

## THE INSTITUTIONAL AEGIS: INTERNATIONAL ORGANIZATIONS AS SHIELDS AGAINST MEMBER STATE RESPONSIBILITY\*

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### Abstract

*The development and proliferation of international organizations has endowed them with a legal personality separate from their member states, opening the possibility of international organizations as independent actors of internationally wrongful acts. While the ILC's Draft Articles on the Responsibility of International Organizations has attempted to codify the law on the matter, the obscurity of law persists with regards to the law of responsibility of those international organizations. Behind this obscurity, there is a concern that the powers of an international organizations may be misused to shield member states against responsibility. The separate legal personality of international organizations has been invoked in past cases to shield member states from alleged misconduct of their troops, military intervention and breaches of regional treaty law. This article will attempt to lay out the manners by which the law may be utilized to raise this shield and veil the responsibility of member states through an international organization. It will also briefly discuss the limited remedies available to counter this veil.*

### Intisari

*Seiring dengan perkembangannya yang pesat, organisasi internasional telah diberikan kepribadian hukum yang terlepas dari kepribadian hukum negara-negara anggotanya. Dengan ini pula, peluang suatu organisasi internasional untuk secara independen melakukan pelanggaran hukum internasional-pun telah terbuka. Walaupun ILC Draft Articles on International Organizations telah berusaha merumuskan hukum untuk hal ini, ketidakpastian hukum kerap muncul dalam hal hukum pertanggungjawaban organisasi tersebut. Ketidakpastian ini menimbulkan kekhawatiran bahwa organisasi internasional dapat digunakan sebagai sebuah perisai bagi negara-negara untuk mengelak dari tanggung jawab atas sebuah pelanggaran hukum. Hal tersebut dapat dibuktikan dari digunakannya kepribadian hukum independen yang dimiliki oleh organisasi internasional untuk melindungi negara-negara anggotanya dari gugatan untuk tindakan tentara negara-negara anggota, intervensi militer maupun pelanggaran perjanjian regional. Artikel ini akan memaparkan bagaimana hukum dewasa ini dapat digunakan untuk mengangkat tabir antara tanggung jawab negara anggota dan sebuah organisasi internasional, juga membahas sekilas mengenai upaya-upaya hukum terbatas untuk menembus tabir tersebut.*

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## A. Background

There is growing usage of international organizations as an actor involved in international relations. In entangling themselves as actors, it is inevitable that international organizations may find themselves engaged in conducts breaching international law. Many of these international organizations have both a separate legal personality<sup>7</sup> and immunity from jurisdiction (Neumann, 2006) leading to concern that they may be used to shield its member states from liability (Wilde, 2006).

The questions that follow, and which will be the focus of this article is whether or not an international organization could act as a shield for member state responsibility.

## B. Acts under the Auspices of International Organizations

International organizations are vested with many powers, even to conduct military operations (Abbot & Snidal, 1998).<sup>8</sup> The number and forms of the operations undertaken by international greatly vary, from military, political to economic.

However, it is first necessary to determine which alleged acts would *prima facie* entail the responsibility of the international organization and not its member states or third states. Such operations are those conducted through and under