiftieth Anniversary”, *SAYIL*, Vol. 23, pp. 35–36.

<sup>643</sup> With respect to the development of the concept of the *jus cogens* by the ILC in its project on the law of treaties and the draft that ultimately became the Vienna Convention on the Law of Treaties 1969 see Christenson, Gordon A., “*Jus Cogens*: Guarding Interests Fundamental to International Society”, *Virginia Journal of International Law*, Vol. 28, No. 2, Spring 1988, pp. 585–648, at pp. 604–605.

<sup>644</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemmer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 699.

The ILC has applied the same method to draft ARIO by following the model of ASR, and mainly through transferring the legal principles from the latter system to the former. However, the problem that exists here is with regard to the possibility of transplantation of the principles and concepts relating to the State responsibility to the question of the responsibility of IOs, because these two different set of articles deal with two different categories of subjects of international law. Despite all the similarities, the addressees of these two topics are distinct from each other and should not be assimilated, at least not to an exaggerated extent, as the analysis of the first chapter of the thesis also intends to reflect.

With regard to final form of ARIO, ILC has preferred – in the same spirit with its recent practice – to recommend that the General Assembly take note of the draft articles and consider at a later stage the elaboration of a convention on the basis of those articles.<sup>645</sup> This could refer, among others, to the fact that the ILC has been hesitant about the maturity of the provisions of ARIO – or some of them – in their present formulations to be engraved as the final codified rules on the topic of the legal responsibility of IOs. This decision would not completely remove the authority of the articles, but the doubtfulness of ILC may diminish the influence the ARIO could have on subsequent practice. But all these considerations do not discredit ARIO from its just status as an important document with certain legal effects. In addition, in this way the Commission impliedly suggests the General Assembly to leave the matter open for further developments through practice and jurisprudence. In any case, it would be simplistic to conclude that the drafts prepared by the ILC are devoid of any kind of legal effects merely because of the absence of formal legal bindingness.<sup>646</sup> These drafts benefit most assuredly, at least, from the doctrinal authority of the ILC, in the sense of article 38(1(d)) of the Statute of the International Court of Justice, an attribute which renders these drafts interesting in the eyes of judges and arbitrators.<sup>647</sup>

*a) The Relevance of the ILC in the era of Post-modern Public International law*

The central point to the discussion over the relevance of the ILC in our time is the necessity of this body to undergo some role adjustments. There is no doubt that the expansion of ILC methodologies, especially an interdisciplinary approach, would enrich the result of the works of the Commission. Nevertheless, structural and financial obstacles have, regrettably, not yet allowed the Commission to move

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<sup>645</sup> McRae, Donald, “The Work of the International Law Commission, 2007–2011: Progress and Prospects”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 322–340, at p. 323.

<sup>646</sup> Paulus, Andreas, L. “Internationales, nationales und privates Recht : Hybridisierung der Rechtsordnungen. Zusammenspiel der Rechtsquellen aus Völkerrechtlicher Perspektive”, *Deutsche Gesellschaft für Internationales Recht*, Tagung Luzern, 14 März 2013, p. 21.

<sup>647</sup> Caron, David D., “The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority”, *AJIL*, Vol. 96, 2002, at p. 861.

in that desired direction.<sup>648</sup> Nevertheless, nothing prevents the Commission members, on individual or personal footings, to reflect on the outcomes of the works of other scientific bodies researching on international law. In the case of ARIO, the final result of the works of ILA – discussed in preceding chapter of the thesis and also the International Law Institute – could be very illuminating. The ILA final report concerning the issue of the accountability of IOs could show some extra-legal ways and interdisciplinary approaches with regard to the questions dealt with in ARIO.

A point which is worth being noted here concerns the incompatibility of the topic of responsibility of IOs with the criteria enumerated in the formal guidelines for the Commission's choice of topics. As criticism observed by some scholars concerning the ripeness of the topic of responsibility of IOs for codification also reflects, it can hardly be claimed that the topic of international legal responsibility of IOs is sufficiently advanced in stage in terms of State [and IOs] practice to permit progressive development and codification by the ILC.<sup>649</sup> In the preceding sections of this chapter, the problem of the lack of state and IOs relevant practice has been referred to, and therefore, it is clear that the criterion of abundant practice as the prerequisite for the choice of topic is not satisfied with regard to the topic of legal responsibility of IOs.

Some believe that with the 21<sup>st</sup> century, not only a new century has started for the ILC, but also a new chapter in its role, and consequently in its methods of work. As the major codification projects has been concluded, the projects that were based on rich assets of practice, and the ILC was missioned with new topics with less traces and evidence in state and non-state actors' practice, it is time for this organ to redefine its approaches.<sup>650</sup> This reflects, in a sense, also the controversial debate over the kind of topics the ILC should choose for its work or to undertake analysis on, which at the same time mirrors an important characteristic of modern against traditional topics of international law. Depending on whether the ILC undertakes long-term major codification – and progressive development – exercises or merely the analysis of particular questions in order to deliver a legal expertise answer to the General Assembly – or any other national or international body – its methods of work and approaches would necessarily be different. Nevertheless, it seems that the performance of second function by the ILC would in fact interfere with the same and comparable function exercised by the International Court of Justice in the framework of its Advisory Opinions.

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<sup>648</sup> McRae, Donald, "The Work of the International Law Commission, 2007–2011: Progress and Prospects", *op. cit.*, at p. 334.

<sup>649</sup> International Law Commission, Report of the Commission to the General Assembly on the Work of its Forty-ninth Session, para. 238, in [1997] 2 Y. B. Int'l L. Comm'n, UN Doc. A/52/10.

<sup>650</sup> Nolte, Georg, "The Relevance of the ILC in the 21<sup>st</sup> Century – What Should It Be Doing to Make a Contemporary Difference?", in Georg, Nolte (ed.), *Peace Through International Law: The Role of the International Law Commission*, 2009, pp. 3–4.



*b) The (In) appropriateness of using Analogy in drafting ARIO?*

With respect to the legal status of draft articles or draft conventions prepared by the ILC, comprehensive discussions have been taking place that sometimes have led to general presumptions with regard to the legal value of such texts, which are deduced from the capacities of the ILC, as well as based on the necessities of the international legal order. There is a widespread tendency to consider these draft articles as the reflection of customary international law:

“Against the background of the endemic uncertainty existing at the level of the sources of international law, institutional features of the ILC, combined with certain properties of the texts that it produces, converge to convey the image that the resulting texts constitute the most authoritative statement of the content of customary international law”.<sup>651</sup>

However, the example of ARIO, as the ILC admits too, proves that the degree of precision of such image, like any other, varies from one text to another. The main reason for this, as has been noted in the earlier sections, is the lack of practice and *opinio juris* on this specific topic – or most of its aspects. That is also why the ILC has taken recourse to analogy as its main approach and methodological tool in drafting ARIO. However, as has been, rightly, observed in scholarship, in the context of dealing with the question of new roles for the ILC:

“Through a careful choice of topics and an appropriate approach to their treatment, the Commission can make a contribution to the progressive development of international law and its codification, notwithstanding the lack of state [and IOs] practice in an area.”<sup>652</sup>

It seems that analogy is not exactly the appropriate approach to the treatment of the question of international legal responsibility of IOs, or at least most of its dimensions. In this section, the intention is to examine which alternatives, other than analogy, had the ILC at its disposal for drafting ARIO, so that the final product would gain wider acceptance, and would avoid, to a greater extent, the criticism expressed so far in connection with different articles. It should, however, be added in this place that such statement does not mean at all that the application of analogy should have been excluded right from the outset. There are some aspects of the question of international legal responsibility and related parts of the ARIO where the application of analogy – or an argumentation method similar to it – is totally justified.

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<sup>651</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *ICLQ*, Vol. 63, Issue 03, July 2014, pp. 535–567, at p. 538.

<sup>652</sup> McRae, Donald, “The Work of the International Law Commission, 2007–2011: Progress and Prospects”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 322–340, at p. 338.

Even if it was not the intention of the Commission in drafting ARIO to arrive at analogous solutions,<sup>653</sup> it is hard to believe that the end result is much different from it. Using analogy in order to regulate the behavior of two categories of subjects of a legal system is not, in itself, problematic. Only when the analogy is made between two subjects of the legal order which are believed to be dissimilar from various and fundamental aspects, the methodological problems start to appear, as in the case of using analogy between states, on the one hand, and the IOs, on the other. However, the Commission has responded to this criticism in observing that the identical or similar solutions have been chosen following an in depth study and backed by appropriate reasons.<sup>654</sup> There is no doubt that the approaches and working method adopted by the ILC to draft ARIO is similar to the approach and method it had chosen for drafting ASR.<sup>655</sup> The Commission, in fact, does not differentiate between the responsibility of States and IOs, in terms of the approach adopted to draft each set of these articles.<sup>656</sup> In addition, the Commission has justified and defended its broad use of analogy in drafting ARIO, which results in ARIO emulating the ASR, as follows:

“When in the study of the responsibility of international organizations the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to international organizations, this is based on appropriate reasons and not on a general presumption that the same principles apply”.<sup>657</sup>

In addition, as has also been noted earlier, the ILC has used the induction with regard to the codification and progressive development of different articles of ARIO, especially where the practice and relevant case law was missing considerably. Whether in such circumstances the use of inductive method of argumentation would be technically correct is under doubt.<sup>658</sup> In this place, maybe at the end the desired result of the examination would be the conclusion that the ILC better have hesitated and have kept pace with the development of relevant practice and

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<sup>653</sup> See Gaja, G., “First report on responsibility of international organizations”, A/CN.4/541, 3, para. 5; where the special rapporteur states that “It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning states, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions.”

<sup>654</sup> Draft Articles on the Responsibility of International Organizations, with commentaries 2011, p. 2, para. 4.

<sup>655</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemmer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 696.

<sup>656</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), at p. 2.

<sup>657</sup> *Ibid.*

<sup>658</sup> *Ibid.*, commentary to article 52, para. 7, at pp. 84–85.

case law. But on the other hand it may be argued that the ILC itself is an organ having come into existence for the development of international law. Therefore, the mission of this organ and its *raison d'être* has been the development of international law.

Principally the codification also serves the concretization of the rules. By this means the general principles become operational in the form of legal rules and provisions. Some authors, among them *Hafner*, a member of the ILC from 1996 to 2001, express their doubts concerning the ripeness of the topic of the responsibility of IOs for a successful codification by the ILC.<sup>659</sup> *Hafner* suggests that the codification endeavour of the question of international legal responsibility of IOs would have been feasible only if an inductive approach had been adopted by the ILC. The codification of this issue without a comprehensive study of the features of various IOs from different points of view serving as a theoretical basis would be condemned to fail from the outset.<sup>660</sup>

Some scholars, in contrast, defend the idea that the ILC should have taken recourse even more vastly to analogy in order to draft a set of draft articles for the responsibility of IOs that ensures more coherence with the articles on the responsibility of the States for the sake of systemic attributes of the law of international legal responsibility.<sup>661</sup> For this purpose, a profound comparison of these two subjects of international law seems at any case inevitable. The results of this comparison would show us the limits of the possibility of using analogy in drafting any rules on the responsibility of IOs using the rules on the responsibility of States.

To summarize our discussion in this subsection, it appears that the ILC has tried to compensate the lack of state and IOs practice on the topic of responsibility of IOs by using analogies. Thereby, the ILC has expanded – to a great extent – the articles on responsibility of states to the issue of the responsibility of IOs. Even though both projects relate to the same area of public international law, namely the international legal responsibility of a subject of international law, the fundamental differences – intrinsic as well as temporal – do not allow such application of analogical argumentation for the transfer of legal rules from one area to the other. In the next chapter of the thesis, it will be shown how such transfer based on analogical methods may be unfeasible in theory and consequently in practice. As the IOs, in most of the situations, use the facilities – military or non-military – and means of their members to perform their functions and tasks in

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<sup>659</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 697–698.

<sup>660</sup> *Ibid.*, at p. 717.

<sup>661</sup> Ahlborn, Christiane, “The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations. An Appraisal of the ‘Copy-Paste Approach’”, *International Organizations Law Review*, Vol. 9, No. 2, 2012, pp. 53–66, at p. 61.

order to achieve their aims, the question of attribution of conduct in such situations is decisive and of great importance. ARIO could be a good opportunity to deliver clear and precise criteria for the establishment of the attribution of conduct to IO or its members in different situations. It has been proved in practice and jurisprudence that the concept of effective control may give rise to controversial discussions without putting forward a clear cut parameter for the purpose of attribution of wrongful conduct. Furthermore, with regard to the implementation of international legal responsibility of IOs, it goes without saying that the IOs, in almost near to all cases, are dependent on their members to implement the obligation of full compensation abiding them as a result of their international legal responsibility. In such case, it would have been helpful to strengthen the commitments of the member states with regard to performance of this obligation by the IO of which they are members. Unlike the state, where a sole obligation of full reparation would be adequate to ensure the remedy of the injured or damaged third parties, with respect to IOs a more serious member engagement would better guarantee such third party remedy. Thus, a simple analogy with the situation of state responsibility would be, even though consistent in theory, but definitely of restricted utility in practice.

### **III. The Nature of international Responsibility in ARIO: an objective or a subjective responsibility conception?**

For some reasons, partly for practical facility, and partly out of different considerations such as usefulness and necessity, the international legal responsibility is the end product of the process of reduction of a complicated set of facts and relationships to a binary notion.<sup>662</sup> It means that in the establishment of international legal responsibility, all the facts do not have the same relevance or legal value. Often certain crucial facts and elements are not even considered as relevant.<sup>663</sup> To put it differently, some of these elements are ultimately dissolved in the process of evolution and the end product of legal responsibility – with regard to a number of them, even overlooked from the outset, since they are omitted from the definition of responsibility and thus, shall not even be taken into account. In the following subsections, some of the most important elements present in this complicated set of facts and relationships will be dealt with thoroughly.

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<sup>662</sup> Meyer, Timothy, “Review of the Book: International Organizations: Politics, Law, Practice, By Ian Hurd, Cambridge, New York, Cambridge University Press, 2011”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 415–419, at p. 416.

<sup>663</sup> Ahlborn, Christiane, “The Use of Analogies in Drafting the Articles on the Responsibility of International Organization. An Appraisal of the ‘Copy-Paste Approach’”, *International Organizations Law Review*, Vol. 9, No. 2, 2012, pp. 53–66, at p. 65.

### 1. A shift towards “Objectivization”?

The shift towards objectivization of international responsibility took already place during and through the preparation of the draft articles on the responsibility of States by the ILC.<sup>664</sup> At the heart of this shift towards objectivization is the excision of damage as a precondition for responsibility.<sup>665</sup> In addition, objective responsibility corresponds, in sum, to responsibility for a wrongful act where ‘fault’ is not a component element,<sup>666</sup> and in which only the wrongful act has to be established without requiring harmful effects as its consequences.<sup>667</sup> Objectivization of the law of international responsibility, in a sense, would mean that the law of international responsibility has taken up the role of the guardian and guarantor that ensures the implementation of the rules of international law. It does not have civil law character and compensatory nature any more, but rather it has metamorphosed into the guardian of respect for the rules of the international law and taken up the role of the guarantor of their implementation. In other words, the international responsibility law has taken up a new function. The omission of the damage as a constituent element in the definition and notion of international responsibility implies that international law must be respected regardless of the consequences arising out of the violation of its rules.<sup>668</sup> The objective formulation adopted by the ILC with regard to the general principle of international legal responsibility, is supported, above all, by customary international law originating in State practice:

“It is not possible to argue that there exists at present a rule of customary international law in relation to strict liability which plays the same role as article 1 of the ILC’s Articles on State Responsibility in relation to responsibility for breach of an international obligation: a formulation such as ‘Any damage resulting from a lawful but potentially dangerous act authorized by, or attributable to, a State, results in its liability’ is clearly unsustainable.”<sup>669</sup>

Martti Koskenniemi has also referred to the ‘objectification’ in his article on the doctrines of State responsibility.<sup>670</sup> It is clear that the ILC in drafting ARIO has adopted an “objective approach”, unsurprisingly following the conception that

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<sup>664</sup> Pellet, Alain, “The Definition of Responsibility in International Law”, in James Crawford; Alain Pellet; and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 3–16, at p. 8–9.

<sup>665</sup> *Ibid.*, at p. 15.

<sup>666</sup> Sorel, Jean-Marc, “The Concept of ‘soft responsibility?’”, in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 165–171, at p. 166.

<sup>667</sup> Pellet, Alain, “Remarques sur une révolution inachevée, le projet d’articles de la C.D.I. sur la responsabilité des Etats”, *AFDI*, Vol. 42, 1996, p. 12.

<sup>668</sup> Pellet, Alain, “The Definition of Responsibility in International Law”, *op. cit.*, at p. 9.

<sup>669</sup> *Ibid.*, at p. 10.

<sup>670</sup> Koskenniemi, Martti, “Doctrines of State Responsibility”, in James Crawford; Alain Pellet; and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 45–51, at p. 50.

the ILC had adopted with regard to the definition of international responsibility in the articles on State responsibility.<sup>671</sup> In this way, the definition of international responsibility has distanced itself from the concepts and elements of damage and fault, the definition of which might cause undoubtedly controversial debates.<sup>672</sup>

Even though the element of damage does not affect as a constituent element the incurrance of international responsibility, it is, however, more than clear that the concept of damage could be relevant for the assessment of the reparation, specially, compensation in due cases. It goes without saying that the assessment of the reparation succeeds the threshold beyond which the mechanism of international responsibility is triggered. But given the fact that the scope and content of the international obligations of IOs is all but clear,<sup>673</sup> is this amount and extent of, if we can call it absolute, objectivization actually desired? In other words, we may ask whether some emphasis on the damage and the conferring of greater, or of any, role to this element could not compensate or fill the gap existing with regard to international obligations of IOs that would otherwise render the international responsibility for IOs inapplicable in practice. Of course, it is undeniable that in that case the problem with regard to the definition and demarcation of the damage or injury could still persist, and therefore, a solution for that problem should be found as well. But in any way, with regard to the IOs we are still confronted with a deficiency and ambiguity in terms of the primary rules. The other alternative put forward in this respect has been the necessity of the efforts in creating, or extending and completing the mostly needed, failing and lacking primary rules binding on the IOs.<sup>674</sup> In that case the secondary rules envisaged by the ILC could be practical, optimal and could achieve the desired results.

## 2. Re-introduction of subjective element

This subsection intends to inquire into the question of whether a complete ‘objectivization’ of international responsibility has taken place through the codification work of the ILC in this matter. Furthermore, it will be examined whether a partly reintroduction of subjective elements could be useful or not for the issue of international responsibility of IOs. In other words, it will be tried to find an answer to the question whether it would not be desirable with regard to the conception of international legal responsibility of IOs to move back the elements of damage and injury, to borrow from *Pellet*, from the level of ‘new legal relations’ to that of ‘the

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<sup>671</sup> Tams, Christian, J., “All’s well that ends well. Comments on the ILC’s Articles on State Responsibility”, *ZAÖRV*, Band 62, 2002, pp. 759–808, at pp. 765–766.

<sup>672</sup> *Ibid.*, at p. 766.

<sup>673</sup> The unclerities and ambiguities surrounding the scope and content of the international legal obligations of IOs will be discussed thoroughly in chapter four of the dissertation.

<sup>674</sup> Reinisch, August, “Securing the Accountability of International Organizations”, *Global Governance*, Vol. 7, Nr. 2, 2001, pp. 131–149.

triggering of the mechanisms of responsibility'.<sup>675</sup> In that case, the damage and injury would amount and equate to necessary elements for the international responsibility to arise, alongside the elements of breach and attribution.

*a) The Relevance of intent – A move backwards to subjective Responsibility?*

Before entering into the analysis of the complete objectivity of international responsibility regime, it seems to be appropriate to deliver a definition of objective vs. subjective legal systems that would serve as our criterion of examination. For this purpose, referring to the description made by Hans Kelsen appears illuminating:

“A command is *objectively* observed or violated if the behavior it prescribes actually takes place or does not take place (if the person to whom something is commanded actually performs or does not perform the behaviour in question, if his behavior agrees or does not agree with the command), whether or not he is aware of the command. But a command is ‘observed’ or ‘violated’ *subjectively* only when the addressee’s behavior agrees or fails to agree with a command of which he is *aware*, only when he *wants* to behave (or not to behave) in a way which agrees with the *meaning* of an act of commanding which he *understands*, or he *wants* to behave in the opposite way”.<sup>676</sup>

As it can be noticed clearly, the emphasized keywords are equal to the elements of “knowledge” (of the wrongful circumstances of the act) and “intention” that appear and have been adopted by the ILC in certain articles of ARIO or in the commentaries to those articles. Therefore, in our discussion below, these articles and their commentaries will be examined in order to give an answer to the question asked earlier in this subsection.

In examining the complete objectivization of international responsibility, the reference should be made, first of all, to the question of responsibility of a state in connection with the acts committed by an IO in ARIO, where it appears that the intent of the State member has been given considerable weight.<sup>677</sup> The wording and the formulation of article 61 indicate that the ILC has tried to retain strictness with a view to limit the scope of the draft article to cases where the intention to this effect is present,<sup>678</sup> so that not every case of conferral of competence would

<sup>675</sup> Pellet, Alain, “The Definition of Responsibility in International Law”, *op. cit.*, at p. 9.

<sup>676</sup> Kelsen, Hans, “Primary and Secondary Legal Norms-Subjective and Objective Observance and Violation of Norms”, in Hans Kelsen, *General Theory of Norms*, Translated by Michael Hartney, Clarendon Press, 1991, p. 78.

<sup>677</sup> Paasivirta, Esa, “Responsibility of a Member State of an International Organization: Where will it End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations”, *IOLR*, Vol. 7, No. 1, 2010, pp. 49–61, at p. 51.

<sup>678</sup> *Ibid*, at pp. 59–60.

end up in international legal responsibility of the members of the IO. During the drafting of this article, various changes has taken place with regard to its formulation – the word circumvention has been at first added and later omitted, and finally reintroduced in the title<sup>679</sup> – showing the difference of opinions within the Commission with respect to the scope of the concept and the nature of it in terms of objectivity or subjectivity.

Another instance, where the subjective element has been reintroduced among the necessary international responsibility conditions, is with respect to the intention of an aiding or assisting state or IO in facilitating the wrongful conduct, as a precondition of its international responsibility to arise.<sup>680</sup>

*b) The role of Fault*

In this subsection, as in the preceding, the intention is to examine whether the objectivization of international legal responsibility has taken place completely or has been a partly achieved procedure and revolution, as has been claimed in the literature.<sup>681</sup> After having discussed the role played by the element of intention of the wrongdoer and responsible party, we will now turn the focus on the element of fault to examine whether the related facts concerning the fault of the wrongdoer, or the fault of another actor or subject of international law,<sup>682</sup> are relevant at the level of triggering international legal responsibility of that subject of international law.

Fault, as a constituent element of a wrongful conduct for the purpose of international responsibility, has been the subject of controversy among scholars, with all the camps having among their arguments and reasons political or judicial policy considerations.<sup>683</sup> In theory, fault has been equalled with disregarding and violating the principle of due diligence. In other words, where sufficient diligence has been conducted we are confronted with a situation of absence of fault on the part of the subject of law to whom a conduct is attributed, or is involved in the com-

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<sup>679</sup> Fourth Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/564 and Add. 1–2, 28 February, 12 and 20 April 2006, pp. 103–124, at pp. 117–119; Report of the International Law Commission, Fifty-eighth Session, 1 May–9 June and 3 July–11 August 2006, A/61/10, pp. 283–286; Report of the International Law Commission, Sixty-third Session, 27 April–3 June and 4 July–12 August 2011, A/66/10, pp. 161–163.

<sup>680</sup> Articles on the Responsibility of International Organizations, with commentaries, 2011, Article 14 and 58. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

<sup>681</sup> Gattini, Andrea, “La notion de faute à la lumière du projet de convention de la commission du droit international sur la responsabilité internationale”, *EJIL*, Vol. 3, No. 2, 1992, pp. 253–284.

<sup>682</sup> Tzevelekos, Vassilis P., “Reconstructing the effective control criterion in extraterritorial human rights breaches: Direct Attribution of Wrongfulness, Due Diligence and concurrent Responsibility”, *Michigan Journal of International Law*, Vol. 36, 2014, pp. 129–178, at p. 155.

<sup>683</sup> Gattini, Andrea, “La notion de faute à la lumière du projet de convention de la commission du droit international sur la responsabilité internationale”, *op. cit.*, pp. 253–255.



mission of a certain conduct.<sup>684</sup> With respect to cases in which the element of due diligence is already incorporated in the primary rule and as a result there is a primary obligation binding on the subject of international law as to adopting all the measures required by this principle, there is few controversy. The opinions start to diverge and divide when due diligence is absent from the primary rule, thus, the question will be raised as to whether the principle of objective responsibility has to be applied or rather the criterion of due diligence should be given weight.<sup>685</sup> It has been stated and firmly proposed by some authors, including the last special rapporteur of the ASR *James Crawford*, that the fault is not totally absent from the ASR. According to these scholars the degree of fault necessary to raise the international legal responsibility of a State is determined in each case by the primary rule that puts an obligation on the State, an obligation that has been consequently violated by the State in question and that causes the international legal responsibility to be incurred.<sup>686</sup> In other words, in the ILC's conception of international responsibility, the presence and ascertainment of fault is not a general requirement, necessary to be established with regard to every case of alleged commission of a wrongful conduct. Neither can the absence of fault, which is closely related to the concept of due diligence, be considered generally as a circumstance precluding wrongfulness, unless with regard to the cases in which the primary rule provides so.

Presuming that the fault has been adopted as a constituent element of the wrongful act, another theoretical controversy that may arise is whether the objective conception of fault should be applied or a subjective conception. The main distinction between these two conceptions of the concept of fault relates to its content as well as its origin. Some authors have stated that, in contrast to the notion of damage, the notion of fault is interrelated with that of international responsibility.<sup>687</sup> According to this traditional understanding of international responsibility "the establishment of the breach of a primary norm of international law by the source state is the precondition for the right of the affected state to be compensated for the damage suffered".<sup>688</sup> But it must be added that in this relation the fault means a violation and breach of an international rule and the obligation arising from it. Thus, this notion is not really a subjective one relating to the moral situation of the wrongdoer.

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<sup>684</sup> Perret, Robert-Louis, *De la faute et du devoir en droit international. Fondement de la responsabilité*, Polygraphischer Verlag, Zürich, 1962, p. 152.

<sup>685</sup> *Ibid*, p. 261.

<sup>686</sup> Crawford, James, "Revising the Draft Articles on State Responsibility", *EJIL*, Vol. 10, No. 2, 1999, pp. 425–434, at p. 426.

<sup>687</sup> Gehring, Thomas and Jachtenfuchs, Markus, "Liability for Transboundary Environmental Damage Towards a General Liability Regime?", *EJIL*, Vol. 4, No.1, 1993, pp. 92–106, at p. 93.

<sup>688</sup> *Ibid*, at p. 93.

### 3. The role of damage and injury

Before entering into the discussion of the question of the role of damage and injury in the responsibility conception, it should be observed that the choice of the two expressions damage and injury is not accidental but intentional, in order to refer to two distinct potential consequences of a wrongful or lawful conduct of an IO. Although still, albeit indirectly, the source of responsibility in the case of liability, in the case of international responsibility as a result of the breach of an international obligation, damage is only a factor relevant to certain of the new relations which arise as a result of the commission of a wrongful conduct and thus, incurring responsibility, in particular the obligation to make reparation.

As to the proposition of adopting damage or injury as the sole elements triggering international responsibility, some authors, rightly, believe that even in case of the acceptance of the possibility of international legal responsibility in the absence of the wrongful act, there should be some form of definition of the borderlines of responsibility that would limit the scope of responsibility to certain defined and definable situations, otherwise the stability and legal certainty would be threatened:

“the scope of acts of IOs (and States) that can cause some form of injury (notably economic injury) to other actors is so large and heterogeneous that without a requirement that responsibility is limited to those cases where the acts in question contravene legal requirements, or alternatively without a clear definition of protected interests, such responsibility will significantly undermine stability and legal certainty. Without any conceptual or theoretical basis for such responsibility in the absence of a wrongful act, article 17<sup>689</sup> (and indeed 16<sup>690</sup>) uneasily undermines the coherence of a system of responsibility that is said to be based on wrongfulness.”<sup>691</sup>

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<sup>689</sup> Article 17:

“Circumvention of an international obligation through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.”

<sup>690</sup> Article 16:

“Coercion of a State or another international organization

In the course of preparation of ASR and already from the early stages, the ILC had adopted the approach according to which damage or injury does not count among the constituent elements of a wrongful conduct for triggering international responsibility. As has been stated by the then Special Rapporteur, for instance, the economic injury, if any, sustained by the injured State may be taken into consideration, *inter alia*, for the purpose of determining the amount of reparation, but is not a prerequisite for the determination that an internationally wrongful act has been committed.<sup>692</sup>

It appears that the element of damage or injury does not play any direct role with regard to the invocation of responsibility according to the ILC ARIO articles. Nevertheless, an indirect role or impact has been maintained for damage in these articles, namely it determines the amount of reparation due as a result of the wrongful act with damaging and impairing effects. Thus, damage is a prerequisite of compensation. Therefore, the role of damage with regard to the international legal responsibility of IOs is the same as its role with regard to the international legal responsibility of States. The element of damage becomes relevant when there is the necessity of or at the stage of assessing the amount of compensation and generally the modality of reparation. In other words, the damage has mainly relevance with regard to the liability and the assessment of the amount of liability, if we consider the liability as one of the consequences of responsibility. The origin of such liability is in the principle according to which a responsible IO, as well as a responsible State, is under an obligation to make full reparation for the injury caused by the international wrongful act. This principle has been provided for and embedded in article 31 of the ARIO. However, this principle may in practice give rise to some gaps when it is applied on IOs in the present constellation and stage of development of international law generally, and the stage of development of primary rules binding IOs, specifically. The deficiency in the system would arise specially with regard to the situations where the act of an IO causes injuries or damages to a third party, but there is not any breach of international obligation committed towards the injured party. In other words, the IO has not committed a wrongful act in the meaning of ARIO, simply because there is not any rule binding the IO to undertake a certain conduct towards the third party or to refrain from undertaking such conduct, but there is a damage and injury that the conduct of the IO was the main cause of. In these cases, what would be the result given

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An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and
- (b) the coercing international organization does so with knowledge of the circumstances of the act.”

<sup>691</sup> Nedeski, N. and Nollkaemper, A., “Responsibility of International Organizations ‘in connection with acts of States’”, *International Organizations Law Review*, Vol. 9, 2012, pp. 33–52, p. 45.

<sup>692</sup> Ago, R., Third Report On State Responsibility, *ILC Yearbook 1971*, Vol. II (1), p. 223, para. 74.

the present definition or content of the international legal responsibility of IOs? The result would be that the injured third party would be left alone without any remedy and eventual reparation of the damages or injuries it has sustained. Without any doubt, this would give rise to an unjust and unfair situation. A side question that would arise here is to what extent the system of international legal responsibility should be the guarant of justice at all and should consider and respect fairness. This question is relevant to another general discussion as to whether and to what extent it is the mission and task of international law to realize justice or to be fair and to realize fairness in international relations.<sup>693</sup> In addition, if still belief exists that these cases should still be kept out of the realm of international legal responsibility, as the definition of this concept so requires and prescribes, then the alternative solution that may exist to fill this gap is to develop and promote primary rules giving rise to international obligations binding on IOs the breach of which would definitely trigger international legal responsibility.

Another question the answer to which might also be illuminating with regard to the matter under question here and specially, the question raised above, is trying to make clear at one point what the aim of the international legal responsibility regime is at all. Is it the reparation of damages and injuries, or are justice and fairness the ultimate aim and goals of the international legal responsibility, or is it just to provide secondary rules and to provide for the consequence of the breach of the primary rules and norms of the international legal order? In other words, are the rules of the international legal responsibility system merely there to serve as the consequences of the breach of the primary rules of the international legal order in order to guarantee its rules being respected by the subjects of international law? And furthermore, if the latter understanding is accepted, what should be the aim and *raison d'être* behind having secondary norms of international law, an issue which would be decisive for the content of the secondary rules. Is it to guarantee the respect for the rules of international law or is it to give stability and legal character to the order known as international law? Why should there be at all secondary norms in the international legal system? The answer to this question may be found in the views of L. H. Hart and his theory concerning the primary and secondary rules of international law.<sup>694</sup> When analyzing the necessity for secondary rules, Hart seeks to explain the necessity by taking recourse to the example of a simple society disposing only over primary rules and finally arriving at the conclusion and the fact that such society would face a number of challenges in the absence of secondary rules. He argues that in the absence of secondary rules of adjudication and without a defined adjudication method, inefficiencies would arise

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<sup>693</sup> Franck, Thomas M., *Fairness in International Law and Institutions*, 1998, Clarendon Press Publication.

<sup>694</sup> Hart, H.L.A., *The Concept of Law*, Second edition, OUP, 1994, chapter 5.; David, Eric, "Primary and Secondary Rules", in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 27–33.

from disputes over whether a rule was actually broken.<sup>695</sup> The conclusion that can be drawn from the theoretical analysis of Hart with respect to secondary rules – all the three categories of secondary rules, namely, rules of recognition, rules of change and rules of adjudication – is that the principal *raison d'être* of the secondary rules is to maintain the dynamism of primary rules and to safeguard the legal system.

In case we come to the conclusion that it is not the task and mission of the secondary rules of international legal order to fill the remedy and reparation gap – reparation for damages in the absence of a wrongful conduct, other than cases of hazardous activities – then we should think about other solutions for this problem. As a temporary solution, there could possibly be an obligation to reparation of damages deducible of a general principle of law. For example, the principle of non-reasonable enrichment or another comparable principle that could be put forward as a general principle of law in order to provide for theoretical and conceptual basis of reparation obligation. Maybe from the principle of good faith or no-harm interpreted in an expanded way we could deduce such an obligation that would also encompass the IOs. At this place, the examination of doctrine with regard to this gap in the relations of States may be illuminating.

Another concept exists that has been used in a recurrent manner in the practice of IOs – even though its framework is not that clear – with regard to international legal responsibility and the obligation to compensation arising as a consequence of international responsibility, namely, the concept of “unjustifiable damage”. The question that may be raised is whether this concept could be used to enlarge and expand the scope of responsibility. In other words, the question may be raised as to whether the notion of unjustifiable damage is limited to the instances of breach of legal obligations and confined to the boundaries of a restricted understanding of international responsibility? In the correspondence of the UN Secretary-General with the permanent representations of certain States whose rights had been infringed by the UN forces during the operation in 1965 in Congo, it has been stated that:

“...the United Nations would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties”.<sup>696</sup>

And again in another occasion in the same context, the Secretary General of the UN stated that:

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<sup>695</sup> Hart, H.L.A., *Laws as a Union of Primary and Secondary Rules*, Oxford University Press, 1961, pp. 75–77.

<sup>696</sup> United Nations, *Treaty Series*, vol. 535, p. 199; vol. 564, p. 193; vol. 565, p. 3; vol. 585, p. 147; and vol. 588, p. 197; Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN. 4/650 (2011), at p. 61, fn. 246.

“...It has always been the policy of the United Nations, acting through the Secretary General, to compensate individuals who have suffered damages for which the Organization was legally liable.”<sup>697</sup>

In this respect, it can be stated that the position of the UN is not clear as to whether the UN saw the matter restrictively, meaning that the IO may only be legally liable where there is a breach of obligation or whether an unjustifiable damage would suffice, in that case this concept would entail more than just international legal responsibility that would be raised following the commission of a wrongful conduct. Further, in this letter the Secretary General refers to the international responsibility of the UN in connection with unjustifiable damage.<sup>698</sup> It could be argued that damage, independently, gives rise to unlawful – wrongful in the terminology adopted by the ILC – conduct, unless it is proved that the inflicting of the damage was somehow justified. There is also another indirect role played by the damage and injury in the approach adopted by the ILC. Looking at this issue from another perspective, article 43 of ARIO provides that an injured State or international organization can invoke the responsibility of the IO that has incurred international responsibility. The injured State or international organization from the perspective of this article is a State or an IO to whom the obligation breached is owed to. In other words, the breach of an international obligation towards a State or an IO entitles it to invoke the international responsibility of the wrongdoer IO and to request reparation, and also compensation if due. It seems that if in this scenario there has also been a damage occurred and sustained by the injured State or IO, then the liability of the responsible IO would also be incurred and raised and that entitles the injured and damaged State or IO to restitution or compensation. The aim is to refer to the fact that the international responsibility would not be raised unless there is a breach of an international obligation and therefore the existence of damage that is caused by the conduct of the IO would not suffice to raise its international responsibility. But here the question will be raised whether this damage would entail liability of the IO or not. It means that the liability could be raised independently of responsibility. What would be the result of the fact that there would not be any responsibility in case there is not any damage?

In the classical understanding of the international legal responsibility, the injury or damage was one of the constituent and substantive elements of the responsibility concept.<sup>699</sup> In our time, it is rather in certain *leges speciales*, that the international responsibility or liability based on damage may be found. For example, in the Treaty on the Functioning of the European Union there is an article dealing

<sup>697</sup> *United Nations Juridical Yearbook* (1965), p. 41.

<sup>698</sup> *Ibid.*, pp. 41–42.

<sup>699</sup> Barboza, Julio, “Legal Injury: The Tip of the Iceberg in the Law of State Responsibility”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 7–22, at p. 7.

with the matter of non-contractual liability of the EU which states that “[t]he EU shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.’ (Article 340 TFEU).<sup>700</sup> This provision regulates the non-contractual liability of the EU in cases where an act causing damages is attributable to the EU institutions. From the wording of this article, *prima facie*, it could be concluded that damage or injury would suffice as the sole independent prerequisite condition that would trigger international liability of the EU. However, the jurisprudence of the EU judicial bodies, specially the Court of Justice of the European Union, has developed in the direction that requires three criteria to be established and satisfied in order for liability of the EU to be incurred: 1) the rule infringed must have intended to confer rights on individuals; 2) the nature of the breach must be sufficiently serious; and 3) there must be a direct causal link between breach of the obligation and the damage sustained.<sup>701</sup> As it can be noticed with regard to this provision, damage is not the sole element triggering international responsibility.

But there is a point that should also be taken into account and that is the qualification that has been provided for in the second paragraph of article 31 ARIO. In the second paragraph of this article that deals with the reparation of the damages caused by the wrongful act of the IO, there is an emphasis on the fact that the damage should come from the wrongful act of the IO. In other words, as it has been stated by the ILC in paragraph 7 of the commentary to this article, the principle of full reparation is not applicable in all the cases where an IO may be responsible. The example that the ILC refers to in this regard is the case where the organization aids or assists a State in the commission of a wrongful act. It appears that it is also the case with regard to the situations where the IO authorizes a certain act by its members. In addition also the cases where the IO directs and controls the act of a State or its IO members, the principle of full compensation necessarily does not find application with regard to the IO. The question that in this regard will be raised is whether the principle of full reparation finds application on the IOs in the cases where the IO has taken decisions binding on member States and IOs and thereby has caused them to commit a wrongful act. In the cases that the IO has been aware of the wrongfulness of the conduct resulting from its binding decision on States, it is clear from article 15 that the IO incurs international responsibility. But the question is whether in this case the principle of full reparation finds application with regard to IO given the statements that has been explained above and referred to in the commentary to article 31 ARIO. If the prin-

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<sup>700</sup> This article replaces the article 288, paragraph 2, of the Treaty Establishing the European Community which had in turn replaced article 215 of the EEC.

<sup>701</sup> Lewis, E.\Papadima, A.\Tael, K, “Non-Contractual Liability of the EU for Damage Sustained by Women Who Received PIP Breast Implant”, *Amsterdam International Law Clinic*, Supervisors: Kentin, E. and De Ruijter, A., August 2013, at p. 5.

ciple of full reparation would not find applicability on the IO in these cases, then the result would be the division of liability and the obligation to reparation between the IO and its members. To this point there seem not to be any problems with these rules. But the problem may appear as soon as we want to allocate the amount of the obligation of reparation for each of these entities, namely for the IO, on the one hand, and for the member States and IOs, on the other. How should the liability be allocated and apportioned between these different entities? What should be the factors for the division of the obligations to reparation?

As a concluding observation in this subsection, it appears that those developments in international society, to which Pellet refers in its arguments with regard to the main bases for a radical reconceptualization of international responsibility by the ILC, and the particular resonance which Roberto Ago was able to give to those developments within the context of the codification of the topic of State responsibility by the ILC,<sup>702</sup> find less justification with regard to IOs. This is specially so, as the developments with regard to IOs and the primary rules binding on them do not take place at the same pace as those developments with regard to states. Therefore, it seems that a reintroduction of some elements omitted from the conception of international responsibility, when it should be considered and designed with regard to the IOs, at least, would better suit the present stage of the development of international law. A visionary conception of international responsibility for IOs, despite all its virtues, would seemingly lead to inapplicability of international responsibility, as it would ban its mechanisms to be triggered in practice. Adopting the approach supported here would permit to include in the conception of international responsibility the cases where there is not a breach of international obligation present, but there has been a damage or injury sustained by a third party. At the present stage of the development of international law, as will be shown in detail in the coming chapter four of the thesis, the cases where an IO inflicts damage or injury on a third party, without breaching any international legal obligation it is bound by, are not a rarity. Thus, it seems that defending the cause of a more objective international responsibility conception for IOs would produce some desirable results. In the meantime, in order that the complete damages be repaired and the aims of justice are realized, the concept of accountability should be strengthened and further developed in order to fill the gaps that the doctrine of international legal responsibility leaves behind.<sup>703</sup>

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<sup>702</sup> Pellet, Alain, "The Definition of Responsibility in International Law", *op. cit.*, at p. 8.

<sup>703</sup> Yarwood, Lisa, *State Accountability under International law, Holding states accountable for a breach of jus cogens norms*, Routledge, 2011, p. 76.



## IV. Attribution of Conduct: a closer look at the complicated case of PPPs

The ILC has followed, with regard to the essential question of attribution of conduct to the wrong doer, the same principle it had also adopted earlier in its ASR project with respect to the attribution of a wrongful conduct to a State and it has transferred it to ARIO to the case of IOs. Normally, when a conduct has been undertaken by a constitutional organ of an IO, there should not be any problem arising with regard to the attribution of the conduct in question to the IO, by means of applying the above mentioned provision common to the responsibility of both subjects of international law, namely, States and IOs.

However, the complexities may appear as soon as the conduct undertaken is the result of the cooperation of an IO and a State, or in less frequent but possible cases of the cooperation of an IO and a private entity. There are numerous examples where an IO places one of its organs at the disposal of a State. In these cases, apparently, complexities may arise with regard to the attribution of the conduct undertaken by the organ in question to one of these two entities or to both.<sup>704</sup> The symmetrical question is the scenarios where a State or a State organ acts as an organ of an IO, the prominent examples of which are the peace-keeping operations. There are some scenarios where the conduct of an IO would be attributable to a State because of close structural and legal links between them. The well-known example is the case where an IO is established by a small number of States as founding members, and the IO is destined to be an organ of one of the member States. The other possibility may be the case of an international organization that exercises elements of governmental authority.<sup>705</sup> It was quite natural that since these matters have not been regulated adequately in the ASR, the ARIO would be the right place to deal with these issues. ARIO has put forward the general criterion of “effective control” over the wrongful conduct in question in order to ascertain the attribution.<sup>706</sup>

As has been referred to above, with respect to the question of attribution of conduct to IOs, generally the term “organ” gains special importance. From the point of view of ARIO, organ includes “any person or entity which has that status in accordance with the internal law of the IO”.<sup>707</sup> Moreover, the conducts of all

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<sup>704</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), at p. 5.

<sup>705</sup> *Ibid.*

<sup>706</sup> Articles on the responsibility of international organizations, with commentaries, 2011, article 7. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, ICJ Judgment of 26 February 2007, pp. 208–211, paras. 399–407.

<sup>707</sup> *Ibid.*, at p. 12, para. 22.

the organs of the IO, without any exception, are attributable to it. Nevertheless, this fact should not be overlooked that the organs of IOs are very different, may vary a lot from one IO to the other, in addition to the fact that the memberships of the organs of IOs are manifold and the activities of organs of different IOs also vary. In such circumstances, the question that prompts to mind is whether it is really realistic and desirable to have a general rule that attributes all the conduct of all the organs of an IO to it, to the same extent and in the same manner, without making any distinction? In order to find an answer to that question, this issue will be further discussed in the context of the analysis of different forms of delegation of powers by the members to IOs.

It is evident that, with the term organ, only the organs are meant that do not possess their own international legal personality, separate from that of the organization. Clearly, it is possible, even though not very common, that certain organs of an IO have separate international legal personality from that of the organization they form part of. The question that may be raised with respect to these kinds of organs of IOs, is to which entity their conduct would be attributable? ARIO do not explicitly put forward a solution for such situations. However, it appears that there should be no reason why these cases should not be considered as identical with cases where two IOs have cooperated in the commission of a wrongful act. The criterion of effective control over the conduct may then be relevant in assessing the share of each IO in the international legal responsibility and possibly the liability. In the same spirit, it has also been stated that, in general, the best approach to the doctrine of responsibility should be through the concept of control.<sup>708</sup> However, in the cases where such organs are comprised of, exclusively, non-state members, a situation which makes it difficult to consider them as inter-governmental for the purpose of the application of ARIO, it is clear that ARIO would not be applicable to the responsibility of such organs, even if their conducts are attributable to them – and not to the IO of which they form an organ – and an eventual wrongful act may have been committed by them too. It means that the two preconditions for the responsibility to arise according to ARIO are already satisfied, but still the ARIO would not be applicable. In this case, again, we would face another accountability gap caused by a deficiency in the international legal responsibility system that the ILC draft articles intend to construct and install within the international legal order.

Even though the concept of effective control may be useful in practice, it represents one of the points that has been controversial and criticized with regard to the ARIO, and therefore, it is appropriate to discuss it in the context of the issue of the attribution of conduct to IOs. It appears that the ARIO follows the “effective control” standard as a criterion for this purpose.<sup>709</sup> However, it has been ob-

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<sup>708</sup> Bantekas, Ilias, “The Contemporary Law of Superior Responsibility”, *AJIL*, Vol. 93, 1999, pp. 273–595, at p. 594.

<sup>709</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 22, para. 5(1).

served that the practice and jurisprudence do not still enough support this approach.<sup>710</sup> Given the conditions of attribution of conduct, set out in ASR and ARIO considered together, the attribution of conduct relating to certain areas and in the framework of specific functions, to an IO or its member States with respect to certain IOs, having supranational and integrational characteristics, prominently EU, may become the subject of controversy and accompanied by ambiguity.<sup>711</sup>

The intention in this section has not been only to focus on the description of the general rules of the attribution of conduct to IOs, which is sufficiently clear in ARIO, but to touch upon some complexities that may arise with respect to this specific aspect of the international legal responsibility. Another new development in the practice of IOs which may, definitely, have implications on the question of the attribution of conduct for the purpose of the international legal responsibility, and for which ARIO has, unfortunately, not provided any provision or guidance to resolve the problem, and therefore may lead to future ambiguities and gaps in the international regulations, is the prominent phenomenon of Public-Private Partnerships (PPPs), used by the IOs as a practical framework to perform their functions, as has also been referred to briefly above in the context of the international accountability of IOs.

The PPPs are very common in the domain of global health and their role in this sphere, especially the synergy resulting from the cooperation between public and private sector – in our case the IOs as the public sector – cannot be ignored. With the proliferation of PPPs, on the one hand, and the increase of their roles and powers, on the other hand, the possibility of negative impacts of their acts on the individuals and their rights, even fundamental rights, also rises, even more so as very often the PPPs are active in sensitive areas with widespread impact on global health. These entities are exercising more and more public power over global health, while the question of their accountability or responsibility, or the responsibility of another entity arising from the acts of PPPs, is far from clear. Furthermore, there may even be, to some extent, gaps in the primary rules applicable to these PPPs, as they sometimes develop outside the framework of international law. Some scholars suggest that the acts of these PPPs should be attributed to the IO by taking recourse to ARIO. However, it seems that the ILC in the ARIO has not explicitly regarded these public-private entities as agents of IOs. The argument of scholars for holding the IO responsible lies on the agency relationship between the IO, on the one hand, and the Partnership, on the other. For the agency relationship to be found, it is evident that the tighter the interactions between the two entities, the stronger the bases for the argument in favour of

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<sup>710</sup> *Ibid.*, para. 5(2).

<sup>711</sup> Kuijper, Pieter Jan, "Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?", *IOLR*, Vol. 7, No. 1, 2010, pp. 9–33, at pp. 14–15.

agency relationship.<sup>712</sup> These and similar suggestions relate, of course, to the question of international legal responsibility of IOs – and possibly the states members of such IOs – for the acts of PPPs.<sup>713</sup> The indeterminacy in ARIO, on the question of agency status of PPPs, should not, necessarily, be understood as a serious deficiency. As it has been rightly described by Ian Hurd, “law is often indeterminate, and thus states and IOs are constantly involved in a process of negotiating the law’s meaning.”<sup>714</sup>

This subsection seems also to be the right place to discuss another aspect of the question of attribution of wrongful conduct which relates to the issue of attribution in cases of cooperation between intergovernmental organizations, hereinafter IGOs and the non-governmental organizations, hereinafter NGOs. The role played by NGOs in global governance has gained in importance and it is now impossible to overlook NGOs as these entities definitely count, at least, as secondary actors at the international scene.<sup>715</sup> Rather than creating new organs and subsidiary bodies, the IGOs benefit from the cooperation with NGOs as a kind of expanded arms with crucial expertise and information source. As the NGOs are regarded as private entities in the eyes of international law, their situation is comparable to that of other private entities. In the case of cooperation between an IGO and an NGO, two major questions may arise in connection with the issue of attribution. First, in, albeit rare, cases where an IGO places one of its organs or agents at the disposal of an NGO, the question as to which entity would be accountable and responsible in the case of an injury or damage, gains in relevance and importance. In finding a response to this question, first it should be determined whether NGOs may incur international responsibility. By means of analogy, the conditions for the international responsibility of NGOs are: a) international legal personality and possessing international legal obligations; b) a conduct by that NGO in breach of its international obligation which would be attributable to it.

With respect to the first question, namely, the international legal personality of NGOs and the related and/or corollary issue of the ability to possess and actual

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<sup>712</sup> Clarke, Lisa, “Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships”, *Chicago Journal of International Law*, Vol. 12, No. 1, 2011, pp. 55–84, at p. 56–83.

<sup>713</sup> In such cases, it would be interesting to discuss whether the principle of implied powers also apply with regard to the private entities when acting as the agents of the IOs, which would of course have a negative side effect, as it would complicate the determination of the enlarged boundaries of the mandate of the IO at the end of the day.

<sup>714</sup> Meyer, Timothy, “Review of the Book: International Organizations: Politics, Law, Practice, By Ian Hurd, Cambridge, New York, Cambridge University Press, 2011”, *AJIL*, Vol. 106, No. 2, April 2012, pp. 415–419, at p. 417.

<sup>715</sup> Hobe, Stephan, “Legitimacy, Recognition, Democratic Control, Transparency and Accountability of Non-Governmental Organizations”, in Wybo P. Heere (ed), *From Government to Governance*, Hague Joint Conference on Contemporary Issues of International Law, TMC Asser Press, 2004, pp. 101–108.

possessing of international legal obligations by these entities, the opinions of scholars are rather diverging. Some authors believe that a distinction should be made between NGOs exercising public functions and those not involved in such activities, and as a result recognizing that the first group enjoys international legal personality, while the second is deprived of such quality.<sup>716</sup> According to a more prudent and cautious opinion, the NGOs have a rather composite and limited legal status in international law – which is the result of putting aside the dichotomy of subject and object in international law – which explains the reluctance in bestowing international legal obligations on them.<sup>717</sup> Whereas some other scholars have without hesitation answered in the negative when inquiring into the question of international legal personality of NGOs, these scholars claim that the exclusion of NGOs from the scope of application of ARIO is a recent proof for that assertion.<sup>718</sup> Assuming that such is the case under international law, it would mean that a wrongful conduct of an organ or agent of an IGO that has been placed at the disposal of an NGO not only would not entail the international legal responsibility of the former IGO, but also would be of no consequence as to international legal responsibility for the two entities involved in such conduct. Here again a gap in the international legal responsibility regime would appear.<sup>719</sup> Nevertheless, it is also important to note that the mentioned situation happens when the organ or agent of the IGO is fully seconded to the NGO, since otherwise there is always the possibility of discussing the IGOs' international responsibility, as is the case with respect to the exchange of organs or agents between states and IGOs.<sup>720</sup> In the cases where the temporary transfer of the organ or agent is incomplete, depending on whether the wrongful conduct committed by the seconded organ or agent can be attributed to the IGO or not, it will or will not incur international responsibility. However, one further difficulty in ascertaining the international responsibility, is that there is not the possibility of conclusion of international agreements – governed by public international law and not private international agreements – between IGOs and NGOs for dealing with the distribution of re-

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<sup>716</sup> *Ibid.*, pp. 101–108.

<sup>717</sup> Lindblom, Anna-Karin, “The Responsibility of other entities: Non-governmental organizations”, in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 343–354, at p.346.

<sup>718</sup> Rossi, Ingrid, “Should NGOs be more accountable at the international level?”, Working Paper No. 12–May 2008, Leuven Centre for Global Governance Studies, at p. 12, Available on: <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP126e.pdf> (last visited on 19.09.2014).

<sup>719</sup> This gap could be used as an argument in favour of the general necessity for strengthening NGO accountability. In this regard, accountability could correct this deficiency, or mitigate the negative impacts deriving from absence of remedy or impunity. For a general discussion of the need of NGO accountability See: Slim, Hugo, “By What Authority? The Legitimacy and Accountability of Non-Governmental Organizations”, *The Journal of Humanitarian Assistance*, March 10, 2002. Available on: <http://www.jha.ac/articles/a082.htm> (last visited on 07.11.2015).

<sup>720</sup> ARIO, *op. cit.*, commentary to article 7, para. 1, pp. 19–20.

sponsibility, prominent example of which are model contribution agreements relating to military contingents placed at the disposal of the United Nations by one of its Member States. Therefore, in the present context the risk of a hole in the international responsibility regime is higher in situations of full transfer of organs or agents.

The opposite case where an NGO places one of its organs or agents at the disposal of an IGO is easier to analyse in connection with the international responsibility question. It is clear that in such cases the organ or agent of the NGO will be considered the agent of the IGO, in the sense of paragraph (d) of article 2 ARIO, since that NGO organ or agent is charged by the IGO with carrying out, or helping to carry out, one of its functions. The only question that remains to be answered is whether the “effective control”, as provided for in article 7 ARIO, would also be required for the responsibility of the IGO to arise in case of a wrongful conduct of the NGO organ or agent placed at the disposal of the IGO. It is clear that in accepting the absence of necessity of “effective control” by the IGO over the wrongful conduct of the NGO organ or agent, a step would be taken in favour of reduction of international responsibility gap. Because in such situations the IGO would incur international responsibility even though the wrongful conduct would not be attributable to it in the strict sense of the term. Nevertheless, in seeking to support this idea, it can be argued that an IGO has accepted the risk of subsequent international responsibility for the wrongful conducts of an NGO organ or agent, with which it is cooperating in the form of organ exchange. Furthermore, it can be argued that such presumption would provide an incentive for the IGO to monitor more closely the conducts of the organ or agent placed at its disposal, and thus, would promote accountability at the international level with regard to the activities in which IGOs and NGOs are involved in a parallel manner.

## **V. Principle of Speciality and its relevance and implications for the responsibility of IOs**

The principle of speciality in uncomplicated words means that IOs do not possess a general competence, but rather have been established in order to exercise specific functions and therefore, the scope of their powers and competences should be defined and delineated by making reference precisely to those functions. Interestingly, arguments have been put forward on the basis of the principle of speciality seeking to justify a specific set of responsibility rules for each category of IOs:

“The principle of speciality supports organizational effectiveness, and the need for organizational effectiveness should determine the scope of how an

MDB discharges its responsibility and provides remedies in the settlement of private claims.<sup>721</sup>

The most important question which may be raised in this connection is the role that the principle of speciality plays in ARIO or maybe should have played. Although the above quoted statement relates to MDBs, there is nothing that could prevent the argument being put forward also with respect to other kinds of IOs. It is clear that in ARIO such weight has not been given to the principle of speciality, or according to certain scholars this principle only partially appears in ARIO,<sup>722</sup> although ARIO is not directly dealing with private claims. Such freedom has not been provided for in the implementation of international legal responsibility. On the contrary, according to the approach adopted in ARIO the IOs are not free to decide the way they implement their international legal responsibility, but they are expected and obligated to behave in a certain way and according to certain defined rules and procedures. Thus, in the light of ARIO it cannot easily be argued that in the context of international legal responsibility the principle of speciality sets IOs so much apart from States.<sup>723</sup> Nevertheless, some IOs believe that this feature of IOs justifies the taking of a different approach with regard to the responsibility of IOs than the one taken by the Commission with regard to States.<sup>724</sup> In this connection, the Commission contends that it has taken into account the principle of speciality in drafting ARIO. It refers to articles 8 and 64, as two prominent examples where this principle is reflected.

As has been indicated by the ICJ in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the limits of the powers of IOs are defined by the promotion of common interests.<sup>725</sup> In other words, the tasks and functions of an IO are based on the promotion of these common interests. In this regard, a critical point that should always be made clear is, at the first stage, what are these interests, and at the second stage, which authority has the legitimacy to determine these interests, should the internal law of the IO be silent in that matter. And there is another question, namely whether the obligations of IOs also are defined by the function of these common interests? If that would be the case,

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<sup>721</sup> Arsanjani, Mahnoush H., "Claims against International Organizations: Quis Custodiet Ipsos Custodietes", *Yale J. World Public Order*, Vol. 7, 1981, p. 131, at pp. 133–134.

<sup>722</sup> Pellet, Alain, "International Organizations are definitely not States. cursory remarks on the ILC Articles on the Responsibility of International Organizations", in Ragazzi, Maurizio (ed.), *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, Leiden-Boston, 2013, pp. 41–54, at p. 46.

<sup>723</sup> Noemi Gal-Or and Cedric Ryngaert, "From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN", *German Law Journal*, No. 5, 2012, p. 513, fn. 7.

<sup>724</sup> For the position of some IOs with regard to the draft articles preceding their second reading see UN Doc. A/CN.4/637 (14 February 2011).

<sup>725</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 78, para. 25.

to some extent the problem with regard to the obscurity and vagueness of the obligations of IOs would be solved. These issues will be more elaborated on in the next chapter regarding the scope and content of the international obligations of IOs.

The principle of specialty makes its appearance in different parts of ARIO. One of these places is article 25 concerning the necessity as a circumstance precluding the wrongfulness of the conduct of IO. In the formulation of this article, the principle of specialty has played a role in limiting the invocability of necessity by IO in comparison to States. In contrast to States, which can invoke the necessity with regard to any conduct that they have committed, on the condition that the preconditions are satisfied, the IOs may only and in a limited way invoke the necessity. In the commentary to the this article, the ILC has stated that in the invocation of necessity by an IO in order to safeguard an essential interest of the international community of its member States, the principle of specialty must be taken into account and the invocation must be consistent with this principle.<sup>726</sup>

The principle of specialty, together with the attributed powers doctrine constituting the two sides of the same coin,<sup>727</sup> is “one of the main factors differentiating the legal personality of international organizations from that of States”.<sup>728</sup> From that, some IOs have concluded that DARIO should specify that the responsibility of IOs is defined by the principle of specialty. What this definition based on the principle of specialty means is not clear. However, the concern has been expressed with respect to unpredictable long-term consequences of treating IOs like the States. This discussion justifies and paves the way for the discussion of the next issue.

International organizations do not possess general competence and as a result operate under the principle of specialty. Function, as a conceptual tool, in the spirit *Virally* has meant it in its doctrine on the analysis of IOs, which is also at the core of the principle of specialty, should guide us in analyzing legal duties and regulating legal consequences relating to the different aspects of the life of IOs, including their conducts.<sup>729</sup> It is difficult to understand why it should not be the case with respect to analyzing the question of legal responsibility of IOs, a major and important consequence of the conducts of these subjects of international law. Result of such change of course would simply be the consideration of different functions and different categories of IOs in the analysis and regulation of the

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<sup>726</sup> Articles on the responsibility of international organizations, with commentaries, 2011, Article 25, para. 4, p. 52. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

<sup>727</sup> Klabbers, Jan, «The Life and Times of the Law of International Organizations», *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317, at pp. 296–297.

<sup>728</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 39.

<sup>729</sup> Viñuales, Jorge E., “The Secret of Tomorrow: International Organization through the Eyes of Michel Virally”, *EJIL*, Vol. 23, No. 2, 2012, pp. 543–564, at p. 553.



question of international legal responsibility. Latter approach would be evidently different from a one-size-fits-all way of regulating the issue under consideration. The principle of speciality implies that the IOs are not uniform, but rather vary widely in capacities, powers, and responsibilities. The functions of each IO and tasks accompanied by and associated with them demand a certain kind of structure and different set of competences that these IOs are endowed with. All this leads not only to, sometimes, very different relations between an IO and its members, which may vary a lot from one IO to another, but also may have impacts on the relations between the IO and third parties. These facts have given rise to one of the major criticisms on ARIO, as to adopting a so-called one-size-fits-all approach that does not actually fit IOs at all. In the following section, this line of criticism will be dealt with, in the light of certain features of IOs, upon which a categorization could be built. Such categorization would have the function of distinguishing between the different kinds of IOs with respect to certain aspects and dimensions of the international legal responsibility of IOs, where these characteristics would matter, and thus, should have been taken into account.

## VI. The Appropriateness of the “One-Size-Fits-All” Approach

With respect to the possible approaches to treat various issues in connection with IOs, there exists a palette of ideas depending to some extent on the understanding of the nature of these subjects of international law. This palette ranges from the position according to which all the IOs fit into one and the same category, because of their common characteristics, of course, that distinguish them also from states, while rejecting any further categorization of different kinds of IOs, to the other extreme idea that each and every IO is a *sui generis* creature that is different from other kinds of its species.<sup>730</sup> Depending on where the emphasis is put – specificities or generalities – each of these positions may somehow be defensible in a different context, since they all are a partial reflection of the reality. This shows also that the expression “sweeping generalities”<sup>731</sup> has been rightly used in the context of international institutional law.<sup>732</sup>

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<sup>730</sup> Klabbers, Jan, “The Life and Times of the Law of International Organizations”, *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317, at p. 289.

<sup>731</sup> Kuijper, P. J., and Paasivirta, E., “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 111–138, at p. 126, fn. 42.

<sup>732</sup> Paasivirta, E. and Kuijper, P. J., “Does one size fit all?: the European Community and the responsibility of international organizations?”, *Netherlands Yearbook of International Law*, 2005, Vol. XXXVI, pp. 169–226; Feld, W. J., and Jordan, R. S., and Hurwitz, L., *International Organizations: A Comparative Approach*, Praeger, 1994, p. 11; White, N. D., *The Law of International Organizations*, Manchester University Press, 2<sup>nd</sup> ed., 2005, p. 230; Ginther, *Die Völkerrechtliche Verantwortlichkeit Internationaler Organisationen gegenüber Drittstaaten*, Springer, 1969, p. 151.

It is undeniable that IOs vary considerably along a number of dimensions, including the autonomy to carry out their tasks.<sup>733</sup> The International Law Commission, while admitting the variety of IOs in terms of their functions, type and size of membership and resources, decides to adopt in ARIO the so-called one-size-fits-all approach, with the possibility that the specific, factual or legal circumstances pertaining to each international organization being taken into account, where appropriate.<sup>734</sup> This decision of ILC has been criticized prodigiously in the international legal literature. However, it is interesting to note that not all these criticisms are accompanied or followed by delivering a solution or feasible alternative approach that could be adopted in drafting articles on responsibility of IOs, which would reach the potential cases of international responsibility as widely as possible.

In relation to the uniform definition of responsibility of IOs the question has been raised as to whether it would be correct and appropriate to speak of responsibility of IOs in general, while the measure of influence of Member States in different IOs is not the same.<sup>735</sup> To put it differently, given the difference in the modalities of relations between an IO and its Member States and also other kinds of members, would it be suitable and effective to establish a system of responsibility of IOs which would ignore these fundamental differences, and would regulate and set up a uniform regime for the responsibility of all kinds of IOs? Some IOs, in their comments to the text prepared for the second reading of the ARIO, have expressed their concern to the effect that the draft articles do not adequately reflect the diversity of international organizations.<sup>736</sup> These IOs have, especially, criticized the so-called “one-size-fits-all” approach taken by the ILC in the preparation of its draft articles on the responsibility of IOs. Some of these IOs have observed in their comments that the DARIO fails to take into account the fundamental differences between IOs.<sup>737</sup> Moreover, some IOs observed that the type of their activities does not raise the kind of responsibility provided for in the DARIO at all.<sup>738</sup> On the basis of the differences in the internal rules of IOs, ILO has doubted whether uniformly applicable rules for the responsibility of IOs would be desirable at all.<sup>739</sup> On this point, the IOs are even supported by some States, who

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<sup>733</sup> Elsig, Manfred, “Principal-agent theory and the World Trade Organization: Complex agency and ‘missing delegation’”, *European Journal of International Relations*, Vol. 17, Nr. 3, 2006, pp. 495–517, at p. 497.

<sup>734</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), pp. 1–11, Para. 15..

<sup>735</sup> Elsig, Manfred, *op. cit.*, at p. 496.

<sup>736</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 8.

<sup>737</sup> *Ibid.*, p. 10.

<sup>738</sup> *Ibid.*, pp. 13–14.

<sup>739</sup> *Ibid.*, p. 38.

have also reflected the same criticism with regard to ARIO. For instance, the representative of Austria has commented as follows:

“...international organizations usually act vis-à-vis their member States. Member States may also act on behalf of an international organization. Therefore, questions of responsibility (and also liability) are closely linked to the specific inter se relations between organizations and their member States. Disregarding or levelling those specific relations carries the risk of leaving conceptual gaps.”<sup>740</sup>

As a solution, some IOs have insisted on the necessity of greater emphasis and prominence to be given to *Lex Specialis*, as the *lex specialis* rule has the capacity to open the door for considering the diversity, and indirectly correcting the inappropriateness of such a uniform approach. In the same spirit, but as another alternative, it has been opined that IOs can be categorized according to the amount of autonomy they enjoy and exercise in different areas in which the decision-making has been delegated to them. The problem is only that even within an IO, that variant changes from one task to another and depending on the task in question.<sup>741</sup> In considering this latter alternative, it has to be admitted that the main obstacle for applying such distinguishing approach based on making categories among IOs for the purpose of international responsibility, is the criteria for defining or delimiting the edges and boundaries of these categories. The final result would be the creation of overlapping categories with several IOs falling under many of these categories at the same time. Hence, it would ultimately give way to the possibility of evading international responsibility by simply bringing forward the assertion of belonging to a certain category and not to the other.

In this connection, it would also be necessary and interesting to inquire briefly into the positions taken in the scholarship on this issue. As the doctrine has realized that rigidity with respect to the notion of accountability may have counterproductive effects, it has concluded that behaving rigidly when dealing with the notion of responsibility would also bring about negative and undesired impacts.<sup>742</sup> Welcoming the project of ARIO did not prevent States, IOs and the scholars from criticizing the draft for its lack of specification in line with the characteristics of IOs. For instance, *Amerasinghe* has argued that the recognition of the “laws” of IOs, put forward by *Reuter*,<sup>743</sup> is equal to state that there can be no general law

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<sup>740</sup> UN Doc, A/CN.4/636 (14 February 2011), p. 6.

<sup>741</sup> Elsig, Manfred, *op. cit.*, at p. 499.

<sup>742</sup> ILA Report of the Sixty-Eighth Conference, Taipei, May 24–30, 1998, *Report of the International Law Association Committee on Accountability of International Organizations*, at p. 598.

<sup>743</sup> Reuter, P., “Principes de droit international public”, *RCADI*, Tome 103(II), 1961, pp. 525–668, at p. 526; Reuter, P., “First Report on the Question of Treaties Concluded between States and International organizations or between two or more international organizations-Participation of International Organizations in Multilateral Conventions”, *YBILC*, 1972 (II), pp.172–199, at pp. 197–199.

applicable to IOs.<sup>744</sup> The argument these authors bring forward is based on the individualized nature of the constitutions of IOs. They believe that as the law of IOs flows from their constitutions and each IO has its own constituent document, thus there can be neither general law nor general principles of law applicable to all IOs or several organizations.<sup>745</sup> However, *Amerasinghe* defends the idea of the possibility of the existence of a limited number of general principles applicable on all IOs and the possibility of the existence of international institutional law.<sup>746</sup> *Amerasinghe* has tried to deliver, having regard to similarities as well as differences among IOs, solutions and strategies for the cases where there are no rules applicable on an IO and the constitutional law of the IO is silent on the matter.<sup>747</sup> This discussion is, generally, related to how we can reconcile “unity” and “diversity” in a set of legal rules that would be representative of the international institutional law.<sup>748</sup> As has been referred to above, diversity has been emphasized by the scholars vastly.<sup>749</sup> As mentioned earlier, on the basis of the diversity of IOs, some scholars have raised doubts and have expressed some concerns with regard to the adoption of the so called one-size-fits-all approach by the ILC in drafting articles on the different questions relating to the international legal responsibility of these secondary subjects of international law.<sup>750</sup> From the review of the positions taken by the scholarship on the specific issue of appropriateness of general rules of international responsibility for IOs, it appears that the gist of their opinions may be summarized in some sentences. Without questioning the importance and usefulness of general rules, which are no doubt necessary for the consolidation of the legal system as well as for practical considerations, applicable on a wide range of subjects of the legal order, it seems that the views of scholars are converging in opining that one of the weaknesses of the ARIO is minimal attention to and reflection of the typology of IOs in terms of their relationship with their members in the draft articles and consequently few consequences flowing from such categorization on the provisions of the articles, specially with respect to member state

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<sup>744</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at p. 15.

<sup>745</sup> Amerasinghe, C. F., *op. cit.*, at pp. 12–20.

<sup>746</sup> *Ibid.*, at p. 17.

<sup>747</sup> *Ibid.*, at pp. 15–20.

<sup>748</sup> The expressions used in a composition in the context of the law of IOs by Schermers and Blokker in their comprehensive manuscript on international institutional law *see* Schermers, H. G., Blokker, N. M., *International Institutional Law: Unity Within Diversity*, Martinus Nijhoff, 2003, 4<sup>th</sup> ed., pp. xxxiv and 1302; Schermers, H. G., Blokker, N. M., *International Institutional Law: Unity Within Diversity*, Martinus Nijhoff, 2011, 5<sup>th</sup> ed., pp. 15–19.

<sup>749</sup> Wouters, Jan and Naert, Frederik, “Some Challenges for (Teaching) the Law of International Organizations”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 23–29, at pp. 23–24.

<sup>750</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemmer, S./Vedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 704.

responsibility for the conducts of the IO, where such distinctions between various IOs would ask for different provisions.

It is true that ARIO represents a considerable simplification by making no categorization of different kinds of IOs, but rather following a so-called “one-size-fits-all” approach, which result in a general set of secondary rules being adopted, regardless of – sometimes even truly profound – differences between IOs. It is also clear that ARIO in doing so makes no difference in the content and forms of responsibility between IOs, only consisting of States as members, and other IOs, also having other entities as their members. For instance, one problem that may arise in this respect is that these other entities members of the latter type of IOs may in some cases participate indirectly in providing reparation, while often they have not formally participated in the decision-making. That is because normally these entities other than States members of IOs do not enjoy full membership status, and are thus deprived of the voting rights that full members normally enjoy. It would be an insufficient answer to argue that it should not be overlooked that often these types of members have a minimized amount of contribution to the IO of which they are member.

Even though the ARIO seeks to remain as general as possible in its scope, there is an inexplicable exemption of a category of IOs from ARIO that deserves being touched upon in this place. By reading the scope of the application of the ARIO,<sup>751</sup> one may wonder about the reason behind the preclusion of IOs only consisting of IOs as members, from the scope of application of ARIO. It does not seem that the reason for the exclusion of these sorts of IOs has been that these IOs do not incur international legal responsibility at all. Such situation, in addition to creating a gap in the responsibility and accountability of the subjects of international law, would also encourage and pave the way for the abuse of the two-layer organizational veil, even with fewer hurdles and without the risk of liability. In such a situation, the member States that have hid themselves behind the façade of IOs which are themselves the apparent members of the IO excluded from international responsibility, would be ensured that they could benefit from this gap in the responsibility system, and can come out without any kind of direct or indirect liability and burden arising out of responsibility incurred by the IO, of which they are indirectly members.

Now that the major positions taken in doctrine with respect to the question of suitability of a general legal system of international legal responsibility for IOs, or the desirable degree of its generality have also been examined, the focus will be placed on two major forms of relationships between an IO and its members, to see whether this dichotomy may be a parameter for categorization between different kinds of IOs and at the same time a criterion for the purpose of differentiation in forms and contents of international legal responsibility of these IOs. In analyz-

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<sup>751</sup> Articles on the Responsibility of International Organizations, with Commentaries, UN Doc. A/CN.4/650 (2011), at pp. 9–10, para. 11.

ing this issue the aim is to inquire into the question of whether the ILC should have considered, and consequently taken into account, in drafting articles on the issue of the responsibility of IOs, the different relationships that an IO can have with its members States or non-states. To what extent the consideration of the nature of this relationship and the conferral of powers would impact the question of international responsibility? To find an answer to these reflections, it seems appropriate to refer to a major dichotomy borrowed from the typology of these conferrals and trying to analyze the question of responsibility in each of these scenarios and in light of the relationship between an IO and its members. These issues will be examined in further detail in the following subsections 1 and 2 below.

### 1. Agency Relationship between States and IOs

After having portrayed one of the major criticisms ARIO project has been facing concerning its substance and structure, it is time to turn the focus to the other alternative approach that the ILC could have adopted, in order especially to examine whether that alternative approach could escape criticism. Hence, the main object of investigation in this subsection will be to inquire into whether it is necessary and feasible to introduce the recurring trio of relationships between IO and its members – based on the various degrees of conferrals of powers by states to IOs – in the secondary rules on international responsibility of IOs.

A key feature of delegation relationships within IOs, to borrow from Epstein and O'Halloran, is that membership in such organizations is voluntary.<sup>752</sup> One of the well-known examples is NATO, where in the words of the organization “the member States retain all decision-making authority and participate on a daily basis in the governance and functioning of the organization”.<sup>753</sup> Another example is the Assembly of State Parties (ASP) under article 112 of the ICC Statute – assuming that the ASP possesses international legal personality, and capable of incurring and assuming international legal responsibility, which still is a controversial matter.<sup>754</sup> Delegation of powers and authority to IOs, from limited degrees to some large measures, welcomed by some scholars and condemned by some others,<sup>755</sup> has nowadays become anyhow part of the reality of our time. It is also for this reason that IOs have been, rightly, described as “a long chain of delegation”.<sup>756</sup> In

<sup>752</sup> Epstein, David/O'Halloran, Sharyn, “Sovereignty and Delegation in International Organizations”, *Law and Contemporary Problems*, Vol. 71, winter 2008, pp. 77–92, at p. 78.

<sup>753</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 11.

<sup>754</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, *op. cit.*, at p. 706.

<sup>755</sup> Ku, Julian G., “The Delegation of Federal Power to International Organizations: New Problems with Old Solutions”, *Minn. L. Rev.*, Vol. 85, 2000–2001, at p. 71.

<sup>756</sup> Nielson, Daniel L., and Tierney, Michael J., “Delegation to International Organizations: Agency Theory and World Bank Environmental Reform”, *International Organization*, 57, issue 1, 2003, pp. 241–276, at p. 242.

the vast palette of relationships between an IO and the member states, agency relationship is maybe the weakest form of liaison between states members and the IO. Precisely, on the basis of an ephemeral and *ad hoc*, while for the most part attenuated amount of conferral, the international responsibility remains with the states – be they members of the IO or not. In this form of relationship, the IO, functioning as the agent, is best described as an intermediary, while the member states operate as a collective principal.<sup>757</sup> Obviously, the degree of independence and autonomy – official as well as *de facto* – of these agents, namely IOs, varies from one case to the other and may even change in one and the same case during the different phases of the life of the IO. However, in these instances of power and conferral of authority, there is always a degree, even minor, of control exercised by the principal over the decisions and conduct of the agent. This control may take place through the legal avenues, envisaged in the procedures of such IOs, or rather through political avenues in the form of exercising some kind of influence.<sup>758</sup> Even within one single IO, the degree of control and influence of members may differ from one organ to the other. Now, the interesting and relevant question in this regard and in connection with international legal responsibility is whether all these facts should be taken into account in the regulation and establishment of the international legal responsibility of the IO – and also joint or subsidiary responsibility of members, or at least those exercising the effective and decisive control – or, should these facts be considered totally irrelevant with respect to the question of responsibility? Adopting the former approach would, of course, *inter alia*, require the incorporation of some criteria and thresholds in the definition of the conditions for members’ responsibility in order to ascertain when the control of members has reached the point necessary for engaging their responsibility. We will start our examination with the inquiry into relevant ARIO articles to perceive whether the categorization between IOs according to the relations they hold with their members, has been incorporated and reflected indirectly.

In effect, there are signs in ARIO that show the awareness of ILC about the necessity of such provisions distinguishing between different kinds of relations between IO and its members and to provide for each category the proper legal effects. However, the provisions of ARIO are less than adequate to cover the above mentioned cases. It seems that the above mentioned trio appears in ARIO under the guise of aid or assistance, direction and control, coercion or circumvention of obligations by members of an IO in relation to a wrongful or lawful act of this latter. Articles 58 and 59, the intentionally missing puzzle pieces of ASR, relating to the responsibility of a state in connection with the conduct of an IO, could,

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<sup>757</sup> Alter, Karen J., “Delegation to International Courts and the limits of recontracting political power”, in D. Hawkins, D.A. Lake, D. Nielson and M.J., Tierney (eds.), *Delegation and Agency in International Organizations*, Cambridge University Press, 2006, p. 312.

<sup>758</sup> *Ibid.*, p. 316.

actually, satisfy this need, if the second paragraph did not exclude the acts by a state member of an international organization done in accordance with the rules of the organization. At the first glance, it may be concluded that the participation of members in the decision-making and the votes they cast, could in no way engage their international legal responsibility under these two articles. Therefore, according to ARIO, a member state of an IO may incur international legal responsibility by exercising control over or influencing the decision-making, prominently, in circumstances where the state member intends to circumvent its own international legal obligations. It is clear from article 61 that the establishment of the intent of the member state is a precondition *sine qua non* of the international responsibility. However, the existence of the qualification “as such”, in the second paragraphs of both articles 58 and 59 cannot be overlooked. As the ILC admits in the commentaries to these two articles, the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded.<sup>759</sup> According to the understanding of ILC, and as it has been explained in the commentary, only the borderline cases, which are so near to and can be confused with the lawful exercise of aid or assistance according to the rules of the IO, may raise the international legal responsibility of the aiding or assisting state. Thus, the term “as such” aims to refer to all the lawful aid and assistance in the framework of the IO, except the borderline cases to those which are wrongful and take place inside the framework of the IO and entail the members’ international responsibility. For the purpose of ascertaining such borderline cases, the ILC has referred to the factual context, which in a non-exhaustive manner, consists of the size of membership and the nature of the involvement. This may mean, logically, that when the State member exercises a disproportionate control and influence, actually more than it is entitled to, then such aid and assistance in the commitment of the wrongful conduct by the IO is also wrongful and engages the international legal responsibility of the actor. In other words, it refers to the situations where the aid or assistance reaches the threshold of direction and control. Therefore, the inclusion of ‘as such’ in article 58 seems not to be necessary. Furthermore, it is not explicitly stated in the commentary to articles 58 and 59 whether any establishment of the intent – or subjective element – of the aiding or assisting State is necessary, in addition of course to the knowledge of the circumstances of the internationally wrongful act provided for in paras. 1(a) of both articles 58 and 59. Nevertheless, as the intent has been identified as the second prerequisite for international responsibility of an aiding or assisting state to arise in commentaries to article 14 of ARIO, as well as article 16 of ASR, it seems that the intention of facilitating the commission of the wrongful act is necessary for article 58. Whereas concerning the case of direction and control there is a slight difference. It seems that on the basis of stronger dominance of the directing or control-

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<sup>759</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), Art. 58 and commentary to this article, para. 4, at p. 91.



ling state or IO over the commission of a wrongful conduct, the intention of these latter entities is assumed and need not to appear explicitly in the commentaries.

Furthermore, it is interesting to note here a lacuna – commentaries do not provide us with any response concerning whether leaving this gap in ARIO has been intentional or not – existing in this regard with respect to an IO member of another IO. Note that articles 14 and 15, on the aid and assistance or direction and control exercised by an IO over the wrongful conduct of another IO, do not contain the same excluding provision, that would bar the application of the provision to the cases of participation of an IO member of another IO in decision-making or other forms of acts according to the rules of the organization, and thereby providing aid and assistance or exercising direction and control over the wrongful act of the IO, of which it is a member.

The necessity of these ARIO provisions originates from the agency relationship between an IO and its members, the degree of which may vary from one IO to the other, and also with regard to the one and the same IO differ from one period to the other through the recontracting by members – with the latter expression the reviewing of delegation contract is meant. In other words, this is the consequence of the possibility of exercising weighty and considerable influence and control over the decisions and conducts of an IO by its members, which makes the members’ joint or subsidiary responsibility notion indispensable for, inherent in, and thus, inseparable from any idea and notion of international legal responsibility of IOs. Therefore, it seems that a sophisticated and elaborate set of provisions on this aspect of responsibility of IOs could bring about a more comprehensive and complete implementation of responsibility of IOs – on the basis of the assumption that more legalized and precise rules allow for less influence.

Among the IOs having agency relationship with their members, a distinction may further be made between trustee-agents, on the one hand, and the traditional agents, on the other. What distinguishes them especially is the amount of influence of the members on the conduct of the agent and its decisions. Greater independence of trustee-agents – among the prominent examples are international courts – is sometimes due to the constellations of principal-agent-beneficiary trio relationships, and has often been guaranteed, above all, through structural designs and delegation contracts.<sup>760</sup> Even in the category of trustee-agents, international courts do not properly fit in a single sub-category.

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<sup>760</sup> Alter, Karen J., “Delegation to International Courts and the limits of recontracting political power”, in D. Hawkins, D.A. Lake, D. Nielson and M.J., Tierney (eds.), *Delegation and Agency in International Organizations*, Cambridge University Press, 2006, p. 334–335.

## 2. Transfer of Powers to IOs

The case of the transfer of powers to IOs by the founding or other member states may be considered as the strongest form of conferral and shift of authority and powers between an IO and its members, the opposite of agency relationship, or in other words, the other extreme in the wide spectrum of conferrals of powers and authority by states to IOs. This kind of relationship is, above all, characterized by irrevocability of powers conferred and the exclusive authority being transferred to and exercised by the IO – at least under full type of transfer. Moreover, it goes without saying that the result of these conferrals, of course, is ultimately the exercise of sovereign rights to varying degrees by IOs.<sup>761</sup> The most prominent example of the transfer of competences, and consequently the decision-making authority is the European Union, which arguably is very often referred to as an IO like no other. Now, an interesting question that prompts to mind in connection with present research would be whether the unique features of IOs resulting from or being subject of the transfer of powers justifies the elaboration of a separate responsibility system – that in the framework of ARIO could possibly be reflected and contemplated in separate provisions dedicated to these IOs – which would at the same time be generally applicable to this category of IOs. In order to find the answer to this question, first of all, it should be examined whether these special features that distinguish this latter category of IOs from other IOs, are the same or similar among all the IOs belonging to this category, to the extent that would justify the elaboration of a specific international responsibility regime, that would be generally applicable to all kinds of subjects belonging to this category. Prior to any investigation, it is important to note that experience and practice shows that even in this very same category with regard to one and the same IO, there may be different kinds of conferral of powers depending on the area and activity field and related tasks.<sup>762</sup> For our question under examination here, this would mean, above all, that in integration-oriented IOs different levels of transfer of powers may coexist with regard to various fields. As a result, this quality and attribute already hinders or renders difficult a general designation of IOs, or labeling an IO as to appertaining to a certain category.

As an alternative, a responsibility regime could perhaps be proposed which is designed and applicable for each kind of relationship between the IO and its members without the necessity of categorizing the IOs, but rather single relations.

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<sup>761</sup> McGuinness, Margaret E., “Contesting the ‘Sovereignists’: How to Learn to Stop Worrying and Love International Institutions”, *George Washington International Law Review*, Vol. 38, 2006, pp. 831–850, at pp. 841–842.

<sup>762</sup> UIA, International Organizations: Diversity, borderline cases, functional substitutes and possible alternatives In Groom, A. J. R. and Taylor, Paul (Eds.), *International Organizations: A conceptual approach*, London, Frances Printer, 1977, pp. 78–83. Slightly revised version under the title: International Organizations: An overview. In: *Yearbook of International Organizations Brussels*, Union of International Associations, 1978.

In analyzing the feasibility of such responsibility regime, attention should be paid to the fact that in the cases of agency relationship and delegation of power, the important factor in ascertaining the international responsibility is the degree of control the members exercise on the IO. Furthermore, in the opposite cases where an IO delegates powers and authority on another IO or state, this is again the degree of control that will be decisive. The ILC has referred to the “nature of involvement” as among factual contexts that may be decisive in establishing international responsibility in cases of a state member of an IO, and aiding or assisting, or directing and controlling that latter IO in the commission of a wrongful conduct.<sup>763</sup> As will be discussed later in chapter five of the dissertation, this proposition could solve the problems existing with regard to piercing the organizational veil and the apportionment of international responsibility between an IO and its members.

One of the aspects, related to the attribute of powers transfer, is the relationship between the IO and its members with regard to this kind of IOs. It should be examined whether this relationship is so different that would justify, at least partly, the elaboration of such a distinct – for a specific category of IOs – responsibility system? A relevant dimension that may be helpful to our analysis on this question is whether the exercise of influence and control of members over the decisions and conducts of such IOs is so minor that would justify the complete exclusion of member responsibility for the conducts of the IO – or in connection with those conducts? It has been argued that theoretically situations of full transfers of sovereign powers may exist, when three indicia are present: 1) irrevocability of the transferred powers; 2) exclusive exercise of the conferred powers by the IO; and 3) the lack of state control.<sup>764</sup> It is clear that in such cases the members would not incur international responsibility for the acts in the framework of the rules of the IO. As a result the borderline cases referred to in the commentaries of the articles 58 and 59 of the ARIO, are the cases of delegation of powers, since as has been noticed in the preceding subsection, in the cases of agency relationship between an IO and its members, the international responsibility of members is indisputable. Within the delegation category, those cases of conferral of powers which are closer to and more inclined towards agency relationship than the transfer of powers, would entail the member responsibility.

Another aspect that is related to the member responsibility in the cases of partial transfer of powers and seems to be absent from the ARIO, is the situation where an IO takes a binding decision on members without having the intention to circumvent its own international legal obligations, thereby leading to and causing

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<sup>763</sup> Articles on the responsibility of international organizations, with commentaries, 2011, Article 58, at p. 91, para. 4. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) (last visited on 08.04.2022).

<sup>764</sup> Sarooshi, Dan, *International Organizations and Their Exercise of Sovereign Powers*, Oxford University Press, first edition, 2005, p. 70.

the commission of a wrongful act by its members. In other words, in the cases of partial transfer of power by member states to the IOs, there is the possibility of piercing the organizational veil, obviously, proportional to the degree to which the IO is acting in the “capacity” of the states.<sup>765</sup> It is clear that such solution would avoid responsibility, thus an accountability gap would arise. ARIO in article 17 has only provided for the responsibility of the IO in situations where it takes advantage of the separate legal personality of its members in order to avoid compliance with an international obligation, as has been explained in detail in paragraph 4 of the commentaries to this article. Introduction of the so-called Sarooshi typology<sup>766</sup> of IOs could avoid this lacuna and deficiency in ARIO, in spite of some criticism as to the one-dimensional character and the intrinsically, restricted Principal-agent nature of the rationales behind the analysis put forward by Sarooshi in his typology and the assertion that he ultimately reduces the relationships between the IO and its members merely to that theory.<sup>767</sup>

Consequently, it can be stated as a concluding observation here that even though the categorization of IOs may be irrelevant for the international responsibility of the IO as such, it seems that it could be illuminating in apportionment of international responsibility between IO and its members, in cases other than the circumvention of its obligations by the member or the cases of a consenting member. Employment of this categorization and labeling the cases according to the nature of the relationship between IO and its members, could provide us with a useful analytical tool for determination and ascertainment of member responsibility, and further for measuring the extent of involvement of the IO and each of its members in the commission of a certain wrongful conduct.<sup>768</sup>

## VII. The Role of Damage and the definition of Injured State or IO in ARIO

ILC has made it clear right from the outset in ARIO in paragraph 3 of the commentary to article 4 that “damage” or “injury” do not appear to be elements necessary for international responsibility of an IO to arise. The exceptional cases happen when the damage is required by the primary rule, thus forming part of the legal obligation incumbent upon the IO which will be breached by its subsequent

<sup>765</sup> McGuinness, Margaret E., “Contesting the “Sovereignists”: How to Learn to Stop Worrying and Love International Institutions”, *op. cit.*, at p. 848.

<sup>766</sup> Kwai Leng Ng, Veronica, *The Sarooshi Typology and the Sub-Conferral and Exercise of Powers between Intergovernmental Organizations: Contestation and Responsibility*, Thesis for the degree of Doctor of Philosophy of the University of Western Australia, School of Law, 2013, at pp. 2–35.

<sup>767</sup> McGuinness, Margaret E., “Contesting the ‘Sovereignists’: How to Learn to Stop Worrying and Love International Institutions”, *op. cit.*, at pp. 849–850.

<sup>768</sup> Sarooshi, Dan, *International Organizations and Their Exercise of Sovereign Powers*, *op. cit.*, at pp. 63–64.

wrongful conduct.<sup>769</sup> In other words, the primary rule binding on the IO prohibits it from inflicting material or other forms of damage on third parties as a result of its own conducts, or necessitates that the IO prevents the injury from happening or shall ensure that such damage does not take place. In the latter cases, again it depends on the content of the primary obligation, in the sense that whether it is an obligation of conduct (obligation of means) and thus it consists only of measures needed from the IO in preventing the damage, or it is rather an obligation of result, meaning that the IO will be considered as having breached its obligation as soon as the damage has happened.

As is clear from the comparison of articles 43 and 49 of ARIO, the demarcation between injured State or IO and those States or IOs that are entitled to invoke international responsibility of an IO other than the injured states or IOs, is not made very precisely and clearly. According to ARIO, two categories of States and/or IOs may invoke the international legal responsibility of an IO. These two categories are injured States and/or IOs on the one hand, and the States and/or IOs that are entitled to invoke the international responsibility of an IO according to article 49, on the other hand. The common condition with regard to the entitlement of both of these two categories of States and IOs to invoke international responsibility of an IO, is that both should have a link to the obligation breached, as it is ultimately the breach of obligation that entails the international responsibility of the IO.

As it has been stated earlier, in the classical definition and the concept of international responsibility, the injury or damage was a constituent element of the concept.<sup>770</sup> Some authors have discussed the utilization of the concept of “juridical injury”.<sup>771</sup> It seems that the ILC has adopted the concept of juridical injury in ARIO, as injured state or IO is the state or IO towards whom an international obligation is breached. Even in the cases of entitlement of states or IOs other than the injured state or IO to invoke international responsibility of an IO – where there is no specific international legal obligation towards a specific entity (state or IO) – the possibility should have been accepted that another state or IO, other than injured state or IO, invokes the international responsibility, otherwise there would be no implementable responsibility applicable as a result of the

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<sup>769</sup> Articles on the responsibility of international organizations, with commentaries, 2011, Article 4, para. 3, pp. 14–15. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) (last visited on 08.04.2022).

<sup>770</sup> Barboza, Julio, “Legal Injury: The Tip of the Iceberg in the Law of State Responsibility”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 7–22, at p. 7.

<sup>771</sup> For a comprehensive discussion of the concept of “juridical injury” or “legal injury”, see Stern, Brigitte, “Et Si on Utilisait le Concept de Préjudice Juridique? Retour sur une notion délaissée à l’occasion de la fin des travaux de la C.D.I. sur la responsabilité des États”, *AFDI*, t. XLVII, 2001, pp. 3–44.

breach of a certain category of international obligations, namely collective international obligations.

## VIII. ARIO: A “post-Westphalian” model of international law?

If the present developments in the modalities of international governance and global political system continue at the same pace, sooner or later the Westphalian governance would become history.<sup>772</sup> Some scholars have even seen the time ripe enough to speak about post-Westphalian models of sovereignty,<sup>773</sup> an important consequence of which has been defending community interests and being driven by the appeal of community values, beyond the selfish national interests. In this sense, the international legal responsibility system functions as the mirror of the international legal order reflecting the relations between the subjects of this legal order. Therefore, with regard to legal projects which beside codification undertake progressive development of a certain area of international law, one of the most important questions that has to be examined is whether and to what extent these projects have kept pace with the evolutions at the society and the relations they are trying to regulate. In connection with the issue of post-Westphalian model of international law, it would be interesting to examine to what extent ARIO corresponds to the actual evolutions of the international society and its legal order.

This section is mainly seeking to examine whether it can arguably be stated that ARIO in its formulations has adopted or is trying to drive a replacement of the Westphalian system of international law which is characterized by exclusive interstate relations, by a manifestation of the post-Westphalian system where international relations are institutionalized, and more importantly whether besides the hermetic sovereign states, until that stage the sole subject of international law,<sup>774</sup> there is another important category of subjects of international law who appear as major actor of international relations, namely the IOs. In scholarship the end of the cold war and the year 1989 are at the same time marked as the end of the Westphalian era, which, in part, meant also the start of the *de facto* empowerment of Security Council, particularly, and the IOs, generally.

The insufficiency of the Westphalian model of state sovereignty in political geography and international relations theory has been partly due to ignoring

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<sup>772</sup> Fidler, D.P., “Constitutional Outlines of Public Health’s ‘New World Order’”, 77 *Temple Law Review*, 2004, p. 268; Sapsin, J. W., “SARS and International Legal Preparedness”, 77 *Temple Law Review*, 2004, pp. 155–174.

<sup>773</sup> Tierney, Stephen, “Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State”, *ICLQ*, Vol. 54, Issue 01, January 2005, pp. 161–183.

<sup>774</sup> Engle, Eric A., “The Transformation of the International Legal System: The Post-Westphalian Legal Order”, *Quinnipiac Law Review*, Vol. 23, 2004, pp. 23–45.

sources of authority other than states, among them prominently IOs.<sup>775</sup> From a certain point of view, ARIO as an outcome of the admission of the significance of the role of IOs in the international legal relations and international order, should be considered rather than as another manifestation and reflection of a post-Westphalian model of international law, an effort to maintain and strengthen the Westphalian order through further regularizing the situation of IOs in the international legal system. By paying more attention to the fact that the IOs are ultimately inter-governmental entities this might become even clearer.

The law of international legal responsibility and its system could not afford staying behind and resisting the above mentioned developments. The approach the ILC has followed in its set of articles on international legal responsibility of IOs, in general, has also been one of protection of the international community interest. As is clear from the provisions of article 49(1) and (2), a state or an IO may invoke the international legal responsibility of an IO on the basis of interest it may have in the respect for the obligations towards the international community. In the case of an IO invoking the responsibility of another IO, the former IO may defend such interest of the international community, provided that safeguarding that interest is within the scope of its functions, without necessitating injuries to be sustained by the IO invoking the responsibility as a necessary condition for such invocation. However, in this place it should also be emphasized that such solidarity-oriented entitlements with regard to the invocation of international legal responsibility are, first and foremost, directed towards the promotion of respect for international law and the proliferation and strengthening of the implementation of international legal rules.

With regard to the notion of international legal responsibility, it should be recalled that the protection of international community interests has not always been included in the conception of the notion of responsibility. In the classical understanding, international legal responsibility had a rather bilateralist mission.<sup>776</sup> Entitling a third state or an IO, other than an injured state or international organization – in the case of IOs this entitlement is granted within the confines of the functions of the international organization invoking responsibility – to invoke the international legal responsibility of an IO, in order to protect a collective or an international community interest, allowed by the political context of the epoch, has to be considered a radical change. The idea of the protection of collective or international community interest by taking recourse to international legal responsibility, the so-called *actio popularis*, already adopted by the ILC in the framework of the drafting of the rules concerning the responsibility of states that finally resulted

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<sup>775</sup> Shadian, Jessica, “From states to polities: Reconceptualizing sovereignty through Inuit governance”, *EJIR*, Vol. 16(3), 2010, pp. 485–510, at p. 503.

<sup>776</sup> Pellet, Alain, “The Definition of Responsibility in International Law”, in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 3–16, at p. 5–6.

in 2001 in ASR, is closely linked to another notion appearing in the same set of articles, namely that of serious breaches by a state or an IO of an obligation arising under a peremptory norm of general international law. In other words, the breach of an obligation arising under a peremptory norm of general international law allows the third states or third IOs, other than the injured party, to invoke the international legal responsibility of the violator. However, it appears that the scope of the *actio popularis*, envisaged in article 49 is a bit larger, because the breach of obligation occurred shall not necessarily be qualified as serious in order to trigger the *actio popularis* authorization. Rather, the important point is that the obligation breached entails the disturbance of an interest of the international community, which attributes the qualification of *erga omnes* to the obligation in question.

## IX. The Dual Character of an International Organization

An international organization has the institutional form of a legal person, i.e. an entity that has the capacity, through collective decision-making, to act, both internally and externally. The original (multilateral) contractual relationship between the State parties is *supplemented* by a set of (constitutional) relationships of each of the Member States with the international organization. In other words, with the creation of an international organization the alliance between the Member States is not, in principle, replaced by the international organization as a legal person but *both* legal institutional forms exist legally side-by-side.<sup>777</sup>

The idea of power attribution to a new collectivity gives strength and added value to cooperation between States. It is this idea that makes the difference between regular, *ad hoc* meetings of the States on the one hand, and meetings of international organs on the other. This is part of the answer to the question why and how an international organization is more than the sum of its members.<sup>778</sup> Duality of International Organizations means also that IOs are on the one part fora for the cooperation of States and their members, but on the other part these entities are independent bodies with autonomous decision-making and sometimes execution powers. But the central question with regard to the issue of the international responsibility of IOs is to which extent this detailed attention to the real nature of IOs may be of relevance.

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<sup>777</sup> Dekker, Ige F., "Accountability of International Organizations: An Evolving Legal Concept?", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 34.

<sup>778</sup> Blokker, Niels M., "International Organizations as Independent Actors: Sweet Memory or Functionally Necessary", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 40.



Power-conferring rules make it possible that an international organization is a living entity both in the legal world as well as in social reality.<sup>779</sup> A significant amount of controversial legal views and issues discussed in international institutional law can be traced back to the above-mentioned dual character, including the powers and accountability of international organizations.<sup>780</sup> The fundamental dual character of international organizations and their powers has, of course, far-reaching repercussions on the legal regime of accountability of international organizations. A complete replacement of the alliance between the Member States by the international organization as a legal person would have made the legal picture quite unequivocal. However, the dual character of international organizations brings in the controversial question of the residual or separate accountability of Member States for the acts and omissions of their organizations.<sup>781</sup>

For this reason, the ILA Committee underlines in its recommendations that, although international organizations should be seen as autonomous entities, references should also be made to member states “since international organizations are ultimately composed of member states and decisions of international organizations are, in most cases, taken as a result of initiatives and proposals of individual member states”.<sup>782</sup>

As long as neither in theory, nor in practice any choice is made for lifting the dual character of international organizations, the problems connected to the indirect or direct accountability and responsibility of Member States for the acts or omissions of their international organizations will remain an inherent part of the legal regime of the accountability of international organizations.<sup>783</sup> Because international organizations *are* established as independent actors, there may be all kinds of legal barriers in addressing, for instance, alleged human rights violations. In most cases, in order to guarantee their independence, international organizations enjoy immunity from jurisdiction in their Member States. As a result, it may be difficult for national courts to deal with complaints about human rights violations by international organizations that are brought before them. This has always been the case, not only in recent years. But as a result of the increased dynamism of international organizations, in particular since the end of the Cold War, these questions have now been asked more frequently and in a more fundamental manner than before.<sup>784</sup>

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<sup>779</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, *op. cit.*, p. 35.

<sup>780</sup> *Ibid.*

<sup>781</sup> *Ibid.*

<sup>782</sup> ILA, Report of the Seventy-first Conference, Berlin 2004 (London, International Law Association 2004), pp. 164–234, at p. 171.

<sup>783</sup> Dekker, Ige F., “Accountability of International Organizations: An Evolving Legal Concept?”, *op. cit.*, p. 36.

<sup>784</sup> Blokker, Niels M., “International Organizations as Independent Actors: Sweet Memory or Functionally Necessary”, *op. cit.*, p. 37.

### 1. Functional Duality in the framework of ITAs

The dual character of IOs is mainly due to their multi-faceted tasks which leads them to perform a multitude of functions to which the expression functional duality refers. As a prominent example, the rules and regulations that the International Territorial Administrations (ITAs) enact during their holding of office with regard to the territory under their effective control would later be part of the internal legal system of the state that succeeds or the entity in that territory.<sup>785</sup> Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual in nature. Thus, this situation opens and paves the way for the judicial review of the actions of the International Territorial Administrations.<sup>786</sup> In that context, it is worth noting that a great need has especially been felt to have an official institution to evaluate conformity with international human rights standards of the legislation adopted by international administrations.<sup>787</sup>

### 2 The test of “effective control” in the ARIO

As the criterion for the attribution of conduct the ARIO has expressly adopted the “effective control” test in its article 6. Even though at the first sight it may appear that this criterion may solve all the problems with regard to attribution, at the second sight and in practice, with respect to various IOs in different constellations, this parameter is not able to determine the question of attribution definitively. Once again the EU, representing the most developed and prominent REIO, is just one example where this criterion may not always be determinative in attribution of certain conducts committed by member States and consequently apportionment of international legal responsibility.<sup>788</sup> In this connection, it has rightly been observed that the criterion of effective control must be more clarified and further elaborated on.<sup>789</sup>

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<sup>785</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, pp. 350–351.

<sup>786</sup> *Ibid.*, p. 351.

<sup>787</sup> *Ibid.*, p. 352.

<sup>788</sup> Kuijper, Pieter Jan, “Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?”, *IOLR*, Vol. 7, No. 1, 2010, pp. 9–33, at p. 17.

<sup>789</sup> The Report of the ILC Study Group on the Responsibility of International Organizations, Sophia Conference, 2012, p. 25.

### 3. Prevalence of the Obligations arising out of the UN Charter over the ARIO Articles

At this point, the question will be raised as to whether the provision of Art. 67<sup>790</sup> refers to all the obligations arising out of the charter of the UN, namely primary and secondary obligations, or is it only limited to secondary obligations? Moreover, which obligations are secondary obligations under the UN Charter? The Charter of the UN leaves no doubt, at least for the member States of the universal organization of our time, that the obligations arising out of the Charter take precedence over other conflicting international legal obligations.

The question that comes to mind is whether this provision refers to the primary obligations arising out of the Charter of the United Nations or the secondary obligations? The answer to this question is very crucial at this point. Since in case the reference is made to the primary obligations stemming from the Charter, then the indirect result would be the binding force of the Charter for IOs that are not members of the UN, like for example WTO or EU.<sup>791</sup> It seems that the reference is mainly made to secondary obligations, specially, the decisions and measures taken by the SC. This conclusion is arrived at because of the nature of the ARIO provisions which are secondary rules that may necessarily come into conflict with secondary rules of the Charter. In fact, these provisions would amount to greater cohesion of the international legal system by way of binding the IOs to the obligations of the UN Charter. The obligations of the Charter are not, of course, merely limited to obligations expressly provided for in the Charter rules but also other subsequent and subsidiary obligations originating from decisions of the UN organs. If we accept that the article 103 of the Charter is a “last resort” provision,<sup>792</sup> namely that the interpretation tends to harmonize international obligations, the “prejudice” that stems from the conflict has to be interpreted so as to prevent conflict as much as possible.

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<sup>790</sup> “Article 67. Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.”

Articles on the responsibility of international organizations, with commentaries, 2011, pp. 103–104. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

<sup>791</sup> Gal-Or, Noemi and Ryngaert, Cedric, “From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN”, *German Law Journal*, No. 5, 2012, pp. 537–538.

<sup>792</sup> Paulus, A. L. and Leiss, J., “Article 103”, in Simma, Bruno, (Ed.), *The Charter of the United Nations – A Commentary*, third edition, OUP, 2012, pp. 2110–2137, at p. 2114.



## Chapter Four

# The (In)appropriateness of the definition of Responsibility in ARIIO for IOs

Back in 1939 Ago had observed that the problem of the determination of the legal nature of an international wrongful act, or in other words, the problem of the origin of international responsibility, still constitutes undoubtedly one of the delicate issues of the public international law.<sup>793</sup> It seems that this observation, even almost a century later, may still be considered topical. The appropriateness of the definition of international legal responsibility applicable on IOs adopted in ARIIO, which is no doubt useful and vital in order to prevent any confusion with liability or responsibility arising in other legal systems, mainly, national legal systems or in the transnational legal system,<sup>794</sup> has nevertheless been criticized from various points of view. Prominently, from a practical perspective, the ability of IOs to implement responsibility and the obligation of full reparation has been doubted, as

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<sup>793</sup> Ago, Roberto, “Le Délit International”, *RCADI*, Vol. 68, 1939, p. 419.

<sup>794</sup> Amerasinghe, C. F., “The Essence of the Structure of International Responsibility” in Maurizio Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 3–6, at p. 4.

financial issues have always been a matter of concern with respect to IOs.<sup>795</sup> Just as a brief response to such criticism, it seems more appropriate to make a distinction in this regard between IOs that have financial independence and those that are totally dependent on contributions that may hardly even cover the implementation of their main tasks. From a theoretical point of view, it is important to note that the members of an IO have no additional obligation to provide for the expenditures that are not the “expenses” of the IO which can be determined according to the Advisory Opinion of the ICJ in its *Expenses* case,<sup>796</sup> by reference mainly to the purpose of the IO. Following a strict interpretation of the statement of the court, the responsibility of an IO and the possible liability arising from the commission of a wrongful act are not necessary for the achievement of the purposes of the IO. With respect to liability for the acts not prohibited by international law the case would be somehow different as to the consideration of financial burdens arising from liability as the expenses of the IO, but even under those conditions it should be examined how inevitable the conduct leading to liability has been for attaining the purposes of the IO and also the role played by the IO in preventing the damage. However, the examination of the appropriateness of the definition and content put forward in ARIO for the principle of international legal responsibility relates to an aspect that is directly connected to the primary obligations of IOs which makes the definition problematic in practice. The ARIO provision regarding the elements of an internationally wrongful act of an IO explicitly requires that the action or omission under consideration constitutes a breach of an international obligation of that organization. This paragraph of article 2 is impliedly referring, first and foremost, to the primary rules binding on an IO from which the international obligations emanate and originate. In the course of the discussion in this chapter, however, other possible sources of legal obligations of IOs will be examined in order to enquire into whether the violation of those rules would also lead to international responsibility of these subjects of international law. The intention is not to enter into the theoretical debate over the existence of a rule of recognition in international law bestowing legal validity to rules, as denied by Hart, and instead acknowledges the acceptance and practical function of rules as the source of their legal validity.<sup>797</sup> This analysis is, particularly, destined to provide an answer to our main question in this chapter as to whether and to what extent the definition of the elements of international responsibility are appropriate.

Not only the definition of international legal responsibility in ARIO may face practical problems, but also its implementation by the IO and specially, by the

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<sup>795</sup> Amerasinghe, C. F., “Financing”, in René-Jean Dupuy, *Mannuel sur les Organisations internationales*, 2<sup>e</sup> édition, Académie de droit international de la Haye, 1998, Martinus Nijhoff Publishers, pp. 313–337.

<sup>796</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July, *ICJ Reports* 1962, p. 151.

<sup>797</sup> Van Hoof, G.J.H., *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers, 1983, at p. 53.

members, as it has been devised in ARIO, seems to be more of a reminder to the members for their obligations under the rules of the organization than a new legal obligation created for the members of the IO to support and strengthen the implementation. The explanatory nature of this paragraph of article 40 has not been denied by the Commission who admits in the commentary that there is not any further obligation for the members according to this provision of the ARIO beyond their obligations according to the rules of the IO. The advantage of paragraph 2 of article 40 is mainly, where reparation can not be considered as “expenses” of the IO, otherwise the members of the IO are under the undeniable obligation to approve and supply for such expenditure.<sup>798</sup> However, there is also a much less strict view who believes that “all expenses incurred as a result of the responsibility of an organization are expenses of the organization”.<sup>799</sup> Nevertheless, it is not clear why the measures taken for the implementation of the obligations arising from international legal responsibility should be subject to the rules of the organization, which makes the paragraph 2 of article 40 devoid of any added value. If paragraph 2 does not contain any further obligation for the members of an IO with respect to the implementation of international legal responsibility of the IO other than what has been provided for in the rules of the IO, some doubts with regard to the necessity of the codification of this provision in ARIO seem to be completely justified.

It is clear that in whichever definition of the concept of international legal responsibility, the rationale behind it is the famous phrase “power breeds responsibility”.<sup>800</sup> However, this does not mean that thereby all the problems are resolved and whatever formulation the rule would adopt it would suffice for the effective regulation of the questions of responsibility. This being said, the present chapter intends to show that it is exactly what has happened with the adopted formulation by the ILC for the fundamental and central rule of the regime of international legal responsibility of IOs in the ARIO. The desirability of the actual definition of the international responsibility of IOs, and specifically, the definition of the central question of wrongful acts has been doubted on many occasions. As is clear, the definition of international legal responsibility is closely related to the wrongful act of an IO which is in turn directly dependant on the international legal obligations of an IO. In other words, as in the case of States, international responsibility is linked to a breach of an obligation under international law.<sup>801</sup>

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<sup>798</sup> Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), *op.cit.*, p. 151.

<sup>799</sup> Amerasinghe, C. F., *Principles of the institutional law of International Organizations*, 1996, Chap. 8.

<sup>800</sup> Eagleton, C., *The Responsibility of States in International Law*, New York University Press, New York, 1928, p. 206; Ahlborn, Christiane, “The Use of Analogies in Drafting the Articles on the Responsibility of International Organization. An Appraisal of the ‘Copy-Paste Approach’”, *International Organizations Law Review*, Vol. 9, No. 2, 2012, pp. 53–66, at p. 63.

<sup>801</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to art. 1, para. 5, at p. 5.

As it has been provided for in article 10 of the ARIO, breach of any of international obligations of an IO may lead to the international responsibility of that organization, on the condition that the breach of obligation is attributable to the IO. Furthermore, as has also been provided for in paragraph (2) of the commentary to article 10 of the ARIO, the international obligation in question may originate from different sources. Thus, the obligation may emanate from a customary rule of international law, a general or particular treaty provision or a general principle of law applicable within the international legal order.<sup>802</sup> In this context, one of the most topical questions may be raised as to whether the breach of the obligations arising out of other sources may also engage the international responsibility of IOs. In this connection, the most important and relevant issue is first to inquire into which other sources may establish obligations for IOs other than the sources enumerated above. The most prominent example may be the obligations arising out of the rules of self-regulation. One of the subsections of this chapter will be entirely devoted to the discussion of the trend to self-regulation in IOs. But first it has to be examined to what extent these rules are legally binding on IOs. Furthermore, in case these rules are not legally binding on IOs, do these rules possess any enforcement power, and in case the answer is in affirmative, where does that power come from? In other words, whether the IO is anyhow obliged to respect these rules. Furthermore, what would be the consequence if the IO does not follow the provisions of these self-regulated rules? It would be interesting to examine whether the consequences are limited to the provisions of these regulations or whether any default general rule of international law exists that would be applicable to those situations. For instance, if in the course of the breach of these rules or as a result of such breach, a third party incurs damages or injuries, could we speak of international responsibility or liability as the consequences for the IO in defiance of those regulations? In case there should follow a form of accountability, responsibility and consequently liability, what nature these consequences would have? In this chapter it will be sought to find answers to questions closely related to the issue of legal obligations of IOs for the purpose of the establishment of a wrongful act.

The primary rules binding on IOs which give birth to legal obligations for these IOs are not clear as to their scope and content. The reason, mostly, can be traced back to the fact that the IOs are not, in principle, parties to international conventions and legally binding documents. This is, partly, due to a technical reason: in most of the cases these conventions and instruments are open for the adoption, ratification, approval and accession merely by States. Most often provision has not been made for the accession of IOs to these instruments. Sometimes this unclarity leads to ambiguous situations as to whether the IOs may accede to these binding instruments. And often the opinions are different with regard to the

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<sup>802</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to art. 1, para. 5, at p. 31, Art. 10, commentary para. 2.



interpretation of international instruments in terms of their openness to IOs accession. In this situation, two main solutions come to fore: Either the present sources of the obligations should be expanded to include comprehensively the IOs or the other solution would be to think of other sources of obligations for these subjects of international legal order. In the light of the latter solution, a suggestion would be the upgrading of other obligations, mainly non-legal obligations of the IOs to the level of legal obligations, so that the consequence of the legal obligations would apply to those obligations too. But political considerations would always militate against this latter proposition. It seems that the important and necessary condition in the eyes of paragraph (b) of article 4 of ARIO is that the obligation in question is an obligation under international law. For an obligation to be under international law it has to be established by the recognized sources of international law. For that reason, in the different subsections of this chapter the principal and classical sources of international law will be reviewed in terms of their potential and ability as primary rules of IOs.

After examination of the deficiencies in the content and scope of the primary rules binding on IOs as a result of different intrinsic or technical reasons, it will be time to turn the focus on the next related question. The main objective of this chapter is to show that given the ambiguities surrounding the content and scope of the obligations of IOs, the article relating to this matter, namely article 11 of the ARIO, is not comprehensive. The article does not make clear at all the different forms of obligations of IOs that may exist. It is true that the article with regard to the responsibility and international obligations of States has also not very comprehensively dealt with this matter. But the point is that the obligations of States do not suffer the extent of ambiguity that the international obligations of IOs suffer. The definition of the international “responsibility” in ASR is generally not controversial,<sup>803</sup> even though some scholars has shown some doubts about certain elements of this definition which was also one of the reasons behind the distinction between responsibility and liability. According to these scholars such a distinction is artificial and unnecessary.<sup>804</sup> In the article 11 of the ARIO, the ILC has not taken any position with regard to the crucial question as to which international obligations of IOs may raise and engage the international responsibility of IOs.

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<sup>803</sup> Pellet, Alain, “Can a State Commit a Crime? Definitely, Yes!”, *EJIL*, Vol. 10, No. 2, pp. 425–434, at p. 426.

<sup>804</sup> Boyle, Alan E., “State Responsibility and International Liability for Injurious Consequences of Acts not prohibited by International Law: A Necessary Distinction?”, *International and Comparative Law Quarterly*, Vol. 39, 1990, pp. 1–26, at p. 14.

## I. The sources, content and scope of the Obligations of International Organizations

Let us start our discussion with another significant and major criticism that has been raised with respect to ARIO for not having paid enough attention to the primary rules, while “primary rules may in fact lie at the heart of the problem”.<sup>805</sup> It is absolutely an undeniable fact that negative effects of this deficiency become even clearer when reference is made to one of the key articles of the ARIO, defining the elements of an internationally wrongful act. According to article 11, when all the elements are present together, in principle, international legal responsibility of IOs may be raised. Among the required elements, article 4(b) enumerates the international legal obligation as one of the major poles of the definition. There is no doubt that international law generally applies to IOs as another category of subjects of this legal order.<sup>806</sup> However, with regard to different sources of international law, delicate and specific debates are still running as to the sometimes particular case of IOs and their international legal obligations which can be illuminating for our main questions.

The focus in the following sections is not only on the question of legal obligations of IOs, in the strict sense of the term. To borrow a concept from political science, “unpacking the obligation”,<sup>807</sup> which may justify the importance of other forms of obligations – apart from legal obligations – there is also another relevant matter, namely, the self-regulation and soft law trends which are mainly aimed at raising legitimacy of IOs and their expanding activities.

In recent years the question of the rights and obligations of IOs has been brought to the fore by numerous scholars. This is because these bodies are undertaking ever increasing tasks at the international scene and are expanding their scope of competences vertically and horizontally. It is not doubted that States still occupy a prominent place in the international legal order and a prominent place is still reserved to them as the “born” subjects of international law.<sup>808</sup> However, there is no doubt that we are living in the era of the conferral of “sovereign powers” on international organizations.<sup>809</sup> They are entering more and more in subject areas

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<sup>805</sup> Wood, Michael and Vicien-Milburn, Maria, “Legal Responsibility of International Organizations in International Law”, *Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011*, p. 9.

<sup>806</sup> Grant, D. Thomas, “International Responsibility and the admission of States to the United Nations”, *Michigan Journal of International Law*, Vol. 30, No. 2, 2009, pp. 1095–1185, at p. 1133.

<sup>807</sup> Cameron, Lindsey, “New Standards for and by private military companies?”, in Peters, Anne/Koehlin, Lucy/Förster, Till/Fenner Zinkernagel, Gretta, *Non-State Actors as Standard Setters*, 2009, Cambridge University Press, pp. 113–146, at p. 139.

<sup>808</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 228.

<sup>809</sup> Sarooshi, Dan, “International Organizations and their Exercise of Sovereign Powers”, Oxford University Press, 2007, pp. 58–75.

that had been formerly restricted and dominated by nation States.<sup>810</sup> Consequently, without the relevant obligations and rights there would be a gap in the international legal order. In other words, under these circumstances the establishment of IOs and their participation in international relations would be a step backwards in the way to the complete realization of the rule of law at the international plane. And that is exactly the situation that has to be avoided if we are wishing the continuity of the trend towards the completion and comprehensiveness of international law as the international legal order of the international community. To this end, the content and scope of the rights and especially obligations of these entities, namely IGOs in various areas such as human rights, environmental protection, climate change and etc., should be precisely determined.

The structure of this section has been chosen to a great extent as a function of main topical issues that link the question of principal sources of international law with the matter of primary rules binding on IOs. The crossroads of these two topics has given rise to live debates in theory and practice that could impossibly be dealt with here exhaustively. Therefore, in each of the following subsections the examinations will look into the related questions with the objective of finding an answer for our main question, which is to inquire into whether there is a deficiency in the primary rules and international obligations of IOs relevant for the question of international legal responsibility. In addition, beside the question of legal obligations, from the outset it must be made clear whether the obligations should be limited to binding obligations or must also extend to all the regulations that direct, form or influence the behavior of international legal actors.<sup>811</sup> Another general and fundamental question that is definitely relevant to the discussion in this chapter is which place has to be assigned to the will of IOs in the international legal order.<sup>812</sup> This issue will be, specifically, discussed in the context of customary international legal obligations of IOs. Another consideration worth being reflected on is the possible hybrid character of the law of IOs.<sup>813</sup>

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<sup>810</sup> Brahm, Eric, “Intergovernmental Organizations (IGOs)”, in *Beyond Intractability*, (eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder. Posted: March 2005 <http://www.beyondintractability.org/essay/role-igo> (last visited on 05.04.2022).

<sup>811</sup> Hafner, Gerhard, “Kodifikation und Weiterentwicklung des Völkerrechts”, in Cede, F. und Sucharipa-Behrmann, L., *Die Vereinten Nationen: Recht und Praxis*, Manz/C.H.Beck, 1999, Wien, pp. 131–142, p. 132.

<sup>812</sup> For the role assigned to the will of States in the international legal order see: Tomuschat, Christian, “Obligations Arising for States Without or against their Will”, *RCADI*, Vol. 241, IV, 1993, pp. 209–369, at p. 209 f.

<sup>813</sup> Paulus, Andreas, L. “Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen. Zusammenspiel der Rechtsquellen aus Völkerrechtlicher Perspektive”, *Deutsche Gesellschaft für Internationales Recht*, Tagung Luzern, 14 März 2013.

### 1. The International Organizations' own Obligations

The question of primary rules that are at the origin of the international obligations derived from these rules is not a new debate in international legal scholarship.<sup>814</sup> Because of the fundamental importance that the primary rules and international obligations have for the ARIO,<sup>815</sup> we will start this section with the IOs' own obligations. Below in this chapter, the legal effect of international obligations of members for the IO will be touched upon as well. As the International Court of Justice has observed in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*: "... the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."<sup>816</sup>

Before starting our analysis of the traditional sources of international law in connection with the rules binding on IOs, a side question that arises from this statement of the Court will be dealt with here. Given the above observation of the Court, could it be asserted that IOs are not bound by certain legal obligations emanating from general international law, the foundation of whole system of international law,<sup>817</sup> merely because the provisions of these rules are not directly related to the purposes and functions of those organizations? In other words, could IOs escape rules of general international law by taking recourse to their missions, or in certain situations, on the basis of their internal law? If we accept this line of argument, then we should conclude that, for instance, the international financial institutions such as World Bank or International Monetary Fund are not necessarily bound by human rights obligations arising from general international law, since human rights and their promotion and protection are not principally related to the mandate of these institutions and bodies. But this conclusion does not seem to be correct as the practice of these bodies show too. The problem that we confront is then on which legal basis it can be argued that IOs are bound by general international law. In order to answer this question, the best way of proceeding with our argumentation seems to be first to ask from which source gen-

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<sup>814</sup> Micha, Eleni, "The Fight Against Corruption Within Peace Support Operations: In Search of the Responsibility of International Organizations", *IOLR*, Vol. 5, No.1, 2008, pp. 85–118; McGoldrick, D., "State Responsibility and the International Covenant on Civil and Political Rights", in Malgosia Fitzmaurice and Dan Sarooshi, *Issues of State Responsibility before International Judicial Institutions*, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 161–199; Loibl, Gerhard, "Environmental Law and Non-Compliance Procedures: Issues of State Responsibility", in Malgosia Fitzmaurice and Dan Sarooshi, *Issues of State Responsibility before International Judicial Institutions*, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 201–217; Chiu, Hungdah, "Succession in International Organizations", *ICLQ*, Vol. 14, 1965, pp. 83–120.

<sup>815</sup> Wood, Michael and Vicien-Milburn, Maria, "Legal Responsibility of International Organizations in International Law", *Summary of the International Law Discussion Group meeting held at Chatham House* on Thursday, 10 February 2011, p. 9.

<sup>816</sup> *I.C.J. Reports 1949*, p. 180.

<sup>817</sup> Tunkin, Grigory, "Is General International Law Customary Law Only?", *EJIL*, Vol. 4, 1993, pp. 534–541, at p. 534.

eral international law acquire its generality. Is it, above all, due to the content of the norms incorporated by its rules or is it merely an outcome of the function of the sources of international law in which those rules emerge and evolve? It appears that both these factors play a role – the formal sources as well as the interests of the international community – at different stages and to different degrees.<sup>818</sup> The non-parties to a general multilateral treaty may become bound by its provisions through a customary process.<sup>819</sup> Therefore, even from the latter perspective there are not major obstacles in the way of abiding IOs by the general international legal rules. However, attention should be paid to the fact that not all the rules containing human rights and other important norms – the breach of which carries the potential of material injury and damage to the third parties, in addition to the legal injury as a result of the violation of the rule as such – form part of general international law. In one of the subsections below, the specific issues of *jus cogens norms* and *erga omnes* rules will be further elaborated on.

After having discussed the question of general international law, the next issue is to inquire into the status, legal effects and bindingness of other rules of international law than general international law, which comprises, in particular, rules emanating from particular treaties, conventions and customary international law. As the internal law of an IO is the most imminent legal system regulating the affairs and relations of that entity, we will start our analysis in the next subsection with the examination of internal law of the IOs in terms of their relation with international legal system. In other words, it will be sought to answer the question as to whether the internal law of an IO forms part of international law. As most often the constituent treaty of an IO is the primary conventional instrument binding on the IO and forming a significant part of the internal law of the IO, in the following subsection on the conventional obligations of IO, this specific aspect will also be dealt with. The role of IOs in the formation of customary international law and the legal effect of these rules on IOs will be thoroughly focused on in a separate section of this chapter.

In the context of internal law of the IO, there is also another dimension that may be of importance regarding the nature of the obligation the violation of which would lead to international responsibility. In this connection, it may be asked whether the obligations breached should necessarily emanate and originate from international law. Paragraph 2 of the commentary on article 10 explains that the term “international obligation” means an obligation under international law. Nevertheless, this statement is not decisive in the sense that it can not solve the debates and divided opinions as to an exhaustive definition of international obligations under international law. An important and highly controversial issue concerns the internal law and rules of the IO and the legal nature of these rules. In

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<sup>818</sup> Danilenko, G.M., *Law-Making in the International Community*, Martinus Nijhoff Publishers, (Dordrecht/Boston/London), 1993, p. 9.

<sup>819</sup> Tunkin, Grigory, *op. cit.*, p. 539.

other words, whether these rules form an integral part of international law or on the contrary these rules remain outside the realm of international law. Since this issue has caused significant concerns for some IOs, *inter alia*, and most importantly the EU, in the next subsection this issue will be focused on thoroughly. In any way, it should also be kept in mind that the distinct question of the responsibility of IOs in internal legal systems – which belong to the domain of *lex specialis* – is a totally separate issue. This question is regulated by the internal legal systems of each IO.

A significant part of the obligations and norms respected by the IO, regulating its affairs and giving direction to its behavior, flows out from its internal legal or normative system. With respect to the internal legal system of an IO, the most relevant question in connection with the issue of international responsibility that would arise is whether that system forms part of the overarching international legal order. Furthermore, it would be important to clarify the legal status of the internal normative system of an IO in the larger schema of international legal order and its possible relevance and the role it may play with respect to international responsibility. In the next section, the status of internal law of IO in international law will be examined in the framework of which also the question of internal rules of the IO – other than internal legal rules in the strict sense of the term – will be dealt with.

*a) Rules of the Organization-internal law or international law?*

Let us start our analysis of the issue in question in this subsection with a major point of criticism that has been expressed several times by different entities during the preparation phases with regard to the ARIO, namely, that the draft articles should make clear the legal nature of the rules of the organization, which have been referred to many times in different parts of the draft articles on the responsibility of IOs. As a well-known example, the EU can be referred to which has expressed its concerns in this respect at several occasions in the course of the preparation of the ARIO. According to the position of EU, the secondary Community law does not form part of international law and thus, the violation of its rules by the EU or by its member states can not raise international responsibility in the meaning of ARIO provisions. Therefore, it should be made clear whether it can be asserted that the rules of the international organizations constituting the internal law of the IO are also, at the same time, an integral part of international law.<sup>820</sup> Paragraph 7 of the commentary to article 10 is quite clear in its intention to

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<sup>820</sup> *The report of the ILA Study Group on the Responsibility of International Organizations*, Sophia Conference, 2012, p. 19; *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, p. 3, 15 para 39 and 126 para 42; Tammes, A. J. P., “Decisions of International Organizations as a Source of International Law”, 94 *RCADI*, 1958 (II), pp. 265–363; Asamoah, Obed Y., *The Legal Significance of the Declarations of the General Assembly of the United Nations*, Martinus Nijhoff, The Hague, 1966; Castaneda, Jorge, *The Legal Effect of United Nations*

leave open the resolution of this question, apparently, for a case by case appraisal and determination. The only assertion made by the ILC in this regard is that should an internal rule and/or obligations emanating therefrom be considered an obligation under international law, the principles of international responsibility and ARIO provisions find applicability to the case in issue. Nonetheless, it seems that the paragraph 2 of article 10 delivers, at least, an assessment – with possibly a presumptive value – with respect to the legal nature of those obligations of the IO originating in internal law which are owed towards the members of the IO. According to the ARIO these latter category of obligations of IOs are regarded as part of international law, since the breach of them – provided that such breach is attributable to the IO – would trigger the international responsibility. As an explanation for the position it has taken and the formulation that has been adopted for article 10, specially, its paragraph 2, the ILC in paragraph 8 of the commentary puts forward a quantitative reason. If the intention of the ILC has not been to establish a presumption in favour of considering a certain category of obligations arising from the internal rules of the IO as forming part of international law, but rather to purport to continue with upholding its neutral position, then it seems that the introduction of paragraph 2 in article 10 creates more confusion rather than providing any further clarity to the matter under discussion.

As the next step, it would be interesting to go through the doctrine on the question of the legal nature of internal law of IOs. The opinions of publicists are divided as to the legal nature of the internal law of IOs. These views vary from one side of the spectrum who believe that the rules of treaty-based IOs are unconditionally part of international law, to the other side of the spectrum who uphold the idea that the internal law of IOs does not form part of international law, mainly on the basis of the separate existence – here personality is rather meant, since theoretically the existence of the IO is dependant on the continuance of the existence of its members – of the IO from its members. In the middle of this spectrum, there are some synthesis-based and plausible positions that support the idea that a distinction should be made between different kinds of internal rules of the IO.<sup>821</sup> At any rate, it seems that there is a common point in most of these positions and arguments, namely that the more the rules emanating from the internal law of the IO are distanced from the direct expression of the consent by States – primary subjects of international law – the stronger the belief that these rules do not belong any more to the realm of international law. However, it is

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*Resolutions*, Columbia University Press, New York, 1969; Higgins, Rosalyn, *The Development of International Law through the Political Organs of the United Nations*, Oxford University Press, Oxford, 1963; Lauwaars, Richard H., *Lawfulness and Legal Force of Community decisions*, Sijthoff, Leiden, 1973.

<sup>821</sup> Ahlborn, Christiane, “The Rules of International Organizations and the Law of International Responsibility”, *SHARES Research Paper 02 (2011)*, Amsterdam Centre for International Law, ACIL 2011-03, p. 6. Available on: <http://www.sharesproject.nl/wp-content/uploads/2012/04/02-Ahlborn-The-Rules-of-International-Organizations-and-the-Law-of-International-Responsibility-.pdf> (last visited on 05.04.2022).

difficult to acknowledge this argument as a criterion for determination of the legal nature of rules emanating from the internal law of an IO. It is even more so when attention is paid to the fact that consent as the foundation of international law is losing ground to certain other foundations related to international community interest and principles protecting human dignity and human rights.

The question of the nature of the law of IOs, namely whether these rules are merely internal law or part of international law is not only important from a theoretical point of view, but also has practical repercussions. As we witness, many of the legal obligations that the IOs are abided to, are enacted in the framework of the internal law of the IOs, starting from their founding instruments to other secondary rules and regulations of the organization based on the constituent instruments. In this regard, the mandates of the peacekeeping operations are a well-known example among many others.<sup>822</sup> In order that ARIIO finds applicability with regard to the breach of the rules of the organization, article 4(b) is clear enough to remove all doubts about the necessary international character of the obligation breached. For this reason, the focus in this section will be on the issue whether the rules of an IO are more of an independent and internal (constitutional) nature or rather qualified as international law. Before starting with the arguments, it should from the outset be kept in mind that it is not at all excluded that depending on the IO in question the nature of the internal rules may be differing. For instance, there is belief among scholars and in the regional jurisprudence that the EU legal order and its internal rules have the nature of a constitutional legal order, thus not permeable to external rules, among others rules of international law.<sup>823</sup> The attribute of self-contained regime with the acknowledgement and acceptance of the possibility of filling the lacunae of the regime by a residual applicability of general international law, seems to be the closest notion to reality.<sup>824</sup>

With respect to the position of the ILC as to the nature of the internal rules of the IO, it seems that the 2009 draft, the provisional text prepared for the first reading of DARIO was clearer. In the 2009 draft there is not any reference to the obligation of the IO arising from its internal rules towards its members (article 9(2)). From this it could be understood that according to the former draft, the IO could have obligations towards other States and IOs emanating from its internal law which was considered indeed part of international law. In other words, that would oblige the IO to respect its internal law even in its relations with non-member States and IOs, as the violation of those rules would, *inter alia*, prompt the application of international responsibility mechanism. One argument for the

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<sup>822</sup> Maus, Sylvia, "Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?" in H.J., Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin, Heidelberg, 2011, pp. 103–128, at p. 113.

<sup>823</sup> For the relevant case law of the European Court of Justice see *Costa v. ENEL*, 6/64, ECR [1964] 585 at 593; *Van Gend en Loos*, 26/62, ECR [1963], 1 at 12.

<sup>824</sup> Simma, Bruno and Pulkowski, Dirk, "Of Planets and the Univers: Self-contained Regimes in International Law", *EJIL*, Vol. 17, No. 3, 2006, pp. 483–529, at pp. 516–519.



omission of the reference to the obligations of the IO arising from its internal law may be that the ILC wanted to make clear that there is not a generic assumption that the rules of the international organization belong to the sphere of international law, the request that has been made to ILC, *inter alia*, by the European Commission.<sup>825</sup> But it seems that the new formulation that has been adopted in article 10(2) does not either solve all the problems and can lead to misunderstandings and complications as mentioned above. The problem that could arise with respect to the new formulation is that it excludes the possibility that international obligations could arise for the IO under its rules towards non members. The interesting point is that paragraph 5 of the commentary that explains this issue in clear phrases has been repeated word for word in the new draft as the new paragraph 5. And in paragraph 8 of the 2011 commentary the possibility of the existence of other rules of the IO that would form part of the international law has been recognized. But it appears that it does not alone justify the inclusion of the members in the paragraph 2 of this article. In any event, the ILC took a neutral position in this respect even when preparing the 2009 draft which is to be taken from the paragraph 6 of the commentary. Another consequence that the attribution of international law nature to the internal law of the IOs would encompass would be with respect to the *lex specialis* rule that is reflected in ARIO. If we consider the internal law and rules as international law then there could potentially a contrast arise where a certain conduct according to international law would be considered wrongful while according to the rules of the IO that same conduct would not be considered wrongful or *vice versa*. But on the contrary, if we consider the rules and internal law of the IO not part of international law then such a conflict may not at all happen.

Depending on the parties and the addressees or the persons against whom the rules of the IOs is in matter, those internal rules of the IOs may acquire either legal or factual nature or both, whence sometimes the attribute “dual nature” for the internal rules of the IOs.<sup>826</sup> The normative acts of the IOs may have different natures, depending on the addressees, or in other words, these they may have different formulations, depending on the other side of the relationship to which the IO is a party. Considering the internal law of an IO as facts, comes close to the classic theoretical perspective about national law in its relation to international law. But the modern perspective about the relationship between internal law and international law is in favour of the authoritative, while at the same time, in exceptional cases, rebuttable interpretation of internal law by internal authorities. The ICJ has acknowledged this perspective in its judgment in case *Abmadou Sadio Diallo*.<sup>827</sup>

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<sup>825</sup> The European Commission had proposed that the second paragraph be completely deleted from article 9. See UN Doc. A/CN.4/637 (14 February 2011), pp. 24–25, paras. 1–2.

<sup>826</sup> Nedeski, N. and Nollkaemper, A., “Responsibility of International Organizations ‘in connection with acts of States’”, *The International Organizations Law Review*, Vol. 9, 2012, pp. 33–52, p. 39.

<sup>827</sup> *Abmadou Sadio Diallo (Guinée c. RDCongo)*, C.I.J. Recueil 2010, p. 639 (665), para. 70.

Furthermore, it may arguably be asserted that depending on the subject-matter with which the rules of the secondary law of the IO are dealing, these rules could indeed be considered part of international law. However, against this view there is also a more restricted opinion supported in the scholarship, according to which the secondary law of an IO, unreservedly, is of a purely internal nature.<sup>828</sup> It is clear that in supporting the former view, it should be noticed that the possibility of secondary law of the IO forming part of international law is to a great extent dependent on the authority and the importance of the IO too – the scope of its membership being one of the major factors for the assessment of this authority and importance, but also its functions and missions in relation to international community interests. For instance, the resolutions of an IO with significant importance and authority at the international plane, such as the United Nations, have the potential to contribute to the evolution of customary international law or general principles of international law.<sup>829</sup>

Besides the question of legal nature and status of internal law of IOs in relation to international law, there is also the question of residual applicability of general principles and rules of responsibility as arguably codified in the framework of ARIIO. To put it differently, in a hypothetical case in which an IO breaches its internal rules – considered merely as such without international law attribute – and there is no sanction envisaged for such violation according to the internal law of the IO, should in such cases the violation of internal law remain without any consequences, or there will be the possibility of the application of secondary rules and principles of general international law? It goes without saying that, if the violation of internal law of the IO is accompanied by and constitutes, at the same time, a breach of an international obligation of that IO, then the secondary rules of general international law will be applied without any doubt. An example for these kinds of situations is when the internal law of the IO embodies similar substantive international legal obligations. Otherwise, according to the strict attitude towards the internal law of the IOs, the rules and regulations belonging to that legal regime do not form part of international law, and therefore, the violation of those rules can not prompt international responsibility. This is a truism; that case would again be different from a situation in which the IO draws up specific accountability (and responsibility) rules and regulations, inspired by international best practices and guidelines, breaches of such rules may be characterized as breaches of the ‘special’ rules of the organization in the sense of the ARIIO, and thereby engage the organization’s responsibility in international law.<sup>830</sup>

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<sup>828</sup> Ahlborn, Christiane, *op. cit.*, p. 14.

<sup>829</sup> Joyner, Christopher C., “International Law”, *Encyclopedia of American Foreign Policy*, 2002, Encyclopedia.com. Available on: <http://www.encyclopedia.com/doc/1G2-3402300076.html> (last visited on 05.04.2022).

<sup>830</sup> Gal-Or, Noemi and Ryngaert, Cedric, “From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN”, *German Law Journal*, No. 5, 2012, p. 523.

Although it is more than clear that the source of international obligation has no bearing and effect on the fact that, on the condition of the presence of other requirements, the breach of international obligation leads to international responsibility.<sup>831</sup> A delicate question may arise in this relation with respect to obligations arising from general principles of law, on the one hand, and the so-called soft law rules and regulations, on the other hand. The former issue will be discussed in a separate section of this chapter while the second matter will be dealt with in the next subsection of the present section. The reason for including part of the issue of soft law under the present section is that normally the trend to self-regulation – which produces a significant share of soft regulations – takes place within the internal normative plane of the IO or at the level of its internal legal regime.

In the context of the legal nature of internal rules of the IOs, it is also interesting to raise the question as to the relevance of those internal rules and regulations of the IO that originate in the established practice of the IO. While subparagraph (b) of article 2 of ARIO explicitly enumerates the practice of IOs among the sources of internal rules of the IO,<sup>832</sup> it is not quite clear whether the rules originating from practice may give also rise to obligations that would have the capacity to raise international responsibility of the IO – or its members – as a consequence of the breach of these rules. In case of an affirmative answer, this would be tantamount to considering these obligations as international obligations, and thus the result would be to deem the internal law of the IO as part of international law. As an example the SC is bound by international human rights which is, *inter alia*, inducible from its practice, for example, with regard to the resolutions adopted on the economic sanctions taken according to chapter VII of the UN Charter and its relevant practice in this regard.<sup>833</sup> In this connection, an argument in favour of an affirmative answer is that the international responsibility could be a further guarantee for the respect of these rules, as normally these rules are to be found neither

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<sup>831</sup> On the irrelevance of the source of international obligation for the incurrance of international legal responsibility see Nishimura, Yumi, “Source of the Obligation”, in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 365–369; There is no need for further elaboration on the bases of the binding force of the obligations deriving from the rules of the general international law for IOs, which can be found in the separate and distinct legal personality of IOs. On the basis of this separate legal personality, one can argue that the IOs are also among the subjects of international law, albeit still subsidiary, thus the general international law is applicable on them as it is applicable on any other subject of this legal order. At the same time, the ascertainment of separate international legal personality of an IO is conditioned on the capability to hold international rights and obligations under international law.

<sup>832</sup> *Articles on Responsibility of International Organizations, with commentaries*, 2011, para. 17, p. 11. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

<sup>833</sup> Wagner, Markus, “Die Wirtschaftlichen Maßnahmen des Sicherheitsrates nach dem 11. September 2001 im völkerrechtlichen Kontext – Von Wirtschaftssanktionen zur Wirtschaftsgesetzgebung?”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZAÖRV)*, Vol. 63, 2003, pp. 879–920, at pp. 915–916.

in the treaties establishing the IO nor in any formal rules forming part of the internal law of the IO. Therefore, it can be assumed that normally there is no legal consequence envisaged as a result of their violation. In the same spirit, these rules have not only the potential to be counted as part of international legal body, but may even under certain circumstances be considered as giving birth to inchoate forms of global law.<sup>834</sup>

As has been explained above, the ILC is of the opinion that rules of the organization, under certain circumstances, may be viewed as part of international law.<sup>835</sup> It is clear that this is not a definitive position. This statement comes to mind as if ILC has had doubts in this regard and has preferred to leave some space for opposite views. Nevertheless, in the practice of some IOs definitive positions may be found, which are apparently based on the premise that IOs are normally based on constitutive agreements that are the legal basis and foundation for the establishment of those entities,<sup>836</sup> and while there is no doubt that these instruments shall be duly interpreted,<sup>837</sup> these instruments remain international agreements. There is a position at hand with regard to the nature of internal law of IOs taken by another regional IO, namely, the Organization of American States (OAS) dating 8 of January 2003, that seems to be based partly on the rationale formulated in the former phrase. According to the OAS, the internal standards and rules of the Organization, “having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law.”<sup>838</sup>

Moreover, another aspect concerning the internal law of the IOs is that the internal rules of the IO that may be breached and consequently raise the international legal responsibility of that IO, may be of procedural or substantive nature.<sup>839</sup> A question that may be raised in this respect is whether there should be a distinction made for the purpose of the international legal responsibility of IO with respect to the category of the obligations and internal rules breached. It

<sup>834</sup> Teubner, Gunther, “Global Bukowina: Legal Pluralism in the World Society”, in Teubner, Gunther (ed.), *Global Law without a State*, Brookfield: Dartmouth, 1997, pp. 3–28.

<sup>835</sup> Draft articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 5, Para. 8, (last visited on 08.04.2022).

<sup>836</sup> For the difference between constitutive and prescriptive agreements see: Cogan, Jacob K., “Presentation and Power in International Organization: The Operational Constitution and Its Critics”, *AJIL*, Vol. 103, 2009, pp. 209–263, at pp. 213–218.

<sup>837</sup> For a thorough study of the interpretation of the constitutional and other instruments of IOs see: Amerasinghe, C. F., “Interpretation of Texts in Open International Organizations”, *BYBIL*, Vol. LXV, 1994, pp. 175–209.

<sup>838</sup> A/CN.4/545, Sect. II.I (last visited on 27.01.2012), para. 2, p. 15.

<sup>839</sup> Ueki, Toshiya, “Responsibility of International Organizations and the Role of the International Court of Justice”, in Ando, Nisuke and McWhinney, Edward and Wolfrum, Rüdiger (Eds.), *Liber Amicorum Judge Shigeru Oda*, Vol. 1, Kluwer Law International, 2002, pp. 237–249, at pp. 239–240.

seems that, generally, the various classifications of international obligations should not have any bearing on the question of international responsibility. The breach of an international obligation, defined as lack of conformity between the requirements of international law and the facts of the matter,<sup>840</sup> may come about with regard to substantive as well as procedural rules. In other words, a single and unitary regime of international responsibility is applicable on different kinds of international obligations deriving from internal law of the IO – be it obligation to result or means, procedural or substantive obligation, etc. – as long as these obligations are considered international obligations and form part of the body of international law. As has been rightly observed by Dominicé, “there are not several categories of breach distinguished by differences in nature among various obligations”.<sup>841</sup> But at the same time, it is true and a distinct issue that there is more probability that the substantive internal rules of an IO form part of international law than procedural rules.

It goes without saying that for international responsibility to arise as a result of the breach of the internal rules of an IO, that embody or give rise to an international obligation, there is no need of an injury or damage inflicted on an entity, within or outside the IO. In those cases the international responsibility regime would function as normally. However, it may be questioned whether in establishing the breach – which necessarily implies the interpretation of the obligation – the internal obligation of the IO should be interpreted by taking recourse to methods of interpretation and principles applied in general international law or those principles specific<sup>842</sup> to the interpretation of the constitutive or other instruments of IOs. This question is not only of theoretical nature devoid of any practical bearing. In this regard, an example is the question of *détournement de pouvoir* committed by IOs.<sup>843</sup> To put it differently, we have to do here with the cases in which the IO has not breached any legislative and internal provision of the rules of the IO but exercises the powers in its discretion for purposes not envisaged by its founding documents.<sup>844</sup> Is the IO in such circumstances in breach of its internal law and/or international law? The answer to this question seems again to depend to a great extent on the interpretation of internal rules of the IO and the content and scope of the obligations derived from them. On the contrary, as has also been set out by the ILC in article 5 of the ARIO, the characterization of an act of an international organization as internationally wrongful is governed by

<sup>840</sup> Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, commentary on Article 12, para (2).

<sup>841</sup> Dominicé, Christian, “The International Responsibility of States for Breach of Multilateral Obligations”, *EJIL*, Vol. 10, No. 2, 1999, pp. 353–363, at p. 363.

<sup>842</sup> Amerasinghe, C. F., “Interpretation of Texts in Open International Organizations”, *op. cit.*, pp. 175–209.

<sup>843</sup> On the *détournement de pouvoir* generally see Fawcett, J. E. S., “*Détournement de pouvoir* by International Organizations”, *BYBIL*, 1957, pp. 311–316.

<sup>844</sup> *Ibid.*, at p. 311.

international law. The internal rules of an IO may only then have a bearing on and affect the characterization of an act of an international organization as internationally wrongful, when it has beforehand been ascertained that these rules are part of international law.<sup>845</sup>

From the point of view of conflicts of rules at the international level which could give rise to collisions between international legal rules emanating from different legal orders, it is also recommendable to avoid any general and across-the-board consideration of internal law of IOs as part of international law. Furthermore, from the perspective of international legal order, an all-inclusive and overall approach with respect to the legal nature of internal law of IOs consisting in considering the rules of those legal systems as forming part of international law would have the negative side effect of intensifying the fragmentation of the international legal order. Adverse or disadvantageous repercussions of such fragmentation, most importantly inconsistent and incongruent development of international law, would not be escapable, especially, in the absence of an institutional and substantive hierarchy in international law.<sup>846</sup> A proposition in this connection could be the creation of a category of international legal rules emanating from internal rules of IOs. As has been observed, categorizations of international law could also serve as a potential mechanism for resolving conflicts.<sup>847</sup> In the context of the conflicts that may arise within the international legal order between different international rules, in case we accept that the internal rules of IOs are part of international law, there is no reason why these rules should not be consulted in determining the wrongfulness of the conduct of an IO. However, in article 5 of ARIO it has been provided that the IO may not rely on its internal law for this purpose. If these internal rules are also part of international law, then the IO is under an obligation to respect them as it does with regard to its other international legal obligations. Hence, these rules may have a bearing in the characterization of an act as internationally wrongful. This question may be of great relevance, since it can give rise to conflicts of obligations at the moment of the determination of the international legal obligations of IO for the establishment of a wrongful act.

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<sup>845</sup> Some authors believed that the restricted definition of the rules of the organization may not be helpful with regard to certain IOs. For more on this position see Kuijper, P. J., and Paasivirta, E., "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review (IOLR)*, Vol. 1, 2004, pp. 111–138, at pp. 132–133.

<sup>846</sup> Leathley, Christian, "An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?", *International Law and Politics*, Vol. 40, pp. 259–267; Koskenniemi, Martti and Leino, Päivi, "Fragmentation of International Law?: Postmodern Anxieties", *LJIL*, Vol. 15, 2002, pp. 553–560.

<sup>847</sup> International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Seventh Session*, U.N. GAOR, 60<sup>th</sup> Sess., Supp. (No. 10) at ch. XI, U.N. Doc. A/60/10 (2005); Leathley, Christian, "An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?", *op. cit.*, pp. 259–267.

At one place the ILC has taken the position that the internal rules of an IO cannot be sharply differentiated from international law.<sup>848</sup> But there has been an opposition brought forward by the European Commission, as referred to earlier in this section, on behalf of the European Union to the effect that this statement can not be generalized to all the IOs, as the EU law, for instance, does not constitute part of international law according to the judicial practice of the EU based on its legal order.<sup>849</sup> In this case, the consequence would be that should the EU violate its internal legal rules derivation from its legal order, at the same time and parallel to the legal consequences arising out of the breach of its internal law in EU legal order, it would also incur international legal responsibility. Further in case of the *erga omnes* obligations, according to the draft articles, in but a very impossible scenario of the breach of these kinds of obligations, every other third State would have legal interest in invoking international legal responsibility. Here may the relevant question be posed whether the European legal order is distinguished from international law or from general international law. In the latter case, European Union law, or any other distinct legal order would be still part of the international legal order even if distinct from the general body of rules belonging to this order and distinct from the part that constitutes its general body. It is clear that here is not the right place to enter into the extensive discussions on the distinctiveness of the EU legal order or any other possible or allegedly self-contained regime from the international legal order.<sup>850</sup> With regard to the EU, this example may not have real practical use and importance, since the secondary rules of the EU is already well developed and constitutes a *lex specialis* against the general rules set out in ARIO and the practical necessity of ARIO application may not be raised at all or may rise in very exceptional scenarios.<sup>851</sup>

Another aspect and part of the internal law of an IO that may give rise to critical debate with respect to its international law nature is the staff regulations of an IO. Two questions may be raised in this connection, firstly, whether staff regulations of IOs form part of international law, and secondly, whether it is recommendable to consider these regulations all-inclusively as part of the corpus of international law. As to the first question, namely the *lex lata* nature of staff regulations of IOs in international law, it seems that there are certain principles which have gained the status of customary international law. However, the transfor-

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<sup>848</sup> Draft articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 15, para. 2 (last visited on 08.04.2022).

<sup>849</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 19, para. 1.

<sup>850</sup> Simma, Bruno and Pulkowski, Dirk, "Of Planets and the Universe: Self-contained Regimes in International Law", *EJIL*, Vol. 17, No.3, 2006, pp. 483–529.

<sup>851</sup> Articles on the Responsibility of International Organizations, with commentaries, 2011, Article 64, p. 100, para. 1–2. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) (last visited on 08.04.2022); Simma, Bruno and Pulkowski, Dirk, "Of Planets and the Univers: Self-contained Regimes in International Law", *op.cit.*, at pp. 517–519.

mation of these regulations from rules of the internal legal system of IOs into customary international legal rules has been rather due to their contents and not an automatic recognition owed to a general approach as to considering these rules as forming part of international law. Regarding the second question, as to the desirability of *lex ferenda* nature of these regulations, it seems that a distinction should be made, at any rate, between IOs with a heavy weight at the international plane – influenced and determined by the scope of membership, its missions and functions – and other more limited IOs. It is more than obvious that the internal rules of an IO such as the UN has more authority for being considered as general rule than staff regulations of a sub-regional IO with limited membership. In addition, such minimum common rules contributed to the uniformity of staff regulations of IOs at the international level while leaving space for rules reflecting specificities of each IO.

A category of cases and activities with regard to which the consideration of the law of the IO as constituting part of international law or merely internal law of the IO matters – significantly for the applicability of the concept of responsibility – is with respect to operational activities of IOs, the prominent example of which are peacekeeping operations of the IOs, notably the UN. Normally, the mandates encompassing legal obligations of the body performing the mission are adopted, at least partly, in the framework of the rules of the IO. Now, the question that arises is whether these rules of the IO should be considered part of international law or only internal law of the IO in issue. It is noteworthy that the breach of internal rules and law of an IO by one of its organs may not necessarily lead to international responsibility of that organ, even though the rules in issue forms part of international law, for the simple reason that the organs of an IO, normally, lack their own and separate international legal personality. On the contrary, there remains still the possibility that in these cases the international responsibility of the IO of which the latter organ forms part, be engaged. Nevertheless, this matter may gain even more relevance with regard to regional IOs, as with respect to the international legal character of a great part of internal law of universal IOs there is less controversy among scholars – such as the UN and its resolutions.<sup>852</sup> Here, the breach of obligations emanating from tasks of the IO may have as the consequence the international legal responsibility only if these mandates and their provisions – which are embodied in the internal law instruments of the IO – are considered as part of international law.

As a final observation, it can be concluded that depending on the weight given to the *lex specialis* rule and the general international law rule in question, it will be determined whether the internal rule of the IO will take precedence over general international law or *vice versa*. In cases of conflict with respect to characterization of an act as wrongful between the internal rules of the IO and the rules of general

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<sup>852</sup> *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Reports, para. 86.



international law, the *lex specialis* rule may provide the solution. Those who over-emphasize the *lex specialis* rule believe that in such situations the rules of the IO should always take precedence, in their argument they take recourse to the speciality principle. But it appears that such a high extent of giving importance to *lex specialis* against general international law does not seem correct, at least not with respect to the characterization of a conduct as wrongful. At any rate, as a provisional conclusion of our analysis in this sub-section, it may be observed that the absence of a clear-cut general rule on the legal nature of the rules of IOs as to their allegiance to international legal corpus will cause further controversy and thus, ambiguity with regard to primary rules binding on IOs and the legal obligations deriving from those rules. That situation affects also the scope of application of ARIO and international responsibility principles.

After having examined the legal nature of internal rules of IOs, in general, in terms of their relevance for the incurrance of international responsibility, we will proceed in the following subsections with our analysis of the legal nature of some specific categories of internal rules, regulations and norms of IOs for the purpose of international responsibility. If we bear in mind the link between the breach of an obligation and the incurring of further obligations or of sanctions as a consequence of that breach, we shall see that, in a sense, the rules relating to the responsibility of subjects of international law are complementary to other substantive rules of international law – to those giving rise to the legal obligations which these subjects may be led to violate.<sup>853</sup> One of the predominant features of the theory of responsibility is its non-autonomous character.<sup>854</sup> For this reason, we will now turn our focus to the rules and regulations that, as a whole, constitute the outer layers of normative structure of IOs and in spite of not being derived from traditional sources of international law, in one way or another, regulate the activities of these subjects of the international legal order.

#### aa) Global Administrative Law – Responsibility of IOs from a GAL perspective

The global administrative law, to put it in simple words, is a trendy notion based mainly on the fact that increasingly the boundaries between domestic and international, in the performance of governance related and administrative tasks, are blurring.<sup>855</sup> GAL seeks to design and institute an accountability scheme that would comprehensively encompass all the global administrative bodies that, in one way or another, play a role as actors in the global governance, primarily through a series of principles that aim at realizing good governance at the global plane. As described in the general concept of accountability in the chapter two, international legal responsibility represents one of the central pieces of the accountability puz-

<sup>853</sup> Ago, R., Third Report on State Responsibility, *ILC Yearbook 1971*, Vol. II (1), p. 219, para. 61.

<sup>854</sup> Reuter, P., “Principes de Droit International Public”, *RCADI*, t. 103(II), pp. 425–651, p. 595.

<sup>855</sup> Krisch, Nico and Kingsbury, Benedict, “Global Governance and Global Administrative Law in the International Legal Order”, *EJIL*, 17 (2006), 1–13, at p. 3.

zle. The relevance of GAL for our discussion is because this concept encompasses “the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make.”<sup>856</sup> Concerning the extension of international responsibility span to those parts of GAL having undisputedly international law character due to their emergence in international legal sources, there is no doubt that international responsibility is applicable. Difficulty arises, however, with regard to those parts which form part of internal law of an IO – international administrative body in GAL terminology. In facing this dilemma, it may be of use to attract the attention to the issue that GAL is at the same time a response to the emergence of a new dimension and scene for the relations between entities at a level that can not easily and precisely be called, neither domestic, nor international, but rather at best be referred to as global with a variegated multitude of interactions among the actors of this scene, on the one hand, and between these global actors and individuals, on the other hand. Hence, the most relevant question at this stage would be whether the general mechanism of international responsibility may be triggered as a result of the violation of global law and obligations derived from the norms of that legal order? This question gains importance, as the belief exists that normative practices and normative sources, by which GAL emerges, are not fully encompassed within standard conceptions of international law. In other words, these normative patterns can not easily be seen as, strictly speaking, primary rules for the purpose of the application of secondary rules of international responsibility. As increasingly the IOs regulate their affairs and relations following the above-mentioned models and global law patterns, the issue of prominence and efficiency of a classical international responsibility regime for IOs gains in relevance. It seems that there could hardly be a single answer found to this crucial question, as global law is, for the moment, a multitude of rules, principles, and practices which are, above all, the result of the impact of global forces on other legal orders, *inter alia*, international law as well as domestic legal orders.<sup>857</sup> At the same time, it appears that the conception of global law not only comprises of trends in the practice of various international actors, brand new tools, and mechanisms, but it also encompasses old phenomena reinterpreted in a sort of “global” language and terminology.<sup>858</sup> The link between global law concept and our question concerning primary rules for the purpose of international responsibility is that the former concept may confer a kind of legal attribute to the above mentioned practices and norms. To put it differently, under the umbrella

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<sup>856</sup> Krisch, Nico and Kingsbury, Benedict, “Global Governance and Global Administrative Law in the International Legal Order”, *EJIL*, 17 (2006), 1–13, at pp. 5–6.

<sup>857</sup> Ziccardi Capaldo, Giuliana, *The Pillars of Global Law*, Ashgate, 2008, pp. 1–17.

<sup>858</sup> Ziccardi Capaldo, Giuliana, *op. cit.*, pp. 95–137.

concept of global law, many soft law rules and thereto related mechanisms find the opportunity to harden into a new legal order expanded at the universal level, with the tendency to supplant classical international law. Should this metamorphosis of existing legal orders into a single and unitary global legal order happen entirely, could the general rules of international responsibility still find applicability? ARIO already contains certain elements that could, at the first sight, be interpreted as proof of its adaptability, and thus, might justify its transferability to the level of global law. Nevertheless, the application of ARIO rules, even in the case of avant-garde provisions of article 49, requires the breach of an international obligation in the meaning of its article 4(b). Therefore, it seems that the articles of ARIO in order to be invoked require a breach of an obligation under international law in the classical sense. Hence, it appears that these two, albeit valuable, efforts at the international level – drafting of international responsibility articles for IOs, on the one hand, and the development of global law for IOs, on the other hand – may continue to grow parallel to each other without ever meeting in an intersection. The GAL has been intentionally chosen as our focus, since the manifestations of the global law phenomena has been significant in that area. Different and variegated GAL mechanisms have been established within international financial institutions to promote the principles and practices believed to becoming unified under the general title of global administrative law.

As a result of gaps in international rules and regulations, and following practical necessities, IOs have entered the realm of norm creation, and for doing so, at the same time, have developed new structures, which are different from the traditional norm creation at the international level.<sup>859</sup> This new role played by the IOs, which consists in the development of ‘soft law’ and other normative structures, could be best analyzed by Global Administrative Law.<sup>860</sup> Global administrative law has, appropriately, been described, summarily, as an approach taken by international bodies and scholars as a restraint to the power of IOs and to deal with the increasing power exercised by international organizations.<sup>861</sup> Therefore, it is quite natural that the question prompts to mind as to whether international responsibility plays any role in the supervision of this new normative dimension.

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<sup>859</sup> Kinney, Eleanor D., “The emerging Field of International Administrative Law: Its Content and Potential”, 54 *Administrative Law Review*, 2002, pp. 415–433; Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, 6 (2009), pp. 319–358; Richard, Vanessa, “Les Organisations Internationales entre *Responsibility* et *Accountability*: Le Régime de Responsabilité Esquissé par la CDI est-il adapté aux organisations internationales?”, *Revue Belge de Droit International*, 2013(1), Éditions Bruylant, Bruxelles, pp. 190–205.

<sup>860</sup> Rawaski, Frederick, “Engaging with Armed Groups: A Human Rights Field Perspective from Nepal”, *International Organizations Law Review*, 6(2009), pp. 601–626, at pp. 602–603.

<sup>861</sup> Clarke, Lisa, “Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships”, *Chicago Journal of International Law*, Vol. 12, No. 1, 2011, pp. 55–84, at p. 70.

At the same time, international organizations have adopted their relatively complex set of internal rules, regulations and guidelines, the implementation of which is, most often, being supervised by Independent Accountability Mechanisms (IAMs). A relevant question raised in the context of our examination – which is undoubtedly also linked to the question whether these regulations are or could be considered international law for the purpose of international responsibility – is whether these IAMs could apply general international law on international responsibility, codified in ARIO, as relevant substantive rules in their proceedings. The answer to this question has definitely practical bearing for the scope of applicability of international responsibility, as the emphasis of the debate concerning the contours of the international legal obligations of IOs seems to have shifted over the past two decades so from ‘getting them to comply’ with international standards, such as human rights standards (especially those contained in the IC-CPR) in the abstract, to getting IOs to incorporate or ‘mainstream’ international human rights and environmental standards into their operations.<sup>862</sup>

At any case, one of the specific and emerging fields of global law, either considered as part of international law or not, under the well-known title “Global administrative law”, is without any doubt linked with and parallel to the appearance of the phenomenon of the global governance appeared in international legal discourse.<sup>863</sup> For instance, in the field of employment relations, general principles of law are a source of applicable principles.<sup>864</sup>

As *Paulus* has rightly observed:

“...Governance without Government” is the description of a problem rather than a solution.”<sup>865</sup>

Hence, the preeminent task the GAL is seeking to perform, is to control the exercise of power in all forms of international governance, a kind of new public management incorporated in international institutional law inspired, partly, by a public law conceptual framework.

At the same time, attention should be paid to the point that the principles of GAL cannot be applied to perfection. Sometimes that would, precisely, not be desirable, as it can be shown by the primary examples of the participation or “too

<sup>862</sup> A sentiment consistently echoed in various initiatives surrounding the UNs Millennium Development Goals. The report of the ILA Study Group on the Responsibility of International Organizations, Sofia Conference 2012, *International Law Association*, Part Two; Daniel D. Bradlow and Andria Naudé Fourie, *The Evolution of Operational Policies and procedures at International Financial Institutions: Normative Significance and Enforcement Potential*, (April 6, 2011), p. 4. Available on: [http://digitalcommons.wcl.american.edu/fac\\_works\\_papers/27/](http://digitalcommons.wcl.american.edu/fac_works_papers/27/) (last visited on 05.04.2022).

<sup>863</sup> Krisch, Nico and Kingsbury, Benedict, “Introduction: Global Governance and Global Administrative Law in the International legal Order”, *op. cit.*, pp. 1–13, at p. 1–5.

<sup>864</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at p. 17.

<sup>865</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, pp. 84–85, at p. 442.

much accountability to wrong people”.<sup>866</sup> Moreover, from the perspective of accountability conception, discussed earlier in chapter two of the dissertation, a GAL tool cannot supplant a secondary rules regime, as it seems that in the case of default in the IAMS put in place for the review and enforcement of GAL, the general rules of international responsibility may function as a correcting, last resort.

From a technical legal point of view, the first issue that comes to mind is the legal basis of the applicability of such global administrative law on IOs generally. Directly following this question, is the contribution and relevance of this law to international legal responsibility. Clearly, should the obligations of this area of international law be indeed binding for the IOs this development could be considered a contribution to the resolution of the problem of the lack of primary rules and international obligations of IOs which restricted the scope of applicability of international responsibility principles on IOs. At the same time the goal of accountability of these entities is also realizable, since the global administrative law could provide the conceptual and theoretical framework necessary for the accountability to be specified.

Specially, a GAL, above all, includes the principles of transparency, participation, and reason-giving and etc. But the point is that the content of GAL rules cannot completely fill the gap existing with regard to the scope and content of the primary rules binding on IOs that would give rise to international obligations for IOs in their everyday interactions at the international level. Global administrative law, as it has been conceptualized so far, is first and foremost dealing with so-called good governance concerns at the global level. All the different international obligations arising in various activity areas that are already in place for states, intrinsically, do not fit under the umbrella of global administrative law. Hence, the of scope of applicability of ARIO on IOs – which is the result of the gaps in primary rules binding on IOs in comparison with states – cannot be fully filled. To put it differently, recourse being taken to the concept of Global Administrative Law would not suffice to remove the problem of inapplicability of international responsibility in cases where an IO is involved in certain activities in connection with which the scope of its international obligations are not clear-cut or have still not been crystallized – a criticism recurrently observed with regard to ARIO in the scholarship.

From another perspective, however, the GAL provides tools and contributes to accountability that may achieve goals sought, in some way, also by international responsibility, but of course through other channels than mere reparation. In this so-called ‘global administrative space’, the non-binding norms and regulations – through their quality of high degree of efficiency – can perform the functions that

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<sup>866</sup> Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, 6 (2009), pp. 319–358, at p. 334.

would compensate the absence of and replace a system of binding rules.<sup>867</sup> As a result, it is clear that the mechanism of international legal responsibility would not correspond exactly to the normative form and structure presently in trend and expanding, since the element of bindingness which, in principle, constitutes an international obligation would be lacking. Therefore, GAL accompanied and supported by an elaborated conception of accountability of IOs, equipped with efficient and adequate review mechanisms would definitely fill the responsibility gap considerably.<sup>868</sup> However, it should not be overlooked that conceptualizing and, especially applying the GAL issues must always be accompanied by balance of interests and considerations as has been observed earlier "...GAL issues must be integrated with effectiveness and efficiency objectives..."<sup>869</sup>, so that this conceptual framework can be productive and able to achieve the desired results.

#### bb) Non-binding normative instruments of IOs: The Trend of Self-Regulation

Although our ultimate aim in this subsection is to inquire the intersection between self-regulation trend as a, relatively, new normative pattern at the international and global level, on the one hand, and the international responsibility as a secondary rules regime under general international law, on the other, let us start with approaching the phenomenon of self-regulation in a descriptive, analytical manner. Efforts to justify the trend of self-regulation have been based, partly, on the ability of the resulting norms in delivering governance instruments to fill the "toolbox required to steer, stimulate or enforce the cooperation between member states and to get a grip on the actions of their citizens".<sup>870</sup> As the question of soft law rules, as the possible sources of legal obligations for IOs, will be discussed independently and in more detail in another section of the present chapter of the thesis, in this subsection only the relation between self-regulation trend, soft law and its possible legal nature for the purpose of the ascertainment of obligations of IOs will be touched upon.

By the efforts of pioneer scholars of the law of international organizations, the obvious approach to the analysis of international organizations today, to borrow

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<sup>867</sup> Krisch, Nico and Kingsbury, Benedict, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", *op. cit.*, pp. 1–13, on p. 1.

<sup>868</sup> Richard, Vanessa, "Les Organisations Internationales entre *Responsibility* et *Accountability*: Le Régime de Responsabilité Esquissé par la CDI est-il adapté aux organisations internationales?", *Revue Belge de Droit International*, 2013(1), Éditions Bruylant, Bruxelles, pp. 190–205, p. 197.

<sup>869</sup> Kingsbury, Benedict and Casini, Lorenzo, "Global Administrative Law Dimensions of International Organizations Law", *International Organizations Law Review*, 6 (2009), pp. 319–358, at p. 339.

<sup>870</sup> Dekker, Ige F. and Wessel, Ramses A., "Governance by International Organizations: Rethinking the Normative Force of International Decisions", in Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory*, Nijhoff, Leiden and Boston, 2004, pp. 215–236, at p. 236; Hafner, Gerhard, "Kodifikation und Weiterentwicklung des Völkerrechts", in Cede, F. und Sucharipa-Behrmann, L., *Die Vereinten Nationen: Recht und Praxis*, Manz/C.H.Beck, 1999, Wien, pp. 131–142, at p. 132.

from Viñuales, is emancipated from the most extreme forms of normativism.<sup>871</sup> In the same spirit, the trend of self-regulation refers to a phenomenon comparable to the one which has appeared in the context of multinationals, namely the voluntary adoption of Corporate Social Responsibility principles by these latter firms.<sup>872</sup> On the one hand, there are the legality concerns in light of the political ideal of the international rule of law that may be raised in connection with self-regulation,<sup>873</sup> which would consequently justify the attitude that the classical understanding of international law should rather be followed with regard to the question of international obligations. On the other hand, another approach exists also – opposite to the former indeed – which encourages the transit and passage to modern international law with respect to the definition of international obligations, and thereby expanding the definition in order to encompass also those regulations consisting mainly of so-called “soft law” norms.<sup>874</sup>

The relevance of this discussion to our central question in this section concerning the self-regulation trend originates from the fact that these regulations can possibly be considered as a kind of soft law regulation. These regulations may even have the potential to give birth to international legal obligations, provided that the assumption is accepted that the law of the IO constitutes part of international law and can move to the international level. However, even if it could be proved that these regulations may be relevant for the purpose of international legal responsibility, the problem of the inadequacies of specifications by their provisions and unclear scope and boundaries of the obligations arising from them, which is common to soft law rules, would still remain and seems to cause problems in practice and not easy to specify and determine.

From a rather cynical political perspective, it has been observed that the trend to self-regulation is nothing than a strategic move by interest groups with the intention to “shift regulation from formal intergovernmental bodies to private regulatory systems, where they have more control over outcomes”.<sup>875</sup> The Neo-liberal principles and doctrines emphasize the most, in comparison to other principles and doctrines, on self-regulation.<sup>876</sup> At the roots of self-regulation tendencies are

<sup>871</sup> Viñuales, Jorge E., “‘The Secret of Tomorrow’: International Organization through the Eyes of Michel Virally”, *EJIL*, Vol. 23, No. 2, 2012, pp. 543–564, at p. 560.

<sup>872</sup> Vidal-Leon, Christian, “Corporate Social Responsibility, Human Rights, and the World Trade Organization”, *Journal of International Economic Law*, 2013, 16, pp. 893–920.

<sup>873</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *ICLQ*, Vol. 63, Issue 03, July 2014, pp. 535–567, at p. 538.

<sup>874</sup> Hafner, Gerhard, “Kodifikation und Weiterentwicklung des Völkerrechts”, in Cede, F. und Sucharipa-Behrmann, L., *Die Vereinten Nationen: Recht und Praxis*, Manz/C.H.Beck, 1999, Wien, pp. 131–142, p. 132.

<sup>875</sup> Hafner, E. M./Victor, D. G./Yonatan Lupu, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 54.

<sup>876</sup> Paulus, Andreas L., *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 222.

mainly external pressures exercised by NGOs and local governments, accompanied by strengthened media scrutiny.<sup>877</sup> The rationale behind self-regulation trend is, therefore, not much distant from premises and arguments put forward in favour of self-regulation in political economy theories. As a phrase states: “Honest and prudent behavior by a financial market institution is integral to its reputational capital, which in turn increases its franchise value”.<sup>878</sup> From a sociological perspective, IOs could be seen as “continue to have the freedom to behave opportunistically, but to be constrained by self-interest from doing so, because an institution’s power derives from becoming “institutionalized” in social settings.”<sup>879</sup> Self-regulation as a concept has also a place in the context of ethical trade. The description delivered in that context is most illuminating as in that connection self-regulation is considered as a “compromise between, and as an alternative to, international regulation, on the one hand, and the open competitive reign of the free market on the other”.<sup>880</sup> Accordingly, the self-regulation trend in IOs can be understood as a compromise between effectiveness as a result of lesser constraints, on the one hand, and the protection of the interests of those affected by the activities of IOs, on the other hand. In this connection, it would also be appropriate to ask the question and inquire into the constraints of and obstacles for a more expanded abidance of IOs to primary international rules and regulations. There is no place here to discuss the consequences that the distribution and proliferation of the tendency to self-regulation – comparable to codes of conduct in the domain of corporate social responsibility<sup>881</sup> – would have for the international legal responsibility system, in general, and the responsibility of IOs as subjects of this legal system, specifically. Nevertheless, should the self-regulated norms fall out of the scope of applicability of general international responsibility rules, such trend would definitely lead to the exclusion of the international responsibility regime for ever increasing areas. In any case, there is no way than to admit that the informal sources of law, known as soft law, are sources of flexibility.

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<sup>877</sup> Shihata, I.F.I., *The World Bank Inspection Panel: In Practice*, 2<sup>nd</sup> edition, Oxford University Press, 2000, pp. 1–22.

<sup>878</sup> Bossone, Biagio and Promisel, Larry, “The Role of Financial Self-Regulation in Developing Economies”, *Financial Sector of the World Bank Group*. Available on: <https://elibrary.worldbank.org/doi/abs/10.1596/27109> (last visited on 30.04.2022).

<sup>879</sup> King, Andrew and Toffel, Michael W., “Self-regulatory Institutions for Solving Environmental Problems: Perspectives and Contributions from the Management Literature”, *Working Paper No. 07–089*, 2007, p. 10. Available on: <http://www.hbs.edu/faculty/Publication%20Files/07-089.pdf> (last visited on 05.04.2022).

<sup>880</sup> Duncombe, Richard and Heeks, Richard, “An Information Systems Perspective on Ethical Trade and Self-regulation”, *Development Informatics Working Paper No. 13*, Institute for Development Policy and Management, 2002, p. 16.

<sup>881</sup> International Organization of Securities Commissions (IOSCO), “Model for effective self-regulation”, *Expert Meeting on the Trade and Development Implications of Financial Services and Commodity Exchanges*, 3 September 2007. Available on: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD110.pdf> (last visited on 10.04.2022).



With regard to the legal nature of soft law rules, a general answer that would be true for all the rules is difficult to find, as depending on the subject matter and area to which these regulations are related, for instance environmental concerns, human rights questions or other, the answer to this question may vary. However, with regard to the effects of soft law norms and rules, it can be stated that in any case these norms influence the behavior of States and IOs as well.<sup>882</sup>

Hence, from our analysis in this subsection, the following conclusion could be achieved as to the side effects of the proliferation of self-regulation trend and its bearing for the question of international responsibility. Greater emphasis on effectiveness, rather than compliance,<sup>883</sup> an attitude originating in social science studies, would imply a review of the strict definition of obligations, thus ideally a reconsideration of the definition of the elements of international legal responsibility.

### cc) The case of International Financial Institutions

While IOs, undoubtedly, do have many international legal obligations, including obligations towards individuals, the sources and content of those obligations remain opaque. In addition, the mechanisms for enforcing these obligations, insofar as they exist at all, remain weak.<sup>884</sup> This argument is typically substantiated by the fact that IOs are not usually signatories to international conventions, and particularly not those regulating environmental and human rights obligations.<sup>885</sup> But it has been stated that this position is slowly changing. This phenomenon can be seen most clearly and dramatically in the case of international financial institutions.

#### 1) Operational Policies and Procedures (OP&Ps) – Internal Rule of Law in MDBs

The Operational Policies & Procedures of Multilateral Development Banks typically govern the appraisal, design and implementation of development projects and programmes; as well as the anticipation, prevention and mitigation of various potential adverse effects that may flow from these activities.<sup>886</sup> Operational policies establish the parameters for the conduct of operations; they also describe the circumstances under which exceptions to policy are admissible and spell out who

<sup>882</sup> Karlsson-Vinkhuyzen, Sylvia I. and Vihma, Antto, “Comparing the Legitimacy and effectiveness of global hard and soft law: An analytical framework”, *Regulation and Governance*, Vol. 3, Issue 4, 2009, pp. 400–420.

<sup>883</sup> Hafner, E. M./Victor, D. G./Yonatan Lupu, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 90.

<sup>884</sup> Horta, K., “Rhetoric and Reality: Human Rights and the World Bank”, *Harvard Human Rights Journal*, Vol. 15, p. 227.

<sup>885</sup> Clark, D., “The World Bank and Human Rights: The Need for Greater Accountability”, *Harvard Human Rights Journal*, Vol. 15, 2002, p. 206.

<sup>886</sup> The report of the ILA Study Group on the Responsibility of International Organizations, Sofia Conference 2012, *International Law Association*, Part Two; Daniel D. Bradlow and Andria Naudé Fourie, “The Evolution of Operational Policies and procedures at International Financial Institutions: Normative Significance and Enforcement Potential”, p. 5.

authorizes exceptions.<sup>887</sup> Furthermore, these Operational Policies & Procedures try to raise the transparency in Multilateral Development Banks through increased access to different documents related to various sessions held by different organs of these Banks.

As to the nature of these norms the opinions are widely apart. Opponents of the international legal nature of these norms argue that these policies and procedures require unilateral promulgation by the Multilateral Development Bank in order to obtain the character of international legal obligation:

“An MDB’s operational policies and procedures serve the purpose of internal administration with a view to increasing the efficiency, effectiveness, and accountability of operations in member countries. As such, they cannot be considered part of international law unless an MDB has voluntarily assumed such obligations within international agreements.”<sup>888</sup>

In the same spirit, some scholars consider the Operational Policies & Procedures as part of the self-contained regime of the international institution, thus giving it the discretion to modify its provisions without due regard to international law and independently from the rules of this legal order.<sup>889</sup>

In contrast, some scholars defend the opposite position by taking recourse to the approaches taken by the Bank which may have consequences for the interpretation of Operational Policies & Procedures. By applying analogy to the position defended by Gowlland Gualtieri, in the context of international environmental law, whenever the “Bank states that it aims to conduct its operations in accordance with international law standards, internal policies and procedures must be understood as aiming to uphold international law standards found in customary international law and treaty law, general principles of international law and certain non-binding instruments.”<sup>890</sup> In addition, this shows a major process of how Operational Policies & Procedures may harden through time. Arguably, he observes that such process makes a bridge between the rules of international law and the IAM – in the case under discussion the Inspection Panel of the World Bank. In other words, this explains how international legal rules become relevant for Independent Accountability Mechanisms such as the Inspection Panel and can make their way into accountability mechanisms of IOs.

The interpretation of these Operational Policies & Procedures in practice can avoid misunderstandings by implementation. Interpretation of Operational Policies & Procedures by Independent Accountability Mechanisms adds to their usefulness, even as soft law rules. Positive point about the Operational Policies &

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<sup>887</sup> *Ibid.*

<sup>888</sup> Wouters, Jan/Ryngaert, Cedric, “Good Governance: Lessons from International Organizations”, *Institute for International Law, Working Paper No. 54 – May 2004, K.U. Leuven, Faculty of Law*, p.19.

<sup>889</sup> *Ibid.*

<sup>890</sup> Gowlland Gualtieri, A., “The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel”, *BYBIL*, Vol. 72, 2002, pp. 213–253, at pp. 245–246.

Procedures is their dynamism, partly owed to the existence of Inspection Panels, which may, if they use some creativity ‘contribute to the development of the rules and laws applicable to the supervised international organization’, in spite of all criticism that may, rightly, be reflected with respect to their corrective functions. In addition, it has been argued that Independent Accountability Mechanisms have contributed to the hardening of these soft norms, through the substantive and procedural development of the concept.<sup>891</sup> Nevertheless, the highest degree of hardship these Operational Policies & Procedures may achieve seems to be the level where they become part of internal law of the IO. Assume that the Operational Policies & Procedures make it to this stage with success, the fight for gaining recognition as rule of international law would still be far from over for them. Only this would be the beginning of a new struggle for these norms, namely, that of being part of international law or not. Moreover, it is worth mentioning that these Operational Policies & Procedures are two tiered. One upper tier that is binding and the lower tier that is not binding. Multilateral development banks’ staff is given discretion to deviate from this lower tier Operational Policies & Procedures.<sup>892</sup> There is a point that should be considered in this regard. These Operational Policies & Procedures are adopted by an internal organ of the Multilateral Development Banks, for example the Bank’s Board of Executive Directors, or its senior management.<sup>893</sup> Thus it is clear that these Operational Policies & Procedures are not adopted as an agreement between States and based on their consent. However, these Operational Policies & Procedures are, in principle, mandatory for the Bank.<sup>894</sup> Operational Policies & Procedures that are incorporated in the agreement between the Bank and the borrower have a clearer status as legal obligations. Under the Operational Policies & Procedures, there is also another kind of norms, known as Operational Standards. As to their nature it has been stated that “Operational Standards comprise of Operational Policies that are binding and Bank Procedures and Operational Memoranda that have recommending nature.”<sup>895</sup>

A fact that has been proved in practice is that, irrelevant from their nature, these Operational Policies & Procedures at least affect the operations of Multilateral Development Banks. In other words, even if these Operational Policies & Procedures do not have legal character *per se*, and cannot be considered as obligations under international law automatically, these latter bodies have the competence to review the compliance with these Operational Policies & Procedures of

<sup>891</sup> The report of the ILA Study Group on the Responsibility of International Organizations, *op. cit.*, p. 11–17.

<sup>892</sup> *Ibid.*, p. 7.

<sup>893</sup> *Ibid.*

<sup>894</sup> Wouters, Jan/Ryngaert, Cedric, “Good Governance: Lessons from International Organizations”, *Institute for International Law, Working Paper No. 54 – May 2004, K.U. Leuven, Faculty of Law*, p. 19.

<sup>895</sup> Janik, Cornelia, *Die Bindung Internationaler Organisationen an Internationale Menschenrechtsstandards*, Mohr Siebeck, *Jus Internationale et Europaeum* 66, 2012, p. 274.

the Multilateral Development Banks in their activities, thus opening a channel for abiding the Multilateral Development Banks to certain norms and rules that are equipped with compliance and accountability mechanisms.

The question that may be raised here is whether these Operational Policies & Procedures can fill the gap that exists with regard to the primary rules binding on IOs and their international obligations. If the answer is in the negative, then it can be argued that self-regulation tendency could have shrinking, thus negative effect on the scope of application of international legal responsibility of IOs. To answer this question, it must be examined to what extent these Operational Policies & Procedures reflect the different international obligations that are already binding on States. In the cases in which these Operational Policies & Procedures reflect an existing, binding international obligation, it could be argued that these norms could contribute to the *opinio juris* element of the corresponding customary rule for the IO that has adopted them. In addition, it is worth being noted that the informal procedure of the adoption of the Operational Policies & Procedures has undergone different stages of evolution. At present more and more stakeholders are involved in the formation of these internal laws.<sup>896</sup>

Stakeholder participation has also raised with respect to Operational Policies & Procedures reviews. The question that comes to mind with regard to Operational Policies & Procedures and that would be the most relevant with regard to our research work is to what extent these Operational Policies & Procedures enjoy binding force on Multilateral Development Banks. To what extent are the Multilateral Development Banks obligated to behave according to these Operational Policies & Procedures and keep their behavior in accordance with them? It seems that at most these Operational Policies & Procedures would provide means for non-legal accountability of Multilateral Development Banks – corresponding to the first level of accountability according to ILA classification. Moreover, a major criticism reflected with respect to Operational Policies & Procedures, in spite of all their virtues, is the lack of internal sanctions in case of violations by the IO, from which it is expected that it respects these policies and procedures. Given their nature, it would be necessary to ask whether these Operational Policies & Procedures have the potential to fill the gap that exists with regard to the primary obligations binding on IOs. There would be two possibilities for these norms to appear as primary rules binding on IOs. The first is through the transformation of these rules into international legal rules, namely, the hardening process. The second possibility is that these normative processes are recognized as a new source of international law. Let us start with the discussion of the latter alternative. Unilateral acts, statements and declarations containing obligations on the part of states have already been firmly recognized, prominently by the ICJ in the *Nuclear Test*

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<sup>896</sup> The report of the ILA Study Group on the Responsibility of International Organizations, *op.cit.*, p. 7.

*Cases* in 1974,<sup>897</sup> as a source of international legal rights and obligations for states under that legal order in general.<sup>898</sup> To the extent that we can consider these Operational Policies & Procedures as unilateral acts, these norms could amount to international obligations for the purpose of international responsibility.

As to the first alternative, the question that may be raised in connection with these norms and regulations is whether these norms have the potential to undergo a transformation into international customary rules. If we can conclude that the adoption of these regulation by the IO has been accompanied by the belief in a certain degree of duty to respect them – which is arguably the case with regard to certain categories of Operational Policies & Procedures – and further, that the degree of duty to respect these norms reaches the threshold of *opinio juris*, then it can be argued that this element, in addition to the behavior in accordance with those norms, could substantiate the existence of customary obligation for the IO.<sup>899</sup> Consequently, strengthening the normative significance and enforcement potential of the Operational Policies & Procedures, would be equal and lead to the hardening of these norms.

It has been observed that the reason is not clear why the Operational Policies relating to human rights do not refer to relevant human rights treaties and international legal documents, whereas in Operational Policies dealing with the environmental protection such reference is present.<sup>900</sup> The reason may lie in the fact that the international environmental legal instruments are actually of soft law nature and therefore would not build a further constraint for the Bank, whereas international human rights legal documents are much further developed than that and enjoy a stronger binding force.

For the purpose of examining the relationship between Operational Policies and ARIIO, the case of Bank Operational Policy 4.12 (OP 4.12) has been chosen and will be focused on and discussed in a more closely manner. The OP number 4.12 of the Bank on Involuntary Resettlement requires a resettlement plan or a resettlement policy framework for projects that lead to displacement for the populations affected by forced displacement and involuntary resettlement from active Bank projects. For any complaints regarding inconformity of the Bank actions and measures with that OP, the Inspection Panel as the competent organ has the authority to investigate and review the matter. It is clear that the consequences of the violation of the Policies remain within the internal normative regime of the IO

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<sup>897</sup> *Nuclear Test Case (New Zealand and Australia v. France, ICJ)*, Judgment of 20 December 1974, paragraphs 43 et seq.

<sup>898</sup> Müller, Benito/Geldhof, Wouter/Ruys, Tom, “Unilateral Declarations: The Missing Legal Link in the Bali Action Plan”, May 2010, pp. 22–23. Available on: <https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/ecbiUDsfinal.pdf> (last visited on 05.04.2022).

<sup>899</sup> Janik, Cornelia, *Die Bindung internationaler Organisationen an Internationale Menschenrechtsstandards*, Mohr Siebeck, Jus Internationale et Europaeum 66, 2012, p. 275, fn. 511.

<sup>900</sup> Janik, Cornelia, *Die Bindung internationaler Organisationen an Internationale Menschenrechtsstandards*, Mohr Siebeck, Jus Internationale et Europaeum 66, 2012, p. 278.

– in the present case the World Bank. Nevertheless, a similar requirement exists as a human right under international law in the form of the prohibition of forced displacement. At the same time, international humanitarian law (IHL) also prohibits the forced displacement of the civilian populations at war time and in international conflicts.<sup>901</sup> Interesting point in this connection would be to inquire whether the Bank could be held internationally responsible for breaching the Policy. Another question that could be asked here is whether the OPs with human rights protection content are adopted in the implementation of human rights obligations – or convictions as to being bound by those obligations – or as a kind of replacement and alternative for such rules and therefrom derived obligations? If the second case is valid – as some proposals with regard to the review of OPs suggest<sup>902</sup> – then it could be argued that the OPs are, in a way, means of opting out from human rights obligations, specifically, and international obligations under international law, generally by IOs that adopt the approach of self-regulation. Of course, in that situation from the ARIO perspective a tendency will not be positive for the expansion of the scope of applicability of ARIO provisions.

Importance of analysis presented here is mostly justified by the fact that many other IOs also engage in comparable normative activities of soft law creation which may also be referred to as non-treaty rule making.<sup>903</sup> What is special about the World Bank OPs that justifies their choice as our examination subject here has been that the World Bank is the leading international institution in terms of self-regulation, especially also in certain domains like access to information policy.

What finally make the accountability mechanisms of Multilateral Development Banks different from the system of international legal responsibility, is the requirement of “material adverse effect” and the establishment of a causal link between material damage and the Multilateral Development Bank’s noncompliance with its policies and procedures, which is in fact a fundamental departure from the law of international responsibility. In other words, the non-compliance with the policies and procedures may be pursued in case it leads to material adverse effects, thus raising the liability of the Multilateral Development Bank without having the potential to raise its international responsibility. In addition, it is undeniable that the OP delivers a framework that especially in the course of implementation and through review processes contributes to the specification and crystallization of standards and norms related to Bank – or any other international financial institution – projects and activities.

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<sup>901</sup> Jacques, Mélanie, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law*, Cambridge University Press, 2012, pp. 19–49.

<sup>902</sup> Bugalski, Natalie and Pred, David, “Reforming the World Bank Policy on Involuntary Resettlement”, *Submission to the World Bank Safeguards Review*, April 2013, p. 6, para. 5. Available on: <https://www.inclusivedevelopment.net/> (last visited on 19.07.2015).

<sup>903</sup> For a comprehensive enumeration see Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, 2009, Vol. 6, pp. 319–358, at p. 350.

## 2) World Bank Access to Information Policy

As the access to information policy of the Bank and the measures taken in this connection by different organs of the international financial institutions belonging to this group has already been focused on earlier in the context of the accountability of international financial institutions, it might be appropriate also to use it as the prominent case in our analysis of the self-regulation trend in the practice of the World Bank. Another reason for that choice has been that the necessity and demands for more transparency and participation of the different stakeholders in the decision-making processes of the Bank have been behind the adoption of Access to Information Policy.<sup>904</sup> The former principles of transparency and participation are at the core of the generally accepted conception of GAL.

Considering the definition and description delivered above on the concept of global administrative law, it can arguably be observed that the World Bank access to information policy could form part of GAL, as the principles this Policy incorporates and intends to safeguard fall under the category of norms and principles understood as belonging to the emerging field of GAL. That has been another reason for the focus on this OP in the present subsection. The answer to the question whether these norms could, in one way or another, form part of the body of international law will be the key to finding the answer to the subsequent question to be examined, namely, whether these regulations could be relevant for the purpose of establishing the international legal responsibility of financial institutions that have adopted these norms. Conclusions drawn from such analysis can, in principle, be generalized to other IOs adopting comparable norms. As self-regulation is becoming, for different reasons, an increasing trend in the practice of IOs, its impact and bearing on the scope of the applicability of international legal responsibility, as the secondary rule system applicable by default, is hard to ignore. Should the result of the analysis be an affirmative response to the appartenance of these norms to the international legal system, it may then at the same time serve as a response to the criticism brought with respect to the lacuna in primary legal rules applicable on IOs.

Therefore, the precise questions of our analysis in this section would be the following: whether these norms and provisions can be considered a) legal obligations; b) if the answer is positive, do these obligations belong to the corpus of international law and to what extent is the Bank obligated to respect these norms adopted by it?; c) in case of violation of these norms, following the review by competent mechanisms, is there the possibility of triggering international responsibility mechanism and ARIO provisions as the final and last resort?

First of all, with respect to the nature of these commitments and provisions as legal obligations or else, there is at least no doubt that these provisions form part

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<sup>904</sup> Birdsall, Nancy, "The World Bank: Toward a Global Club", in Colin I. Bradford JR. and Johannes F. Linn (eds.), *Global Governance Reform. Breaking the Stalemate*, Brookings Institution Press, Washington D. C., 2007, pp. 50–59.

of the internal normative system of the IO. However, from the title and the expressions used in the preamble of the paragraphs, specifically the word “policy statement”, it may be deduced that the Bank does not intend to undertake any kind or form of legal obligation with regard to respecting the provisions of the policy statement in question. On the other hand, the access to information touches directly a widely recognized human right, namely the right to information, while at the same time it may also cause injuries to certain entities when information relating to them is disclosed. Thus, the way the Bank treats this issue may have grave consequences which can hardly be overlooked. Therefore, general question in this regard is whether policy statement of IOs may in certain cases be considered as legally binding or entailing certain legal obligations for IOs adopting these statements. With regard to states, to the extent that the policy statements could be considered as unilateral acts and statements, there remains no doubt as to their international legal nature. At any rate, official pronouncements by states that undertake to state a rule of international law could be evidence of customary law – in case these statements imply both elements of international custom, namely, general and consistent practice and an explicit description of the state’s sense of legal obligation.<sup>905</sup>

Consequently, concerning the other important question for our research as to whether these provisions form part of the body of international law, through different channels there is the possibility that these norms and regulations be considered part of international law. First is through the customary rule, provided that these OPs satisfy the above mentioned criteria. To put it differently, the OP of IOs should fulfil both elements of the definition of a customary rule. The OP should represent the general and consistent practice of the IO and an explicit description of the IO’s sense of legal obligation.

Another important aspect that may be relevant in this connection is with regard to the appeal procedure provided for in the context of the access to information policy, and whether this mechanism in its entirety may be considered as *lex specialis*, thus excluding the application of ARIIO to an assumed breach of the right to information. Appeal procedure may be invoked by a requestor who claims that the Bank has violated this policy by improperly or unreasonably restricting access to information that it would normally disclose under the policy. At the first glance, such provisions may seem to have the capacity to be *lex specialis*, replacing by default applicable general ARIIO secondary rules. However, as there is no real full reparation remedy provided for in the access to information policy statement paragraph F (36) adopted in its last amended version dating July 1, 2013, it seems hard to argue that the appeal procedure may exclude the application of ARIIO

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<sup>905</sup> Ferreira, André D. R./Carvalho, Cristieli/Graeff Machry, Fernanda/Barreto Vianna Rigon, Pedro, “Formation and Evidence of Customary International Law”, *UFRGS Model United Nations Journal*, Vol. 1, 2013, pp. 182–201, at p. 186 et seq. Available on: <https://www.coursehero.com/file/15096825/Formation-and-Evidence-of-Customary-International-Law/> (last visited on 05.04.2022).



completely. Paragraph F (36) expressly limits the remedy available to the requester to receiving the information requested and does not make reparation for the damages sustained as a result of improper or unreasonable denial of access to information in violation of the policy statement. It is clear that from the point of view of the Bank these measures satisfy any possible necessary measures it should have taken in order to implement the obligations arising from the right to information for the IOs.

### 3) IFC Sustainability Framework

The IFC Sustainability Framework is comprised of Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, which entail commitments for IFC and its clients to these ideals set as the main goals of the framework. The substance of these standards again overlaps with the content of the GAL concept, the reason for which we will discuss this specific Policy of IFC in this subsection.

Once again with regard to these standards and provisions the same questions relevant for our analysis in this section can be raised as to whether these norms may be considered as legal rules or entailing some form of legal obligations. Subsequently, it may be questioned whether the nature of these norms permit it, in one way or another, that we consider these standards as part of the international legal system, and thus, to become relevant as an international obligation for the purpose of the establishment of international legal responsibility, to be raised in case these norms are not respected. In other words, the question is would the IFC incur international legal responsibility failing to respect these norms and standards.

In trying to find an answer to the second question, it seems that the same line of argument followed earlier to be appropriate. In order that these standards and norms be considered part of international law, either they should emerge in one of the traditional sources of international law – a possibility could be that the internal law of the IO, of which these standards form part, be regarded as part of international law – or constitute *per se* a new source of international law.

On the one hand, with respect to access to information, the policy statement adopted by IFC in its introduction refers to the principal objectives which are mainly the enhancement of transparency about its activities to achieve more engagement, improve development effectiveness, and promote good governance. On the other hand, it is increasingly recognized that, since universally recognized human rights are part of general public international law, they are binding upon international organizations as on any other subject of international law.<sup>906</sup> Since the human rights obligations imposed on international organizations are grounded

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<sup>906</sup> De Schutter, Olivier, “Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Oxford-Portland, 2010, p. 104.

in general international law rather than in human rights treaties, they are less far-reaching than those imposed on the States to which these international organizations owe their existence.<sup>907</sup> Two scenarios could be imagined: the first one is the case when IFC breaches these standards but such breach is not factually followed by a breach of an international obligation, for instance a human right; the second scenario relates to the situation when the disrespect by the IFC of these standards is factually followed by a breach of one of its established international obligations, for example a human rights obligation. Without any doubt, in the second situation, the international responsibility of the IFC would be raised and ARIO articles are applicable. Nevertheless, a noteworthy point here is that often the activities financed by the international financial institutions are performed by third parties – either national states or domestic or international private companies. By taking recourse to the argument that financial aid is not identical with aid or assistance or direction and control in the commission of wrongful acts, the IFIs seek to escape international responsibility.

It is not necessary to elaborate on the fact and also thereupon based, well-known argument that by not respecting its formal commitments, the minimum price it will definitely pay is the diminution of the institution's credibility and with it all the other consequences of the decrease of public confidence in a financial institution. In the framework of international organizations, generally, the emphasis on human rights functions instrumentally towards shoring up legitimacy.<sup>908</sup>

#### 4) Jurisprudence of the Independent Accountability Mechanisms – A subsidiary means for the determination of the Obligations of the IOs?

Actually the word jurisprudence refers to the compliance and implementation reviews performed by these bodies. It is true that part of the OPs and standards adopted by IOs, especially IFIs, in the framework of self-regulation programs and policies, are aimed at preventing and avoiding violations of international legal rules, such as human rights obligations or international environmental rules. Consequently, the implementation and supervision mechanisms established in order to review the conformity of the IOs and IFI institutions with these standards, are mainly destined to strengthen the realization of preventional objective of these policies and standards. Nonetheless, the role these mechanisms can play in the crystallization and specification of international rules – upon which the self-regulated standards and norms are modelled – can not and should not be overlooked. Even though some of these standards and OP&Ps do never find the chance to be hardened or metamorphosed into international legal obligations,

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<sup>907</sup> *Ibid.*, p. 76.

<sup>908</sup> Sandvik, Kristin, “On the Social Life of International Organizations: Framing Accountability in Refugee Resettlement”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, Intersentia, Antwerp-Oxford-Portland, 2010, p. 303.

their interpretation by review mechanisms may be helpful to the clarification of international law.

Thus, the main concern should not necessarily be whether these norms and standards form part of international law, or how we can ensure that such transformation is achieved. But rather the concern should be how we can best benefit from the synergy of the interactions between these various normative levels and standard networks.

#### dd) ‘Trade Plus’ Obligations of the WTO

Trade plus obligations of WTO belong to the vaster picture of the so-called “trade plus” issues, which have been gradually penetrating the trade law discourses. The main preoccupations of these trade plus issues are labour, environmental and a wide selection of human rights concerns.<sup>909</sup> Such obligations are potentially exercisable against WTO in international law.<sup>910</sup> It would be interesting to ask whether ARIO articles would then be applicable in cases of inconformity of WTO Dispute Settlement Body recommendations and decisions with these standards. The point at which the mechanism of responsibility will be triggered – namely, shift from accountability to responsibility – depends on the interplay between and the out-weighing of the disadvantages by the benefits and advantages of informal rule-making.<sup>911</sup> It can also be argued that it is hardly defensible that obligations similar to WTO-plus obligations, stringently binding for members of the WTO,<sup>912</sup> are non-existent for the IO itself.

#### b) Treaty Obligations

Treaties still remain one of the main, if not the main, sources of international legal rules and obligations for the subjects of international law, despite opposite, and sometimes unofficial rule-making tendencies.<sup>913</sup> Nobody would anymore deny the reality that the IOs intrinsically possess the capacity to conclude treaties with other subjects of international law, or to enter into the already existing conventions. For

<sup>909</sup> Gal-Or, Noemi, “Global Trade Law: How do you analyze the present state of Global Trade Law?”, *Academic Foresights*, No. 7, January-April 2013, p. 2. Available on [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2257362](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257362) (last visited on 05.04.2022).

<sup>910</sup> Gal-Or, Noemi and Ryngaert, Cedric, “From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): The Responsibility of the WTO and the UN”, *German Law Journal*, No. 5, 2012, p. 520.

<sup>911</sup> Gal-Or, Noemi, “Global Trade Law: How do you analyze the present state of Global Trade Law?”, *op.cit.*, p. 5.

<sup>912</sup> Valles, Cherise M., “Appellate Body Report in China: Rare Earths-Addressing Violations of WTO-Plus Obligations”, *Global Trade and Customs Journal*, Vol. 10, Issue 4, 2015, pp. 130–135.

<sup>913</sup> Tomuschat, C., “International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law”, 281 *Recueil Des Cours* 10, 25, 1999, p. 306; Tomuschat, C., “Obligations Arising for States Without or Against Their Will”, 241 *Recueil Des Cours* 4, 199, 1993.

that to happen, of course, the other axiomatic condition is that the international legal instrument in question provides for this possibility, or at least does not explicitly rule out or ban the accession of IOs to it. Nonetheless, not all the IOs are bearer of many international duties or obligations, as very few treaties in fact impose duties directly on non-state actors.<sup>914</sup> There is less reason for concern with regard to foundational values of international community, as the conventional rules embodying such values are binding on IOs via other sources of international law, namely, international custom and general principles of law. In this regard the EU is almost an exception because this IO has concluded many treaties, a consequence of which is the emergence of the mixed agreements phenomenon, to which the IO and its members are at the same time parties. It should also not be forgotten that the exceptional situation of EU in terms of its plenitude of conventional engagements is a consequence of the principle of specialty, and thus, derives from its large scope of competences conferred to it by the founding member states. From a strictly legal and technical point of view, in many international instruments, treaties and conventions, it has simply not been anticipated that the IOs may become parties.<sup>915</sup> However, in some treaties certain provisions provide for their application to the officials of the public international organizations.<sup>916</sup> However, such practices and instances are far from being considered a commonplace. Treaty is a traditional instrument of creation of rules and obligations under international law, thus, understandably in the first place used by and open to States, the pioneer subjects of international legal system. As Paasivirta has put it:

“International Organizations are subject to fewer substantive treaty obligations than their Member States.”<sup>917</sup>

aa) IOs are absent from most of the norm-creating multilateral treaties

Admittedly, from a quantitative perspective and for practical considerations, the desirability of involving all, or a majority, of IOs at the negotiations and concluding conference of a treaty is not very high. However, there is always the more practical and easier alternative of these IOs acceding to the concluded treaty subsequently, provided of course that the treaty in question allows the accession by IOs. Sometimes, the features of IOs require a different set of rules and regulations tailor-made for these subjects of international law. Consideration of characteristics

<sup>914</sup> Ryngaert, Cedric, “Imposing International Duties on Non-State Actors and the Legitimacy of International Law”, *Leuven Centre for Global Governance Studies*, Working Paper No. 42, March 2010, p. 10.

<sup>915</sup> One example is the United Nations Convention Against Corruption (UNCAC), article 67.

<sup>916</sup> Trebilcock, Anne, “Implications of the UN Convention against Corruption for International Organizations: Oversight, Due Process, and Immunities Issues”, *International Organizations Law Review*, Vol. 6, 2009, pp. 513–540, at pp. 517–518.

<sup>917</sup> Paasivirta, Esa, “Responsibility of a Member State of an International Organization: Where will it End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations”, *IOLR*, Vol. 7, No. 1, 2010, pp. 49–61, at p. 60.

of IOs has, for instance, given rise to a separate treaty on the law of the treaties destined to be applicable on IOs.

It can not be contested that general international law, manifested in two main sources of general principles of law and customary international law, is directly applicable to IOs, without the need for incorporation in the internal law of the IO – as is necessary in some domestic legal systems.<sup>918</sup> In this context, it is important to refer, once again, to the widely known statement of the ICJ concerning the applicable law on the activities of the IOs. The International Court of Justice has identified the sources of obligations of international organizations as follows: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”<sup>919</sup> The conclusion that can be drawn with respect to the scope of international obligations of IOs is that those rules and obligations reflected in general or particular conventions, but not having obtained customary or general principles of law status, would not be applicable on IOs, as long as the IO is not a party to the convention in question.

Now back to the practice, one may ask how many of the international treaties concluded, specially, among multilateral instruments containing major and elaborated international legal obligations, provide for the possibility of accession of IOs to those treaties? The answer is unfortunately discouraging. The result is that the scope of the international conventional obligations of IOs is far behind and less expanded than the scope of international treaty obligations of states. International human rights treaties have traditionally been open to accession and ratification only by states. This may, however, change rapidly in the years to come. Both the expansion of the competences transferred to IOs by States and the voluntary acceptance by these organizations of certain human rights obligations, to the extent that their activities may impact on human rights, make such a route at once more plausible and perhaps more desirable than a few years ago.<sup>920</sup> It is widely known that since international organizations are normally not parties to human rights instruments, they are not bound by human rights obligations as a matter of treaty law.<sup>921</sup> However, this does not prevent them from being subjected to those human

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<sup>918</sup> Schermers, Henry G. and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, *op. cit.*, p. 833, § 1335.

<sup>919</sup> *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, ICJ, *Advisory Opinion*, ICJ Rep. (1980), p. 73, at para. 37.

<sup>920</sup> De Schutter, Olivier, “Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 110.

<sup>921</sup> Reinisch, A., “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions”, *American Journal of International Law*, Vol. 95(4), 2001, p. 854.

rights rules which have attained the status of customary law or peremptory norms (*jus cogens*).<sup>922</sup> Indeed, as an option, Member States could press on international organizations to accede to human rights conventions (whenever possible), as in the case of the EU under the Lisbon Treaty.<sup>923</sup> The entry into force of the Lisbon Treaty has modified the existing legal scenario, as the Treaty provides a legal basis for the Union to accede to the European Convention of Human Rights.<sup>924</sup> Moreover, the accession of IOs to human rights treaties would put the international organizations under the scrutiny of the related international courts/supervisory bodies.<sup>925</sup> Thereby, not only the accountability of IOs would be promoted, but also the scope of applicability of international responsibility mechanisms would be broadened. This gains even more importance, as even though the subordination of IOs to international legal rules is clearer than that of states<sup>926</sup> – with regard to states, consent is more emphasized on as the basis of bindingness – the scope and content of international obligations of IOs suffers from ambiguity and incertitude. For the purpose of international responsibility, and in order that this final and ultimate accountability mechanism grows into a comprehensive remedy regime and eventually becomes more relevant – as it is conceived presently – and given the increasingly expansion of the domains of active presence of IOs, there is a great need to make more clear whether and by which rules the IOs are bound. Ambiguity as to the scope and content of the international obligations of IOs obstructs the international responsibility from being initiated, and thus, depriving third parties from an already existing and conceived remedial regime.

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<sup>922</sup> Sands, P. and Klein, P., *Bowett's Law of International Institutions*, 5<sup>th</sup> ed., Sweet & Maxwell, London, 2001, p. 458; Orakhelashvili, A., “The Impact of peremptory norms on the interpretation and application of United Nations Security Council Resolutions”, *European Journal of International Law*, Vol. 16(1), 2005, p. 60.

<sup>923</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 212.

<sup>924</sup> Art 1(8) of the Lisbon Treaty.

<sup>925</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 212.

<sup>926</sup> Schermers, Henry G. and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, *op. cit.*, p. 995, § 1574.

## bb) Obligations Under the Charter of the UN

Principles of human rights and fundamental freedoms written in the Charter of the United Nations,<sup>927</sup> together with all the other international obligations aiming at ensuring peace and security at the international level,<sup>928</sup> justify the necessity of respecting the Charter, even by non-members of the UN. Of course, this latter statement provided for in article 2(6), even though explicitly referring to non-member states, should by way of analogy be also extended to IOs. The UN members should not be allowed to escape, opt out of or circumvent their Charter obligations by means of establishing IOs. This contention is in the same spirit and in line with the argument of the European Court of Human Rights at the regional level in its judgment in *Waite and Kennedy* case.<sup>929</sup> As *Amerasinghe* has rightly noted, the principles applicable to IOs is not confined to the rules of the IO and its internal law, which is made up of constitutional texts and surrounding (secondary) law, but can also emanate from other sources of international law.<sup>930</sup> As to the question whether the UN is bound by the Charter, there is not any necessity for elaboration, as the Charter is already binding for the UN as its founding document and internal law of the organization, and more importantly prevailing also according to article 103, the supremacy clause of the Charter, over other international obligations of the UN. This assertion is supported by the contention that “the Charter is the supporting frame of all international law”.<sup>931</sup> In any event, the Legal Council of the UN in an internal document issued on 12 October 2009 has pointed out that the UN is bound to human rights, international humanitarian law and refugee law directly through the Organization’s obligations from Charter to uphold, promote and to encourage respect for these rules.<sup>932</sup> Some authors by reading Art. 1(3) in conjunction with Articles 55 and 56 are of the opinion that the Charter has created an obligation for the UN to promote increased respect for human rights.<sup>933</sup>

According to the Charter of the UN international organizations are not given the possibility to accede to the founding instrument of the organization and as a result cannot become full members of the United Nations under the same condi-

<sup>927</sup> Cohen, Benjamin V., “Human Rights under the United Nations Charter”, *Law and Contemporary Problems*, Vol. 14, pp. 430–437, at p. 430.

<sup>928</sup> As some examples: Peaceful settlement of disputes article 2(3), prohibition of threat or use of force in an inconsistent manner with the purposes of the UN art. 2(4), etc.

<sup>929</sup> Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 410, para. 67.

<sup>930</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at p. 17.

<sup>931</sup> Fassbender, B., “The United Nations Charter as Constitution of the International Community”, *Columbia Journal of Transnational Law*, Vol. 36, 1997, pp. 529–619, at p. 585–586.

<sup>932</sup> Draft articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 37, para. 6 (last visited on 08.04.2022).

<sup>933</sup> White, N. D., *The Law of International Organizations*, Manchester University Press, Manchester and New York, 1996, p. 225.

tions that the States enjoy in the UN, unless there is, of course, an amendment of the Charter to that effect. The reason why the Charter of the UN has not provided for such possibility is that the number and importance of IOs at the time of the drafting of Charter were not the same as they are today. In addition to that, the IOs did not possess the powers or financial and other facilities that certain IOs now enjoy. At that time the IOs were not involved in international relations as they are today and the number of IOs was by far much less than the number of these entities at the moment. The result was that there were simply not many IOs who would practically satisfy the conditions of becoming a member of the UN. The very proliferation of IOs, as one of the main phenomena of the twentieth century, has practically started with the establishment of the UN. Therefore, the provisions have not been made to this effect. The first issue that would be raised is whether in this situation the obligations arising out of the Charter of the UN would be applicable and binding on IOs and if the answer is in affirmative, what would be the legal basis of this applicability and the bindingness. According to some authors, there are certain signs in the Charter of the UN, namely articles 2(6) and article 103, leading us to believe that the Charter could be considered the constitution of the world community.<sup>934</sup> Thus, the exclusion of IOs from the scope of its obligations would open the door and pave the way for the misuses by the members of these IOs which are at the same time members of the UN.

Although the IOs are denied full membership in the UN, there is the so-called “United Nations System of Organizations”.<sup>935</sup> Certain categories of IOs, prominently specialized agencies of the UN, although independent from it, in terms of their international legal personality, by way of their agreements with the UN, are usually bound to all or some of the obligations deriving from the Charter.

The relevance of Charter obligations for IOs from the point of view of our research question is based especially on two aspects. Firstly, the question whether a violation of Charter obligations by an IO – provision of article 2(6) – entails international responsibility of violating IO? Secondly, whether the prevalence provided for in article 103 would constitute a circumstance precluding wrongfulness for an IO that violates one of its international obligations conflicting with a Charter obligation in order to discharge the latter obligation? From another perspective, a similar question that may be raised here with regard to article 67 ARIO<sup>936</sup> is whether a consequence of this article dealing primarily with the prevailing effect of obligations under the Charter would be the bindingness of the Charter provisions even for those IOs which are not parties to the Charter and thus not mem-

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<sup>934</sup> Fassbender, B., “The United Nations Charter as Constitution of the International Community”, *Columbia Journal of Transnational Law*, Vol. 36, 1997, pp. 529–619, at p. 594.

<sup>935</sup> For a comprehensive list and description of all the different IOs belonging to this system See <https://www.ungm.org/Public/KnowledgeCentre/UNOrganizations> (last visited on 05.04.2022).

<sup>936</sup> The saving clause embodied in Article 67 of ARIO reads as follows: “These draft articles are without prejudice to the Charter of the United Nations.”



bers of the UN. This would of course have impacts on the question of international responsibility of IOs as well.

In answering the first question, it must previously be made clear whether article 2(6) entails any international legal obligation on IOs – non members of the UN – to respect the Charter. Commentary to article 67 of the ARIIO leaves this question open, while only stating that the bindingness of Charter provisions – in that case article 103 – for other IOs may be on a different basis than for the states members of the UN. But it does neither specify nor clarify which legal bases could exist for applicability of Charter obligations on IOs. The assertion that article 103 of the Charter prevails over the constituent instruments of the international organizations,<sup>937</sup> first and foremost, implies such prevalence for the member states of the IOs parties to the founding instruments of these IOs as well as the UN Charter. However, the conclusion is drawn in commentary to article 67 that the Charter obligations have prevailing effects also with regard to IOs.<sup>938</sup> As to the second question, ARIIO has not enumerated conduct giving effect to article 103 of the Charter as a circumstance precluding wrongfulness. In this relation, only compliance with peremptory norms of international law is explicitly recognized by article 26 of ARIIO as such circumstance. It should be kept in mind that the content of some of jus cogens norms is written into and can already be found in certain Charter provisions. As a result, compliance with those Charter provisions, embodying peremptory norms, as well as decisions of organs of the UN aiming at upholding those norms precludes the wrongfulness of a conduct. As to the question whether an indirect effect of article 67 would be the bindingness of Charter for non parties IOs, it seems that this article *per se* cannot be the basis of IOs being bound by the Charter and UN law, beyond the related secondary rules provisions or decisions.

cc) Treaty obligations with parallel customary international law status

It is obvious that those treaty rules that are not binding on IOs as such, which have at the same time obtained customary law status, would be, in principle, binding on those IOs on the basis of their customary character. In other words, the problem of the lack of possibility for IOs to become the members of the international conventions and documents can be to some extent and partly mitigated with regard to those international obligations that have reached the international customary rule status. Some scholars are of the opinion that with regard to certain category of international treaties, namely, substantive provisions of general law-making treaties the IOs have not the choice to take recourse to persistent objector

<sup>937</sup> Lauwaars, R. H., “The Interrelationship between United Nations Law and the Law of Other International Organizations”, *Michigan Law Review*, Vol. 82, 1983–84, p. 1604 ff.

<sup>938</sup> For a discussion of the effects of the article 103 of the Charter on the other international obligations see White, N. D., “The Ties that bind: The EU, The UN and International Law”, *Netherlands Yearbook of International Law*, Vol. XXXVII, 2006, pp. 57–108, at pp. 85–90.

– with the intention to abstain from applying those rules.<sup>939</sup> It appears that the binding force of such provisions is rather based on their universal law and general principle of law character than customary international law. To put it differently, these kinds of treaties embody general principles of law that are automatically binding on IOs without the necessity of ascertaining the consent of the IOs in question to be bound by those principles and rules. There remains, however, the possibility that the provisions of these treaty rules become binding on IOs through the means of customary international law. The opposite situation would not automatically create binding force for the treaty rules and provisions embodying already existing customary international rules for IOs. But before making any conclusions in this regard it should first be made clear whether and to what extent the IOs are bound by the international customary law. For the answer to this question, the next section will deal with the international customary obligations of IOs and especially certain aspects which merit closer examination.

*c) International Obligations under Customary International Law*

There is little doubt that IOs are bound by the rules of general customary international law and one would face very much difficulty trying to argue that IOs are exempt from the scope of applicability of general customary international law.<sup>940</sup> However, the scope of the obligations of IOs under customary international law, one of the main sources of obligations for the subjects of international law which is codified in article 38(1)(b) of the Statute of the ICJ, is far from being clear.<sup>941</sup> This is, mainly, due to the functional character of the competences of the IOs, best explained by the principle of specialty which implies the non-absolute character of the competences of IOs. As a result, the duties and obligations of IOs should also be in accordance with this subsidiary role, sometimes complementary to that of the states. A prominent example is with respect to protection and promotion of human rights by IOs in situations where these latter actors undertake transitory international administration of a territory, in which case depending on their mandates the scope of their duties may vary significantly with respect to each

<sup>939</sup> Schermers, Henry G. and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, *op. cit.*, p. 999, § 1577.

<sup>940</sup> Maus, Sylvia, “Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?”, in H.J., Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin, Heidelberg, 2011, pp. 103–128, at p. 116.

<sup>941</sup> Mégret, F. and Hoffmann, F., “The UN as a Human Rights Violator: Some Reflections on the United Nations Changing Human Rights Responsibilities”, *Human Rights Quarterly*, Vol. 25, 2003, pp. 314–342; Reinisch, A., “Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts”, *IOLR*, Vol. 7, No. 1, 2010, pp. 63–77, fn. 27.

mission.<sup>942</sup> For those who wish to compensate the ambiguity of the borderlines of and lacuna in the obligations of IOs in the treaty law by taking recourse to customary international law, the situation may be even more disappointing. As has been observed in the scholarship with regard to the customary obligations of IOs:

“It is often far from established which rules of customary international law apply to international organizations and in what way”.<sup>943</sup>

It is still uncertain to what extent international organizations are bound by customary law obligations such as human rights. This may for example cause problems with regard to paragraph (b) of Article 13 of the ARIO which against this background may not be conducive to holding international organizations responsible for aid and assistance in the internationally wrongful act of the State.<sup>944</sup> The absence of clarity as to the contours of customary international obligations of IOs has manifold reasons. The lack of practice – resulting from functional character of IOs – as one of the pillars of customary rules in international law, is a major factor. With regard to IOs, the lack of the existence of international courts having jurisdiction to proceed with the cases of IOs is also an indirect obstacle to the formation and determination of the customary rules applicable on IOs. The same situation existed with regard to States a hundred years ago, which had led to the situation where the writers on international law had to take the place of the judges and had to pronounce on whether there is an established custom or not.<sup>945</sup> In addition, any attempt to ascertain the scope and content of the international customary obligations of IOs cannot ignore the other fundamental constituent element of this source of international law, namely, the subjective element of *opinio juris* of IOs. According to the ICJ in its judgment in the *Continental Shelf case* between Libya and Malta: “... the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”.<sup>946</sup> It has been observed that with regard to international responsibility, customary international law is of great relevance and governs this field of the international law with regard to IOs.<sup>947</sup> It is of no surprise, because as it has been shown in the preceding sec-

<sup>942</sup> Maus, Sylvia, “Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?”, in H.J., Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin, Heidelberg, 2011, pp. 103–128, at pp. 116–118.

<sup>943</sup> Wood, Michael and Vicien-Milbburn, Maria, “Legal Responsibility of International Organizations in International Law”, *Summary of the International Law Discussion Group meeting held at Chatham House* on Thursday, 10 February 2011, p. 6.

<sup>944</sup> Reinisch, August, “Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts”, *International Organization Law Review*, Vol. 7, 2010, pp. 63–77, at p. 73.

<sup>945</sup> Oppenheim, L., “The Science of International Law – Its Task and Method”, *AJIL*, Vol. 2, 1908, pp. 313–356, at p. 315.

<sup>946</sup> *Continental Shelf case (Libya v. Malta)*, ICJ Rep. 1969, p. 13 at pp. 29–30 (para. 27).

<sup>947</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at pp. 19–20.

tion, the international treaty obligations of IOs are far less extensive than those of states.

Besides the important issues of the binding force of customary international law for IOs, and the scope and content of the obligations of IOs emanating from customary law, there is also the role of IOs in the formation of customary international law which deserves being focused on. It would be interesting to clarify whether and how the IOs could actively participate in the formation of international custom. Many different aspects could be discussed in relation to the custom creating conducts of IOs, either considered as practice or *opinio juris*, or even both. To what extent the actual practice of IOs may give effect to and provide for one of the necessary preconditions of the customary international law, namely the practice? Furthermore, an interesting evolution in this regard is the emerging customary international law of peace missions. Could it be a further evidence of customary rule building capacity by international organizations?

It seems that there should not be obstacles for the participation of IOs in the formation of customary international law. At least in the field where the IOs have power and function, it appears that their practice should be taken into account and is of relevance with respect to the formation of customary rules. What the ICJ had in mind is that the subjects of international law, by means of their practice and *opinio juris*, take part in the formation of customary rules in the international legal system. As IOs are also subjects of international law, thus these should logically be able to be involved in the formation of these rules. The consent may be seen as the *opinio juris*,<sup>948</sup> thus the resolutions of IOs may be considered as one of the forms of the manifestation of the consent of IOs and by this means the IOs may also provide one of the necessary constituent elements of international custom. The only question that may be raised is whether the resolution may be considered the consent of the IO or the member States. There is no doubt that a resolution is the result of the consent of the required number of member States of the IO.

Therefore, the following subsections seek to find an answer to the question whether and to what extent IOs by way of their *opinio juris* (1) and also their practice (2) participate in the formation of customary international law and also to what extent they are bound by these rules. It is of importance, as has been explained above, in many international major and important instruments of international law there is not a provision with regard to the accession of IOs to these documents. Therefore, the customary international law could to some extent fill this gap.

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<sup>948</sup> International Law Association, *Statement of the Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee*, London Conference, Committee on the formation of Customary (general) international law, 2000, p. 7.

In the international legal order there are examples of customary rules that has been derived and evolved from an originally non-binding decision of an organ of an IO. The prominent example in this regard is the Universal Declaration of Human Rights that has come into existence in the framework of a non-binding resolution of General Assembly of the UN and subsequently metamorphosed into part of customary international law body of rules.<sup>949</sup> Further this development can be put forward as one of the instances of the involvement and participation of IOs in the creation of customary rules of international law.

In the writings of some authors it has been observed that the Security Council of the UN is bound by fundamental customary human rights.<sup>950</sup> At this point the question seems quite legitimate whether the human rights not having the fundamental character have also binding force on the Security Council as well or not. For an affirmative answer to be possible it should be first made clear what the legal basis for the binding force of fundamental human rights is and consequently whether this basis also exists with regard to other non-fundamental human rights. In case such legal basis is absent, what other legal basis would be thinkable for the binding force of these rights on the Security Council. Furthermore, the binding force of these rules for other IOs other than the UN and its bodies should also be examined.

Thus, it can be concluded that the establishment of the scope and content of the international obligations of IOs under customary international law is always the result of an analytical practice which takes mainly into account the principle of specialty which would require the interpretation of the functions and competences of the IO the obligations of which we are trying to deduce.

As has been made clear at the beginning of this chapter, the intention of this sub-section was not at all to examine and analyze the whole area of the formation and binding force of the customary international rules, but rather the aim was to inquire into the appropriateness of the definition of the second constituent element of international responsibility in ARIIO, namely, breach of international obligations by IOs, in light of the specific category of international obligations deriving from customary international law. For that purpose, the most important aspect that has to be examined is whether the IOs' obligations under customary international law are at the present stage of the substantive and institutional development of international law easily recognizable. As observed above, the consent of IOs does not play a role with regard to the applicability of fundamental customary international rules on these subjects of international law. Hence, the binding force of general customary international rules and obligations are independent of the

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<sup>949</sup> White, N. D., *The Law of International Organizations*, Manchester University Press, Manchester and New York, 1996, p. 225–226.

<sup>950</sup> White, N. D., “The Ties that bind: The EU, The UN and International Law”, *Netherlands Yearbook of International Law*, Vol. XXXVII, 2006, pp. 57–108, at p. 90.

participation of IOs in their formation. On the contrary, with respect to other customary international rules – not forming part of fundamental and general customary law – both the consent and the role played by IOs in their formation may have impacts on the binding force for and the applicability of these rules on the IOs. The status and position of consent, as well as the role of the IOs in the formation of customary international law will be the focus of the succeeding subsections.

aa) Formation of *Opinio Juris* by the IOs and its role in custom-building process

In the assessment of evidence in identifying customary international law, many questions rise with respect to the normative or evidential value of the *opinio juris* and practice of IOs, understood also as the role of these subjects of international law in the formation of customary international law – the customary rules that bind IOs, as well as those rules that do not concern the activities of IOs, and thus, not binding for IOs.<sup>951</sup> The other side of the coin is the question of the bindingness of customary international rules for IOs – those rules in the formation of which the IOs have (in various manners) participated, as well as other rules formed without the IOs playing any role in their evolution, but also those rules of customary international law irrelevant for the activities of IOs. Debates on these issues are not new and the opinions diverge and sometimes generate contentious discussions.<sup>952</sup> Nevertheless, relative consensus exists on some of the aspects, including the fact that the role played by an IO in the formation of customary rules is an equivalent of and proportionate to the amount of its authority and independence. Moreover, it is clear that with regard to those rules concerning exclusively the activities of IOs, the participation of these entities is required. It appears that in these cases even the well-established practices of the IOs should inevitably be accompanied by *opinio juris*, even if sometimes difficult to prove as the IOs are, after all, conglomerations of multiple state and non-state actors.<sup>953</sup> This structural and institutional reality renders the ascertainment of the *opinio juris* of IOs even harder than those of their state counterparts. For the moment, it appears that a trend exists and tries to take root among some scholars, supported also by ILC in its report on the formation of customary international law, as to considering the constant and uniform practice of subjects of international law as having the capac-

<sup>951</sup> Daugirdas, Kristina, “IO Reputation and the Draft Articles on IO Responsibility”, *EJIL, Talk!*, 24 March 2015, para. 2.

<sup>952</sup> French, Duncan and D’Aspremont, Jean, “The ILC Project on the Identification of Customary International Law – Saving the Temple from Submergence”, Guest post. Available on: <http://opiniojuris.org/2014/11/17/guest-post-ilc-project-identification-customary-international-law-saving-temple-submergence/> (last visited on 08.04.2022).

<sup>953</sup> Lepard, Brian D., “The Necessity of *Opinio Juris* in the Formation of Customary International Law”, *Discussion Paper for Panel on “Does Customary International Law Need *Opinio Juris*?”*, at pp. 2–3. Available on: [https://law.duke.edu/cicl/pdf/opiniojuris/panel\\_2-lepard-the\\_necessity\\_of\\_opinio\\_juris\\_in\\_the\\_formation\\_of\\_customary\\_international\\_law.pdf](https://law.duke.edu/cicl/pdf/opiniojuris/panel_2-lepard-the_necessity_of_opinio_juris_in_the_formation_of_customary_international_law.pdf) (last visited on 05.07.2014).

ity to create customary rules on the basis of the rationale of legitimate expectation of similar conduct in the future.<sup>954</sup> From the perspective of international legal responsibility of IOs and the provisions of ARIO, arguments in favour of reducing the theoretical and practical importance of *opinio juris* contribute to the practical applicability of that mechanism, as the international customary obligations of IOs could be more easily discernible and determined. In other words, ARIO seek to clarify the circumstances that establish a breach of an international obligation and the consequences of such breach which are integrated in and incorporated under the concept of international responsibility. For that purpose, it is first essential to determine what the international obligations of an IO are. However, there is still also an opposite view held by some scholars as to the central importance of *opinio juris* for the formation of customary international rules.<sup>955</sup>

Again in this regard, it should not be overlooked that IOs remain complicated creatures. They are not a unitary entity but formed and composed of different constituents and segments that form together this entity called IO. By giving international legal personality to an international organization, we try to give an image of a unitary entity to this body which is a patch-work of various and different actors. These actors behind the façade of IO may have each their own interests and follow at the same time individual goals. To what extent are they ready to sacrifice these individual interests and aims for the common interests and aims the promotions of which is the *raison d'être* of this organization they have created and delegated powers on? Who forms the *opinio juris* of the IO? Is it the secretariat and its staff of different grades? Is it the civil service officials or rather it is the member States of the IO who form the *opinio juris* of the IO. Depending on which entity the *opinio juris* demonstrated is attributed to, various impacts for the emergence of customary rule and its bindingness would follow. Therefore, it is a crucial matter which organ of the IO has the authority to represent the *opinio juris* of the IO. For instance, a United Nations legal Counsel has once stated that the Organization is according to customary international law and the Charter under the obligation to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.<sup>956</sup> Normally, a legal counsel of an IO is not competent to undertake unilaterally an international obligation on the part of the IO. However, the statements of the legal counsels of IOs may have the value of an indication of – beside some other indications – their *opinio juris*.

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<sup>954</sup> International Law Association, “*Statement of the Principles Applicable to the Formation of General Customary International Law*”, adopted by Resolution No. 16/2000, London Conference, 2000, section 1(i).

<sup>955</sup> Lepad, Brian D., “The Necessity of *Opinio Juris* in the Formation of Customary International Law”, *op. cit.*, pp. 5–11.

<sup>956</sup> The documents were published in the New York Times, 9 December 2009, [www.nytimes.com](http://www.nytimes.com). In Draft articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 37, para. 6. (last visited on 08.04.2022).

In this respect, it can be recalled that “Resolutions of the United Nations General Assembly may, in some instances, constitute the evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law”.<sup>957</sup> What are these specific instances and their preconditions? Is it dependent on the consent of the members? It seems that the *opinio juris* of the IO – in situations when it has been manifested by a resolution or a decision of a body, rather than the secretariat – depends, at least indirectly, on the widespread consent or *sensus* of its members.

In the scholarship, it has been observed that the recommendations adopted by an organ of an IO may be the manifestation of that IO’s *opinio juris* on a specific subject.<sup>958</sup> It seems to be unproblematic to generalize this observation to other decisions of the organs of an IO. However, in case different competent organs of a same IO have differing opinions or *opinio juris* with respect to the one and the same question, then it seems most logical that it prevents the *opinio juris* of the IO to be identified. In any case, it should be examined, having regard to the internal regulation and structure of the IO, to what extent the position of a specific organ can be considered the position of the IO, since in most of the cases the organs of an IO have no independent and autonomous international legal personality separate from the IO of which they form a part.

The so-called concept of “new custom”, as is described by Abi-Saab, owes its appearance to the help of international organizations, mainly United Nations which provides the ideal institutional framework for this purpose.<sup>959</sup> But such involvement does not automatically imply the bindingness of the customary rules so created for the IO under the auspices of which the rule in question has been developed. Although, it could be argued that the IO, impliedly, by providing the institutional framework and infrastructure for facilitating the evolution and adoption of the rule, has manifested its *opinio juris* – as to the legal and binding character of the rule – and has demonstrated its consent to be bound by that rule.

No doubt the IOs have human rights and humanitarian obligations. In an era in which it is almost established that non-state armed groups are also bound by

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<sup>957</sup> ILA Committee on the Formation of Customary (General) International Law, “Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law” (“ILA Report on Custom”), 69 *ILA Report of the Sixty-Ninth Conference Held in London* (2000) 712, at 766; in Gourgourinis, Anastasios, “General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System”, *EJIL*, 22 (2011) 4, pp. 993–1026, at p. 999.

<sup>958</sup> Viñuales, Jorge E., “The Secret of Tomorrow: International Organization through the Eyes of Michel Virally”, *EJIL*, Vol. 23, No. 2, 2012, pp. 543–564, at p. 554.

<sup>959</sup> Abi-SAAB, G., “La Commission du droit international, la codification et le processus de formation de droit international”, in United Nations, *Making Better International Law: The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, 1998, p. 189, at pp. 196–197.



human rights and humanitarian rules,<sup>960</sup> there remains no question of IOs not being bound by such fundamental rules of international law. For instance, it has been argued by the European Court of Human Rights that relevant Security Council Resolutions are the primary source for analyzing the human rights obligations of the international administrations.<sup>961</sup> Security Council Resolutions in these cases count not only as the constitutional and internal law of these international administrations, but also as the evidence of *opinio juris* of the Organization.

As a concluding observation of this subsection, it can be stated that the complexity and multitude of the means for the deduction of *opinio juris* of IOs, has had indirect impact on the fact that the primary norms of international law that bind IOs remain unsettled. Obviously, this situation diminishes the practical effect of ARIO, as the mechanism of international responsibility needs clarity with regard to international obligations of IO the breach of which triggers the very mechanism of international responsibility.

#### bb) The Practice of IOs

In doctrine, it is generally accepted that the conduct of intergovernmental organizations, under certain circumstances, affects the formation of customary rules. The practice of IOs, when they act in their own name and they possess international personality, contributes to the formation of customary international legal rules.<sup>962</sup> The position of ILA in this regard has also been that the practice of IOs in their own right counts in the process of customary rule formation. To paraphrase ILA in its work on the formation of general customary international law: “The practice of intergovernmental organizations in their own right is a form of “State practice”.”<sup>963</sup> According to the ICJ in its Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case*,<sup>964</sup> the conduct and activities of IOs have the potential to contribute to the formation of customary international law. That is obviously provided that this conduct satisfies the conditions required for custom building which according to classical theory of international custom are mainly perceived and recognized as the uniformity, extensivity and representativeness. As in the classical perception of international custom, according to which the practice has been considered as only a means of proving the existence of consent between the states, rather than a normative re-

<sup>960</sup> Rawaski, Frederick, “Engaging with Armed Groups: A Human Rights Field Perspective from Nepal”, *International Organizations Law Review*, Vol. 6, 2009, pp. 601–626, at p. 609.

<sup>961</sup> ECtHR, *Behrami & Behrami v. France*, Application No. 71412/01 and *Saramati v. France, Germany and Norway*, Application No. 78166/01, 45 EHRR (SE10) (2007), para. 140.

<sup>962</sup> Shaw, Malcolm, *International Law*, Cambridge University Press, 2003, p. 241.

<sup>963</sup> International Law Association, “Statement of Principles Applicable to the Formation of General Customary International Law”, *Final Report of the Committee on Formation of Customary (General) International Law*, London Conference 2000, p. 19.

<sup>964</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports, 1951, p. 15.

quirement,<sup>965</sup> the condition in order that the practice of IOs has custom building capacity, is that the consent of IOs counts in the process and has an impact on the formation of customary international rules. In article 2 of the ARIIO where the “rules of the organization” are referred to, the established practice of the organization has also been enumerated among those rules. By way of analogy, it can also be argued that for the customary rules to evolve it is necessary that these practices are established practices of the IO.<sup>966</sup> What exactly the term “established” means, has been clarified by the ILC in the commentary to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.<sup>967</sup> Formal acts of the organs of the IO, such as resolutions, but also other informal statements and declarations of the IO and its bodies could be the sources of established practice. An important prerequisite recognized for the established practice of IOs is that such practice should be representative for the whole membership.<sup>968</sup> Hence, the agreement and consensus of the members of the organization becomes also material to the affirmation of the practice as established.

After having reaffirmed that the practice of IOs counts for the formation of customary rules, it would be interesting to see whether IOs can also prevent and exclude the application of a customary rule by taking recourse to the theory and doctrine of persistent objector.<sup>969</sup> In other words, are IOs allowed to claim the status of persistent objector? Noteworthy, in this context the objection needs to be timely, as subsequent objection is not permitted. It is true that many IOs did not have the occasion of objecting many customary international rules in the early stage of formation of those rules and constantly thereafter. However, it seems that the applicability of the persistent objector principle on IOs by this argument would find less support as many scholars believe that the status of persistent objector cannot be claimed by new states<sup>970</sup> – an argument that can be extended to IOs by way of analogy. The reason for focusing on the question of invocability of persistent objector status is that it could be a means at the disposal of IOs for restricting the scope of their international obligations, a situation which could have indirectly a negative impact on the practical effect of international responsi-

<sup>965</sup> Petersen, Niels, “Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation”, *American University International Law Review*, Vol. 23, pp. 275–310, at p. 300.

<sup>966</sup> Draft articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 11, para. 16. (last visited on 09.04.2022).

<sup>967</sup> *Yearbook of the International Law Commission*, 1982, Vol. II, Part 2, p. 21, para. 25.

<sup>968</sup> Peters, Christopher, “Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?”, *GoJIL*, Vol. 3, 2011, Issue 2, pp. 617–642, at p. 630.

<sup>969</sup> Dumberry, Patrick, “Incoherent and Ineffective: The Concept of Persistent Objector Revisited”, *ICLQ*, Vol. 59, 2010, pp. 779–802, at p. 780–784.

<sup>970</sup> McClane, B. J., “How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?”, *ILSA JIL*, Vol. 13, 1989, p. 6.

bility of IOs and ARIO. Should the will and consent of IOs – and also their dissent of a practice – play a role in the binding force of general customary rules for those IOs? To put it differently, is the will of IOs, besides that of states of course, at the foundation of international law? The importance of consent as the foundation of international law has significantly diminished,<sup>971</sup> if not has come to its demise. The rationale behind the support for the persistent objector principle, namely, a means for escape from uncontrolled custom building processes,<sup>972</sup> has even less legitimacy with regard to IOs. With regard to the role of the practice of IOs in the creation of customary international law rules, it should also be recalled that IOs have limited functions and powers. It means that these subjects of international law are not necessarily involved in all the affairs in international relations and activities, even though the realm and scope of this statement diminishes with every day that passes, and we are witnessing the ever increasing participation of IOs and delegation of powers and tasks from States on these entities.

Some commentators are hesitant about the possibility of participation of IOs in the formation of customary international rules. Negative, undesired and unacceptable result of such statements, if true, is above all, the exclusion of certain states from participation in the formation of customary international law in the case of organizations of international integration,<sup>973</sup> where states confer and transfer completely on IOs competences, sometimes even to the exclusion of any possibility of exercising these competences any more by those states.<sup>974</sup> Simply put, those states that have transferred powers and competences to IOs should be given also the chance to participate in custom creation processes through the participation of IOs to which they have transferred the powers in some areas.

One question that may rise in the context of the practice of IOs is whether a customary rule may be formed exclusively by the relevant practice of IOs, binding subsequently on IOs as well as states? It seems that the relevant practice of IOs, accompanied by *opinio juris* of IOs and states, have considerable chances of crystallizing into customary rules of international law. Another question that will be raised in this regard is whether an international organization itself can be bound by customary norms, which have become binding because of State practice.<sup>975</sup> Can

<sup>971</sup> Tomuschat, Christian, “Obligations Arising for States Without or Against Their Will”, *RCADI*, Vol. 241(IV), 1993, at p. 209.

<sup>972</sup> Dumberry, Patrick, “Incoherent and Ineffective: The Concept of Persistent Objector Revisited”, *op. cit.*, p. 783.

<sup>973</sup> Virally, M., “Definition and Classification of International Organizations: a legal approach”, in G. Abi-Saab (ed.), *The Concept of International Organization*, UNESCO, Paris, 1981, pp. 50–66.

<sup>974</sup> Dekker, Ige F. and Wessel, Ramses A., “Governance by International Organizations: Rethinking the Normative Force of International Decisions”, in Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory*, Neijhoff, Leiden and Boston, 2004, pp. 215–236, at p. 235.

<sup>975</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 337.

IOs through their practice, generally, and their conduct in operational activities, specifically, harden soft law? And would this hardened rule – necessarily a customary rule – be also binding on IOs? The first question will be examined in more detail below in the second subsection. As to the second question, according to a widely established approach that has been followed by several scholars, once a norm has become customary international law it applies to all subjects of international law, irrespective of their nature.<sup>976</sup> For the purpose of international customary rule creation, the practice of IOs encompasses also the resolutions, decisions and other acts of the IOs – although these latter may also be the evidence of *opinio juris* on the part of the IO. The legal acts of IOs is a large spectrum consisting of binding and mandatory decisions and acts, as well as non-mandatory norms – these latter norms are devoid of binding force, but are availed of normative force and validity. As the legal system of IOs is composed of all the different norms and rules with various natures, the law creating practice of IOs should be examined with a holistic approach. For that reason, in the following subsection the law creating practice of IOs is not only limited to binding acts of IOs, but also other normative valid acts of IOs will be considered as well. Specially, it would be interesting to examine whether these latter practices could give rise to customary rules binding on IOs despite the intention of the actor IO to withhold binding force for those acts and norms.

### 1) The law-creating practice of IOs

IOs have shown tendency towards reading more into the provisions of their constituent instruments in order to avail themselves of more extended powers and authorities in different areas. The law-creating acts of IOs have not been an exception to this. Although it is still generally true that the IOs are not involved in rule-setting at the international level, at least not to the extent that States do,<sup>977</sup> by taking recourse to teleological approaches and interpretation techniques the former entities try to expand their engagement, accompanied sometimes inevitably by agency losses or costs in the language of IR.<sup>978</sup>

The question here is whether the law and regulations created by an IO are also binding on other IOs – not members of the former IO. It is to be noted that certain IOs are increasingly active in creating international rules and regulations, despite the emergence of informal international law-making trends (especially har-

<sup>976</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, *op. cit.*, p. 337.

<sup>977</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 230.

<sup>978</sup> Wouters, Jan and De Man, Philip, “International Organizations as Law-Makers”, *Leuven Centre for Global Governance Studies, Working Paper No. 21*, March 2009, pp. 7–8. Available on: [https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp21-30/wp21.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp21-30/wp21.pdf) (last visited on 06.04.2022).

monization networks)<sup>979</sup>. In this respect, it appears that there should be made no significant distinction between IOs and states, in the sense that, subject to the principle of speciality of course, acts, decisions and practices of certain IOs, on the condition of satisfying certain requirements, and regardless of whether these acts have gained the status of customary international law or not, may create international legal obligations for other IOs. That being said, however, much controversy may arise as to the satisfaction of requirements to be fulfilled by law-creating practices of IOs. Often the competences of IOs in doing so are disputed or the practices are challenged as *ultra vires*. Such controversies obviously diminish the legitimacy and validity of those practices and impede any normative character to be evolved for other IOs to follow suit.

In addition, as noted in the last paragraph, it should be taken into account that not all the practices of IOs have the capacity of law-creating, although certain commentators have opined that IOs need to be added to Article 38 as a source of international law on the ground that IOs have dramatically affected the institutionalization of public international law leading to the reconceptualization of the world community.<sup>980</sup> The attribute of generality, necessary for a custom-building practice, may face some difficulties given the functional nature of most IOs, reflected also in the principle of speciality. As often as not it is, furthermore, argued that the practice of IO represents the practice or the belief of the member states, rather than that of the organization itself. It is even more so, because in the words of the ICJ the practice in question must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.<sup>981</sup> Attribution of belief is usually even more complicated than that of the practice.

Another point mostly important and interesting in this debate is the attention that should be given to integration organizations. Because of widespread competences the role of their practice in the formation of international customary rules becomes even more significant, with the EC/EU as the forerunner in this re-

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<sup>979</sup> Berman, Ayelet and Wessel, Ramses, “The International Legal Status of Informal International Law-Making Bodies: Consequences for Accountability”, in J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Oxford, Oxford University Press, 2012, (forthcoming), pp. 8–10. Available on: <https://www.utwente.nl/bms/pa/research/wessel/wessel86.pdf>; Berman, Ayelet/Duquet, Sanderijn/Pauwelyn, Joost/Wessel, Ramses A./Wouters, Jan, “Introduction and Key Issues Surrounding Informal International Lawmaking”, in Ayelet Berman, Sandrijn Duquet, Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking: Case Studies*, Torkel Opsahl Academic EPublisher, The Hague, 2012, pp. 1–20. Available on: [http://www.ficlh.org/fileadmin/ficlh/documents/LOTFS/LOTFS\\_3\\_Web.pdf](http://www.ficlh.org/fileadmin/ficlh/documents/LOTFS/LOTFS_3_Web.pdf) (last visited on 06.04.2022).

<sup>980</sup> Alvarez, José E., *International Organizations as Law-Makers*, Oxford University Press, New York, 2005; Schultz, David, “Review of the Book: International Organizations as Law-Makers, by José E. Alvarez”, Vol. 16, No. 6, June 2006, pp. 442–444. Available on: <http://www.lawcourts.org/LPBR/reviews/alvarez0606.htm> (last visited on 06.04.2022).

<sup>981</sup> *North Sea Continental Shelf Cases*, Judgment, ICJ Reports, 1969, at p. 77.

spect.<sup>982</sup> With the appearance of these kinds of IOs, and the members conferring ever more competences to them, to the point that in certain areas it is only the IO that has the exclusive competence and capacity to decide and act – to the exclusion of any role for the member states – this issue gains more importance and relevance. This situation leads to strengthening the argument that the IOs may play a role, even to the extent of directly participating in the formation of the rules of international customary law. A situation that may have been not so evident at the beginning of last century and right after the world wars, but increasingly undeniable today and even more evident with the progress of the present day trends. Consideration has been made, for instance, as to whether the practice of EU-friendly treatment at the international level has reached the status of an international custom.<sup>983</sup>

## 2) Practice in the Framework of Operational Activities of IOs: physical practice by IOs

Practice, one of the two constituent elements of customary international law, is particularly important with respect to international peace missions. To date, there exist no codifications of international law which specifically deal with peace missions. Existing jurisprudence deals with the conduct of states during armed conflict rather than the conduct of international organizations in peace missions.<sup>984</sup> Since the end of the Cold War, certain basic co-ordinates of a prospective international law of peace missions have emerged. At policy level, the practice of the UN Security Council, the North Atlantic Council, and increasingly the Peace and Security Council of the African Union, are of particular importance.<sup>985</sup> In this relation, it is consistent practice of both the UN Security Council and the North Atlantic Council to integrate relevant general principles of international humanitarian law, in particular, in the legal framework of peacekeeping operations. Both NATO and the United Nations have also translated relevant principles into rules binding upon peacekeeping forces in order to define their authority and its limits.<sup>986</sup>

A specificity of operational activities of IOs that justifies their separate examination is, on the one hand, their frequency, and on the other hand, the often far-reaching mandates of such operations and related competences with direct effect

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<sup>982</sup> Ličková, Magdalena, “European Exceptionalism in International Law”, *EJIL*, Vol. 19, no. 3, 2008, pp. 463–490, at pp. 475–490.

<sup>983</sup> *Ibid*, at p. 464.

<sup>984</sup> Häußler, Ulf, “Human Rights Accountability of International Organizations in the Lead of International Peace Missions”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Schmitt, Pierre (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 255.

<sup>985</sup> *Ibid*, p. 256.

<sup>986</sup> *Ibid*, p. 257.

and power over individuals.<sup>987</sup> With regard to the prominent example in this context, namely, the peace-keeping operations of the UN, specifically, and other IOs, generally, and on the basis of the principle of speciality, it cannot be denied that new obligations applicable on and tailor-made for IOs' missions and operational activities are evolving and the scope of the present obligations are expanding.<sup>988</sup> In addition, other initiatives are also being conceived and advanced with the aim of promoting the legal as well as non-legal accountability of IOs' operational engagements. For instance, the concept of integrated missions,<sup>989</sup> evolved out of peacekeeping and peacebuilding missions tries to deliver a holistic concept comprising a comprehensive spectrum of international obligations that would have a synergetic effect for the realization of the objectives of the international missions.<sup>990</sup> This could be a good example of practice having possibly the potential, if accompanied with the belief on the part of the IOs of the legal nature of practices, to evolve into customary rule for IOs, and even for states who engage in similar or comparable activities. ICJ has pointed out in its Advisory Opinion on the *Reparation for Injuries* case that the practice of an IO may be the source of duties and obligations for the IO, since it develops and implies the functions and purposes of the IO.<sup>991</sup> In the same spirit, an integrated mission is an instrument comprising a system-wide response with which the UN seeks to help countries in complex situations, such as transitional periods, frequently with the cooperation of other global institutions, regional organizations, donor countries, NGOs, host governments, etc.<sup>992</sup> These practices, based on subsuming actors and approaches within an overall political-strategic crisis management framework,<sup>993</sup> however, lack the attribute of consistency and uniformity in order to be relevant for international custom building. The result of examinations of these approaches and practices have come

<sup>987</sup> Porretto, Gabriele and Vité, Sylvain, "The application of international humanitarian law and human rights law to international organizations", *Centre Universitaire de Droit International Humanitaire (CUDH), Research Paper Series/Collection des travaux de recherche*, No. 1, 2006, p. 6. Available on: [http://www.geneva-academy.ch/docs/projets/CTR\\_application\\_du\\_DIH.pdf](http://www.geneva-academy.ch/docs/projets/CTR_application_du_DIH.pdf) (last visited on 06.04.2022).

<sup>988</sup> Maus, Sylvia, "Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?", in H.J., Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin, Heidelberg, 2011, pp. 103–128, at p. 105.

<sup>989</sup> For a comprehensive account of integrated missions See: Eide, E.B./Kaspersen, A.T./Kent, R./Von Hippel, K., "Report on Integrated Missions: Practical Perspectives and Recommendations", *Independent Study for the Expanded UN ECHA Core Group*, May 2005, pp. 9–35. Available on: [https://docs.unocha.org/sites/dms/Documents/Report\\_on\\_Integrated\\_Missions\\_May\\_2005\\_Final.pdf](https://docs.unocha.org/sites/dms/Documents/Report_on_Integrated_Missions_May_2005_Final.pdf) (last visited on 15.10.2015).

<sup>990</sup> Maus, Sylvia, "Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?", *op. cit.*, at p. 108.

<sup>991</sup> *Reparation for Injuries suffered in the Services of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 180.

<sup>992</sup> Eide, E.B./Kaspersen, A.T./Kent, R./Von Hippel, K., "Report on Integrated Missions: Practical Perspectives and Recommendations", *op. cit.*, p. 3.

<sup>993</sup> *Ibid.*

to the conclusion that “a variety of practices have emerged based on different actors’ and different missions’ own interpretations of the concept, some more successful than others.”<sup>994</sup>

Another important dimension with regard to international obligations of IOs in the framework of operational activities and derived therefrom, is the question of applicability of international humanitarian and human rights law on these missions. The intention in this chapter is not to enter into a separate analysis of each and every category of international obligations of IOs in terms of their subject area, for instance, human rights, international humanitarian law (IHL), environmental rules and etc. applicable on operational activities. The approach of the ILC with regard to international responsibility has also been to keep away from the secondary rules on international responsibility any question concerning the interpretation of primary rules and the establishment of the breach of obligation. Nevertheless, we will briefly go over some aspects of the international obligations of international transitional civil administrations, the civil wing of the peacekeeping and peacebuilding operations. While an international organization’s rights under internal law need to be interpreted as a function of and depending on its competences, the same is true with respect to its duties or obligations under international law.<sup>995</sup> This could be considered as a further and additional radiation of the principle of specialty. As a result, even customary international obligations of an IO could be influenced or defined by its competences. The exercise of state function thus encompasses an obligation to respect human rights in the same way as the national administration and the government’s obligations.<sup>996</sup> The status of foreign military contingents participating in international operations is different from that of civil presence in terms of an applicable legal framework.<sup>997</sup> However, the same reasoning held in respect of the civil components of international administration can of course be applied to military forces if they can be regarded as UN subsidiary organs, and if they exercise functions to which human rights can be applied. This would, for instance, be the case if the military personnel would run detention facilities or exercise policing activities.<sup>998</sup> Therefore, in order to establish the exact content of the obligations of IOs, attention should be paid to the functions the IO exercises as an important factor, and to the question of which obligations inherently apply to the functions in question. The Human Rights Committee has confirmed the complementary character of the human rights legal framework and the

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<sup>994</sup> *Ibid.*

<sup>995</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 338.

<sup>996</sup> *Ibid.*

<sup>997</sup> *Ibid.*, p. 339.

<sup>998</sup> *Ibid.*



humanitarian law framework.<sup>999</sup> The extraterritorial application of human rights treaties has recently been reaffirmed.<sup>1000</sup> With regard to ICCPR, the Human Rights Committee has repeatedly argued that the state jurisdiction can be extended beyond the territorial boundaries of the State party to the ICCPR. Wherever an international subject or entity should have ‘effective control’, the extraterritorial application of the obligations is assumed. As far as the ECHR is concerned, the European Court of Human Rights extensively examined the extraterritorial application of the convention in the landmark case of *Loizidou v. Turkey*.<sup>1001</sup> The Court explicitly linked the obligation to ensure the application of the ECHR to the ‘effective control’ over territory.<sup>1002</sup> The developed ‘effective control’ criterion was confirmed by the same Court in the *Banković* case.<sup>1003</sup> Being a subject of any legal system must involve being subject to responsibilities as well as enjoying rights.<sup>1004</sup> Built on these premises, it can be argued that the international obligations of IOs are to be extended to all the activities and operations of the IOs in which the IO is exercising effective control over a territory or individuals. This is not in contradiction with the above argument according to which the international obligations of an IO are delineated and demarcated by its competences, which leads however to a certain limitation of those international obligations, especially in the case of customary international law. Nevertheless, there are at the same time values and thereon based concepts emerging at the universal level relating to and emanating from the international community interests that will also have impacts on the scope of the international obligations of IOs. The policy concept of human security, as a prominent example, is fundamental to all peace missions and important for the future interpretation and application of Chapter VII of the UN Charter.<sup>1005</sup> Concerning the law of armed conflicts/International Humanitarian Law, the Unit-

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<sup>999</sup> Human Rights Committee, “General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

<sup>1000</sup> De Brabandere, Eric, “Human Rights Accountability of International Administrations: Theory and Practice in East Timor”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 340.

<sup>1001</sup> ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, Preliminary Objections, para. 56 and 62, 20 EHRR(1995) p.129.

<sup>1002</sup> *Ibid.*, para. 62.

<sup>1003</sup> ECtHR, *Banković et al. v. Belgium et al.*, Application No. 52207/99, para. 71, 11 *Butterworths Human Rights Cases* (2001) para 61.

<sup>1004</sup> Crawford, James, “The System of International Responsibility”, in James Crawford; Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford University Press, first edition, 2010, pp. 17–25, at p. 17.

<sup>1005</sup> Häußler, Ulf, “Human Rights Accountability of International Organizations in the Lead of International Peace Missions”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 216.

ed Nations – similar to NATO practice – requires peacekeepers’ compliance with the spirit of international humanitarian law.<sup>1006</sup>

In the light of the absence of specific law-making treaties, the legal framework of international peace missions is based on customary international law and general principles of international law.<sup>1007</sup> The ICRC has asked the related question in terms of application of the Geneva Conventions, to which the UN is not, and cannot become, a party, as has been the official position of the UN.<sup>1008</sup> The UN – in the first phase of its practice –<sup>1009</sup> limited itself to declaring that it would observe and respect the “principles and spirit” of the Conventions.<sup>1010</sup> In a letter addressed by the Secretary-General of the UN to the Acting Permanent Representative of the Union of Soviet Socialist Republics, it has been said:

“... in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of the civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.”<sup>1011</sup>

But this does not exclude the applicability of international humanitarian regime on the UN,<sup>1012</sup> particularly, and other IOs, generally, under customary international law. Furthermore, the UN in its recent practice, and in an implied manner, has recognized the applicability of the law of international armed conflict to its operations authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations. For all practical purposes, it is now accepted by the Secretary-General that the UN is bound by the customary law of armed conflict.<sup>1013</sup> Some commentators have gone even further by observing that such recognition on the part of the UN is not only limited to customary international law, but also encompasses obligations embodied in IHL and human rights law treaties.<sup>1014</sup> The interesting question that may be raised in this relation is to

<sup>1006</sup> *Ibid.*, p. 258.

<sup>1007</sup> *Ibid.*, p. 259.

<sup>1008</sup> See the Opinion of the UN Legal Adviser, (1972) UNJYB, at p. 153.

<sup>1009</sup> Porretto, Gabriele and Vité, Sylvain, “The application of international humanitarian law and human rights law to international organizations”, *op. cit.*, at pp. 21–23.

<sup>1010</sup> Regulations UNEF s 44; ONUC s 43; UNFICYP s 40, published in R Siekmann (ed), *Basic Documents on United Nations and Related Peace-keeping forces*, (2nd ed, Nijhoff 1989), 37, 94, 179.

<sup>1011</sup> *United Nations Juridical Yearbook* (1965), p. 41.

<sup>1012</sup> Zwanenburg, Marten, “United Nations and International Humanitarian Law”, *MPEPIL*, May 2013, p. 3, para. 9. Available on: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1675> (last visited on 06.04.2022).

<sup>1013</sup> Bothe, Michael, “Peace-keeping”, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds.), *The Charter of the United Nations, A Commentary*, Third edition, OUP, 2012, pp. 1182–1183.

<sup>1014</sup> Porretto, Gabriele and Vité, Sylvain, “The application of international humanitarian law and human rights law to international organizations”, *op. cit.*, p. 23.

what measure the applicability of these principles and rules can also be extended to other IOs, following the practice of the UN as the universal IO mostly active in such operations. If we accept that the act of the Secretary General and the subsequent practice of the UN forces have the capacity to create customary rules embodying new international obligations originating at the conventions to which neither UN nor any other IO have been a party, then in the future any other IO involved in similar operational activities would be automatically bound by such enlarged rules. In this regard, the Security Council's Resolution 1327 is noteworthy, by means of which the Council has expanded the rules encompassed in SG's Bulletin to the "members of regional and subregional organizations and arrangements" participating in the operation.<sup>1015</sup>

In contrast, some other scholars have assessed, for instance, the Secretary General's Bulletin of 6 August 1999, from a legal point of view, as an administrative regulation adopted by the Secretary-General in his capacity as chief of UN operational and strategic command.<sup>1016</sup> Consequently, this appraisal would reduce the legal status of the Bulletin to an internal law instrument of the Organization, subject to modification or invalidation at any time the issuing or adopting authority would wish so. Obviously, this should be distinguished from a unilateral act by an organ of the IO with the aim of binding the IO by certain international rules, and undergoing the commitments originating from those rules. However, in that Bulletin the Secretary General, explicitly, reconfirms the application of customary and treaty IHL existing already as applicable rules on the UN operations.

A means of creating international human rights obligations for IOs engaging in field operations, naturally of peace-building and post conflict nature, is to include them in peace agreements or similar instruments with international legal nature. Armed groups may be called here as the example of the entities upon which the minimum human rights standards are made applicable by means of including them in peace agreements, although the international legal personality of these groups is anything than clear and recognized, and thus not having the possibility at all to become a member of any international convention or treaty.<sup>1017</sup>

Therefore, the result can be achieved that the UN and some other major IOs, engaged in numerous and manifold activities at the international level, as an IO and subject of international law, are bound by many of the principles and rules embodied in humanitarian conventions that have gained customary law status and also sometimes even by some other conventional rules not still having such status. However, with respect to the latter category of rules and obligations the question

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<sup>1015</sup> Resolution 1327 (2000), 13 November 2000, S/RES/1327 (2000), p. 2.

<sup>1016</sup> Shraga, D., "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages", *AJIL*, Vol. 94(2), 2000, at p. 409; Benvenuti, P., "Le respect du droit international humanitaire par les forces des Nations Unies: La Circulaire du Secrétaire Général", *RGDIP*, Vol. 105, 2001, p. 358.

<sup>1017</sup> Rawaski, Frederick, "Engaging with Armed Groups: A Human Rights Field Perspective from Nepal", *International Organizations Law Review*, 6(2009), pp. 601–626, at p. 622, specially, fn. 43.

still remains open as to the legal basis and source of such bindingness for IOs, namely, general principles of law, customary international law or other.

### 3) Verbalpraxis of IOs

Verbal practice, oral or written, as any other form of practice of IOs, may no doubt secondarily (international customary law created primarily by state practice), contribute to the emergence of customary international rules.<sup>1018</sup> In the doctrine, it has been opined that the practice of IOs, embracing the verbal practice, that is truly issue of its autonomous will and not only the aggregation of its members' individual wills, would be relevant for the formation of customary international law. Otherwise, a verbal practice reflecting the practice of states is relevant for the identification of customary international law<sup>1019</sup> – which should be distinguished from the creation of customary international law. It appears that there are not clear-cut, general criteria for ascertaining that a certain kind of practice, for instance the resolutions of an IO, should always be considered the practice of states participating in the decision-making of the organ of IO rather than that of the IO itself. Assessment in such circumstances should be made on case by case, taking into account of course factual conditions, like the powers, functions and competences of the IO, size of membership, relations between the IO and its members, procedures for deliberation and decision-making, etc. This could give rise to disparate controversies over the weight and value of a certain verbal practice of a specific IO in terms of its relevance for customary rule creation, and to an untrained eye unhelpful and unfavourable for the ascertainment of the scope and content of the international obligations of IOs.

In order to compensate the lack of practice of IOs in certain areas, that would be of importance for the formation of relevant customary international rules or the concretization of the content of those rules, the verbal – oral or written – practice, namely the resolutions of IOs or different statements of its authorities could replace the lack of actual practice, thus contributing to the formation of the customary rule in question. Endorsing certain sets of provisions by voting in favour of the resolutions of an IO, in the framework of which the provisions under question are codified, is a prominent example in cases where beside states, IOs are also members of an IO. Specially, it is interesting to notice that in such cases the *opinio juris* element of the custom is combined with the actual practice, thereby facilitating the process even further.<sup>1020</sup>

<sup>1018</sup> Wood, Michael, “Third Report on identification of customary international law”, *Report of the Special Rapporteur of International Law Commission*, 27 March 2015, A/CN.4/682, at p. 47.

<sup>1019</sup> Scharf, Michael P., “Accelerated Formation of Customary International Law”, *ILSA Journal of International & Comparative Law*, Vol. 20, no. 2, 2014, pp. 305–342, at pp. 324–328.

<sup>1020</sup> Paulus, Andreas, L. “Internationales, nationales und privates Recht : Hybridisierung der Rechtsordnungen. Zusammenspiel der Rechtsquellen aus Völkerrechtlicher Perspektive”, *Deutsche Gesellschaft für Internationales Recht*, Tagung Luzern, 14 März 2013, p. 16.

In sum, it appears that there is consensus among the scholars as to the dominant and primary role played by states in the formation of customary international law, in comparison with the secondary and restricted role played by IOs, often-times under the shadow of their member states. The significance of this observation with regard to the ascertainment of the verbal practice of IOs and its value in customary rules creation, is that as often as not the verbal practice, for instance a resolution or declaration adopted by an IO, is considered as the collective practice and/or *opinio juris* of the members of the organ of the IO adopting those instruments.<sup>1021</sup> Furthermore, the IO in such situations would not be able, for instance, to invoke such instruments as confirmation for claiming the status of persistent objector. Moreover, given the almost omnipresence of states in most of the organs of the IOs,<sup>1022</sup> attribution of the verbal practice to IO and to its members turns out to be a difficult assertion to prove.

cc) The idea of customary international law specific to IOs

By means of analogy with the draft conclusions provisionally adopted by the Drafting Committee of the ILC on the topic of identification of customary international law,<sup>1023</sup> it may be argued that the emergence of the rules of such particular customary international law applicable only on IOs is not impossible. In part seven of the draft conclusions, the Commission recognizes the possibility of such customary rules that applies only among a limited number of states. Necessary elements for the existence of such rules are a general practice among the states concerned that is accepted by them as law (*opinio juris*). Theoretically, based on this it can be argued that nothing seems to prevent that a rule of particular customary international law emerges only among IOs, as a consequence of a general practice by IOs accepted by them as law. In the same spirit, in his article on the need for the examination of IOs, *Amerasinghe* has discussed the legal value of the subsequent practice of IOs in situations where their constituent documents are similar.<sup>1024</sup>

From a pure theoretical point of view nothing denies the capacity of IOs to create rules of customary international law, which are because of their content by nature specific to IOs and may apply only to this category of subjects of international law. For instance, a certain way of handling in a specific question relating to

<sup>1021</sup> Prost, M. and Clark, P.K., “Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?”, *Chinese Journal of International Law*, 2006, Vol. 5, pp. 341–362, at p. 306.

<sup>1022</sup> Abbott, Kenneth W. and Snidal, Duncan, “Why States Act through Formal International Organizations”, *Journal of Conflict Resolution*, Vol. 42, No. 1 (February, 1998), pp. 3–32.

<sup>1023</sup> International Law Commission, “Identification of Customary International Law”, *Text of the draft conclusions provisionally adopted by the Drafting Committee*, (A/CN.4/L.869), Sixty-Seventh Session, Geneva, 4 May–5 June and 6 July–7 August 2015, p. 4.

<sup>1024</sup> Amerasinghe, C. F., “The Law of International Organizations: A Subject which needs exploration and Analysis”, *IOLR*, Vol. 1, Issue 1, 2004, pp. 9–21, at p. 19.

the life and activity of IOs in the situation where their constituent instruments and internal regulations are silent may be considered a rule of customary general international law, but limited to IOs.

Some scholars have impliedly admitted the existence of specific customary international rules applicable exclusively on IOs in their relations with the members of their staff, or in the relations between different organs of the organizations.<sup>1025</sup> Considering such rules – definitely belonging also to the internal law of the IO – as part of customary international law would not face theoretical problems with regard to the international legal personality of the staff members or different organs of the IO, as such rules contain unilateral legal obligations undertaken by the IO towards – and rights for the benefit of – these latter entities devoid of international legal personality. Obviously, supporting the latter idea presupposes the acceptance as premise of the demise and dissolution of boundaries between internal law of the IO and thereto external international law.

*d) International Obligations under General Principles of Law*

General principles of law are often at the origin and the main source of detailed rules applicable on IOs, which form a supplement to the legal system of the IO in regulating its affairs.<sup>1026</sup> This can be explained by the fact that the IOs are, to a certain extent, a mirror of structural and normative attributes of domestic constitutional and legal systems. For this reason, the dynamic, causing modifications of domestic legal systems, in the form of changes in the national laws and in decisions of national courts, can have an impact on the law binding IOs.<sup>1027</sup> In certain regions, where an advanced degree of integration of member states in the legal system of an international organization of integration has already taken place, prominently the EU, the latter IO's internal law may become applicable and binding for any other IO acting in that region.<sup>1028</sup> The Statute of the International Court of Justice, still the most reliable source for the specification of the sources of international legal rules, in its article 38 (1)(c) refers to “the general principles of law recognized by civilized nations” as one of the sources of international law. However, it is not clear, at least from the text, whether these principles are also applicable to IOs or not. There is no doubt that to the extent that these principles reflect general international law, the IOs are bound by them, as has been support-

<sup>1025</sup> Peters, C., “Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?”, *Goettingen Journal of International Law*, Vol. 3, 2011, pp. 617–642, at pp. 630–631.

<sup>1026</sup> Schermers, Henry G., and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, *op. cit.*, p. 833, § 1336.

<sup>1027</sup> *Ibid.*, 834, § 1338.

<sup>1028</sup> Heuninckx, Baudouin, “Applicable Law to the Procurement of International Organizations in Europe”, *Public Procurement Research Group, Fourth Public Procurement Research Students Conference, 7 and 8 September 2009, The University of Nottingham*, p. 20. Available on: <https://www.nottingham.ac.uk/prrg/documentsarchive/phdconference2009/baudouin%20heuninckx.pdf> (last visited on 06.04.2022).

ed by the scholarship, specially with respect to the main substantive provisions of human rights treaties which have gained the status of general principle of law, even though admitting unclarity with respect to the scope of obligations.<sup>1029</sup> This has also been confirmed by the ICJ in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*.<sup>1030</sup> The result of the holistic approach the ICJ took in this issue, which can be considered as the furtherance of its jurisprudence and that of the PCIJ, was that the court has stated as follows:

“International Organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”<sup>1031</sup>

In this connection, it may be asked whether all the general principles referred to in the ICJ Statute are part of general rules of international law, as pointed out by the Court in its aforementioned Opinion. It appears that many scholars believe that not all the general principles form part of and have the nature of general rules of international law. Rather the function of general principles of law can be understood as “to complement to a certain extent other rules of international law and thus contribute to filling in gaps.”<sup>1032</sup> As a result, the applicability of general principles of law on the conducts and activities of IOs should be subject to other international obligations of the IO – treaty or customary law obligations – as well as the principle of specialty. Although general principles of law irrefutably could provide to some extent a means for elaboration and development of primary rules and standards, these principles as a source of normativity – in spite of their progressive consolidation in certain areas – remain often vague, surrounded by ambiguity in their interpretation and difficult to define and locate in contemporary practice.<sup>1033</sup>

One of the well-known general principles that is at the origin of and gives rise to several international obligations for IOs is the principle of good faith. The Organization and member States have the general obligation to cooperate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution. This can again be inferred from the statement of the ICJ in its

<sup>1029</sup> Maus, Sylvia, “Human Rights in the UN Peacekeeping Missions: A Framework for Humanitarian Obligations?”, in H.J., Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin, Heidelberg, 2011, pp. 103–128, at pp. 111–112.

<sup>1030</sup> *I.C.J. Reports 1980*, pp. 89–90, para. 37.

<sup>1031</sup> *Ibid.*

<sup>1032</sup> Gaja, Giorgio, “General Principles of Law”, *MPEPIL*, May 2013, p. 6. Available on: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410> (last visited on 06.04.2022).

<sup>1033</sup> Panezi, Maria, “Sources of Law in Transition: Re-visiting General Principles of International Law”, *Ancilla Juris* (anci.ch) 2007, pp. 66–79, at p. 66. Available on: [https://www.academia.edu/1150864/Sources\\_of\\_Law\\_in\\_Transition-Re\\_visiting\\_General\\_Principles\\_of\\_International\\_Law](https://www.academia.edu/1150864/Sources_of_Law_in_Transition-Re_visiting_General_Principles_of_International_Law) (last visited on 06.04.2022).

advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.<sup>1034</sup> Generally, in this way various international obligations can be deduced for the IO on the basis of the principle of good faith and on the basis of the Constitution and other basic and constituent documents of the IO. This argument is especially useful in those cases where there is a lack of express obligation for the IO on a specific matter and the Constitution and other relevant documents are also silent. But the key question with regard to the obligations deriving from the principle of good faith is how to determine the concrete limitations of those obligations. Who should be the judge in the case of a difference with regard to the scope of the obligations? This matter could itself serve as a source of differences between the IO and eventually its members or third parties. It should also be borne in mind that there is an increasing trend in the top down establishment of general principles of law. Proclamation in international fora can be a means of the establishment of general principles too.<sup>1035</sup>

There is also another point that is worth being mentioned here, namely, the question of whether there could be general principles of law coming into being from the mere fact of their existence in a considerable number of constituent documents of IOs. If the answer is in the affirmative, would these general principles of law have the potential to become at some point binding on all the other IOs as well as States? Or should it be considered as another source of rules of international law – other than, thus in addition to and supplementing, the ones enumerated in article 38 of the ICJ Statutes? Some authors believe that similarity of texts by themselves cannot lead to the creation of general principles, whereas the practice in interpretation, provided that these practices are consistent, general and similar accompanied by a belief of legal obligation, may lead to the emergence of general principles in interpretation.<sup>1036</sup> Given the prerequisites acknowledged by these authors for the creation of principles, it seems that these principles belong rather to the domain of customary international law than to the general principles of law. In any event, the constituent instruments of IOs are, generally, at the same time international treaties binding on states parties to these treaties – simultaneously members of the IO. General principles of law emanating from treaty rules

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<sup>1034</sup> *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, I.C.J. Reports 1980, p. 96.

<sup>1035</sup> Simma, Bruno and Paulus, Andreas L., “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View”, *American Journal of International Law*, Vol. 93, 1999, pp. 302–316, at p. 307; Simma, Bruno and Alston, Philip, “The Sources of Human Rights Law: Custom, Jus Cogens and General Principles”, *Australian Yearbook of International Law*, Vol. 12, 1992, pp. 82–18, at p. 105.

<sup>1036</sup> Amerasinghe, C.F., *Principles of the Institutional Law of International Organizations*, Second revised edition, 2005, Cambridge Studies in International and Comparative Law, Cambridge University Press, p. 17.



and conventional instruments have the capacity to be invocable against states.<sup>1037</sup> In this connection, the question may in general be raised as to whether for the IOs, general principles of law, as a source of international law, are exactly the same as those enumerated in article 38 or are there any additional or different general principles as sources of international obligations also existing that may be specific to IOs. It appears that there is support for the idea that there are also general principles of international institutional law emanating directly from international law generally and the law of IOs, specifically.<sup>1038</sup>

There are different doctrines and principles in the national legal systems of different countries with regard to administrative behavior that could be brought up to the position of general principle of law in the meaning of the third paragraph of article 38 of the ICJ Statutes and by this way binding on IOs. As an example the *détournement de pouvoir* may be brought forward.<sup>1039</sup> In fact, through this channel certain gaps in the primary rules applicable to IOs may be filled and unclarity in the primary obligations of IOs could be clarified. It would be necessary to take recourse to the public law or administrative national laws and regulations. In other words, international law could borrow in this regard enormously from these areas of the national legal systems and fill the legal lacuna that exists with regard to IOs and that renders consequently the law of international legal responsibility of IOs of doubtful practical effect. The more the IO assumes administrative and public tasks the easier the establishment of general principles of law that find applicability on IOs. It is to be noted that the acceptance of a general principle of law is dependant on its fairness,<sup>1040</sup> in the sense that it satisfies the interests of all the parties.<sup>1041</sup>

Another conclusion that may be drawn from this subsection is that even if there is no controversy over the fact that lacuna in primary obligations of IOs may be filled by general principles of international law, but the major problem in this respect with regard to many rules in international law, specially treaty rules, is to establish with certainty whether these principles have attained, in addition to their conventional binding force, at the same time the status of general principles of

<sup>1037</sup> Maes, F., "Environmental Law Principles, Their Nature and the Law of the Sea: A Challenge for Legislators", in Sheridan, M. and Lavrysen, L. (eds.), *Environmental Law Principles in Practice*, Bruylant, Bruxelles, 2002, pp. 60–89, at p. 64.

<sup>1038</sup> *Ibid.*

<sup>1039</sup> Fawcett, J. E. S., "*Détournement de pouvoir* by International Organizations", *BYBIL*, 1957, pp. 311–316, at p. 311.

<sup>1040</sup> Franck, Thomas M., "Non-Treaty Law-Making: When, Where and How?", in: Rüdiger Wolfrum/Volker Röben (Hg.) *Developments of International Law in Treaty Making*, Heidelberg, 2005, 417, 423.

<sup>1041</sup> English translation from "Voraussetzung für die Akzeptanz eines allgemeinen Rechtsgrundsatzes in diesem Sinne ist die Fairness einer Regel, die den Interessen aller Seiten gerecht wird." In Paulus, Andreas, L. "Internationales, nationales and privates Recht: Hybridisierung der Rechtsordnungen. Zusammenspiel der Rechtsquellen aus Völkerrechtlicher Perspektive", Deutsche Gesellschaft für Internationales Recht, Tagung Luzern, 14 März 2013, p. 16.

international law too, so that they could be binding for IOs that are not members of the treaty under question, to be applied to IOs.

*e) Erga omnes Obligations and Obligations Arising out of jus cogens Norms*

The concepts of *erga omnes* obligations and *jus cogens* norms, the former derived from and the consequence of the latter,<sup>1042</sup> have now become sufficiently embedded in the international legal order<sup>1043</sup> that it would be impossible to argue that IOs are exempt from the binding force of these rules and obligations, or that these norms would have milder consequences for IOs in terms of their violation by the latter entities or the measures the IOs have to adopt in reaction to the violation by a third entity.<sup>1044</sup> IOs, as subjects of international law, are bound by the norms of overriding importance within the international legal order, characterized traditionally as “necessary (natural) law”.<sup>1045</sup> Rules with *jus cogens* character do not need previous practice or consent of the subjects of the legal system.<sup>1046</sup> This makes the assertion of their application to IOs in the international legal system even easier and simpler to uphold.

If we accept that there are hierarchies between the norms of international law,<sup>1047</sup> it is quite normal that article 41 of ARIO provides for the responsibility of IOs for the “serious” breach of an obligation arising under a peremptory norm of general international law. This article is another reaffirmation for the abidance of IOs by *jus cogens* in international law.<sup>1048</sup> It is also clear that IOs are bound by *jus cogens*. IOs as subjects of international law are bound by the peremptory norms of

<sup>1042</sup> Minagawa, Takeshi, “Essentiality and Reality of International Jus Cogens”, *Hitotsubashi Journal of Law and Politics*, Vol. 12, 1984, pp. 1–15, at p. 14.

<sup>1043</sup> Kawasaki, Kyoji, “A Brief Note on the Legal Effects of *Jus Cogens* in International Law”, *Hitotsubashi Journal of Law and Politics*, Vol. 34, 2006, pp. 27–43, at p. 27.

<sup>1044</sup> De Hoogh, A. J. J., “The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective”, *AJPLL*, Vol. 42, 1991, pp. 183–214.

<sup>1045</sup> O’Connell, Mary Ellen, “Jus Cogens: International Law’s Higher Ethical Norms”, in Donald Earl Childress (ed.), *The Role of Ethics in International Law*, third edition, Cambridge University Press, 2012, pp. 78–101, at p. 98.

<sup>1046</sup> Cassese, A., and Weiler, J. H. H., *Change and Stability in International Law-Making*, Berlin/New York: De Gruyter, 1988, p. 128.

<sup>1047</sup> Weiler, JHH and Paulus, Andreas, “The Structure of Change in international law or Is there a Hierarchy of Norms in International Law?”, *European Journal of International Law*, 1997, Vol. 8, pp. 545–565, at pp. 558–565; Ragazzi, Maurizio, “International Obligations Erga Omnes: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions”, in Goodwin-Gill, G. S., and Talmon, S., *The Reality of International Law. Essays in Honour of Jan Brownlie*, Clarendon Press, Oxford, 1999, pp. 455–477; Goodwin-Gill, G. S., “Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute”, in Goodwin-Gill, G. S., and Talmon, S., *The Reality of International Law. Essays in Honour of Jan Brownlie*, Clarendon Press, Oxford, 1999, pp. 199–223.

<sup>1048</sup> Nieto-Navia, Rafael, “International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law”, March 2001, The Hague, pp. 1–27. Available on: [https://www.researchgate.net/publication/268361993\\_International\\_Peremptory\\_Norms\\_Jus\\_Cogens\\_and\\_International\\_Humanitarian\\_Law](https://www.researchgate.net/publication/268361993_International_Peremptory_Norms_Jus_Cogens_and_International_Humanitarian_Law) (last visited on 06.04.2022).

the legal system that confers them international legal personality. There is the issue of eventual difference between the peremptory norms belonging to *jus cogens*, on the one hand, and those peremptory norms that belong to the corpus of general international law, on the other hands. Some scholars have opined that these latter principles relating to structure or operation of the international legal system form part of the general principles of law rather than *jus cogens* norms, as they believe that *jus cogens* norms are ethical or moral norms in nature.<sup>1049</sup> Built upon that assertion, the argument put forward by some IOs can be refuted, according to which the IOs' obligation to cooperate to bring a breach of a peremptory norm to an end should be limited to provisions of their respective charters.<sup>1050</sup> To put it differently, by accepting the non-functional character of *jus cogens* norms, it can be argued that IOs cannot take recourse to the principle of speciality or their functional nature in order to limit with respect to themselves the obligations arising from and consequences of a violation of *jus cogens* norm.

In the same spirit, as Grant has rightly argued:

“A duty to the “international community as a whole” very much may involve the United Nations, for the United Nations is specially suited as an institution to represent the community's interests. It follows from its distinctness from the community and from its assigned functions that the United Nations itself may owe obligations to the community.”<sup>1051</sup>

Looking at the question of the international obligations of IOs from another perspective, the legal basis and applicability of certain obligations gains importance with regard to the taking of countermeasures by IOs, as it has been provided for in article 53 ARIO.<sup>1052</sup> In the commentary to this article it has been presumed that these obligations are binding for IOs as well. Otherwise an IO would be free to take countermeasures thereby affecting the obligation to refrain from the threat of use of force, the obligations for the protection of human rights, obligations of a humanitarian character prohibiting reprisals and other obligations under peremptory norms of general international law. Thus, paragraph (d) of article 53 is also another means for ensuring the respect for peremptory norms of general international law. In addition, paragraphs (b) and (c) of the same article of ARIO further limit the area in which an IO may take countermeasures, and as a result guarantee that international rules protecting human rights and rules with humanitarian character prohibiting reprisals are not breached by IOs with the

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<sup>1049</sup> O'Connell, Mary Ellen, “Jus Cogens: International Law's Higher Ethical Norms”, *op. cit.*, p. 98.

<sup>1050</sup> A/CN.4/582, Sect. II.U.2; Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 67, para. 3, commentary to article 42, and the relating fn 272.

<sup>1051</sup> Grant, D. Thomas, “International Responsibility and the admission of States to the United Nations”, *Michigan Journal of International Law*, Vol. 30, No. 2, 2009, pp. 1095–1185, at p. 1131, for the distinctness of the UN from the international community see pp. 1128–1131.

<sup>1052</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), art. 53, and commentary to this article para. 1, at p. 85.

pretext of taking countermeasures. Clearly, not all of the rules belonging to the two mentioned fields form part of *jus cogens*, even though the aims and nature of these rules may be very close and sometimes even identical to peremptory norms of general international law, to the extent that some scholars speak of an intrinsic relationship between these concepts and notions.<sup>1053</sup>

From another perspective, it is quite natural that the interests of the international community should also play an important role by investigating and establishing the primary rules and obligations of IOs. Meaning that according to these interests and for their realizations, the IOs incur obligations just as the States do.<sup>1054</sup> Prominently, at the origins of those obligations having the character of *jus cogens* and *erga omnes* in the field of human rights and humanitarian law<sup>1055</sup> are moral and ethical principles transformed into legal norms, endowed with juridical and practical values.<sup>1056</sup> If we accept that there are indeed obligations of international ‘constitutional’ nature,<sup>1057</sup> in that case it would not be very difficult to generalize these obligations and extend them to IOs requiring no other legal basis for their bindingness.<sup>1058</sup>

Despite the unquestionable bindingness of *jus cogens* on IOs and the stronger effects and consequences that the violation of peremptory norms of international law have also for IOs, the mere existence and acknowledgment of the notion cannot contribute to the practical effect of the responsibility mechanism. Indeed, the most problematic aspect with regard to *jus cogens* is that “it is in fact difficult to identify norms of international law which can be defined truly as peremptory.”<sup>1059</sup> It is often very hard to find principles which would satisfy all the criteria in order to be characterized and recognized as such. Furthermore, there seems to be a consensus on the necessity of a strict interpretation of the concept.

<sup>1053</sup> Bianchi, Andrea, “Human Rights and the Magic of *Jus Cogens*”, *EJIL*, Vol. 19, No. 3, 2008, pp. 491–508, at p. 492.

<sup>1054</sup> Minagawa, Takeshi, “*Jus Cogens* in Public International Law”, *Hitotsubashi Journal of Law and Politics*, Vol. 6, 1968, pp. 16–28, at p. 23.

<sup>1055</sup> For the discussion on the nature of obligations arising from human rights and humanitarian law see Provost, René, “Reciprocity in Human Rights and Humanitarian Law”, *BYBIL*, Vol. LXV, 1994, pp. 383–454.

<sup>1056</sup> Minagawa, Takeshi, “*Jus Cogens* in Public International Law”, *op. cit.*, at p. 23.

<sup>1057</sup> Bernstorff, J., “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law”, 19 *European Journal of International Law*, 2008, pp. 749–768.

<sup>1058</sup> Linderfalk, Ulf, “The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?”, *EJIL*, Vol. 18, No. 5, pp. 853–871, at p. 854.

<sup>1059</sup> Nieto-Navia, Rafael, “International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law”, *op. cit.*, p. 27.

f) *Through other Sources of International Obligations: Soft law and the idea of soft responsibility*

Soft law, either as the “symbol of contemporary times and a product of necessity”,<sup>1060</sup> “a response to the insufficiency in the law originating from the institutional law-making processes established by the political community”,<sup>1061</sup> or even as a “self-serving quest for new legal materials”,<sup>1062</sup> could and should actually be a useful and desirable means for the purpose of the international legal responsibility of IOs, through, in a way, filling the gap of primary rules applicable on IOs and contributing to the certainty and determinacy of the legal system. Of course, for this to happen, an essential precondition would be either that such non-binding standard-setting normative instruments or non-legislative codifications produce some kind of non-binding international legal effects – semi obligations – for which a distinct concept of soft responsibility would find acceptance, beside other well-known kinds of responsibility, such as objective responsibility, absolute responsibility, causal responsibility or responsibility for risk. If we accept that certain theories of softness may lead to the inclusion of truly relevant subjects in the international legal discourse, and such efforts are not only destined to gain new material for the field of international law and satisfy the egoist needs of international legal scholars,<sup>1063</sup> by taking recourse to this alternative the above discussed problem may be mitigated. At present, the IOs could easily be nicknamed as machines of soft-law production, given their dynamism, quantity of their work and their involvement in this form of norm creation.<sup>1064</sup> Usually, when IOs issue a recommendation, with their own practice they try to harden the content of the document from soft law into hard law.

Effectiveness of the soft law rules may be best made clear by looking more deeply into the reasons of the respect that subjects of international law have in their behavior for the hard law rules as well as the dynamics that encourage these actors to implement the rules of international legal order. Respecting the legal rules cannot always be explained by the fear of the risk of punishment, in whatever form it may appear. Rather, the risk of reaction on the part of the other parties at the international level incites the subjects of international law to respect its rules, a situation that is referred to as potential of implementation of international law through reciprocity. Thus, in the absence of an executive organ at the interna-

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<sup>1060</sup> Dupuy, Pierre-Marie, “Soft Law and the International Law of the Environment”, *Mich. J. Int'l L.*, Vol. 12, 1990–1991, p. 420, at p. 422.

<sup>1061</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *ICLQ*, Vol. 63, Issue 03, July 2014, pp. 535–567, at p. 547.

<sup>1062</sup> D’Aspremont, Jean, “Softness in International Law: A Self-serving Quest for New Legal Materials”, *European Journal of International Law*, Vol 19, No 5, 2008, pp. 1075–1093.

<sup>1063</sup> D’Aspremont, Jean, “Softness in International Law: A Self-serving Quest for New Legal Materials”, *European Journal of International Law*, Vol 19, No 5, 2008, pp. 1075–1093, at p. 1093.

<sup>1064</sup> Abbot, K.W. and Snidal, D., “Hard and Soft Law in International Governance”, 54 *International Organizations* (2000), pp. 421–456.

tional level in the real sense of the term, and depending on the subject matter in question, soft or hard law rules may be favored. Relevance of this discussion to the question of international legal responsibility is the self-regulation phenomena that we are witnessing in the practice of various IOs, which is a relatively recent trend that may be partly explained by this tendency. Important point in this connection is that such trend, which is beneficial for the first level accountability purposes, restricts even more the applicability of international legal responsibility, precisely by reason of strengthening the norms with non-binding nature or the so-called soft law rules which do not fall under the definition that ARIO has delivered of the elements necessary for the international legal responsibility to arise.

Systematic repetition has been known as the main element essential to the process of the emergence of soft law.<sup>1065</sup> Soft law regulations, the impressionistic reflection of the future hard law rules<sup>1066</sup>, most often manifested in the form of guidelines, best practices, and alike, although from a strict legal viewpoint often non-binding, may contribute to the concretization of legal standards, the prominent example of which is with respect to human rights. In this way, far from the discussion whether soft law rules are good or bad, useful or just “stepchild that is tolerated when other options are unattainable”<sup>1067</sup>, for the purpose of international legal responsibility these rules may be in policy terms helpful,<sup>1068</sup> since they may contribute to meaningfulness of responsibility for IOs. Therefore, the main question here is whether soft law rules are relevant in the context of international legal responsibility. In order to answer this question, first it must be examined whether there is any legal consequence for the subjects of international law when these latter disregard soft law rules. This function can be performed by the soft law provisions with regard to IOs as well as states, which are not different from states from this point of view. However, where general standards are lacking for the IOs, the soft law rules could at the first stance fill the major gap by providing the essential initial general framework, even though it could still be argued that these would not be relevant for the purpose of international legal responsibility because of their non-binding nature, even though, at least in pragmatic reading of law, there are judicial phenomena that are not necessarily obligatory, but still juridical and enjoying certain legal effects, an argument that explains why law should not be merely reduced to the legal rules.<sup>1069</sup> It is evident that the problem of their

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<sup>1065</sup> Dupuy, Pierre-Marie, “Soft Law and the International Law of the Environment”, *Mich. J. Int'l L.*, Vol. 12, 1990–1991, p. 420, at p. 424.

<sup>1066</sup> *Ibid.*, at p. 433.

<sup>1067</sup> Hafner, E. M./Victor, D. G./Yonatan Lupu, “Political Science Research on International Law: The State of the Field”, *AJIL*, Vol. 106, No. 1, January 2012, pp. 47–97, at p. 73.

<sup>1068</sup> Peters, Anne and Pagotto, Isabella, “Soft Law as a New Mode of Governance: A Legal Perspective”, *New Modes of Governance Project*, Project Nr. CIT1-CT-2004-506392, p. 11.

<sup>1069</sup> Papaux, Alain, “Le Droit International Public libéré de ses sources formelles: Nouveau regard sur l'article 38 du statut de la cour internationale de justice”, *Revue Belge de droit International*, 2013(2), Éditions BRUYLANT, Bruxelles, pp. 525–584, p. 532.

binding force could be resolved, *inter alia*, by way of transformation into customary international rules binding on IOs, but at the same time the question remains open how such process should take place. Would the mere existence of such provisions suffice to satisfy the required practice or the material element of customary international law is an important question. In other words, is the time ripe enough to claim that the “voicing of *opinio juris* take precedence over the material element of [State] practice”.<sup>1070</sup> Even if the answer is positive, there still remain doubts with regard to the subjective element, namely where the moral element, which is the *opinio juris*, should come from. However, it seems that the mere existence of such rules may not be a manifestation of *opinio juris*, since the argument may be put forward that should the *opinio juris* have existed indeed then why the rules have not been presented in a legally binding form. In any case, still many ambiguities exist with respect to the soft law rules, but it does not reduce their relevance and importance, as has been observed with respect to soft rules in the context of global administrative law:

“Reducing the discussion of such normative materials to the binary of binding/non-binding, or to an amorphous and undifferentiated category of “soft law”, not only misses much about their widely varying effects, it diverts attention from questions as to how and under what procedures they are made, promulgated, reviewed, contested, or subjected to processes of accountability.”<sup>1071</sup>

Thus, the conclusion from the discussions above that would on its part pose a fundamental question in this respect would be about the degree of bindingness that is necessary in order that we have a legal obligation the breach of which would reach the threshold to raise international legal responsibility. However, it should also be added that the concept of soft responsibility, even though admittedly not devoid of attraction, faces serious opposition motivated by considerations of sovereignty.

## 2. Through the Obligations of their Member States

Various and manifold theories have been put forward in arguing that the IOs are bound or are not bound by the international obligations of their founding and member states.<sup>1072</sup> The theory of substitution and analogical arguments based on the principles of state succession support the idea that IOs are bound by the in-

<sup>1070</sup> Cassese, A., and Weiler, J. (eds.), *Change and Stability in International Law-Making*, 1988, pp. 66–101.

<sup>1071</sup> Kingsbury, Benedict and Casini, Lorenzo, “Global Administrative Law Dimensions of International Organizations Law”, *International Organizations Law Review*, 6 (2009), pp. 319–358, at p. 351.

<sup>1072</sup> Naert, Frederik, “Binding International Organizations to Member State Treaties or Responsibility of Member States for their own Actions in the Framework of International Organizations”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, pp. 167–168.

ternational obligations of their members.<sup>1073</sup> Opposite to this position, on the basis of the necessity of consent of IOs for being bound by international legal rules, *inter alia*, Vienna II Convention on the Law of Treaties rejects the idea that IOs can be automatically bound by international obligations of their members. This depends on different factors, most importantly, first, the nature of the international rules and obligations in question, and second, to what extent IOs are tools and means for the States to achieve a spectrum of interests, from individual ends and egoistic aims to common and beneficiary interests that incorporate and integrate the interests of all. This may somehow also depend on the scope of competences and powers delegated to IOs and their structure. For instance, the ECJ in its judgment in *International Fruit Company* case – and subsequently in other similar cases – held that the Community as such was bound by the provisions of the GATT, in so far as under the EC Treaty the Community has assumed the powers previously exercised by the member states in the area covered by the General Agreement.<sup>1074</sup> Hence, the transfer of powers from states to IOs – delegation of powers to a degree that the control exercised by the delegating states nears zero or descending below a certain threshold – could be an argument for considering the IO being bound by the international obligations to which its members are bound in the area covered by the transfer of powers.

A major question that in this respect may come to mind is whether States or member States of an IO could decide to impose an international obligation on an IO of which they are members without the will of the IO playing any role. In other words, to what extent the consent of the organization is necessary for an obligation to be binding on the IO? There is no doubt that the international legal order, at least to the extent that it relates to the rights and obligations of States, is based on the consent of these principal subjects of international law, a derivative of the principle of equality of sovereign states.<sup>1075</sup> Interestingly, in some of the theoretical essays dealing with non-state actors' participation in international legal processes, the IOs are not enumerated among such actors,<sup>1076</sup> which lead to the impression that the IOs are somehow considered in the same category as states or in a way representative of state actors. Built upon the former conclusion, one could argue that the consent of an IO should be given weight at the international sphere in the same manner as the will of states. But then the question would be raised as to whether the same principle applies with regard to the rights and obli-

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<sup>1073</sup> Schermers, Henry G. and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, *op. cit.*, p. 995, § 1574.

<sup>1074</sup> Case 21–24/72, *Third International Fruit Company Case*, ECR 1972, at 1227.

<sup>1075</sup> Schreuer, Christoph, “The Waning of the Sovereign State: Towards a New Paradigm for International Law?”, *EJIL*, 1993, Vol. 4, No. 2, pp. 447–481, at p. 448.

<sup>1076</sup> Bianchi, Andrea, “The Fight for Inclusion: Non-State Actors and International Law”, in Fastenrath, Ulrich/Geiger, Rudolf/Khan, Daniel-Erasmus/Paulus, Andreas/Von Schorlemer, Sabine/Vedder, Christoph (Eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 39–57, at p. 49.



gations of IOs, which are (subsidiary) subjects of international law, as they have been described by the ICJ in its advisory opinion in 1949 on the *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>1077</sup> The second conclusion may on the contrary lead us to a totally opposite assertion according to which IOs are new transformed reflections of the old nation-states construction, created by them and thus at the end of the day the destiny of the former should be in the hands of the latter. Along the same vein, but from another perspective, as it has been repeated earlier the international legal personality of an IO is separate from that of its member States and organizations. Therefore it would seem logical that the international obligations of members of the IO would not automatically be applicable and binding on the IO as well.

It is not questionable that the member States of any IOs have their own international obligations. But are States also obliged to respect their international obligations even when they are acting in the framework of an IO, namely as the members of the IO and not freely as States.<sup>1078</sup> Would the States member of IOs incur international responsibility for their voting behaviors in the framework of IOs? Although this would indubitably benefit the respect for primary rules of international law by IOs in an indirect manner, but it cannot be assimilated with the promotion of practical effect of the mechanism of international responsibility for IOs. At least some authors believe that the member States of IOs are bound by their human rights obligations when they act in the framework of IOs.<sup>1079</sup>

If the obligations of member States of international organizations would directly extend to the IO the problem of unclarity of the primary rules with respect to IOs would be solved easily. But quite apart from the question of whether such a general rule that would directly transmit the obligations from States to IOs exists or not, and whether it would be legitimate at all,<sup>1080</sup> it is clear that such a general rule would encounter problems in practice. The States member of an IO have different and various sets of international obligations, often not completely matching, at best sometimes partly overlapping. Which of these obligations had to be transmitted to the IO and which obligations should not? A simple answer and solution may be that those obligations that are common to all the members of the

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<sup>1077</sup> *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 178.

<sup>1078</sup> For a discussion of the human rights obligations of the Security Council members see Schilling, Theodor, "Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats. Möglichkeiten und Grenzen", *ZAÖRV*, Band 64, 2004, pp. 343–362.

<sup>1079</sup> Schilling, Theodor, "Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats. Möglichkeiten und Grenzen", *ZAÖRV*, Band 64, 2004, S. 343–362, S. 349.

<sup>1080</sup> On the legitimacy concerns with regard to imposing solutions and international obligations on other subjects of law without their will and consent see Paulus, Andreas, L. "Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen. Zusammenspiel der Rechtsquellen aus Völkerrechtlicher Perspektive", *Deutsche Gesellschaft für Internationales Recht, Tagung Luzern*, 14 März 2013, p. 18.

IO have to be transmitted. However, for such a mere mathematical solution there may not be enough justification. The Interplay with the principle of specialty, hardly ignorable, could also cause practical problems. To put it differently, it is not clear to which extent the principle of specialty should be given weight in such transfer of obligations from states to IOs in the cases where states have delegated powers on IOs but have retained certain amount of control over the delegated competences. Once again, it should be kept in mind that those international rules and obligations belonging to the realm of universal law guaranteeing international community interests are outside the debate of this subsection, since those norms are at any event binding on IOs directly.<sup>1081</sup>

For the purpose of examination of succession of states by IOs in terms of the formers' international obligations, a distinction should be made between international law-making treaties, on the one hand, and other contractual treaties to which member states of an IO are parties, on the other hand. Apart from the widely accepted fact that the IOs are not only, on their own, bound by the general principles embodied in law-making international treaties, but also through the binding force these treaties enjoy on member states of IOs, these latter subjects of international law are required to respect these general principles and the conventional rules specifying these principles. With respect to the first category of treaties, the IOs seem to become bound by these treaties to the extent powers have been assumed by the IO previously exercised by the member states in the area falling under the scope of applicability of the provisions of such conventions and covered by the law-making treaty. Prominent example of succession of an IO to the international obligations of its members constitutes the case of the EU with regard to the obligations of its member states in the framework of GATT.<sup>1082</sup>

The case of contractual treaties to which member states of an IO are parties, is to some extent different. The IOs are not directly bound by the contractual treaty obligations to which their member states are bound. However, in an indirect manner these contractual rules and obligations derived therefrom have also impact on IOs, since these rules qualify and limit the scope and content of the powers which can be accorded by the member states of an international organization to the latter. In other words, these contractual obligations of (founding and/or) member states of IOs by indirectly influencing the powers and competences the IO will be availed of, define also the boundaries and frontiers of the lawful con-

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<sup>1081</sup> Simma, Bruno, "Universality of International Law from the Perspective of a Practitioner", *EJIL*, 2009, Vol. 20, No. 2, pp. 265–297, at pp. 267–268; Kingsbury, Benedict and Donaldson, Megan, "From Bilateralism to Publicness in International Law", in Fastenrath, Ulrich/Geiger, Rudolf/Khan, Daniel-Erasmus/Paulus, Andreas/Von Schorlemer, Sabine/Vedder, Christoph (Eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 79–89, at p. 79.

<sup>1082</sup> Paasivirta, Esa, "Responsibility of a Member State of an International Organization: Where will it End? – Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations", *IOLR*, Vol. 7, No.1, 2010, pp. 49–61, at p. 56.

ducts of these IOs. Nevertheless, a problem may arise with regard to the situation of IOs members of which are bound by different sets of international obligations which do not correspond to each other. Moreover, supposing that an IO has been established, with defined and limited powers and competences – these limits being mainly the indirect result of contractual treaties and obligations by which the founding members are bound. In the course of the life of IO, some competences, powers and courses of action become necessary for the IO in order to perform its tasks and achieve its purposes and aims, for which it has been established. In this situation, could the IO in question by taking recourse to the functionalist doctrine and argument of implied powers, avail itself of those needed powers and competences, even though those powers and competences would go beyond the scope of contractual obligations of its (founding) members? Obviously, it is not easy to find a single answer which would fit all possible cases. Some scholars, on the premise of minimizing the risks of control and maximizing the potential agency gains, have in the context of treaty rule-making by IOs, advocated a restricted recourse to implied powers doctrine and a closely circumscribed scope of competences of IOs.<sup>1083</sup> This standpoint, arguably valid even when generalized to other domains of involvement of IOs, seems to best respond to and balance conflicting interests and aspirations.

At this place, the special case of supranational IOs perhaps deserves a separate brief examination in this relation. Supranational organizations, unlike other kinds of intergovernmental organizations – functioning on the basis of delegated powers by states – are based on a large-scale shift of powers by member states to the IO often so wide-ranging and irreversible that it is characterized as transfer of powers from the member States to the organization.<sup>1084</sup> First and foremost, the ECtHR approach adopted in *Waite and Kennedy v. Germany* case<sup>1085</sup> puts obligations on the member states to ensure that at the end of the day the international obligations of the IOs towards individual third parties protecting their human rights are not weaker than it was for the states before the transfer of powers in the area in which the powers have been transferred.<sup>1086</sup> Consequently, the organization would have

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<sup>1083</sup> Wouters, Jan and De Man, Philip, “International Organizations as Law-Makers”, *Working Paper No. 21, Leuven Centre for Global Governance Studies*, March 2009, p. 23. Available on: [https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp21-30/wp21.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp21-30/wp21.pdf) (last visited on 06.04.2022).

<sup>1084</sup> Kassim, Hussein and Menon, Anand, “Bringing the Member States Back in: The Supranational Orthodoxy, Member State Resurgence and the Decline of the European Commission Since the 1990s”, *ECPR Fifth Pan-European Conference*, Porto, 23–26 June 2010, at p. 3. Available on: [https://www.academia.edu/2715332/Bringing\\_the\\_member\\_states\\_back\\_in\\_the\\_supranational\\_orthodoxy\\_member\\_state\\_resurgence\\_and\\_the\\_decline\\_of\\_the\\_European\\_Commission\\_since\\_the\\_1990s](https://www.academia.edu/2715332/Bringing_the_member_states_back_in_the_supranational_orthodoxy_member_state_resurgence_and_the_decline_of_the_European_Commission_since_the_1990s) (last visited on 06.04.2022).

<sup>1085</sup> *Waite and Kennedy v. Germany*, European Court of Human Rights, Application No. 26083/94, European Court of Human Rights, February 18, 1999, para. 150.

<sup>1086</sup> Reinisch, August and Weber, Ulf Andreas, “In the Shadow of *Waite and Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and

the power to conclude treaties and accept obligations in the limits of these competences. Sometimes an agreement covers a wide range of issues that does not strictly correspond to the division of powers between the Community and the member States. As a solution for such cases, the mixed agreements are invented,<sup>1087</sup> to which both the IO and the member States are separately parties beside one or more third parties.<sup>1088</sup> Formula of Mixed agreements is the incentive to tackle the situation where member States of an IO have conferred competences to an IO which corresponds partly to the issues covered by an agreement. In such cases the mixed agreement provide for the possibility for the IO and its member States to be at the same time the parties to the agreement “on the one part” and the third parties, on the other.<sup>1089</sup> For the question of the apportionment of responsibility between the IO and its members in cases of mixed agreements, at least in the jurisprudence of ECJ, solutions have been adopted as to hold the IO and its members jointly responsible in certain circumstances.<sup>1090</sup> In the same context, the solution in the UN Law of the Sea Convention 1982 according to which States members will have in certain circumstances joint and several responsibilities with the Community will also be touched upon.

### 3. Beneficiaries of the Obligations of International Organizations

IOs may have varying obligations, in terms of substance as well as scope, towards each and every category of entities, with which they may be in contact, in changing degrees of interactions or permanent relationships. Depending on the legal system from which the obligation may originate, the legal responsibility, in principle, arises in that very same legal system. In other words, the legal obligations belonging to a certain legal system, and legal responsibility may not extend to other legal systems, which would mean that those parties, towards whom the IO does not have any obligations in a certain legal system, cannot benefit from the envisaged responsibility system. This is especially true with regard to individuals, NGOs and companies, who may not take recourse to ARIIO articles to seek rem-

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Administrative Tribunals as Alternative Means of Dispute Settlement”, *IOLR*, Vol. 1, 2004, pp. 59–110, pp. 74–110.

<sup>1087</sup> Heliskoski, Joni, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague, 2001, Chapter V.; Hoffmeister and Ondrusek, “The European Community in International Litigation”, 61 *Revue Hellenique de droit international*, 2008, 205.

<sup>1088</sup> Kuijper, P. J., and Paasivirta, E., “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 111–138, at pp. 116–128.

<sup>1089</sup> Björklund, Martin, “Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?”, *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 373–402.

<sup>1090</sup> Judgment of 2 March 1994, *European Court Reports (1994)*, p. I–625 at pp. I–661–662 (recital 29), referred to also in *Second Report on the Responsibility of International Organizations*, UN Doc. A/CN.4/541, para. 8.

edy for the damages or injuries sustained, unless indirectly through the channel of diplomatic protection. As commented by Austria:

“...a clear distinction could be made between the legal positions of member States, third States that have established relations with the international organization and third States that have explicitly refused to do so. In contrast to the law of State responsibility, this distinction is crucial for the law of international organizations because of their limited mandates and capacities and due to the question of the legal effects of their recognition.”<sup>1091</sup>

The issue of the beneficiaries of the obligations of IOs gains importance because this issue makes clear, in the first place, who can invoke the international legal responsibility of an IO. The variety of these beneficiaries is the result of the multitude of relationships that the IOs are maintaining with different parties, prominently member states, non member states, other IOs, staff members and third parties, such as private individuals, NGOs and companies. In this sub section, we will examine briefly the position of the different beneficiaries of the obligations of IOs. In the following sub chapters, the question will be addressed whether these beneficiaries may take recourse to ARIO against IOs, and whether they all find a legal standing to implement ARIO, in sum, which of these categories enjoy justiciable rights against IOs. These beneficiaries, as mentioned above, are namely (a) member States (b) non-member States (c) other IOs with whom the responsible IO may have legal relations, its staff members, of course (d) and finally individuals (e).

#### *a) Member States and IOs*

First of all, one may ask himself with regard to all of the different beneficiaries of obligations of IOs, from which source of international law the obligations may arise which confer rights to a certain group. In the case of members of an IO, it is clear that the main source is the rules of the IO, as enumerated by ARIO, comprising of constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the IO. In addition, it should be pointed out that the rules of general international law, as well as specific agreements binding upon members and IO, prominently headquarter agreements, have also the potential to regulate the relations between the IO and its members. In this place, it should be noted that the subject of our study is merely international law, since we are concerned with international responsibility of IOs and not their responsibility under any other legal systems, such as national legal system. Most of the relations of the IO with its member States are regulated by the Constitution and founding documents and instruments of the IO. But it does not preclude the application of the general principles and rules of international law on such kinds of relations, as has also

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<sup>1091</sup> UN Doc, A/CN.4/636 (14 February 2011), p. 6.

been pointed out by the ICJ in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*.<sup>1092</sup>

These numerous sources allow the members to raise the international legal responsibility of the IO in different occasions where their rights originating from the obligations of the IO towards them is violated. Legal responsibility as a result of the breach of the internal rules of the IO may be implemented either according to the *lex specialis* or the general rules of international legal responsibility, namely ARIIO. In cases where the internal structure of the IO has already provided for dispute settlement mechanisms to deal with the disputes between members and the IO, the members have less concerns with regard to the instance in which they may invoke the international legal responsibility of the IO. On the contrary, in the lack of such mechanisms, the members have the more limited possibility of international administrative tribunals, which is conditioned on the existence of an agreement between the two IOs.

#### *b) Non-Member States*

It is clear that most of the IOs, as objective international actors at the international scene, not only have legal relations with their own members, but also with other States. It is quite imaginable that out of these various and abundant legal relations, some differences and disputes may arise. These legal relations have the potential to lead to the breach of international obligations, like any other legal transaction between any other legal persons and actors on the international playground. As the breach of obligation in these relations cannot be excluded, it may be expected that international legal responsibility of IOs may arise towards non-member States. With respect to these new international relations that may arise between the responsible IO and a non-member State(s), some points are worth being pointed out here. Firstly, the issue of recognition must be taken into account, in the sense that whether the recognition of the international legal personality of the IO is the precondition of the responsibility of the IO or not. With respect to these specific instances, it may be argued that the mere conclusion of international legal relations between a non member State and an IO implies the recognition of the IO by the non Member State.

In the relations between an IO and non-member states, there are certain ambiguities or lacunae which could be filled in ARIIO provisions. For instance, in the cases of tortious liability of the IO where acts of the IO cause personal injury to state officials or damage to state property, as reflected by ILA in its final report on the basis of the practice, the applicable law should be the rules and principles of international law. It is not clear why in such circumstances the domestic law of the state of the place where the injury or damage has occurred would not be applica-

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<sup>1092</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ, Reports 1980, p. 73, at p. 90.

ble, as it would be applicable on any other natural or legal person who would inflict injury to state officials or damage to state property. Of course, for the domestic legal system to be the applicable law, the IO should enjoy legal personality under the national legal system in question. In such circumstances, the drafting of ARIO could be a proper occasion to deal also with such, more specific, questions and regulate the primary or secondary rules applicable at the time of their occurrence.

There is another point in this connection in the ARIO which is not very clear and that is the article 49 of these set of draft articles. Paragraph 1 of this article,<sup>1093</sup> states that if the obligation breached is owed to a group of States or IOs, and is established for the protection of a collective interest of the group, each of the States or IOs member of the group or belonging to this group may invoke the responsibility of the IO that has breached its obligations towards this group. It is not clear why these States and IOs belonging to this group are not considered injured States or IOs. The establishment of the fact that a State or IO belongs to a group may also be in some instances problematic.

### *c) Non-member IOs*

Observation has been made, based on theoretical and practical experience, that the law of international organizations in terms of the obligations of IOs vis-à-vis each other suffers from unclarity.<sup>1094</sup> This is a point which has to be taken into account, also for the sake of the issue of international legal responsibility, when the primary rules applicable on IOs are discussed. In the new world order, in the perspective of postmodern, neoliberal and liberal theories, as the IOs are independent actors, playing parallel and equal to national States, and given the increasing number of these subjects of international law, and with the taking over of more and more functions in different fields and activities of international life, it is quite possible and natural that IOs may come into relation and legal relationship with each other. In this condition, again the potential of the breach of an international obligation towards another IO by an IO cannot be excluded. These relations are so often that the ILC has drafted a convention on the law of treaties between States and International Organizations or between International organizations. Of course it is the latter part of the issue undertaken by the ILC that is of interest and relevance to our argument. The conventional relations between IOs and the treaty obligations of IOs towards each other could, of course, give rise to responsibility of an IO and the application of ARIO provisions.

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<sup>1093</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), article 49, para. 1, p. 77.

<sup>1094</sup> Patel, N. Bimal, *Responsibility of International Organizations towards other International Organizations: Law and Practice of the United Nations, the World Bank, the European Union and the International Atomic Energy Agency*, Eastern Book Company Lucknow, first Edition, 2013, p. 327.

*d) Staff members*

It is, normally, the civil servants of the IO, in contrast to local staff, who may benefit from the international legal responsibility of IOs framework to seek reparations for the damage or injury sustained as a result of the acts of the IO. The reason is that, contrary to the issues relating to the situations of civil servants, the international law – general or particular conventional or customary rules – do not regulate the relations between the IO and its local staff, leaving such questions to the domestic legal systems of the states, or particular contracts governed by such legal systems, where the IO is active.

With respect to local staff, the substance of the international legal obligations of the IO may have entered in some domestic legal systems, through the process of incorporation of international treaties – general or particular – in the national legal systems. However, the responsibility that may arise for the IO as a result of the breach of such obligations remains, intrinsically, a legal responsibility under the domestic legal system. Consequently, the content and formalities of the implementation of such so-called legal responsibility would also be according to the provisions envisaged in each domestic legal system. It goes without saying that the major obstacle for the invocation, and thus implementation of such, or any legal responsibility of IOs at the domestic level is the immunity that IOs enjoy at the domestic courts and tribunals. International civil servants, on the contrary, are hardly banned by the latter obstacle in seeking remedy seizing international administrative tribunals by invoking the international legal responsibility of the IO with which they have one of the different kinds of employment relationships.

ARIO regulates the international legal responsibility of IOs towards states and IOs. Therefore, the staff members of the IO may not take recourse to ARIO articles to raise the international legal responsibility of the IO and subsequently for obtaining reparation. In any case, it is clear that in many cases the conducts of the IO towards its staff has the qualification of a wrongful act in the sense of ARIO. For this reason, it seems that it would be appropriate to extend the scope of the article on responsibility of IOs to their relationship with their staff members and employees – at least to those forming the international civil service.

*e) Beneficiaries denied the right to invoke international responsibility: Individuals and the International Community as a Whole*

The title intends to refer to individuals and the “international community as a whole”, entities that can, in principle, assert their claims at the international level exclusively either via the intervention of states or IOs other than the alleged responsible IO. With regard to these two groups of beneficiaries of obligations of IOs the ARIO have not recognized the right to invoke the international responsibility of an IO by taking recourse to its provisions, even though the ARIO admits that there is the possibility that a person or entity other than a state or an IO may



have the entitlement to invoke the international responsibility of an IO.<sup>1095</sup> To use the metaphor with the institution of trust, it can be observed that the safeguarding of the rights of persons (natural persons (individuals) and corporations), as well as the interests of the international community as a whole, has been trusted to states, at the first stage, and the IOs, at the second stage. Diplomatic protection, a channel for the states to protect the rights of individuals under certain conditions, as well as functional protection exercised by IOs<sup>1096</sup> – also under certain conditions and subject to the principle of speciality – are also guarantees for the respect of the rights of individuals. The same is true for the protection of the interests of the international community as a whole, consigned to the states primarily according to article 49(2) ARIO, and to IOs subject to the principle of speciality set out in article 49(3) ARIO.

The obligations of IOs towards individuals resulting from the interactions between these two categories of entities, lie within both international law as well as domestic legal systems of States. Depending on the kind of involvement of IOs, namely, in the light of the distinction between *jure imperii* or *jure gestionis* acts of IOs – used for the acts of states – the obligations arise from different legal systems for the IOs towards individuals.<sup>1097</sup> Mostly, the obligations of IOs in their relationships with individuals (including also NGOs, domestic or multinational corporations all deprived of international legal personality) resulting from the acts of IOs falling under the second category, are not usually within the international legal system but rather under other legal systems, most often, for example, under the internal legal systems of the headquarters States or the third States in the territory of which the IO is present, undertaking some kind of activities and thereby entering into direct relationships with individuals. Therefore, the responsibility arising from the breach of those obligations does not, in principle, fall within the purview of ARIO. It is worth noting that in most cases these obligations arise from the purchase contracts, other forms of supplying and procurement of the material needed, necessities of the IO and other service contracts that the IO may enter into with local persons for delivering services to the IO in cases where these relationships do not fall under the international civil service relationships.<sup>1098</sup>

Articles 33 and 50 of the ARIO clearly define the scope of application of the draft articles. By defining the scope of the international obligations arising from international responsibility in accordance with ARIO provisions, article 33 limits the scope of the result of application of ARIO to the international obligations “owed to one or more States, to one or more other organizations, or to the inter-

<sup>1095</sup> ARIO, Article 50, UN Doc. A/CN.4/650 (2011), p. 81.

<sup>1096</sup> Crawford, James, *State Responsibility, the General Part*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2013, pp. 566–597.

<sup>1097</sup> Gaillard, Emmanuel and Pingel-Lenuzza, Isabelle, “International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass”, *ICLQ*, Vol. 51, Part 1, January 2002, pp. 1–15, at p. 9.

<sup>1098</sup> Reinsch, August, *International Organizations before National Courts*, Cambridge University Press, 2000, pp. 258–262.

national community as a whole”.<sup>1099</sup> At the same time, article 33(2) acknowledges the possibility of a right arising from the international responsibility of an IO, which may accrue directly to any person or entity other than a state or an IO. A question that may be raised in this regard is whether the breach of an international obligation of an IO towards an individual could also give rise to international responsibility. Whatever the answer to this question, the possible international responsibility would not be implemented under ARIIO as set out in article 33(1). It has been provided in article 50 that the draft articles do not regulate and do not apply to any entitlement that a person or entity, other than a State or an international organization, may have to invoke the international responsibility of an international organization.<sup>1100</sup> But in any event, the ARIIO does not exclude the existence of obligations of IOs towards persons, individuals and other entities, and thus international legal responsibility of IOs towards them, as is clear from the “without prejudice” formulation used in drafting these two articles. In this respect, the prominent example of international legal responsibility of IOs arising out of breach of obligations owed to individuals is the obligations under international administrative law giving rise to employment claims. In this category are included, mainly, the officials of the IO that have a contractual relationship with it.<sup>1101</sup> In this regard, a notable point is the nature of the contracts between the IOs and its employees. There is no doubt that the IO has under international law certain obligations with regard to the employment relations emanating from different sources. The important issue in this connection, nevertheless, is whether this contract is part of international law.

Other than contractual relationships between individuals and IOs, the former may also get in a legal but non-contractual relationship with IOs. This kind of relationship that may follow a tort committed by an IO is no more very rare, as the IOs are now involved in a vast range of activities at the local, national, regional and international levels. Normally, it is the states or IOs – respectively through diplomatic or functional protection – which have capacity and entitlement to invoke responsibility and claim reparation for the violation of the rights of individuals and the damages sustained by them. A problematic variation of the same scenario could, however, be the encroachment of the rights of individuals lacking a nationality (stateless persons) by an IO through its decisions or actions undertaken in the implementation of decisions, for example by UNHCR or World Immigration Organization (WIO). Article 50 ARIIO explicitly sets out that there may be a possibility of the entitlement that a person or entity other than a state or an international organization may have to invoke the international responsibility of an IO, but ARIIO does not deal with this matter. On the contrary, there is also another

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<sup>1099</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), article 33, at p. 59, para. 5.

<sup>1100</sup> *Ibid*, article 50, at p. 81.

<sup>1101</sup> *Ibid*, Commentary to article 33, at p. 59, para. 5.

place in the ARIO where reference has been made to the individuals or at least entities other than States or IOs, with the possibility of indirectly receiving reparation for injuries or damages by those persons or entities, namely, article 49 paragraph 4 litra (b), where this article refers to the beneficiaries of the obligation breached by the IO. However, the condition for the entitlement of a state or an IO to bring a claim and invoke responsibility is that the obligation breached should be owed to the international community as a whole. To put it differently, in principle, the mechanism of international responsibility designed in ARIO consisting in invocation of international responsibility by a state or an IO can be triggered and take place under specific conditions depending on whether these entities – states and/or IOs – are injured or not injured but affected in other specific ways by the wrongful conduct in question.

Article 50 of ARIO once again emphasizes that the scope of this set of draft articles is limited to the invocation of international responsibility of an IO by States or other IOs. But it cannot be a reason for limiting the scope of international obligations the breach of which when attributable to IO constitute a wrongful act, to international obligations owed to states and IOs. Along the same vein, ARIO sets out the conditions for invoking international responsibility of an IO in cases of breach of international obligations owed to the international community. But there are also obligations that IOs may owe to states or other IOs for the benefit of individuals. Therefore, ARIO do not exclude the possibility that an IO may be internationally responsible towards individuals. This is exactly the question of the rights the individuals may have under international law vis-à-vis IOs. Under certain circumstances the individuals and legal persons may also be entitled to invoke the international legal responsibility of IOs. Individuals could have rights that would entail obligations for the IOs towards individuals. A prominent example could be the membership of individuals in IOs for example the possibility of the membership of individuals in the Arab International Bank.<sup>1102</sup>

The other entity the IOs may have international obligations towards is the international community (as a whole). The origin of this discussion has been coined by the landmark decision of ICJ in the case *Barcelona Traction*<sup>1103</sup> where the court has spoken for the first time of obligations *erga omnes*. As the ICJ has referred to in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt* repeated earlier, the IOs are bound by the obligations arising from general international law. Along the same vein, the ILC has admitted that the breach of the obligation may well affect more than one subject of international

<sup>1102</sup> Mendelson, Maurice, “The Definition of ‘International Organization’ in the International Law Commission’s current Project on the Responsibility of International Organizations”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 371–389, at p. 372.

<sup>1103</sup> *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, Second Phase, ICJ Reports, 1970, paras. 33–34.

law or the international community as a whole.<sup>1104</sup> It should, however, be noted that it has been stated by some scholars that the ILC work on international responsibility is incomplete with respect to the consequences of the breach of obligations owed to the international community as a whole, namely, the *erga omnes* obligations.<sup>1105</sup> This gap has not been filled by the ILC at the occasion of the drafting of ARIO and the provisions dealing with the same matter this time in connection with IOs. Some would even say that the ILC has, regrettably, not used its second chance to make good the shortcoming that had appeared in ASR and it did not capture the moment to make it good with regard to IOs. It is stated that the respective articles in the draft, namely, articles 41 and 42 incorporating the communal spirit into ARIO,<sup>1106</sup> suffer from un-clarity.<sup>1107</sup> At least one point is clear, namely, that these kinds of obligations lead to the consequence that international responsibility may take and adopt multilateral dimensions. This development is related to and the result of the emergence or the affirmation of the existence of community interests towards the international community as a whole.<sup>1108</sup>

With respect to the connection between the international obligations of IOs towards international community, on the one hand, and the international responsibility of the IO for the breach of those obligations, on the other hand, the important issue is to make clear whether these obligations are towards international community of states – in the sense of article 53 of the Vienna Convention on the Law of Treaties – or the international community as a whole far beyond the former concept. There are various indications that could support and strengthen each of the two positions, as has also been the case in the process of the preparation of the draft articles.<sup>1109</sup> In ASR the ILC has observed in paragraph 10 of the commentary to article 48 with regard to the entitlement of all states to invoke the international responsibility of a state breaching an obligation owed to the international community as a whole, that each and every state is a member of the international community as a whole.<sup>1110</sup> At the same time, limiting the entitlement of IOs

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<sup>1104</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to art. 1, para. 5, at p. 14.

<sup>1105</sup> Dupuy, Pierre-Marie, “Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of ‘Obligations Owed to the International Community as a Whole’”, *EJIL*, Vol. 23 (4), pp. 1059–1069, at p. 1059.

<sup>1106</sup> Ajeviski, Marjan, “Serious Breaches: The draft Articles on State Responsibility and Universal Jurisdiction”, *European Journal of Legal Studies*, Vol. 2, No. 1, 2008, pp. 12–48.

<sup>1107</sup> Dupuy, Pierre-Marie, “Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of ‘Obligations Owed to the International Community as a Whole’”, *op. cit.*, at p. 1060.

<sup>1108</sup> Dupuy, Pierre-Marie, “Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of ‘Obligations Owed to the International Community as a Whole’”, *op. cit.*, at p. 1061.

<sup>1109</sup> “State Responsibility. Comments and Observations received from Governments” (A/CN.4/515, 16 March 2001), sv Art. 43.

<sup>1110</sup> ASR, (A/56/10), Article 48, commentary para. 10, p. 127,

to invoke such responsibility of another IO in article 49(3) ARIO to the scope of their functions could be understood as an indication for the fact that the ILC does not consider the IOs, as such, as the members of the international community, or at least not on an equal footing with the states. However, in support of an inclusive and open-ended conception of the international community as a whole,<sup>1111</sup> the ILC besides the explicit wording of article 49, in its commentary paragraph 12 to that article grounds its argument partly on the Seabed Authority's entitlement to claim compensation and act "on behalf" of "mankind", an existence, probably encompassing, but far beyond the international community of states. In this respect the European Union appears to be the forerunner. The EU has in different occasions invoked the international responsibility arising out of the breach of obligations owed to the international community as a whole.<sup>1112</sup> In most of the cases, the content of this responsibility invocation is the adoption of economic measures, which can be considered as countermeasures. A precondition in this regard is that the IO should have the mission and function of safeguarding this interest and obligation in question. That can be deduced from and should be searched in the EU constituting and internal rules and instruments. But the question may be in this case whether an IO may take countermeasures in a case where the obligation is owed to the international community as a whole.<sup>1113</sup> This would be the case of article 43 of ARIO. But there has also been some States that during the preparation of ARIO has supported a more general entitlement for the IOs.

## II. Necessity of accountability to fill the responsibility gap

This sub-section is actually a partial conclusion achieved as a result of the analysis in preceding sections with respect to the position of different possible entities holder of rights and interests, who are parties in different – legal or other – relationships with IOs and may invoke their rights or interests against the IO. This would give rise to international rules and obligations for IOs, the transgression and failure in discharging them respectively by the IOs would have, in principle, the international responsibility as the consequence. As ARIO is not invocable by individuals, NGOs and companies, who constitute sometimes the parties mostly affected by the decisions, activities or operations of IOs, only the development and elaboration of accountability may fill the answerability, and liability gap in cases where damage or injury to these entities has occurred. Especially in the areas

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<sup>1111</sup> Crawford, James, "Responsibility to the International Community as a Whole", *Indiana Journal of Global Legal Studies*, Vol. 8, Issue 2, Article 2, 2001, p. 9. Available on: <http://www.repository.law.indiana.edu/ijgls/vol8/iss2/2> (last visited on 06.04.2022).

<sup>1112</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to article 49, para. 9, at p. 79.

<sup>1113</sup> Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), commentary to article 49, para. 10, at p. 80.

where legal responsibility may not find its way through, it is important to strengthen accountability and its mechanisms.

The ILC does not make clear whether the rules of the organization should be internal or international law, it only suffices to state that to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, ARIO would be applicable.<sup>1114</sup> The nature of the internal rules of the organization is far from theoretical for the purposes of ARIO. It determines partly also the scope of application of these articles.<sup>1115</sup> The ILA study group has recommended in its report that the ILC should specify the legal nature of the rules of the organization.<sup>1116</sup> In any event, with respect to the validity or bindingness of other rules of international law for IOs, some scholars believe that the ARIO can generally help – through their invocation by various actors in international and transnational discourses in a consistent manner – to clarify the content of the primary international law norms that bind IOs.<sup>1117</sup>

Even though there is not much controversy over the fact that IOs are bound by the principles inherent in law-making treaties or the spirit of such conventions – of which the IOs are actually not formally parties – the related obligations of the IOs remains too vague and far from being specified. Applicability of general principles of law on IOs as a source of international obligations of these subjects of international law does not alone achieve the removal of all ambiguities and unclarity surrounding the primary rules binding on IOs. Consequently, the problem of ascertaining the content and scope of international obligations of IOs impedes the establishment of international responsibility of IOs. As a result, any possible injuries or damages that might be caused by the activities of IOs remain unrepaired. Primary customary international rules binding on IOs, giving rise to international obligations – relevant and essential element of the mechanism of international responsibility – are in almost all areas covered by international law at this moment, at best, in the process of concretization.<sup>1118</sup> Progress in this process is no doubt beneficial for the practical effect of the mechanism of international responsibility and promotes the appropriateness of the definition of constituent elements of international responsibility adopted in ARIO. Therefore, the vast practical inapplicability of ARIO as secondary set of norms is temporary, depending on the result of the concretization of primary rules process. As long as the scope and content of primary rules and obligations of IOs has not been freed from ambigui-

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<sup>1114</sup> UN Doc. A/64/10 (2009), at 79 (para 6).

<sup>1115</sup> The report of the ILA Study Group on the Responsibility of International Organizations, Sophia Conference, 2012, p. 27–28.

<sup>1116</sup> The report of the ILA Study Group on the Responsibility of International Organizations, Sophia Conference, 2012, p. 28.

<sup>1117</sup> Daugirdas, Kristina, “Reputation and the Responsibility of International Organizations”, *EJIL*, Vol. 25, No. 4, 2014, pp. 991–1018, at p. 1016.

<sup>1118</sup> Delbrück, Jost, “The Role of the United Nations in Dealing with Global Problems”, *Indiana Journal of Global Legal Studies*, Vol. 4, Issue 2, Spring 1997, pp. 276–296, at pp. 285–296.

ties, the international responsibility mechanism and ARIO may remain relatively theoretical. However, the efforts undertaken by different IOs in various areas consisting in crystallizing ever more the legal frameworks and environments within which the IOs can act and manoeuvre give us enough reason to be optimistic in that regard.





## Chapter Five

### Drawbacks of unclarities surrounding the obligations of IOs for ARIO

The preceding chapter sought to depict the incontestable reality that international legal order, despite the significant advances in terms of regulating international relations after the Second World War in the UN era, still shows gaps in respect of regulating the conducts of certain of its subjects, namely IOs.<sup>1119</sup> Ambiguity and uncertainty with regard to the scope and content of the international obligations of IOs – apart from its negative impacts on the parties in interaction with IOs – has two major drawbacks for the rule of law in the international legal system. The first one is with regard to the practical applicability of ARIO provisions to the potential cases of international responsibility of an IO flowing from its damaging or injurious conduct. The second drawback, which is also the result of the first, is that the unclarities surrounding the content and scope of international obligations of IOs would pave the way for states (or IOs) members to abuse the international legal personality of the IO in order to escape their own international legal obligations without enduring subsequent international responsibility. To put it different-

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<sup>1119</sup> Paasivirta, Esa, “Responsibility of a Member State of an International Organization: Where Will it End? – Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations”, *IOLR*, Vol. 7, No.1, 2010, pp. 49–61, at p. 50.

ly, the emerging international responsibility gap would be a temptation for the abuse of the international legal personality of the IOs by members to circumvent their international legal obligations.<sup>1120</sup> This chapter is dedicated to portray these two major drawbacks, followed by a detailed description of various scenarios in which the abuse of international legal personality of an IO by its members could take place. In the second place, an analysis of the different solutions will be undertaken, *inter alia*, those put forward by ARIO with the aim of preventing and/or remedying the negative effects of abuse of international legal personality of an IO by its members with the intention and for the purpose of circumventing their own international obligations.

## I. Limited scope of applicability of ARIO in practice

It is not any more necessary to repeat that as shown in the previous chapter the scope and content of the obligations of IOs are anything than clear. One of the pillars of the ARIO conception of international legal responsibility of IOs as a mechanism of secondary law is the existence of an international legal obligation. In virtue of describing an internationally wrongful act, the engine that sets off responsibility mechanism under international law, as a conduct constituting a breach of an international obligation, the ILC conception of international responsibility of IOs rests upon international obligations of these subjects of International law. ARIO has been criticized in the literature precisely by reason of lack of primary rules and the exercise of the ILC in drafting these articles has been described as and assimilated with “putting the cart before the horse”.<sup>1121</sup> It goes without saying that practical inapplicability of ARIO is not favorable to the as a result of IOs’ conduct injured or damaged third parties. Nevertheless, it is true that the several discourses over the international responsibility of IOs in the light of the ARIO provisions in different cases will indirectly remove a great deal of controversies over the primary rules and obligations of IOs, thus crystallizing the scope and content of international obligations for IOs. The definition of international legal responsibility in ARIO cannot encompass all the cases where in practice the accountability of IOs has to be raised and implemented and a sort of compensation would be due according to the principles of justice. As practice has shown with regard to the international legal responsibility of IOs, there are other obstacles for the practical applicability of that mechanism, the most important one being the immunity of the IO. So far, in the case of Haiti cholera epidemic outbreak the international legal responsibility of the UN could not be established in

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<sup>1120</sup> *Ibid*, at p. 52.

<sup>1121</sup> Möldner, Mirka, “Responsibility of International Organizations – Introducing the ILC’s DA-RIO”, *Max Planck Yearbook of United Nations Law*, Vol. 16, 2012, pp. 281–328, at p. 325.

the US courts on the basis of the immunity defence upheld by domestic courts.<sup>1122</sup> The issue of immunity of IOs impeding the international legal responsibility mechanism to be triggered is beyond the scope of the present dissertation. Therefore, in this place no further elaboration will be made on the fact that even the most sophisticated responsibility mechanism designed for the IOs would not have any success in bringing remedy and justice to victims, on the one hand, and promote and reinforce the rule of law in the international legal order, on the other hand, as long as it is born dead by the immunity bar.

## II. The risk of the Abuse of Legal Personality of IOs by their member States

Prior to going through consequential aspects of the topic of the abuse of international legal personality of an IO by its members, it appears useful to put forward a description of salient idiosyncrasies of the situations and circumstances that can be accounted as abuse of legal personality of IO by its members. First of all, it seems that the intention of the member to abuse the legal personality of the IO is inherent in the concept. On the contrary, the motives for such abuses may be diverse and thus, cannot be comprehensively described. It is believed that the motive is by and large the circumvention of international legal obligations by the members<sup>1123</sup> – given the fact that the international legal obligations of the IOs still suffer in several areas from ambiguity and unclarity. Nevertheless, it should not be excluded that the motives for the abuse of legal personality of IOs may also lie in the pursuance of some other individual or particular interests or concerns by the members of the IOs. Moreover, it is worth noting that the premise of the international legal responsibility of a member abusing the legal personality of an IO is above all the member's causal contribution to the commission of the wrongful act by the IO.

There is no doubt that “IOs are not unitary actors but rather, collectivities constituted and endowed with social agency by their social environments”,<sup>1124</sup> Therefore, behind the facade and veil of the IOs, there are often several and various entities involved in each and every decision-making.<sup>1125</sup> Thus, it is not impos-

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<sup>1122</sup> According to the accounts delivered by the Institute for Justice and Democracy in Haiti. Available on: [http://www.ijdh.org/our\\_works/violations-of-the-right-to-effective-remedy-the-uns-responsibility-for-cholera-in-haiti/](http://www.ijdh.org/our_works/violations-of-the-right-to-effective-remedy-the-uns-responsibility-for-cholera-in-haiti/) (last visited on 06.04.2022).

<sup>1123</sup> Ryngaert, Cedric/Buchanan, Holly, “Member State Responsibility for the Acts of International Organizations”, *Utrecht Law Review*, Vol. 7, Issue 1, (January 2011), pp. 131–146, at p. 144.

<sup>1124</sup> Meyer, John W./Jepperson, Ronald L., “The ‘Actors’ of Modern Society: the Cultural Construction of Social Agency”, *Sociological Theory*, 18 (1): pp. 100–120 in Lipson, Michael, “Peacekeeping: Organized Hypocrisy?”, *European Journal of International Relations*, 13 (1), 2007, pp. 5–34, at p. 9.

<sup>1125</sup> For an extensive examination of the structure, construct and the independence as well as dependence of IOs on their members, and generally the different kinds of relations these entities

sible that these entities may intend to hide themselves behind this façade to reach the aims they cannot or do not want to reach on their own account or under their own names. It is quite natural that the question of the responsibility of the IOs and the solutions taken in that regard may sometimes lead to behavioral externalities. The main instance is the tendency of the member states to hide behind the veil of the organization because of being ensured that these would not bear international responsibility for the wrongful conduct,<sup>1126</sup> even though there are obligations of close cooperation that generally exist between an international organization and its members.<sup>1127</sup> The member States of IOs have a general duty to cooperate with the IO of which they are members. This duty has gained, according to some authors, the status of a general principle of law.<sup>1128</sup> Because of the relevance of this principle to our topic, a subsection of this chapter has been dedicated to the examination of some of the aspects of this principle and its connection to the question of responsibility.

Despite the separate and independent international legal personality of IOs and in spite of their sometimes independence and autonomy of decision-making and implementing capacities, the IOs remain actually comprised of their members. Thus, one of the major and important dimensions of the responsibility of IOs is the appropriation of international legal responsibility between IO and its members in cases where such matter becomes relevant. In addition, exactly this separate international legal personality of a subject of international law, which most of the times is owed to its structure, may possess and exercise an ‘amplifying effect’,<sup>1129</sup> in the words of Virally “effet de déformation”,<sup>1130</sup> and may constitute a temptation for the members to abuse it in trying to conceal behind it their own wrongful conducts, or cover up their pursuance of interests.

The abuse of international legal personality of IOs by their members is not confined to certain areas of policymaking or operational activities. The member States of an IO taking shelter behind the “veil” of the IO of which they are members is a common problem that has been referred to in different contexts, espe-

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entertain with their members see Blokker, Niels, “International Organizations and Their Members. ‘International Organizations Belong to All Members and to None’”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 139–161.

<sup>1126</sup> Leck, C., “International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct”, *Melbourne Journal of International Law*, vol. 10, 2009, p. 365.

<sup>1127</sup> Draft Articles on the Responsibility of International Organizations, with commentaries, UN Doc. A/CN.4/650 (2011), Commentary to art. 22, para. 6, at p. 48.

<sup>1128</sup> Blokker, N.M., and Schermers, H. G., “Mission Impossible? On the Immunities of Staff Members of International Organizations on Mission”, in Hafner, Gerhard et Al. (ed.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern*, Kluwer Law International, 1998, pp. 37–53, at pp. 50–52.

<sup>1129</sup> Viñuales, Jorge E., “‘The Secret of Tomorrow’: International Organization through the Eyes of Michel Virally”, *EJIL*, Vol. 23, No. 2, 2012, pp. 543–564, at p. 556.

<sup>1130</sup> Virally, Michel, “Le rôle des organisations internationales dans l’atténuation et le règlement des crises internationales”, *Politique Étrangère*, Année 1976, Vol. 41, Numéro 6, pp. 529–562, p. 536.

cially in the domain of human rights.<sup>1131</sup> In addition, there is no doubt that nowadays with the developments in international institutional law concerning the participation in the framework of IOs, non-state entities more and more take part in the activities of the IO. These entities may even become members of IOs at least nominally, although the legal rights and obligations emanating from their membership is not the same as that of the State members and thus their membership can be described as being inferior to that of the States in an IO.<sup>1132</sup> By reason of this, usually, lower amount of influence, in this section the focal point will be the states as members of an IO who seek to abuse its international legal personality.

In addition, it should not be kept out of view that a member State of an IO constitutes a collective principal and multiple principals. Meaning that behind and parallel to the member States which are together the collective principal, there are always different multiple principals too.<sup>1133</sup> It should also be noted that the abuse of legal personality in the relations between an IO and its members is not necessarily a one way phenomenon, but, as has been observed in the scholarship,<sup>1134</sup> the known cases of avoidance of international obligations by an IO through recommending or authorizing the members to commit an act, actually wrongful for the IO, are not a rarity. Another central and unsurprisingly controversial question with regard to the abuse of legal personality is whether to adopt a strict or a broad concept of abuse of legal personality of IOs, which is a corollary of how serious we take the separate legal personality of IOs and on which grounds.

In the following subsections, all the points referred to above will be touched upon with the objective to examine and explore how vulnerable ARIO can be in facing practical challenges and crucial problematics inherent in the relations between IOs and their members and the connection of this question to the essential issue of international legal responsibility.

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<sup>1131</sup> Knoll, Bernhard, "Rights Without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo", *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 68, 2008, pp. 431–451, at p. 450.

<sup>1132</sup> Dormoy, Daniel, "Recent Developments Regarding the Law on Participation in International Organizations", in Wellens, Karel (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Martinus Nijhoff Publishers, 1998, pp. 323–332, at p. 223.

<sup>1133</sup> Nielson, Daniel L., and Tierney, Michael J., "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform", *International Organization*, Vol. 57, issue 1, 2003, pp. 241–276, at p. 256.

<sup>1134</sup> Paasivirta, Esa, "Responsibility of a Member State of an International Organization: Where will it End? – Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations", *IOLR*, Vol. 7, No.1, 2010, pp. 49–61.

1. At the time of establishment or subsequent transfer of powers and competences

International organizations are governed by the principle of conferred powers; apart from implied powers, they have only such powers as conferred on them by their constituent treaty.<sup>1135</sup> As usually the constituent instruments of IOs are multilateral treaties between founding member states, it would be less probable that these states would confer the IO with functions and competences to act in contradiction with their own international legal obligations. However, the possibility of such conferrals can not be completely excluded. In other words, that is the case of States establishing an international organization and entrusting it with functions in respect of which they are bound by obligations under international law while the organization is not so bound. Having realized that possibility and its risks, the *Special Rapporteur* Gaja had envisaged those cases in its proposed draft article 28 concerning the circumvention by members of their international obligations through abusing the separate international legal personality of IO. However, it is not clear why the formulation has been modified at the expense of a complete omission of reference to the use by a state that is a member of an international organization of the separate personality of that organization in order to avoid compliance with its own international obligations by transferring functions to that organization.<sup>1136</sup> Evidently, the international legal responsibility of member state in that case would at the same time be subject to the condition that the organization commits an act that, if taken by that state, would have implied non-compliance with that obligation. The formulation proposed by the Special Rapporteur could be a further guarantee to avoid cases of abuse of international legal personality of IOs by its members, particularly at the time of establishment. It is also interesting to note that the omission of reference to the abuse of separate international legal personality of the IO as well as conferral of competences to the IO by the member intending to escape its international obligations, has taken place after the proposal by the Special Rapporteur gradually in the course of the preparation of draft. In the initial formulation, the simple transfer of functions by a member state to an IO with the aim of avoiding its own international obligations, accompanied by the commission of an act by the IO that if committed by the member state would be a wrongful conduct of the latter, sufficed for member state international responsibility.<sup>1137</sup>

<sup>1135</sup> The International Court of Justice has summarized this principle as follows: “International Organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.” See the ICJ’s Advisory Opinion of 8 July 1996 in ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996) p.226, at para 25.

<sup>1136</sup> Gaja, Giorgio, “Responsibility of International Organizations”, *Fourth Report on Responsibility of International Organizations*, A/CN.4/564 and Add. 1–2, 28 February, 12 and 20 April 2006, p. 119.

<sup>1137</sup> Article 28:

The intermediate formulation, adopting some changes to the former draft article, was the provisional article 28 adopted in the draft prepared for the first reading in 2009.<sup>1138</sup> Several states believed that the ILC should narrow down the responsibility of member states envisaged in provisional draft article 28. The position of certain IOs was not much different either, as it can be referred to the observations made by the European Commission proposing to adopt the approach of the European Court of Human Rights in *Bosphorus* case. According to the Court, the assessment and establishment of the equivalent protection offered by the IO depends on the content of the international obligation concerned. In situations where equivalent protection and standards are at hand, the member states can not be held responsible for the actions of the IO or the measures undertaken under the banner of the IO.<sup>1139</sup> It is true that conditioning the responsibility of a member state for the act of an IO merely on the contingency that it “purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation”, as had been envisaged in article 28 at first reading of the draft, is too remote to create a causal link between the conduct of the state member and the act of the IO.

At the same time, it seems that these previous formulations of article 61 are more in line with the case law and jurisprudence of the ECtHR, *inter alia*, in chronological order *Matthews*<sup>1140</sup>, *Waite and Kennedy*<sup>1141</sup> and *Bosphorus*<sup>1142</sup> judgments,

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“Use by a State that is a member of an international organization of the separate personality of that organization

1. A State that is a member of an international organization incurs international responsibility if:

- (a) it avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and
- (b) the organization commits an act that, if taken by that state, would have implied non-compliance with that obligation.

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

<sup>1138</sup> Paragraph 1 of Article 28 could be recast as follows:

“A state member of an international organization incurs international responsibility if:

- (a) It purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation;
- (b) The organization commits an act that, if committed by the state, would have constituted a breach of the obligation.”

<sup>1139</sup> Costello, Cathryn, “The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe”, *Human Rights Law Review*, Vol. 6(1), 2006, pp. 87–130; Wilde, Ralph, “Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake”, *ILSA Journal of International & Comparative Law*, Vol. 12(1), 2006, pp. 7–10.

<sup>1140</sup> *Matthews v. United Kingdom*, (App no 24833/94), *ECHR Reports*, 18 February 1999.

<sup>1141</sup> *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, *ECHR Reports*, 1999-I.

<sup>1142</sup> *Bosphorus v Ireland* (App no 45036/98), *ECHR Reports*, 30 June 2005.

to which the commentary to final article 61 and its predecessor drafts all have made reference. The important point is that according to the jurisprudence in these series of cases, the intention of member states to circumvent their international obligations is not necessarily a constituent element for their international legal responsibility for the acts of the IO that would be considered wrongful if committed by the members. It is evident that member states could not confer competences on the IO that would derogate from their own international obligations.<sup>1143</sup> According to the ECtHR case law the member states in such situations could not escape their own international legal responsibility. However, it appears that the Court has changed its approach in adopting a more conservative attitude in a later series of cases, beginning with *Behrami* and *Saramati*.<sup>1144</sup> Following its revised approach also in *Beric v Bosnia and Herzegovina*<sup>1145</sup>, *Boivin v 34 Member States of the Council of Europe*<sup>1146</sup> as well as *Connolly*<sup>1147</sup>, the Court acknowledges the requirement of a domestic act for the international responsibility of the member state.<sup>1148</sup> A more liberal approach in this regard has been taken by the Court in its *dictum* in the *Gasparini* decision.<sup>1149</sup> It could be equivalent with the formulation adopted by the ILC for its article 61 in the provisional drafts before the final 2011 draft, for instance in the draft of 2006 or even 2009. According to the ILC former approach for the member states to incur international legal responsibility for the acts of IO it would suffice to confer certain competences that would allow the IO to take measures that would violate the international obligations binding on its founding member states. This formulation would be in accordance with the spirit of the *Bosphorus* decision of the Court. However, this formulation has been changed later by giving way to a more restrictive construction of responsibility of states members of IOs for the acts of the IO. It appears that the approach adopted by the ILC has been even more influenced by the distinction made by the Court in *Gasparini* decision, as the commentary paragraph five of article 61 also refers to that decision of the ECtHR. The ILC apparently, mainly building on these series of cases, in the final formulation of article 61 requires the establishment of an inten-

<sup>1143</sup> Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 410, paras. 63–68.

<sup>1144</sup> *Behrami and Behrami v France* (App no 71412/01) and *Saramati v France, Germany and Norway* (App no 78166/01), 2 May 2007.

<sup>1145</sup> *Beric and Others v Bosnia and Herzegovina* (App nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05) (Section IV), 16 October 2007.

<sup>1146</sup> *Boivin v 34 Member States of the Council of Europe* (App no 73250/01) (Section V), 9 September 2008.

<sup>1147</sup> *Connolly v 15 Member States of the European Union* (App no 73274/01) (Section V), 9 December 2008.

<sup>1148</sup> Lock, Tobias, “Beyond Bosphorus: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organizations Under the European Convention on Human Rights”, *Human Rights Law Review*, Vol. 10, 2010, pp. 529–545, at p. 532.

<sup>1149</sup> *Gasparini v Italy and Belgium* (App no 10750/03) (Section II), 12 May 2009.



tion on the part of the member states to circumvent or escape their international obligations as a necessary element. Thereby, the Commission has further restricted the scope of the application of article 61 by requiring the intention of circumvention of their international obligations on the part of member states in order to incur international responsibility in connection with an act of the IO. The final formulation adopted by the ILC in article 61 of the ARIO will be discussed in more detail below in the context of the analysis of international legal responsibility mechanism, generally, and the provisions of ARIO, particularly, with regard to the abuse of separate international legal personality of an IO by its member states.

## 2. In the framework of decision-making

As it has been noted earlier, in the framework of the analysis of the nature of IOs, the members of an IO are not free in their behavior when acting as the members of an IO – even though principally sovereign states. They are always at least restricted to the limits set out by the purposes and principles of the IO.<sup>1150</sup> These obligations of the members of IO serve the fact that the decisions of the members of the IOs cannot automatically be considered as autonomous and expression of free will of the members as individual entities. Additionally, another obligation that the members of an IO must respect in their behavior in the framework of the IOs is the obligation of good faith. Furthermore, states and state representatives cannot be involved in every decision the IO takes. With respect to certain decisions, an organization has a degree of autonomy, as these decisions concern the routine work of the IO or setting the agenda. Some states of course have more influence on the decisions than other states. In general, the relations between member states and also the principal-agent relationship between an IO and its members differ from one IO to the other.<sup>1151</sup>

The possibility to exercise some degree of influence, that could even rise to direction and control, over the decisions of an IO by one or some of its members has created for its members the temptation of abusing the international legal personality of the IO. Such enticements may even be enhanced by the undeniable fact that, as it has been shown in the preceding chapter, the international legal obligations of IOs are still surrounded by unclarity as to their scope as well as their content. This drawback is the consequence of two major factors: the first one is the ambiguity and uncertainty dominating the primary rules and regulations of international law binding on IOs; and the second factor is the lack of precision with regard to the apportionment of international legal responsibility between an

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<sup>1150</sup> Blokker, Niels, “International Organizations and Their Members ‘International Organizations Belong to All Members and to None’ – Variations on a Theme”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 139–161, at pp. 145–146.

<sup>1151</sup> Reinalda, Bob/Verbeek, Bertjan, “The Issue of decision making within international organizations”, in Bob Reinalda and Bertjan Verbeek (eds.), *Decision Making Within International Organizations*, London and New York, Routledge, 2004, p. 22.

IO and its members. Unless there are exact and clear criteria of allotment of international legal responsibility between the IO and its members for the wrongful conduct resulting from decisions taken in the framework of IOs, the risk would be too low for member states to worry about the possibility of incurring international legal responsibility.

To give an example, a famous scenario may be the case of the organs of IOs taking binding decisions that represent at the same time the exercise of direction and control by the members – or a group of them, if the decision would amount – directly or indirectly – to a wrongful act. The opposite situation cannot be excluded neither. In fact, the structure of IOs which defines the relationship between the IO and its members is, most often, in a way that allows the abuse of international legal personality in both directions. The binding decisions could be used by the IOs to outsource their actors.<sup>1152</sup> It has to be stated that organizational structure and institutional culture play an important role for the purpose of compliance with obligations.<sup>1153</sup> In some IOs the member States have not equal rights and legal status, thus their participation rights in decision-making is thereby influenced.<sup>1154</sup> In this case, if the conditions provided for in article 15 of ARIO are present it would mean that the binding decision taken by the organization would render the IO responsible. However, in this case, the State or an IO member of the responsible IO would also incur responsibility.<sup>1155</sup> The binding decision of an IO would entail the responsibility of IO in the case that the decision in question would lead to a wrongful act. The commentary of article 15 of ARIO is to this meaning. But the result may not be desirable because it could open the door for the State to use, or better abuse, the IO veil to take binding decisions and at the end the IO would be responsible and the States that have taken the decision in the framework of the IO would come out with clean hands. Our main focus in this subsection is the abuse of international legal personality of IO by its members. Therefore, the question of abuse of international legal personality of its members by the IO will not be elaborated on any further in this chapter.

In drafting ARIO following the model of ASR, not only the specificities of the IOs in comparison with states should have been completely kept in mind and given effect, but also the special characters of various IOs should have been taken

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<sup>1152</sup> A/C.6/59/SR.22, para. 24 in Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 40, para. 1. (last visited on 09.04.2022).

<sup>1153</sup> Dickinson, Laura A., “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance”, *AJIL*, Vol. 104, 2010, pp. 1–28, at p. 28.

<sup>1154</sup> Dormoy, Daniel, “Recent Developments Regarding the Law on Participation in International Organizations”, in Wellens, Karel (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Martinus Nijhoff Publishers, 1998, pp. 323–332, at pp. 324–325.

<sup>1155</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 38, para. 4. (last visited on 09.04.2022).

into account. With respect to the abuse of international legal personality of IOs and the resulting gap in the international legal accountability, the organizational structure, the nature and composition of the organs of the IO, specially the governing bodies, the size of the membership and the nature of the involvement which is partly a consequence of the regulations, rules and procedures of the IO, are factors that impact on the existence and possibility of such an abuse. Hence, all these factors should be taken into account in any regime of apportionment of international legal responsibility between IO and its members. Therefore, it seems helpful to turn the focus in the following sub-sections to the specificities of different categories of organs in IOs. In this connection, the specific conditions of decision making in the framework of each kind of organs will be touched upon, and the consequences that these distinctive characteristics may have for the question of international legal responsibility of IOs and the apportionment of legal responsibility between IO and its members, will be examined subsequently.

*a) Decisions taken in plenary organs of IOs*

The most prominent feature of plenary organs of IOs is that all the membership is represented in this category of organs which can be found in almost all IOs. The function of IOs as the provider of a forum for States for deliberation and collective decision-making is often more important than the functions of the IO as an independent actor in international relations.<sup>1156</sup> Specially, in the IOs in which the plenary organ is the main decision-making body, this former function is even more apparent. In such bodies, it is clear that an individual member state alone can *hardly* influence the conduct of the IO, or at least may have more difficulty in doing so. Nevertheless, the possibility of international legal responsibility – in extreme cases – of a group of states exercising direction and control with the objective of pursuing national and particular interests, should not be excluded right from the outset. In such situations, the decisions taken in the framework of IO, against or in contrast with the community or group interests, leading to a wrongful conduct, should have consequence for involving states or states behind such decision. This suggestion would find justification in the theory of constructivism, rather than neo-liberalism and neo-realism. The reason for this is that according to the two latter theories a state, even when acting within an IO, is seen as a unitary, primarily self-interested and rational actor.<sup>1157</sup> And as a result of that, such behaviour of states in the framework of IOs is totally justified and should not be followed by any punitive legal consequences.

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<sup>1156</sup> Paulus, Andreas, *Die Internationale Gemeinschaft im Völkerrecht, Einer Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Verlag C. H. Beck, 2001, p. 230.

<sup>1157</sup> Widén, Martin, “In Search of Legitimacy. The IMF, World Bank and WTO”, Supervisor: Magnus Ericson, Malmö University, IMER, International Relations, spring 2006, p. 15. Available on: <http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1481130&dswid=4448> (last visited on 06.04.2022).

ARIO articles on the responsibility of a state in connection with the conduct of an IO, under the titles “aid or assistance” and “direction and control”, do not make distinction between decisions taken in the framework of different kinds of organs. However, as has been explained by the ILC in the commentary to these two articles, by taking reference to the factual context such as the size of membership and the nature of the involvement of the members, it can be established whether they should incur international legal responsibility as a result of a conduct taken by those states within the framework of the organization. It should be added that the conduct mentioned in the previous phrase mainly refers to the participation of members in the decision making of the IO. Obviously, with the rise in the size of membership, it becomes more difficult to establish that the state members should incur international legal responsibility because their casting a vote as part of the decision making of the IO should be considered as aid or assistance, or direction and control which has facilitated the commission of the wrongful conduct by the IO. Another point that has to be taken into account is that the plenary organ does not necessarily mean an organ consisting of numerous members. It is obvious that an IO with a modest number of members necessarily cannot dispose over a plenary organ of enlarged membership.

Another aspect of decision making relevant to our discussion is the quorum, or sometimes unanimity required for the decisions to be taken. Unanimity reduces almost to zero the risk of disproportionate influence by one or a group of members on the decisions to be taken, unless all the members are in favour of the abuse of legal personality of the IO. In other words, the unanimity rule, in spite of its practical disadvantages, may function as a check and balance. In organs which have adopted majority vote rule, the lower the rate of quorum required for decisions to be taken, the higher will be the risk of such abuse of legal personality of the IO. The major difference that exists usually between plenary organs and executive organs – which will be examined in the following subsection – is that the scope of competences is normally more limited than the latter kinds of organs. Specially, in most IOs, executive and binding decisions are taken in the executive organs rather than plenary organs.<sup>1158</sup> Clearly, greater scope of competence on the part of the IO allures the member states more towards abuse than a restricted scope of competences for IOs.

*b) Decisions taken in the executive organs of limited membership*

As the plenary organ of an IO does not necessarily mean an organ consisting of a considerable number of members, executive organ, also does not always necessarily refer to bodies composed of only very few members. This can differ from one

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<sup>1158</sup> Seidl-Hohenveldern, Ignaz, «Organes à Composition Restreinte», dans *Manuel sur Les Organisations Internationales*, Publié sous la Direction de René-Jean Dupuy, 2<sup>e</sup> éd., Martinus Nijhoff Publishers, Dordrecht/Boston/London, pp. 101–103.

IO to the other depending on the size of the membership and the structure and functions of that IO. However, in the most common instances, the executive bodies are of limited membership,<sup>1159</sup> extensive competences attached by wide powers and in which, in general, each member has a larger say in the decisions and acts of the organ in question. Naturally, when all these conditions are present in an organ, the majority voting system paves the way for potential abuses of the legal personality of the IO. Although in these limited and non-plenary bodies the members of the organ are required to take the interests of the whole membership into account, the exercise of control and influence by one or some members may become even easier, given the fact that commonly smaller quorums are required for a decision to be taken.

An observation that can be made at this stage is that more than any denomination or kind of organ – and given the fact that it is even sometimes difficult to draw exact boundaries between different kinds of organs – the voting rules play a decisive role in paving the way for the abuse of international legal personality of IO by its members in order to commit wrongful acts. Nevertheless, it should be noticed here that no recommendation is intended to be made here with regard to the voting rule that should be followed in order to prevent and avoid any abuse of legal personality of the IOs for pursuing wrongful purposes. This is so much so as sometimes existing factual inequalities and political considerations call for weighted voting systems or qualified majority rules, according to which certain members obtain privileged status and thus have larger say in the decisions and acts of the IO. For this reason, in the following subsection the impact of a weighted voting rule on the potential to abuse of legal personality of IOs will be examined more closely. For this purpose the focus will turn briefly on the international financial institutions which are the most prominent examples of IOs having adopted this voting regime.

*c) Decisions adopted under weighted voting system: International Financial Institutions*

Without intending to deliver any evaluating judgment as to whether differential treatment constitutes one possible avenue to make international law more responsive to new challenges<sup>1160</sup> or is a strategy aiming at strengthening, and thereby perpetuating, inequalities between states, it is clear that related voting rules, *inter alia*, weighted voting, may facilitate abuses. Weighted voting is part of a larger regime known as inequality of voting power. Under the latter decision-making system, various tools have been designed such as plural membership, permanent seats in non-plenary organs, or allowing a higher number of representatives enjoy-

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<sup>1159</sup> *Ibid.*

<sup>1160</sup> Cullet, Philippe, “Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations”, *EJIL*, Vol. 10, 1999, pp. 549-582.

ing full voting rights to a body of an IO.<sup>1161</sup> Nonetheless, it seems that weighted voting is the tool which has the most potential to facilitate those kinds of abuses under question in this chapter. Abusing the legal personality of IOs in the process of decision making in the organs with weighted voting system may be more alluring for the simple reason that the road is even more open for the exercise of influence or direction and control.<sup>1162</sup>

Prominent example of IOs having adopted weighted voting system can be found particularly among International Development Banks (IDBs) and in general most of other International Financial Institutions (IFIs), but the application of this voting system is not confined to these IOs. Ensuring a preponderant and overriding influence for particular states in international financial institutions through the means of a weighted voting system has primarily the purpose of acquiring the cooperation of these states.<sup>1163</sup> The role of members in decisions taken under the weighted voting system, notably in the framework of international financial institutions, may be measured according to the weight of their voting rights. It goes without saying that the influence of the state members who officially enjoy more weight for their votes is higher on the decisions taken by the IO than the other member states, regardless of the criteria and factors conclusive in distributing voting rights among members. Accordingly, these members may have readily the possibility and ability to direct the decision-making in those IOs, as they own upper shares of participation.

Responsibility seems to be appropriate, specifically, in certain cases where the relevant IO commits a wrongful act as a consequence of disproportionate influence in adopting a certain course of policy or actions, although apparently done in accordance with the rules of the organization. This position may be further strengthened through the argument that in weighted voting systems, the ability of other members – members enjoying a weak voting rights and less influence in the decision-making – has been restrained structurally. At the same time, it should be kept in mind that provision for joint or subsidiary international legal responsibility of members may be at the expense of reducing stronger positioned member states' enthusiasm for active participation.

ARIO has almost closed the door to any such discussions and consideration of the responsibility of members under such circumstances in its paragraph 2 to arti-

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<sup>1161</sup> Schermers, Henry G., and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, fourth revised edition, Martinus Nijhoff Publishers, Boston/Leiden, 2003, p.538, § 794.

<sup>1162</sup> See the typology presented in Yee, Sienho, "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 Publishers, 2005, pp. 435–454, at p. 439.

<sup>1163</sup> Leech, Denis/Leech, Robert, "A New Analysis of *A Priori* Voting Power in the IMF: Recent Quota Reforms give Little Cause for Celebration", *Warwick Economic Research Papers*, September 2012, p. 3–11. Available on: [http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2012/twerp\\_1001.pdf](http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2012/twerp_1001.pdf) (last visited on 06.04.2022).

cles 58 and 59. Depending on whether the influence of these states is interpreted as aid or assistance or direction and control, one of these two articles would, in fact, generally have been applicable, if the term “as such” were not introduced in the second paragraph of these articles. The possibility and acceptance of member responsibility explicitly envisaged in the commentary to these two articles does not enumerate the criterion of the amount of involvement of the members in the decision making or other legal undertaking in the framework of the IO leading to the wrongful conduct of the IO, as a factual context factor decisive in establishing the responsibility. Under the subsection dealing with the ARIO solutions directed towards preventing the abuse of international legal personality of IOs, this issue will be focused on exhaustively.

*d) Organs applying one-state-one-vote systems*

Although it is true that most plenary organs, and some of the non-plenary executive organs adopt the one state one vote rule for their decision making procedures – in the case of the latter kind of organs, this rule may be applicable partly in decision-makings depending on the subject matter under question – it does not turn the focus on this voting system to examine its relation with the issue of the abuse of legal personality of IOs. In organs with one state one vote system of decision-making exercising influence necessarily happens through unofficial channels. One of the main questions here would be whether the members of such organs – by reason of casting a negative vote to a budget appropriation that would amount to a wrongful omission on the part of the IO – could incur international legal responsibility, with the possibility of even nuancing such responsibility in accordance with the gravity of the omission.

By adoption of the one-state-one-vote system, it can be ensured that, at least, the structural means for the abuse of legal personality of IO is lacking. Nonetheless, it should be noted here that sometimes the organs of IOs adopt a fusion of different voting systems in their decision-making procedure, for example combining a one-state-one-vote rule and a majority rule. However, choosing such voting regimes do not mean that necessarily the road to abuse will get open. A famous example among IOs having adopted a fusionary voting system is the Global Environmental Facility, in relation to which it has been argued that its governance system has brought together advantages of both the UN and Bretton Woods’ institutional rules and cultures, through adopting a combination of the one-state-one-vote system and a system based on economic strength.<sup>1164</sup>

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<sup>1164</sup> Streck, Charlotte, “The Global Environment Facility – a Role Model for International Governance?”, *Global Environmental Politics*, May 2001, Vol. 1, No. 2, pp. 71–94.

e) *Comparison between Executive Organizations and Non-executive Organizations*

Naturally, the larger is the scope and the range of powers and competences of an IO, the higher is the risk of its members trying to abuse the legal personality of the IO. Operational IOs,<sup>1165</sup> another expression used in order to refer to IOs which go beyond consultative nature mechanisms, are involved in performing tasks that prerequisite decision making on a wider range of issues.

If the term means simply that the IO has not executive competences and that for the execution of its decisions the IO is dependent on states, it is very well clear that even at the stage of decision-making by way of binding decisions or even recommendations a wrongful conduct may be committed. Briefly, even with regard to the kind of IOs where there is less suspicion about, there is the risk that the autonomous legal personality of IO and therefrom sole responsibility of IO would lead to temptations of abuse.

f) *Integration-oriented IOs and Cooperation-oriented IOs*

Cooperation IOs, subordination IOs<sup>1166</sup> or integration IOs are of a different nature.<sup>1167</sup> The latter have a higher amount of international legal personality, if we assume that the international legal personality is measurable and follows the extent of powers and competences that an IO possesses. A relevant principle with regard to that kind of IOs is that normally as a consequence of the transfer of, normally, a wide range of competences, international obligations of members in the areas which are related to the competences that have been transferred to the IO, would also apply to the activities of IO, justified by the argument that the members of an IO cannot free themselves of their international commitments through establishing IOs and transferring competences to these IOs. This is in line with the *Waite and Kennedy* jurisprudence of the ECtHR.<sup>1168</sup>

As the former kind of IO is mainly in the first place a forum for dialogue between the members, looking at and overemphasizing the autonomy and independence of the international legal personality of these IOs rigidly would take us away from reality, which would require, at least arguably in this case, more appropriate rule of recurrent or joint and several responsibility of members in such condition. However, it should be added that such IOs normally have less expanded scope of

<sup>1165</sup> Torres Bernárdez, Santiago, "Subsidiary Organs", in Dupuy, René-Jean (ed.), *A Handbook on International Organizations*, 2<sup>nd</sup> edition, 1992, Martinus Nijhoff Publishers, pp. 109–153.

<sup>1166</sup> This expression has been borrowed mainly from René-Jean Dupuy, "Etat et Organisation internationale", in Dupuy, René-Jean (ed.), *A Handbook on International Organizations*, 2<sup>nd</sup> edition, 1992, Martinus Nijhoff Publishers, pp. 13–30, p. 15.

<sup>1167</sup> For a comprehensive study on the integration organizations and supranational IOs from the point of view of international law see Schroeder, Werner and Müller, Andreas Th., "Elements of Supranationality in the Law of International Organizations", in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 358–378.

<sup>1168</sup> *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, ECHR Reports, 1999-I.



competences which limits also the possibility of commission of a wrongful conduct or injury inflicted on third parties.

### 3 At the Time of the Implementation of the Decisions

Another occasion giving opportunities for shielding the collective action of states behind the organizational veil, or separate legal personality of the IO,<sup>1169</sup> could be in the course of the implementation of decisions taken in the framework of an IO and destined to be put into effect under the supervision of the IO. It is all the more so as the IOs are often dependent on their member states for carrying out the decisions taken by or in the framework of those IOs. The victims of rights violations have, often in vein, attempted to pierce the organizational veil and hold member states liable, as judicial or quasi-judicial forums competent to proceed with the claims against IOs are still a rarity. One of the cases that can be categorized under this subtitle is the case of the UN compulsory sanctions. The other prominent example is the case of international military or civil operations. Controversy exists with regard to these situations over the attribution of troops' conducts to the contributing member states or the IO framing and leading the operations. The wind of change brought by the demise of cold war had *i.a.* the effect of expanding the mandates of peace operations. This expansion manifested itself in size and diversity of the personnel as well as the authority entrusted in the mission in question.<sup>1170</sup> No two international mandates are alike, and policies of participating regional organizations and contributing states further add to this diversity.<sup>1171</sup> Generally speaking, such mandates aim to (re-) introduce stable constitutional democracy characterized by good governance based on human rights as well as the rule of law in the receiving state, *viz.* a state of affairs vital in maintaining or restoring, as the case may be, international peace and security.<sup>1172</sup> Peace missions must rely on states for their funding, personnel and assets.<sup>1173</sup> Separate international legal personality of IOs sometimes permits the states to escape accountability for the results of the actions and/or omissions in the realization of which they have played a considerable role. Absence of clear and precise criteria for attribution of conducts in situations where IOs and their members cooperate closely in a certain activity carries the risk of opening the way for escaping responsibility. Obviously, one of the preconditions for such interpretation is the recognition of an

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<sup>1169</sup> Grant, T., "International Responsibility and the Admission of States to the United Nations", *Michigan Journal of International Law*, Vol. 30, 2009, pp. 1095-1185, at p. 1136.

<sup>1170</sup> Häußler, Ulf, "Human Rights Accountability of International Organizations in the Lead of International Peace Missions", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 218.

<sup>1171</sup> *Ibid.*, p. 215.

<sup>1172</sup> *Ibid.*, p. 220.

<sup>1173</sup> *Ibid.*, p. 229.

objective international legal personality for IOs in general, and valid from the moment of their establishment or at least valid at the time of the commission of conduct in question.<sup>1174</sup>

### III. Solutions to prevent and/or remedy the abuse of the separate legal personality of IOs

From the perspective of the categorization of norms of international law into primary and secondary rules, solutions to prevent the abuse of the separate international legal personality of IOs are, mainly, of primary rule nature. In contrast, the resolutions put forward to remedy the drawbacks of the use of the separate legal personality of IOs by members, are usually of secondary rule nature. The basis of the majority of solutions proposed in the scholarship has been policy considerations, as jurisprudence or practice is still lacking in that regard.<sup>1175</sup> It is not surprising that ARIO has on the same basis offered various solutions for the eventual cases of the abuse of the legal personality of an international organization, provisions that above all serve to remedy the negative consequences for third parties, which consist principally in the absence of tribunals to bring reparation claims to and the lack of funds necessary to pay reparation. In this situation, the most appropriate method of analysis has necessarily an international legal philosophy dimension and the doctrine would be the principal material at hand.<sup>1176</sup>

As long as there are gaps in the international legal obligations of IOs in comparison with the international legal obligations of the states members of these IOs, and inasmuch as it is not clear precisely what types of obligations IOs are under,<sup>1177</sup> there remains the potential risk of abuse of the international legal personality of the IO by its members. In any event, the question of the international legal responsibility of IOs cannot be touched upon without appropriation of responsibility between the IO and its members.<sup>1178</sup> The ideal would, of course, be to find a permanent solution that may have at the same time a certain preventive effect. An

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<sup>1174</sup> Wilde, R., “Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake”, *ILSA Journal of International and Comparative Law*, Vol. 12, 2005, pp. 395-415, at p. 401.

<sup>1175</sup> Ryngaert, Cedric/Buchanan, Holly, “Member State Responsibility for the Acts of International Organizations”, *Utrecht Law Review*, Vol. 7, Issue 1, (January 2011), pp. 131–146, at p. 137.

<sup>1176</sup> Corten, Olivier, *Méthodologie du Droit International Public*, éditions de l’université de Bruxelles, 2009, p. 26.

<sup>1177</sup> Klabbers, Jan, *An Introduction to International Institutional Law*, 2009, p. 284.

<sup>1178</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Wedder, C. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 696–697.

unconditional secondary or concurrent responsibility of member states for the acts of the IO by virtue of membership alone cannot be the answer because of scant legal evidence of such a rule of international law in addition to concerns regarding the independence and impartiality of IOs,<sup>1179</sup> in spite of certain cases of *lex specialis*.<sup>1180</sup> The opposite examples are the cases of IFIs where in their constituent documents a limited liability clause has been incorporated in order to guarantee the autonomy of the IO, on the one hand, and to disclaim the responsibility of members, on the other hand. Interference of members in decision-makings in the framework of the organs of the IO leading ultimately to the ineffectiveness of the IO as a means of cooperation at the international sphere, as well as in the chilling effect that such absolute liability could have on potential members' participation in the IO, are prominent policy considerations for supporting the idea of inappropriateness of subsidiary or concurrent responsibility of members for the acts of an IO as a consequence of mere membership in that IO.<sup>1181</sup> Although the idea of direct responsibility of member states of an IO has found some support in the scholarship, it seems that the doctrine does not easily recognize an unconditional direct responsibility of member states for the wrongful acts of the IO of which they are members solely by virtue of membership. With respect to the direct responsibility of member States of an IO, for instance, some authors, on the basis of international legal practice and by means of deduction from the *prohibition of the abuse of legal rights*, have opined that:

“...In cases of doubt the member states are liable for the debts of their organizations...”<sup>1182</sup>

However, according to general international law it is an accepted principle that only in limited circumstances will member states of an IO be held liable for the wrongful acts of the IOs, prominently in situations in which member states adopt an intervening conduct in relation to the wrongful or unwrongful act of the IO. In the subsections below, these various categories of circumstances will be examined in a closer manner in order for a subsequent juxtaposition with the specific provisions of ARIIO dealing with the responsibility of a state in connection with the conduct of an IO.

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<sup>1179</sup> Ryngaert, Cedric/Buchanan, Holly, “Member State Responsibility for the Acts of International Organizations”, *op. cit.*, p.137.

<sup>1180</sup> Klabbers, Jan, *An Introduction to International Institutional Law*, *op. cit.*, p. 272.

<sup>1181</sup> Stumer, A., “Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections”, *Harvard International Law Journal*, Vol. 48, No. 2, 2007, pp. 553–580, at p. 569.

<sup>1182</sup> Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *LJIL*, Vol. 4, No. 2, 1991, pp. 171–183, at p. 178.

### 1. Piercing the Organizational Veil

Piercing the organizational veil, especially in terms of its justifying conditions, has been discussed in literature as well as by jurisprudence.<sup>1183</sup> The metaphor known as piercing the organizational veil is indeed a reaction to the responsibility gap that has appeared in certain cases in relation to responsibility of an IO and its members.<sup>1184</sup> Piercing the organizational veil is by nature an exception inspired by national corporate law.<sup>1185</sup> However, it is not clear to what extent the decisions about the piercing of the organizational veil should be guided by the factors proved to be relevant in practice and jurisprudence concerning the piercing of the corporate veil.<sup>1186</sup> It has been argued in the scholarship that as there is no control by the public on the capital situation of these IOs, the argument of limited liability of the members can hardly be brought forward against third persons. Furthermore, on the basis of the commercial activities of IOs, some authors argue in favour of piercing the organizational veil and taking the members of the IO directly responsible. But a precondition of this is that we take the immunity and the international legal personality as having the same effects. These scholars believe that the doctrine of Acts of State no more justifies the limitation of liability. In addition, they also believe that international legal personality does not justify the limitation of liability to the IO and does not prevent the extension of liability to members of the IO. As has been observed in this regard:

“There is no legal principle in international or private law according to which legal capacity involves sole liability.”<sup>1187</sup>

International law endows international organizations with legal personality because otherwise their conduct would be attributed to their members and no ques-

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<sup>1183</sup> For the discussion of the piercing of organizational veil with regard to the International Tin Council see Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *LJIL*, Vol. 4, No. 2, 1991, pp. 171–183, at pp. 176–183.

<sup>1184</sup> Paasvirta, E. and Kuijper, P. J., “‘Does one size fit all?’: the European Community and the responsibility of international organizations”, *Netherland Yearbook of International Law*, Vol XXXVI, 2005, pp.169–226; Reinisch, A., “Accountability of international organizations according to national law”, *Netherland Yearbook of International Law*, Vol XXXVI, 2005, pp.119–167; *Conditions of Admission of a State to Membership in the United Nations* (Article 4 of the Charter), Advisory Opinion, *ICJ Reports*, 28 May 1948; Higgins, R., “The Responsibility of States Members for the Defaults of International Organizations: Continuing the Dialogue”, in S. Schlemmer-Schulte & Ko-Yung Tung (eds.), *Liber Amicorum Ibrahim F.I. Shibata*, 2001, pp. 441–448.

<sup>1185</sup> Thompson, Robert B., “Piercing the Corporate Veil: An Empirical Study”, *Cornell Law Review*, Vol. 76, Issue 5, July 1991, pp. 1036–1074, at p. 1036; Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *LJIL*, Vol. 4, No. 2, 1991, pp. 171–183, at p. 181.

<sup>1186</sup> Thompson, Robert B., “Piercing the Corporate Veil: An Empirical Study”, *op. cit.*, at p. 1036

<sup>1187</sup> Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *op. cit.*, at p. 183.

tion of an organization's responsibility under international law would arise.<sup>1188</sup> But this should not pave the way for the abuse of the legal personality of IOs by their Member States. Many of the problems related to the current accountability gap are caused by the fact that government and governance operate across different levels (sub-national – national – regional – international; general – functional; public – private). A major question then is whether and how accountability mechanisms at one level can fill gaps that arise at other levels or even straddle various levels.<sup>1189</sup> One manifestation of this question is whether holding member states of an international organization to account can fill part of the lacuna caused by the difficulty in holding international organizations as such accountable. Another question relating to the accountability for governance divided over multiple layers is whether procedures at domestic level can compensate for shortcomings at the international level.<sup>1190</sup> The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.<sup>1191</sup> In other words, as a principle of existing customary international law, it is stated that international organizations themselves may be held responsible for their wrongful acts, but this does not exclude the joint or several responsibility of the member states for the non-fulfilment by their international organization of its obligations towards third parties.<sup>1192</sup>

For instance, in the context of military operations involving IOs and their member states, it has been recognized in doctrine and in the case law of the European Court of Human Rights that it is not excluded that under certain conditions State responsibility may arise when States attribute competences to international organizations or when the states participate in one way or another in the military operations executed under the framework or in the guise of an IO. As a general rule, the level of accountability of sending states should be tied to their concrete fields of operation and to the effective level of control exercised. Generally, it may be said that once the chain of command ceases to be fully independent and allows for national control (even in minor part) over the deployed police contingent, a potential concurrent responsibility of sending States cannot be excluded.

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<sup>1188</sup> ILC, *Report of the Fifty-fourth session (29 April – 7 June and 22 July – 16 August 2002)*, UN Doc. A/57/10, at para. 469.

<sup>1189</sup> Curtin, Deirdre and Nollkaemper, Andre, "Conceptualizing Accountability in International and European Law", *Netherlands Yearbook of International Law*, 2005, Vol XXXVI, pp. 3–20, at p. 13.

<sup>1190</sup> Curtin, Deirdre and Nollkaemper, Andre, "Conceptualizing Accountability in International and European Law", *op. cit.*, at p. 13.

<sup>1191</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), p. 9, para. 10. (last visited on 09.04.2022).

<sup>1192</sup> Dekker, Ige F., "Accountability of International Organizations: An Evolving Legal Concept?", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 27.

<sup>1193</sup> On the whole, Member States will be deemed responsible either for (a) transferring powers to international organizations without exercising due control over their acts/decisions or for (b) any wrongful act and omission committed by their organs operating within the organizations concerned.<sup>1194</sup> Moreover, it is submitted that in the case law, wherever the individual responsibility of Member States is denied by the tribunals, the role that political considerations have played cannot be denied.<sup>1195</sup> In *Al-Saadoon & Mufdhi* the attribution issue returns to be a pure ‘matter of fact’,<sup>1196</sup> and it is no more determined on the basis of the mere Security Council’s “overall authority and control” over the mission as in *Behrami & Saramati*.

An important point that has to be kept in mind when discussing the international legal responsibility of members of the IO, either jointly or subsidiarily, is that there cannot be a general model and pattern for the apportionment of international responsibility between IO and its members across the board, namely with regard to all kinds of IOs and in all categories of relations. At least it seems logical that there be made a distinction between traditional intergovernmental organizations, as most universal IOs are, on the one hand, and the supranational IOs, most prominent example the EU/EC, on the other hand. In this regard, the question that comes to mind is whether at all and to what extent weight should be given to the role of the member in the commission of wrongful act, including voting if taking a decision constitutes the wrongful conduct, in determining the extent of the international legal responsibility or whether these kinds of considerations are only relevant with regard to the assessment of reparation and compensation. It seems obvious that the degree of autonomy of the IO from its members plays and should play a critical and crucial role in the apportionment of the international legal responsibility between the IO and the members.<sup>1197</sup>

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<sup>1193</sup> Cerone, J., “Minding the Gap: Outlining KFOR Accountability in Post – Conflict Kosovo”, *EJIL*, Vol. 12, Issue 3, 2001, p. 480.

<sup>1194</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 200.

<sup>1195</sup> *Ibid.*, p. 201.

<sup>1196</sup> Milanovic, Marco, “European Court decides Al-Skeini and Al-Jedda”, *EJIL Talk*, July 7, 2011. In *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 86–89, 30 June 2009, the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them.

<sup>1197</sup> For the discussion of ICC as an example of autonomous institution for the purposes of international legal responsibility see Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Vedder, Ch (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, p. 705.

Even taking into account the autonomy of IOs and their independent international legal personality, which is no more than a “thin veil” in the words of *Blokker*, does not prevent us to see clearly the members of the IO behind this veil,<sup>1198</sup> and it is arguable to claim that this veil can be pierced in certain circumstances. The alternative for avoiding the piercing of organizational veil in filling the responsibility gap, would be to develop and promote primary rules and obligations of IOs.<sup>1199</sup>

*a) Joint (shared) Responsibility of the Members with the Organization*

As a solution to the undesired situation of the abuse of separate legal personality of an IO by its members described above, it has been suggested that the international veil of the IOs be pierced in order that the member States can be held responsible for the acts that have been committed in the framework of their IO. In other words, in such situation the international legal personality of the IOs can in a sense be disrespected. For avoiding a total ignorance of the international legal personality of the IO, the suggestion has been made of joint or shared responsibility of the IO and its members.<sup>1200</sup> By following such solution, the autonomy and independence of IO is respected, on the one hand, and, on the other hand, the members of the IO are also brought to account for their conduct in the framework of the IO, thus preventing the possibility of abuse of the international legal personality of the IO. At the same time the reparation offered to the third party, injured or damaged by the conduct of the IO, may also be better guaranteed. Co-authorship of an internationally wrongful act – which leads to multiple attributions for the purpose of establishment of international responsibility – is only one of the many potential situations of shared responsibility in international law.<sup>1201</sup> In this section, the notion of shared responsibility will be dealt with in more detail.

In this relation, there may be a need for clarification as to whether direct responsibility of the members and joint responsibility are one and the same notion. It seems that although these two expressions have been used extensively inter-

<sup>1198</sup> Blokker, Niels, “International Organizations and Their Members: ‘International Organizations Belong to All Members and to None’ – Variations on a Theme”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 139–161, at p. 144.

<sup>1199</sup> Paasivirta, Esa, “Responsibility of a Member State of an International Organization: Where will it End? – Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations”, *IOLR*, Vol. 7, No.1, 2010, pp. 49–61, at p. 57.

<sup>1200</sup> Den Heijer, Maarten, “Procedural Aspects of Shared Responsibility in the European Court of Human Rights”, *J. Int. Disp. Settlement*, 4(2), 2013, 361–383; Brownlie, I., “The Responsibility of States for the Acts of International Organizations”, in: M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355.

<sup>1201</sup> Messineo, Francesco, “Attribution of Conduct”, in Nollkaemper, André and Plakokefalos, Ilias (eds.), *Principles of Shared Responsibility in International Law – An appraisal of the State of the Art*, Cambridge University Press, 2014, pp. 60–98; Messineo, Francesco, “Multiple Attribution of Conduct”, *SHARES Research Paper No. 2012-11*, pp. 10–23. Available on: <http://www.sharesproject.nl> (last visited on 06.04.2022).

changeably, they are not identical. Another question of terminological nature in this context relates to the two commonly used expressions of joint responsibility and shared responsibility. To what extent the two concepts of joint responsibility and shared responsibility are different from each other? Joint responsibility, alongside shared accountability, has been considered as sub-categories of shared responsibility. Joint responsibility refers to the cases in which the acts of two or more actors result in a single injury and raise responsibility for wrongful acts of each of these actors separately. To put it differently, in joint responsibility, there is not a collective responsibility incumbent upon a group of actors.<sup>1202</sup> From a terminological perspective joint responsibility refers to the cases where the IO and the member states are each separately and completely responsible while shared responsibility refers to the situation where the amount of responsibility of each entity is proportionate to its share of involvement.

There is also a specific case where the members of an IO will be jointly and severally responsible with the IO. This case is in the framework of the UN Law of the Sea Convention, which contains a special provision in Annex IX (article 6.2). Some believe that this case relating to the sharing of responsibility between the European Community and the member States is envisaged in the framework of a treaty and should in principle be considered *lex specialis*.<sup>1203</sup> It appears that at least in ECJ jurisprudence the joint responsibility of member States and the organization in cases of mixed agreements in the absence of a declaration of competence has been accepted.<sup>1204</sup> But it seems that the case of the mixed agreements cannot serve as a proper precedent from which to derive a generally applicable rule of joint responsibility of IOs with their members towards third parties, the reason being simply that in mixed agreements the IO and its members are considered one party of the agreement giving the agreement actually a bilateral nature.<sup>1205</sup>

Another kind of cases where States members of an IO may practically incur joint responsibility with the IO, are the so-called *Bosphorus* cases of the ECtHR. Such cases do not of course deviate completely from the general principle according to which the states members of an IO may not be responsible for the wrongful acts of the IO only by reason of their membership in that IO. Rather, according to the understanding of the Court only if the IO does not provide 'equivalent rights protection' or if rights protection by the IO is 'manifestly deficient' will the

<sup>1202</sup> Nollkaemper, André and Jacobs, Dov, "Shared Responsibility in International Law: A Concept Paper", *ACIL Research Paper No 2011-07 (SHARES Series)*, finalized 2 August 2011, at p. 69. Available on: <http://www.sharesproject.nl>.

<sup>1203</sup> Kuijper, P. J., and Paasivirta, E., "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 111–138, at p. 120.

<sup>1204</sup> Judgment of 2 March 1994, *European Court Reports* (1994), p. I–625 at pp. I–661–662 (recital 29), referred to also in *Second Report on the Responsibility of International Organizations*, UN Doc. A/CN.4/541, para. 8.

<sup>1205</sup> Judgment of 2 March 1994, *European Court Reports* (1994), p. I–625 at pp. I–661–662 (recital 29).



responsibility of the Member States be engaged.<sup>1206</sup> In such cases, the member States may not be released from their human rights obligations where the competences relating to these rights and obligations have been conferred on an IO. But of course such responsibility of member states is conditional on the lack of sufficient rights protection on the part of the IO, where it can be said that a boomerang effect will trigger the responsibility of the member states at the same time that the IO continues to incur international legal responsibility as well. A point that may deserve being reflected on is what prevents other binding legal documents, namely other than the ECHR, to have the same so-called boomerang effect, with the same arguments that have been put forward by the ECtHR in its *Bosphorus* judgment with regard to the purpose and object of the Convention. In other words, the reasoning of the ECtHR could be generalized and applied to the purpose and object of any convention and legal instrument binding on states. In this way the gap in the legal obligations of the IOs may be properly filled and it may well serve as prevention for the possible abuses of the legal personality of IOs. ARIIO has not adopted a principle according to which the member states would incur international legal responsibility in the absence of any involvement on their part in the action of the IO. Therefore, it can be said that the ways of ECtHR and the ARIIO start to fall apart following the approach taken by the Court in the *Gasparini* case. Certain scholars do not seem to feel much ensured by the latter approach and believe that it would not lead to a solid foundation.<sup>1207</sup> Now the question that arises here is whether from a legal policy perspective it is more desirable to continue the approach adopted in ARIIO or it is better to change in favor of the spirit of *Gasparini*. The scenario in case of the acceptance of such principle would be that as soon as there would be a violation of rights and obligations and that there would be a lack in the protection of those rights, or a lacuna in the internal dispute settlement mechanism of the IO, then at least those states having the same obligations which have been violated, would incur automatically joint international legal responsibility with the IO. But at the same time it is questionable whether such structure would be desirable for all states members of IOs, because it would provide another channel for the abuse of the legal personality of IOs by some states not bound by certain legal obligations to the detriment of the other states who have accepted the legal obligations. In such cases, it is clear that the latter states would not be happy with paying for the wrongs of the other groups of states. Another negative side effect is that it would have chilling effect in the long run for the readiness of states to enter into legal obligations where the ways for misuse are open through IOs by other states or a chilling effect on states to accept

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<sup>1206</sup> *Bosphorus v Ireland*, Application No 4036/98 (2006) 42 EHRR 1, paras 156–157.

<sup>1207</sup> Ryngaert, Cedric, “The European Court of Human Rights’ Approach to the Responsibility of Member States in Connection with Acts of International Organizations”, *ICLQ*, Vol. 60, Issue 04, October 2011, pp. 997–1016, at p. 1012.

the membership of IOs where other members are not bound by the same legal obligations as they are.

At least in situations where the member states have the ability to control and prevent the wrong ful conduct of an IO, the idea of joint and several responsibility or recurrent responsibility of members of the IO should be easy to defend by making analogy to the *Trail Smelter* general rule already accepted as a established general rule of international law.<sup>1208</sup> Evidently, the acceptance of joint and several responsibility of member states as a consequence of participation in the decision making process would necessarily imply the reintroduction of fault in the definition and establishment of responsibility for the member concerned.

*b) Drawbacks*

As the main drawback to these suggestions the disrespect of the international legal personality of the IO has been observed. The result of this disrespect would be the loss of the autonomy of the IO which is not to the benefit of the aim of international cooperation at the international level. Another argument brought forward by the opponents of these suggestions is that the members of the IOs knowing that they would incur international legal responsibility for the acts and omissions committed in the framework of IOs, would not be ready to take steps necessary for the progress of international cooperation. A point has also been brought forward in the scholarship as to the members of IOs not having the same extent of control over IOs as do the shareholders or creditors of companies.<sup>1209</sup>

As the drawbacks of piercing the organizational veil of an IO in the doctrine the argument has been brought forward that two undesirable scenarios might happen. For instance, in the words of *Blokker*:

“...the IO starts to act freely because it is the member states who are responsible if things go wrong anyway, or the organization loses its independence and strength because the member states wish to become more intensively involved in the actions of the organization if they themselves can be held responsible in the event that things go wrong.”<sup>1210</sup>

In other words, joint responsibility of the members of the IO along with the IO would lead to the loss of the *volonté distincte* which is the *raison d'être* of the establishment of IOs. But it seems that the first scenario is not possible to happen in

<sup>1208</sup> Yee, Sienho, “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 Publishers, 2005, pp. 435–454, at pp. 448–449.

<sup>1209</sup> Ebenroth, Carsten Thomas, “Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case”, *LJIL*, Vol. 4, No. 2, 1991, pp. 171–183, at p. 178.

<sup>1210</sup> Blokker, Niels, “International Organizations and Their Members. ‘International Organizations Belong to All Members and to None’ – Variations on a Theme”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 139–161, at pp. 160–161.

reality since as it has been argued in the first part of the thesis, in the end it is the member states that are the members of the organs of the IO and the prospect to their responsibility would prevent them to vote for a conduct that would finally entail their own international legal responsibility. It is difficult to imagine how in the end an organ of an IO can freely act without the participation of the members of the IO. It should also be mentioned that normally the bodies in IOs that are composed of experts or the secretariat that enjoy theoretical independence from the member States are not the main decision-making bodies that have the competence to take the vital and important decisions within the structure of an IO. And with regard to the second allegedly undesirable scenario it seems that it would not be at the end of the day undesirable that the conduct of the IO be more responsible and there would be a greater sense of accountability within the IOs and during the decision-making, and that the member states of an IO while voting and decision-making having the potential consequences of the decisions in mind and that the decisions in the framework of an IO are taken mindful of the eventual legal consequences and impacts. In this way the aim of the accountability of the IOs would be better realized too.

In any case, a clearer demarcation of competences, which is one of the results of a sound application of constitutional and institutional balance to the structure and agenda of an IO, would facilitate the proportionement of responsibilities between the IO and its members.

## 2. The general duty to co-operate

In this sub-section, the focus will be on the general duty of the member states of IOs to cooperate with the IOs of which they are members, in order to examine whether from this general principle of law a solution can be deduced for the above mentioned problematic.<sup>1211</sup> In order to answer this question, firstly, the content of this duty must be made clear. Secondly, it must be shown how large the scope of this duty may be. It is clear that this principle does not lead to the transfer of the international legal responsibility of the IO to its members. However, the indirect consequence of such duty may be that the members would try to avoid the situations in which the international legal responsibility of the IO would be raised, for the reason that on the basis of the duty to cooperate, it is the members who would have to account by default for the reparation obligation derived from the IO responsibility.

Normally such duty is referred to and is to be found, either expressly or impliedly, in the constituent documents of the IOs, albeit with different formula-

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<sup>1211</sup> For a general duty to co-operate see Blokker, N.M., and Schermers, H. G., "Mission Impossible? On the Immunities of Staff Members of International Organizations on Mission", in Hafner, Gerhard et Al. (ed.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern*, Kluwer Law International, 1998, pp. 37–53, at pp. 50–52.

tions. Usually this duty is referred to in the constitutions of the IOs under the duty of good faith.<sup>1212</sup> This is quite logical, as this duty is derived from the fundamental principle of good faith. But is this duty exactly the same as the general concept of good faith or the scope of these two duties is different and they just overlap each other? In some cases, the State parties to a specialized convention have the obligation to cooperate with some relevant IOs.<sup>1213</sup>

Another point that may be worth mentioning in this context is possibly other legal sources of which this duty may also emanate. It has been mentioned that this duty may already have binding force due to the binding force of the constituent instrument of the IO. Now the question is which other legal sources, and thus legal status, could possibly be assumed for this duty, should the constitution of an IO lack any such reference to the duty to cooperate. In other words, could it be argued that the duty to cooperate exists for the members, regardless of whether the founding instrument of the IO refers to it or not? Furthermore, could it arguably be stated that this duty has also the status of a general principle of law? This issue gains even more importance by emphasizing that the constituent document of an IO is not invocable by third parties against the IO or its members. To answer this question, firstly, it must be made clear from which source is such principle drawn and deduced. Definitely it cannot be deduced from the municipal or national legal systems. Thus, it must be examined whether there is the possibility that from the general existence and generality of a principle in the constituent documents of a great number of IOs it can be concluded that the principle in question has achieved the status of a general principle of law. Would this status be the same as the status of general principles of law provided for in para (c) of the article 38 of the ICJ Statute? At least, it can be stated with certitude that this principle has achieved the status of general principle in the domain of international institutional law. And if the answer is in affirmative, it is to ask whether this general principle of law would also be binding on IOs members of an IO or whether it would only be binding for states.

*a) The general principle of "Duty to cooperate" in the light of jurisprudence*

The European Court of Justice has deduced a duty of cooperation in a situation involving shared competences between the Community institutions and the Member States "from the requirement of unity in the international representation of the Community."<sup>1214</sup> In this place, one may ask to what extent this "require-

<sup>1212</sup> Blokker, N.M., and Schermers, H. G., "Mission Impossible? On the Immunities of Staff Members of International Organizations on Mission", *op. cit.*, at p. 50.

<sup>1213</sup> With regard to the Law of the Sea Convention 1982 and the duty of State parties to cooperate with relevant IOs see Oxman, Bernard H., "The Rule of Law and the United Nations Convention on the Law of the Sea", *EJIL*, Vol. 7, 1996, pp. 353–371, at p. 360.

<sup>1214</sup> Opinion of the European Court of Justice of 15 November 1994, Opinion 1/94, pursuant to article 228(6) of the EC Treaty, [1994] ECR I-5267, para.108.

ment of unity”, that constitutes the basis of the argument of the Court, also exists with regard to other IOs. In order to answer this question it should be made clear what the origin and legal basis of this “requirement of unity” may be. The Court has also in its earlier opinions referred to the “requirement of unity”.<sup>1215</sup> Although it seems that the specification of the boundaries of competences between Community and member States was understood in the jurisprudence of the European Court of Justice as an internal Community law matter that is of less concern to the third parties,<sup>1216</sup> the recent trends tend towards a duty of clarification by the IO and its members towards third parties.<sup>1217</sup>

*b) The relevance of the “Duty to Cooperate” for international legal responsibility*

In this section the aim is to show whether the duty to cooperate for the members of an IO can be an incitement to abstain from the abuse of the international legal personality of IO and more importantly, whether the breach of this duty would itself give rise to international legal responsibility.

Above all, the status of this principle depends on the legal source from which it has emanated. Often, it is the founding instrument of the IO that describes the reciprocal rights and obligations of the IO and its members towards each other. This duty is also relevant with respect to the obligation to “full compensation” as the main part of the implementation of international legal responsibility. Some IOs have observed criticism by referring to the application of this principle to IOs and the burdens that this principle may have for the realization of the mandates of IOs.<sup>1218</sup> In such circumstances, the duty of member (States) to cooperate would prevent such undesirable side effects.

As has been stated by the International Court of Justice in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the mere fact of a State’s membership of an international organization entails certain mutual obligations of cooperation and good faith incumbent upon the member

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<sup>1215</sup> For an early Ruling delivered by the European Court of Justice where the Court refers to the close cooperation between the institutions of the Community and the Member States *see* Opinion of the European Court of Justice of 14 November 1978, Opinion 1/78, Ruling delivered pursuant to the third paragraph of article 103 of the EAEC Treaty – Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports [1978] ECR I-2180, para.36 ; Opinion of the European Court of Justice of 19 March 1993, Opinion 2/91, pursuant to the second sub-paragraph of article 228(1) of the EEC Treaty, [1993] ECR I-1083, para.36.

<sup>1216</sup> Opinion of the European Court of Justice of 14 November 1978, Opinion 1/78, Ruling delivered pursuant to the third paragraph of article 103 of the EAEC Treaty – Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports [1978] ECR I-2180, para.35.

<sup>1217</sup> Kuijper, P. J., and Paasivirta, E., “Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations”, *International Organizations Law Review (IOLR)*, vol. 1, 2004, pp. 111–138, at pp. 117 and 137.

<sup>1218</sup> UN Doc. A/CN.4/637 (14 February 2011), p. 29.

States and the organization.<sup>1219</sup> It means that besides the mutual obligations of members and the organization vis-à-vis each other, there are also general obligations of cooperation and good faith apart from the fact whether these obligations have been provided for in the establishing instruments and other documents of the IO or not.

### 3. ILC ARIO solutions for the problem of the abuse of legal personality of IOs

Part five of ARIO deals generally with the question of the responsibility of a State for the conduct of an international organization. The question that may be raised here is whether the few number of articles dealing with this question render the answer of ARIO to the matter insufficient. The solution the ARIO has adopted is the piercing of the organizational veil under certain conditions, most importantly when the member state has the intention to circumvent its own international legal obligations. However, this solution not only applies to the cases where there are gaps in the international legal obligations of the IO in comparison with the obligations of its member, but also to the cases where the IO is bound by the same international legal obligations as the member is and in spite of this fact the member state attempts to cause the IO to commit an act that, if committed by the state, would have constituted a breach of the obligation. In other words, the ILC has tried to find a solution that is maybe even broader than the above discussed problem. Following subsections will focus on different solutions set out in various articles of Part Five of ARIO.

#### *a) Article 61 ARIO: A Direct Solution*

Among the most innovative articles of ARIO can be seen the present article 61 – former article 60 as was reflected in the 2009 draft which was the result of the termination of first reading.<sup>1220</sup> As to the direct responsibility of Member States for acts formally carried out by an international organization, scholars and practice are divided.<sup>1221</sup> However, a quasi consensus exists regarding the cases of circumvention of their international obligations by state members of an IO by means of prompting or causing the IO to commit an act that, if committed by the state, would have constituted a breach of obligation. In these cases there is not any doubt about the intention of the member state to abuse the international legal personality of the IO for its internationally illegal ambitions and objectives. It is important to note that, in the framework of article 61, the member state liability is not based on the attribution of the act of the IO to the member who has commit-

<sup>1219</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, p. 93.

<sup>1220</sup> Kuijper, Pieter Jan, “Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?”, *IOLR*, Vol. 7, No. 1, 2010, pp. 9–33, at p. 12.

<sup>1221</sup> Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations*, 2<sup>nd</sup> edn., Cambridge University Press, 2005, p. 417 ff. and 433 ff.

ted an act in connection to the act of the IO, but on the very wrongfulness of the conduct of the member in question. In this context, the point which is of central importance is the member State involvement as a precondition for its responsibility for the act of the IO.<sup>1222</sup> From an international legal policy perspective, lengthy discussions can be held about the kind and content of the state action, direct or indirect conduct, which is necessary as a precondition for its international legal responsibility to arise in connection with a wrongful act of an IO. It is also precisely these parameters of the provision that make all the difference for the purpose of the practical effectiveness of the rule. Therefore, we will examine these various elements set out in the provisions of article 61 in light of the practical effectiveness of that article.

Article 61 is, above all, destined to prevent the member states of an IO to escape their international legal obligations simply by setting up an international organization and conducting their business through the organization.<sup>1223</sup> Starting with the requirement of a specific intention of circumvention, provided for by paragraph (2) of the commentary to article 61, excludes all the other acts of the IO committed as a result of the prompting of the IO by a state to commit an act, but unintended by the latter state. Therefore, the intention of abuse of its rights by a state is a necessary precondition of application of article 61, which generally is the subject of a general principle of law and gives rise to the liability of subjects of international law. However, the final phrase of paragraph (2) of the commentary to this article seems to create an ambiguity regarding its scope of application. According to the wording of the commentary the present article does not refer only to cases in which the member state may be said to be abusing its rights. It is admittedly difficult to assume cases in which a circumvention of international legal obligations by a member state is not considered an instance of abuse of rights by the member state. The commentary does not provide any further clarification in that regard. In addition, in the paragraphs 3 to 5 of the commentary three examples of case law have been referred to in which the member states in question had failed or it has been claimed that they had failed to ensure compliance with their treaty obligations where they have attributed competence to an international organization. In those examples it is hard to argue that the intention to bypass its international legal obligations by the member state was a necessary precondition for the establishment of the international responsibility of the member state in question, unless the intention to go around its international legal obligations by

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<sup>1222</sup> Naert, Frederik, "Binding International Organizations to Member State Treaties or Responsibility of Member States for their own Actions in the Framework of International Organizations", in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, pp. 167–168.

<sup>1223</sup> Hestermeyer, Holger P., "Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Practice", in Riedel, Eibe/Giacca, Gilles/Golay, Christophe (Eds.), *Economic, Social and Cultural Rights in International Law. Contemporary Issues and Challenges*, Oxford University Press, 2014, pp. 260–289, at p. 264.

the member state is presumed with the possibility of subsequent rebuttal. It appears from the commentary paragraph (2) of draft article 60 adopted after the first reading (present article 61) that this has been the intention of the ILC with regard to the interpretation and elements of proof. Nevertheless, it is not clear whether it can also be easily asserted with regard to the more restricted final formulation of article 61 adopted after the second reading.

Another relatively vague aspect of the earlier drafts of article 61 related to the conduct on the part of the member state of prompting the IO to commit a certain act. There was no explanation on what precisely did the conduct ‘prompting’ mean.<sup>1224</sup> Did it mean that the Member State must have proposed or actively encouraged the act, or did it even go further and also cover cases in which a member State has merely voted in favor of the act, or did it depend on whether the vote of the Member State was necessary for the adoption of the act?<sup>1225</sup> As the requirement of “prompting the IO to commit an act” only appeared in the initial drafts of present article 61, the previous reports of the special rapporteur and the Commission could not be helpful in finding a definitive answer from the viewpoint of the ILC to this question. At any rate, it appears that replacing the word “prompting” by “causing” in the final version of article 61 has resolved the problem and has greatly removed unclarity. At least the emphasis on significant link, referred to also in commentary paragraph (7), and inherent in the word causing is much more illuminating about the required specific role played by the state when causing an IO to commit an act than when it would prompt the IO to do so.

To date, it has to be kept in mind that international organizations cannot be sued before regional judicial or international supervisory bodies of human rights, while Member States can be.<sup>1226</sup> Some authors believe that it would be a successful short-term option finding a circuitous way (the ‘Italian job’) to secure indirect accountability of international organizations by bringing Member States before courts, as it would practically bypass immunities and jurisdictional limits enjoyed by international institutions.<sup>1227</sup> The compromissary answer to harmonize the conflicting interests involved in the question of member state responsibility for the acts of the IOs, would be that the IOs develop efficient and independent ac-

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<sup>1224</sup> Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission on the Work of its Sixty-First Session, UN GAOR, Supp. No. 10, UN Doc. A/64/10 (2009), Article 60, Commentary (1), p. 163.

<sup>1225</sup> Naert, Frederik, “Binding International Organizations to Member State Treaties or Responsibility of Member States for their own Actions in the Framework of International Organizations”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, pp. 167–168.

<sup>1226</sup> Tondini, Matteo, “The ‘Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States”, in Wouters, Jan; Brems, Eva; Smis, Stefaan and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, intersentia, Antwerp-Oxford-Portland, 2010, p. 171.

<sup>1227</sup> *Ibid.*, p. 171.



countability mechanisms within their internal institutional structures in order to provide remedy to the third parties eventually injured by their activities. Only in that case the attractiveness of member state responsibility for the acts of IOs would diminish, which in turn would be favorable, from a practical point of view, for the autonomy and independence of the IO, and from a theoretical point of view, for the unimpaired separate international legal personality of the IO. Article 61 of ARIIO deals with the question of circumvention by states members of an IO of their international legal obligations by taking advantage of the separate international legal personality of the IO.<sup>1228</sup> This issue is the same as the abuse of the separate legal personality of IOs, but as explained above, in the understanding of ILC not limited to it.<sup>1229</sup> The general principle of the “abuse of right” has been referred to earlier by other institutions when discussing the issue of the non-compliance of international organizations with their international obligations.<sup>1230</sup>

In this article, some other words should be briefly focused on. These words are “taking advantage of”, “competence”, “causing”. As the Commission has referred to in the 2011 commentary to article 61, it requires that the State member has “an intention to avoid compliance” with its international obligations in order that the application of the article be triggered.<sup>1231</sup> In this type of case the member state refrains from acting directly. It apparently does not infringe any of its obligations, but achieves the same result, taking advantage of the separate legal personality of the IO for avoiding compliance. In the Resolution that was the result of the work of the International Law Institute, in paragraph b of article 5, “abuse of right” and “acquiescence” are recognized, in particular circumstances, as the reasons for the member States of an IO to incur international legal responsibility and liability for the wrongful conducts of that IO.<sup>1232</sup> Therefore, it can be said that there are some parallels in the works of ILC and ILI. However, it is not quite clear whether the instances of “acquiescence” can also be considered under article 61 as a conduct of the member state causing the IO to commit a certain act that, if committed by the state, would have constituted a breach of obligation by that state. In this regard, it can be observed that the ILC has adopted some of the pro-

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<sup>1228</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), article 61, p. 93. (last visited on 09.04.2022).

<sup>1229</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), commentary to article 61, p. 93, para. 2. (last visited on 09.04.2022).

<sup>1230</sup> *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

<sup>1231</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), commentary to article 61, p. 93, para. 2. (last visited on 09.04.2022).

<sup>1232</sup> For a critical assessment and discussion on the article 5 and 6 of ILI resolution see Brownlie, Jan, “The Responsibility of States for the Acts of International Organizations”, in Maurizio Ragazzi, *International Responsibility Today. Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, pp. 355–362, at pp. 355–357.

visions of IJI Resolution, taking into account the scope of the ARIIO articles, and leaving aside other provisions that have already been touched upon in ASR or under the classical issues of state responsibility. As a prominent example, article 5 (c) (ii) can be referred to dealing with the cases in which an IO has acted as the agent of the state, in law or in fact.

In the opinion of *Paasivirta*, delivered after the publication of the result of the first reading of the draft articles, it is desirable that the scope of the article be as restricted as possible in order to be limited only to the real cases of abuse of legal personality of IO by its members.<sup>1233</sup> The present wording of article 61 is as much as possible restricted encompassing only the cases where the member States have indeed the intention to avoid compliance with their international legal obligations by using the international organization as an intermediate for the commission of the otherwise for them wrongful act. For this reason, it seems that the subject of the member states international responsibility for the use of the separate international legal personality of the IO has not been exhausted by article 61 of ARIIO, and has merits to be further elaborated on in order to clarify and design various provisions encompassing different other aspects and scenarios.

*b) Article 62 (2) ARIIO: An example of Subsidiary Responsibility of Members of IOs*

It is difficult to imagine a member of an IO having the intention to abuse the international legal personality of an IO – in order to escape from its own international responsibility following the commission of a wrongful act – at the same time consenting to subsidiary responsibility for the acts of the IO. Since in the first paragraph of article 62, the subsidiary responsibility of members is, first and foremost, based on the member's consent, it is rather the second paragraph of article 62, which could be relevant for our discussion of the abuse of the legal personality of IOs by their members. This paragraph opens another, albeit a relatively narrow, window for the member State responsibility for the acts of the IO. In cases where the intention of circumvention of its international legal obligations by the member is hard to establish, there is still the possibility to take recourse to paragraph 2 of article 62 by proving that the member has led the injured party to rely on its responsibility. This paragraph is mainly based on the estoppel principle.<sup>1234</sup> In such circumstances, the international legal responsibility of the member state arises, without the requirement of the fixed legal relationship between a legal obligation, its breach and its sanction.

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<sup>1233</sup> Paasivirta, Esa, "Responsibility of a Member State of an International Organization: Where will it End? – Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations", *IOLR*, Vol. 7, No.1, 2010, pp. 49–61, at p. 49.

<sup>1234</sup> MacGibbon, I. C., "Estoppel in International Law", *ICLQ*, Vol. 7, Issue 3, July 1958, pp. 468–513; Stumer, A., "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", *Harvard International Law Journal*, Vol. 48, No. 2, pp. 553–580, p. 563.

In the article 5 (c) (i) of the ILI Resolution, it has been acknowledged that a member state of an IO may incur liability to a third party through undertakings of the state in question. Under these circumstances, and in the light of ARIO article 62, the liability is the result of subsidiary international responsibility that the member state would incur, on the basis of general rules of attribution under international law. To put it simply, in this case the wrongful conduct of the IO is attributable to the member state and thus satisfies the necessary elements for the existence of a wrongful act of the state under a general rule of customary international law. This rule encompasses express as well as implied acceptance of responsibility by the state. However, it remains unclear whether the ILI intended to include under the provision regarding the undertakings by the state also the instances where the member state has led the injured party to rely on its responsibility, namely the second category of cases of subsidiary responsibility of member states for the wrongful acts of the IO provided for in article 62 (2).

*c) Article 40 ARIO: Ensuring the fulfilment of the obligation to make reparation*

Departure point of article 40<sup>1235</sup> of ARIO has been the absence of a subsidiary obligation to make reparation under general international law for the members of an IO towards an injured party when the responsible organization is not in a position to make reparation. Such position has not only been strengthened by the lack of any general international treaty or conventional rule, but also has been supported by doctrine, state practice and *opinio juris*, namely customary international law. Paragraph 2 of article 40 of ARIO does not put a new international obligation on the members of a responsible international organization, but reminds them of their international obligation – under the rules of the IO drawn by necessary implication – according to which they 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 emanating from its international legal responsibility. This obligation may have, as one of its indirect effects, a discouraging impact on the members who would intend to abuse the international legal responsibility of the IO. If the members are in any case under an obligation to ensure that the obligation of the IO to make reparation is fulfilled, which would mean that they are liable by default, they would have little motive to take a course of action in the framework of the IO that would lead to the responsibility of the IO, except may-

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<sup>1235</sup> Article 40 reads as follows:

“Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.
2. The 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 under this Chapter.”

be in rare situations where they could be sure that the international legal responsibility of the IO would not arise at all. Otherwise, the members could, without any concerns follow courses of actions that would entail the international legal responsibility of the IO, knowing that the IO is not able to fulfil the obligation of reparation because of the lack of financial means.

This paragraph appears to be a primary rule that provides for primary obligations for the members of the IO. Therefore, this article may be seen as indirectly reaffirming that the members of an IO are not liable for the wrongful acts of the IO merely because of their membership. In contrast, it appears that a secondary obligation will come into existence for the IO, namely the obligation of the IO to request its members to provide the necessary means to make full reparation.<sup>1236</sup> As is clear from the formulation of this paragraph, in the understanding of the ILC, the scope of the obligation of the members to take measures is, above all, limited to the rules of the organization. In such circumstances, the obligation envisaged in this paragraph is based primarily on the rules of the IO and should be interpreted by taking into account that legal system, namely the internal law of the IO, comprising most importantly the founding instrument of the IO, decisions, resolutions and other acts of the IO adopted in accordance with those instruments, and established practice of the organization. The real problem may appear in cases where the rules of the IO are silent on the question of the obligation of the members to ensure the fulfilment of the obligation to make reparation by the IO as a consequence of its international legal responsibility, and it is hard to deduce, by necessary implication as being essential to the performance of its duties, such obligation for the member states of the IO. The Commission has not introduced an obligation for member states independent from rules of the IO to ensure the fulfilment of the obligation to make reparation, although several IOs were eager that the Commission would exercise progressive development in this regard by envisaging a provision to that effect in ARIO.<sup>1237</sup> Implied in such a provision could, for instance, be an obligation on the member states to envisage a budget line providing a contingency reserve to deal with unforeseen circumstances as is the case with the European Union.<sup>1238</sup>

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<sup>1236</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), commentary to article 40, para. 3. (last visited on 09.04.2022).

<sup>1237</sup> A/CN.4/637, sect. II.B.17.

<sup>1238</sup> *Contingency Margin* (Article 13). This last-resort tool (up to 0.03% of the EU's gross national income) outside the Multiannual Financial Framework (MFF) ceilings can be mobilized under certain conditions to react to unforeseen circumstances. Available on: [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130630/LDM\\_BRI\(2013\)130630\\_R EV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130630/LDM_BRI(2013)130630_R EV1_EN.pdf) (last visited on 06.04.2022).

*d) Articles 58 and 59*

It cannot be claimed with certitude that the ARIO articles on aid or assistance (58) and direction and control (59), were aimed – at least partly – at the prevention of abuse of international legal responsibility of IOs by their members. However, as it has been noted earlier in chapter three, section V (1) of the present thesis, the commentary on these two articles provides for the possibility of member states responsibility in connection with the conduct of an IO, albeit in limited cases and under certain circumstances. According to ARIO provisions, deliverance of aid or assistance by a state to an IO – of which it is a member – in the commission of an internationally wrongful conduct or the exercise of direction and control by a member over the commission of a wrongful conduct by the IO may entail the international legal responsibility of the member, despite being in accordance with the rules of the organization, only if conditions related to the factual context are satisfied. Presumably, these articles were intended to cover also, in exceptional cases, the participation of a member in the decision-making of the IO whereby the member aids or assists or directs and controls the IO in the commission of the internationally wrongful conduct. The qualification “as such” in the second paragraph of articles 58 and 59 precisely refers to the cases in which the member state of an IO participates in the activities in the framework of the IO and undertakes acts in accordance with the rules of the IO, without however intending to achieve a result through abusing the separate international legal personality of the IO. There is no fundamental difference in the nature of international responsibility of a member abusing the separate international legal personality of an IO through delivering aid or assistance to that IO in order to commit an internationally wrongful act, or directing and controlling the IO to do so. The only difference lies in the basis and reason of international legal responsibility of such member, which is in the former case of aid or assistance, the act of aiding or assisting with the purpose of abuse of separate international legal responsibility, whereas in the latter case, the direction and control is the reason for attribution of wrongful act of the IO to the member state attempting to abuse the separate international legal personality of the IO by means of directing and controlling its wrongful act. Certain scholars have argued that in the latter case it is the international legal responsibility that is attributed to the member state of the IO and not the wrongful act of the IO.<sup>1239</sup>

In this context, it is also noteworthy to mention that the terms “direction” and “control” are in the understanding of the ILC sufficiently strict and limited to exceptional circumstances, which would mean that they necessitate surpassing a high threshold for their establishment. The possibility of ‘actual direction of an operative kind’ for the criterion of direction, as well as the situation of domination

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<sup>1239</sup> Stumer, A., “Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections”, *Harvard International Law Journal*, Vol. 48, No. 2, 2007, pp. 553–580, at p. 528.

by a member state over the commission of a wrongful conduct by an IO illuminating the criterion of control,<sup>1240</sup> are not easily made out. Nevertheless, it can not be excluded that in rare cases the rules of the IO may have deficiencies that would open the door for kinds of abuse in question in this chapter.

Another criticism that can be observed with regard to the formulations of these two articles, including the clarifications in the commentaries thereto, is with respect to the absence of an criterion for establishment of member responsibility in the – already very restricted – cases of participation of those members in acts or omissions in the framework and in accordance with the rules of the IO. It might be argued that the commentary paragraph 4 to article 58 enumerating some factual contexts, though decisive in establishing responsibility, is not intended to be exhaustive. Therefore, the absence of explicit reference to the degree or amount of involvement of the member in question, in the act under the rules and in the framework of the IO, as a critical factor of incurring responsibility by that member is quite justified. Nevertheless, it appears that overlooking this criterion, being even more precise than the size of the membership explicitly enumerated in the formulations of the codification, is less readily justifiable.<sup>1241</sup> For this reason, more elaboration on the criteria for determining whether aid or assistance or direction and control in the framework of the IO and according to its internal rules entails international legal responsibility of the member involved in such conducts in connection with a wrongful act of the IO would have been most welcomed.

#### 4. Further Considerations

Not only article 61 of ARIIO, in a direct manner, tries to remedy the abuse of the separate international legal personality of IOs by its members, but there are also other articles that indirectly try to deliver channels for reparation and closing the door to the abuse of the separate international legal personality of an IO by its members. As one of these articles, article 25 concerning the necessity as one of the circumstances precluding wrongfulness can be named. In drafting this article, based on scant IO practice, the ILC has proposed that the scope of the invocability of necessity by IOs should be not as wide as the scope of invocability of this circumstance by States because of the risk that otherwise would be entailed.<sup>1242</sup> That has been the main reason behind narrowing the scope of the essential inter-

<sup>1240</sup> Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR 56<sup>th</sup> Session, Supplement No. 10, UN Doc. A/56/10 (2001), Article 17, Commentary paragraph (7).

<sup>1241</sup> Beneyto, José María, “Accountability of International Organizations for Human Rights Violations”, Report of the Special Rapporteur of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, Doc. 13370, 17 December 2013, p. 19, para. 70.

<sup>1242</sup> Articles on the responsibility of international organizations, with commentaries, 2011. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf), commentary to article 25, para. 4. (last visited on 09.04.2022).

ests which may be safeguarded by taking recourse to necessity as a circumstance precluding wrongfulness by IOs.

Different other solutions based on interpreting the behavior of member states in the framework of IOs have been proposed by scholars with the aim of opening some ways for piercing the organization veil of an IO in order to hold the member states liable for the wrongful acts committed by the IO and their consequences. As an example in this regard, the practice of vote trading has been scrutinized by scholarship in the light of the problematic of abuse of legal personality of an IO by its members. The phenomenon known as vote trading, if not easily accepted as a form of corruption and coercion – in case it would be accepted as such it would doubtlessly remove the wrongfulness of the conduct of the IO and make evident the international legal responsibility of the member allegedly involving in such behavior – at least has the potential to be considered as undue influence.<sup>1243</sup>

At this point, it would be appropriate to make a link between the problematic of abuse of the separate international legal personality of IOs by its members and the solution that the concept of accountability, as understood by ILA, could provide in that regard. A principle, referred to by the ILA in its 2004 final report, in the context of first level accountability, is the principle of stating the reasons for decisions or a particular course of action (or inaction as the case may be) by the IOs. This principle may, as the report has reaffirmed, contribute to greater transparency, and thereby prevent, at least to some extent, the abuse of the international legal personality of IOs by its members at the time of decision-making, or may reduce the temptations for it. Another principle, which may have a significant impact in this connection is the principle of due diligence, enumerated by the ILA among the principles aimed at achieving effective accountability. As the IOs are based on the rule of law, the principle of due diligence requires the members, organs and agents of an IO to ensure the lawfulness of actions and decisions. Furthermore, from this principle follows the obligation of all organs and agents of an IO, in whatever official capacity they act, to comport themselves so as to avoid claims against the IO. It is true that with regard to this latter obligation, ILA does not mention the members of the IO expressly, and therefore, the preventive effect may be weaker. However, the fundamental obligation of the members of the organs of the IO to ensure the lawfulness of actions and decisions of the IO covers all the comportments of the members of the organs of IO in the framework of those organs. In general, respect for the principle of good governance and its derivatives, consisting in transparency in both the decision-making process and the implementation of institutional and operational decisions, participatory decision-making process, access to information, well-functioning international civil service, sound financial management as well as reporting and evaluation,<sup>1244</sup> all

<sup>1243</sup> Eldar, Ofer, "Vote-trading in International Institutions", *EJIL*, Vol. 19, no. 1, pp. 3–41, at p. 3.

<sup>1244</sup> International Law Association, "Accountability of International Organizations", *Berlin Conference Final Report*, 2004, pp. 8–15.

play a crucial role in preventing in one way or another the abuse of international legal personality of an IO by its members. Of course, in order for these requirements to be operational, institutional structures and mechanisms should be created within the IOs. In line with these exigencies, the importance of the principle of constitutionality will be further revealed. *A priori*, it can hardly be argued that the principles of good faith, objectivity and impartiality are irrelevant with the issue of the abuse of separate international legal personality of an IO by its members. In the same spirit, the implementation of principles of supervision and control, procedural regularity and strengthening of the related mechanisms and apparatus are guarantees for the promotion of afore-mentioned principles.

As a final word in this section, the results achieved by means of accountability with regard to avoiding the abuse of the separate international legal personality of IO by members to escape international legal responsibility, are mainly of a preventive nature, while the solutions put forward by the secondary rules of international legal responsibility follow a reparative approach.

## 5. Conclusion

Ambiguity surrounding the content and the scope of the international legal obligations of the IOs can affect the applicability of the different articles set out in ARIO. For instance, articles 14 and 15 of ARIO on aid or assistance in the commission of an internationally wrongful act or direction and control exercised over the commission of an internationally wrongful act would not be applicable if the obligations breached by the aided or assisted State would not be an international legal obligation of the aiding or assisting IO as well. The unclarity surrounding the scope and content of primary rules binding on IOs and therefrom emanating international obligations lead to the inapplicability of different ARIO provisions forming an obstacle to their applicability to different practical cases where the responsibility of an IO may be incurred, among others articles 14 and 15 ARIO.<sup>1245</sup> The foundation of ARIO is the breach of international legal obligations of IOs, with different articles of this set of draft articles being built on the prior existence of international obligations of IOs. As long as the question of the primary rules with respect to IOs in certain areas remains in obscurity, ARIO may not be applied in those areas.

As is shown in this chapter, the issue of the content and the scope of the international legal obligations of an IO can have great effect on the applicability of the different articles of the ARIO on different occasions. Thus, it can be seen that the scope and the content of the international obligations of the IOs is the foundation of these draft articles. As a result, the least unclarity with this regard can

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<sup>1245</sup> With respect to article 14 DARIO see only: Reinisch, A., "Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts", *IOLR*, Vol. 7, No. 1, 2010, pp. 63–77, at p. 73.



potentially render the articles inapplicable. Consequently, as long as the primary rules binding on IOs and thus, the international obligations of IOs remain considerably vague and in several areas ambiguous, ARIO could not be able to remedy in an effective manner the potential cases of abuse of legal personality of an IO by its members.

Since the State and other international entities, by binding themselves to international obligations under the international legal order also accept to respect these obligations in all circumstances, the framework of IOs should constitute no exception to this rule and no immune zone and “black hole” for the States and other IOs to escape their international obligations as soon as they enter into this allegedly vacuum.<sup>1246</sup> It is admitted that the secondary or concurrent responsibility of member states of international organizations is a default alternative. It is specially so as for a long time there has been a lack of any functioning, independent human rights oversight mechanism to hold IOs accountable for human rights violations by different kinds of decisions and field activities like the measures taken by peace-keeping troops and other personels and to provide just redress and compensation to the victims.<sup>1247</sup>

At any event, there are two solutions for the problems stemming from the ambiguity of the international obligations of IOs and the paucity of these obligations in connection with international legal responsibility. First, the primary rule solution, namely to open the way for the elaboration and development of the obligations of IOs; and the second, the secondary rule solution, namely the solution that the ILC has adopted being reflected in article 61 of ARIO.<sup>1248</sup> In general, the structure and construct of an IO opens the way for the abuse of the legal personality either by IO of its members or vice versa. The articles 17 and 61 of the ARIO are the articles where the Commission tries to tackle this problem and to deliver a solution that is inherent to the construct of IOs in the international legal order. Disagreement had been expressed with regard to the adoption of a general rule of member state responsibility without qualifying the general rule restrictively, mainly with the argument that the scope of such a rule would be too vast and thus contra-productive.<sup>1249</sup> On this ground, ARIO has tried to qualify member respon-

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<sup>1246</sup> With respect to the obligations of States when opting in the international organizations on the membership of new members generally and the UN specifically See: Grant, T. D., “International Responsibility and the Admission of States to the United Nations”, *Michigan Journal of International Law*, Vol. 30, Issue 4, 2009, p. 1095.

<sup>1247</sup> Inter-American Commission on Human Rights (IACHR), *Jimmy Charles*, Petition No. 81-06, Report No. 65/06, 20 July 2006. Available on: <http://www.cidh.org/annualrep/2006eng/HAITI.81.06.eng.htm> (last visited on 06.04.2022).

<sup>1248</sup> Paasivirta, Esa, “Responsibility of a Member State of an International Organization: Where will it End? Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations”, *IOLR*, Vol. 7, No. 1, 2010, pp. 49–61, at p. 60–61.

<sup>1249</sup> Paasivirta, Esa, “Responsibility of a Member State of an International Organization: Where will it End? – Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations”, *IOLR*, Vol. 7, No.1, 2010, pp. 49–61, at p. 53.

sibility as much as possible to avoid such criticism. According to the general approach adopted by the ILC in ARIIO, taking advantage of procedural rights conferred on members cannot be considered abuse of the legal personality of IOs.<sup>1250</sup> On the contrary, some authors believe that in the cases where the influence of a certain member state or states on the decision-making process is decisive due to the weight of their votes, the member states in question could be held responsible should the organization decide on a measure that amounts to the violation of an obligation of the member states concerned.<sup>1251</sup>

In drafting ARIIO provisions, the ILC dealing with the question of apportionment of responsibility between an IO and its members has been largely inspired by the case law of the ECtHR, especially the specific question of the responsibility of member states for acts and omissions of the IO of which they are members, as is also reflected in the commentary to those provisions. However, the analysis of the case law of the Court undertaken by the scholars has revealed that there are still some inconsistencies with regard to these matters,<sup>1252</sup> although much valuable progress has also been achieved by the Court's case law in filling the accountability gap in this respect. Maybe that has been one of the reasons why the ILC has been careful in borrowing the conceptions put forward by the Court in its various rulings touching upon relevant issues. For instance, the recurrent criteria of "equivalent protection" or "manifest deficiency" used by the Court do not appear in the provisions of ARIIO, although admittedly these parameters could be helpful in filling the responsibility gap and guarantee remedies to third parties.

As the scope and content of the obligations of IOs is not clear, would it not be a salient proposal that in addition to the responsibility of IOs for the violation of their obligations, their liability for inflicting harm and injury be codified? The concept of accountability and its development could play the role of a preventive factor for the abuses enumerated above. In the present stage of the development of international law with respect to the IOs and the existent lacuna with regard to their international obligations, it seems that the concept of accountability parallel to international legal responsibility could contribute to justice and fairness in international law. Emphasizing accountability beside international legal responsibility would better combat the impunity of IOs, the goal that the international legal responsibility doctrine may also seek to achieve but is at the moment not able to gain being the only rider at the international scene. Complementing the international legal responsibility with the concept of accountability would contribute to

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<sup>1250</sup> D'Aspremont, Jean, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *International Organizations Law Review*, 2007, pp. 91–119, at p. 100.

<sup>1251</sup> Klein, P., "*La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*", Bruylant, Bruxelles, 1998, p. 341.

<sup>1252</sup> Lock, Tobias, "Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organizations Under the European Convention on Human Rights", *op. cit.*, at p. 544.

the better attainment of the very aims that the doctrine of international responsibility is on their search.

A solution put forward by ILA final report, referred to in preceding parts, is the respect for the principle of good governance (good administration in the case of IOs), which requires, among others, maximum possible transparency and participatory decision-making processes. It is clear that this solution has, above all, preventive nature, but is not at all less effective than the other solutions. The structure of IOs and their relations with their member states is, in principle, in a way what potentially facilitates the abuse of the legal personality of the IO by those member states who intend to achieve certain interests and aims in disguise. Their motives may be different, but they have something in common, namely, that they all wish to follow such aspirations not under their own names. Which way would be easier than to do it under the name of an IO which has its own autonomy and account? The best strategy in confronting such intentions is a preventive approach, which can be achieved through the promotion of accountability of IOs. Accountability may be realized ideally by means of strengthening the checks and balances in an efficient manner. Accountability, as a fundament of good governance, would pave the way for such preventive approach which is maybe even more desirable than a remedial approach. Furthermore, following the preventive approach would have another positive result, namely that, it would minimize the damages, which would on its turn facilitate the remedial measures necessary.

As a final word, it can be asserted that the list of the categories of situations and cases, and thereon applicable provisions regarding concurrent or subsidiary responsibility of member states of an IO for the acts of that IO delivered by ARIO considered together with the ILI Resolution, is not all-embracing and exhaustive. In the light of the 1996 Resolution of the Institute of International Law (ILI), referred to above in different contexts, the liability of member states of an IO for the wrongful acts of the IO, as well as lawful acts resulting in damages or injuries to third parties, are not limited to the acquiescence or abuse of rights. As is clear from the wording of article 5 (b) of that Resolution,<sup>1253</sup> these two general principles of law are enumerated not in an exhaustive manner, but rather in an exemplary manner with the aim of delivering an incomplete list of relevant general principles of law. Therefore, any other general principle of law which could be relevant in this regard and supporting the international concurrent or subsidiary responsibility and liability of the member states of an IO, would be a potential window for providing the third parties with remedy or reparation.

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<sup>1253</sup> Article 5 (b), *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.



## Concluding Remarks

The phenomenon of proliferation of IOs that Klabbers speaks of as “mushrooming of IOs”,<sup>1254</sup> has urged focus on the responsibility of IOs under international law as the effect of their activities is felt everywhere in our daily life. Some authors, on the basis of the great diversity of IOs and consequently, the diversity of their internal rules, have expressed their doubts with regard to the feasibility of a codification. If each regulated the question of responsibility of IOs on its own way, this would render the *lex specialis* rule the general rule and the general rules only applicable in special cases.<sup>1255</sup> It is undeniable that a major challenge to the codification of general rules for IOs is their wide-varying difference from each other.

It should be kept in mind that the end result of the ILC draft articles that may be adopted by the States is not always a multilateral convention. But should the articles end up in the form of a multilateral convention, it is evident that in the course of adoption of this convention there will of course be some further modi-

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<sup>1254</sup> Klabbers, Jan, “The Life and Times of the Law of International Organizations”, *Nordic JIL*, Vol. 70, No. 3, 2001, pp. 287–317, at p. 299.

<sup>1255</sup> Hafner, Gerhard, “Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks”, in Fastenrath U./Geiger, R./Paulus, A./Khan, D. E./Von Schorlemer, S./Wedder, Ch. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 695–717, at p. 716.

fications to the draft. Another point that may worth being noted here is the question of international law subjects that may and should be allowed to adopt the convention. Evidently, this time the IOs should be among the prime signatories and parties. Due to the nature and content of the articles it would not make sense, if only States were parties to this document and not the IOs, as these are the primary targets and objects of its provisions. Even if by way of customary nature they would most probably gain consequently they would be applicable to IOs anyhow. Already, some, albeit a few, of the articles codified in the framework of ARIIO have the status of customary international law rules. The most prominent one is the provision with regard to the general principle of international legal responsibility of IOs. It is necessary that there be clarity with regard to which articles have already gained customary rule status. On that basis these rules would be binding on IOs without any further steps being necessary in principle. Even if provision of the possibility of general jurisdiction of the ICJ through article 36(2) is excluded for IOs, there are some other consequences that would follow the scenario where the ARIIO would be available in the form of an international convention open also to IOs for adoption and ratification. That situation would raise some theoretical questions. What would be the result of having a document having almost five hundred or more parties? What about reservations? Should reservations to the potential convention be allowed? What could these reservations possibly be about? ASR has not yet been presented as a convention or a binding document. Anyhow, the codification of the provisions and rules on the responsibility of international organizations “contributes to the prevention of conflicts by means of and through better and improved verifiability of the law.”<sup>1256</sup>

It is clear that for the moment, and as long as the ARIIO has not been adopted as binding legal rules in the framework of a treaty or other binding document, at least their legal value as a “subsidiary mean for the determination of rules of law” in the meaning of paragraph 1 (d) of article 38 of the Statute of the International Court of Justice is undisputed.<sup>1257</sup> There can be no doubt that the ARIIO is the result of “the teachings of the most highly qualified publicists of the various nations”, as the above mentioned paragraph of article 38 requires.<sup>1258</sup> ARIIO has benefitted a lot from doctrine, especially in the period between the first reading in 2009 and the second reading in 2011.

In order that the damages be repaired and the aims of justice are realized, the concept of accountability should be developed in order to fill the gaps that the doctrine of international legal responsibility leaves behind.<sup>1259</sup> As a conclusion it

<sup>1256</sup> Hafner, Gerhard, “Kodifikation und Weiterentwicklung des Völkerrechts”, in Cede, F. and Sucharipa-Behrmann, L., *Die Vereinten Nationen: Recht und Praxis*, Manz/C.H.Beck, 1999, Wien, pp. 131–142, p. 132.

<sup>1257</sup> *Statute of the International Court of Justice* (26.6.1945), UN Yearbook 1946–47, p. 843, at p. 847.

<sup>1258</sup> *Ibid.*

<sup>1259</sup> Yarwood, Lisa, *State Accountability under International law, holding states accountable for a breach of jus cogens norms*, Routledge, 2011, p. 76.

may be observed that the more encompassing concept of accountability finds special importance with regard to IOs, specially having regard to the present stage of the development of international law. Sometimes the measures resulting from the operationalization of the concept of accountability exceed by far – in terms of efficiency and adequacy – the reparation that may follow the establishment of international legal responsibility.<sup>1260</sup> To put it differently, accountability could fill the gap that responsibility and liability would leave behind and that is particularly with regard to the cases where damage has been inflicted following a lawful conduct that does not even form part of the conduct that would raise liability for non-prohibited conducts. The nature of this accountability that arises as a result of the harm following a non-prohibited conduct may have moral nature or be of political nature, inciting the question whether a legal nature for such an accountability can also be imagined and presumed, with regard to which the case law is not always illuminating.<sup>1261</sup> *Yarwood* in this context has pointed out that:

“State accountability may not yet be *lex lata* under public international law but just a few examples taken from state practice have shown that the concept has increasing support as the *lex ferenda*”.<sup>1262</sup>

A thesis that can be brought forward, on the basis of the results of the research on the accountability of States,<sup>1263</sup> is that this notion may be the concept that seeks the realization of common interests and community interests that goes far more than just the bilateral reparation. In the same direction *Yarwood* has vehemently concluded that although the international legal responsibility doctrine enjoys a higher normative standing compared to the notion of accountability, in terms of effectiveness it does not necessarily hold true. The legal restraints emanating from the embodiment of the spirit of a concept in a legal body has been recognized as the main reason for this state of affairs.<sup>1264</sup> In addition, it has been argued that the notion of accountability has shown itself more appropriate for two categories of cases where the effectiveness of international legal responsibility doctrine has its limitations to respond adequately, the first category being the cases of infliction of harm and damage, and second the grave breaches of international norms having the character of *jus cogens*, where the redress in the framework of accountability provides an alternative for the lack of legal “punishment”.<sup>1265</sup> To use *Yarwood*’s language with regard to State accountability, in this way accountability may be the concern of all members of international community. As has been stated by *Paulus*

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<sup>1260</sup> *Ibid.*, p. 126.

<sup>1261</sup> *Ibid.*, p. 151.

<sup>1262</sup> *Ibid.*, p. 154.

<sup>1263</sup> *Ibid.*, p. 153.

<sup>1264</sup> *Ibid.*, pp. 156–157.

<sup>1265</sup> *Ibid.*, p. 157.

in the context of the peremptory norms of international law under the concept of *jus cogens*:

“There is no prospect in solving the institutional problems of global organization by way of legal conceptualization instead of consensual institutional reform”.<sup>1266</sup>

Furthermore, as with respect to the interaction between the concepts of responsibility and accountability, the present thesis defends the position that the necessity of more emphasis on accountability by no means may lead to present accountability as an alternative for international legal responsibility, as each follow different aims and objectives, even though accountability may be considered as encompassing also international legal responsibility, albeit only at its third level. It may be doubted whether one can speak at all of more or less uniform principles of accountability that apply to some or all actors exercising public power. But at least in the narrow form of accountability dealing with responsibility for wrongful acts, it is generally accepted that one can identify a set of principles applying equally to, respectively, all states and all international organizations.<sup>1267</sup> Thus, it seems that the best approach would be not at all to ask whether responsibility better suits the case of IOs or accountability, but attempting to develop the two concepts in parallel, since they have the potential to supplement each other in filling each others gaps and ultimately creating a synergic effect. Accountability, through the element and method of dialogue and by its intrinsic proactive approach, which is in the nature of its notion, may bring about more improvements than maintaining the *status quo* which responsibility tries to restore. However, without justice sometimes no further steps may be taken and restoring rights and bringing justice to those suffered from loss is the starting point. This is where responsibility may be a prerequisite of accountability being further effectively implemented.

In time where the implementation of international legal responsibility and specially adjudication with respect to its existence may be confronted with various obstacles – material as well as procedural and institutional – it seems that the development of the concept of accountability and thereto related mechanisms is advisable. In this connection, it appears that the criticism observed with regard to ARIO, in terms of its monolithic character, is quite justified, but is not limited to the concept of soft law,<sup>1268</sup> which is completely absent from the articles, but also other aspects of accountability, closely linked to international legal responsibility questions, which could properly find some place in the related articles.

<sup>1266</sup> Paulus, Andreas L., “*Jus Cogens* in a Time of Hegemony and Fragmentation. An Attempt at a Re-appraisal”, *Nordic Journal of International Law*, Vol. 74, 2005, pp. 297–334, at p. 331.

<sup>1267</sup> Curtin, Deirdre and Nollkaemper, André, “Conceptualizing Accountability in International and European Law”, *Netherlands Yearbook of International Law*, Vol XXXVI, 2005, pp. 3–20, at p. 15.

<sup>1268</sup> Sorel, Jean-Marc, “The Concept of ‘soft responsibility?’”, in Crawford, James/Pellet, Alain/Olleson, Simon (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 165–171, at p. 165.



Even though the adoption of ARIO as a binding convention may not be anymore the priority of the international community,<sup>1269</sup> the reason of which is mainly attributable to interactions between different sources of general international law,<sup>1270</sup> in this case treaty and customary law – a consideration of legal policy nature – it is without any doubt the intention and aspiration of drafters that these articles gain authority, as their forerunner, namely ASR. In order that ARIO gains more authority and consequently, to become an influential non-legislative codification, an unavoidable precondition is its citation and reference to it, or at least to the content of specific provisions of it, by different judicial and quasi-judicial institutions,<sup>1271</sup> which has been the case until now to a relatively limited extent.

Maybe we should also ask ourselves what would happen if the ILC had left the project of the drafting of articles on the responsibility of IOs open for the duration of at least half century, a destiny comparable to that of ASR, instead of concluding the draft so expedient and hastily, as some believe. That would of course mean reopening longer discussions over controversial issues. Or another scenario would be that the General Assembly would refer the draft, namely ARIO, back to the Commission for reconsideration or redrafting, a competence that has been envisaged for General Assembly in Article 23(2) of the Statute of the ILC.<sup>1272</sup> No doubt the articles would have the chance to be further refined in the practice of IOs, states and jurisprudence of different judicial and quasi-judicial institutions that would refer to them in different cases. It is clear that a longer process of their drafting would have permitted to consider as much practice and jurisprudence as possible in the formulation of the provisions. But nothing prevents them from being refined, even in the form of concluded articles. An optimistic scenario could be that customary rules may be formed around the codified provisions of ARIO, *inter alia*, through their invocation and application by international courts and tribunals. Firstly, in the form of a convention the provisions would find application only in cases where both parties would be member to the convention, thus limiting the possibility of the development of it through international judicial practice. Secondly, the lack of international jurisdiction over IOs would even further limit the development through jurisprudential practice, a gap that has been also echoed

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<sup>1269</sup> Villalpando, S., “Codification Light: A New Trend in the Codification of International Law at the United Nations”, *Brazilian Yearbook of International Law*, Vol. VIII, 2013, pp. 117–55.

<sup>1270</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *ICLQ*, Vol. 63, Issue 03, July 2014, pp. 535–567, at pp. 540–541; Crawford J. and Olleson, S., “The Continuing Debate on a UN Convention on State Responsibility”, *ICLQ*, Vol. 54, 2005, p. 959.

<sup>1271</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *op. cit.*, at p.545.

<sup>1272</sup> Statute of the International Law Commission, 1947, Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by 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. Available on: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

in the context of adoption of ASR by the establishment of a dispute settlement mechanism. In a sense, these codified provisions may encourage relevant practice and lead to the emergence of a customary rule by means of modern ways of formation of customary rules in which *opinio juris* precedes the practice, realizing the function of “catalyser of ‘new custom’”.<sup>1273</sup> But then there is still the risk that they may never enjoy the same authority the ASR enjoy, since as has been rightly observed “the influence of a non-legislative codification also depends on its textual qualities and the way in which it stages authority”.<sup>1274</sup>

The reaction of the scholarship towards ARIO, although to a great extent critical or even cynical,<sup>1275</sup> has not always been exclusively pessimistic about the practical effects of the responsibility articles drafted by the ILC. Optimism has been observed with regard to ARIO, for instance, based on the potential that these articles have in shaping the discourses, prominently by non-state actors like NGOs, about the violation of international law by IOs. Thereby, the disputes and conflicts of interests move, as a consequence of the dissemination of such discourses, from the political field to the international legal sphere.<sup>1276</sup> To put it differently, the dependence of IOs on their legitimacy for being effective and for attracting cooperation of other actors at the international level, leads to the situation where the famous proverb “naming and shaming” seems to work even more for IOs than states.<sup>1277</sup> At the end of the day, if the IO responsibility articles can succeed in influencing the behavior of IOs, even if indirectly, the efforts of the ILC in drafting ARIO deserve applause.

Anyhow, time will tell whether and to what extent ARIO are capable of exerting influence on the crystallization of the law of international organization responsibility through application by international courts and tribunals, as well as the practice of IOs and States. But all this does not take away the applause that the opening of the discussion on the issue of international legal responsibility of IOs deserves, which has been effectuated by the ARIO.

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<sup>1273</sup> Bordin, Fernando Lusa, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *op. cit.*, at p. 566.

<sup>1274</sup> *Ibid.*, at p. 552.

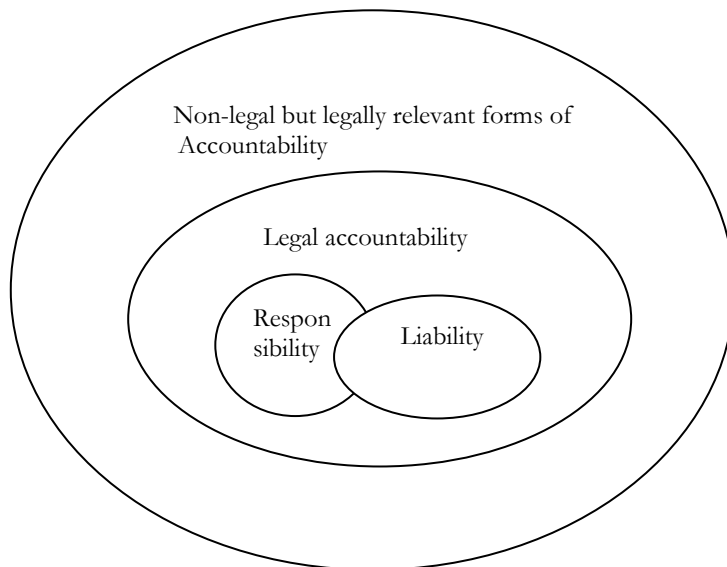
<sup>1275</sup> According to Alvarez, the ILC efforts in codifying the issue of international responsibility of IOs are “at best premature and at worst misguided”. For a comprehensive account of his criticism with regard to ARIO See: Alvarez, José, “Reviewed work: *International Organizations and Their Exercise of Sovereign Powers by Dan Sarooshi*”, *AJIL*, Vol. 101, No. 3, July 2007, pp. 674–679.

<sup>1276</sup> Daugirdas, Kristina, “IO Reputation and the Draft Articles on IO Responsibility”, *EJIL, Talk!*, 24 March 2015, para. 4.

<sup>1277</sup> *Ibid.*, at para. 6.

## Annexes

*Chart 1*  
*Relationship between different levels and forms of accountability*





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The phenomenon of proliferation of international organizations has urged focus on the responsibility of international organizations under international law as the effect of their activities is witnessed everywhere in our daily life. The main purpose of the present book is to examine and review some specific aspects relevant to the question of international legal responsibility of international organizations, mainly, with a view to assessing the International Law Commission's work on the codification of the international legal rules applicable on international organizations in this area. At the same time, the intention is to address the major challenge to the codification of general rules for international organizations, namely, their wide-varying nature and their differences from each other. Furthermore, the perspective has been enlarged by elaborating on the broader concept of accountability of international organizations.



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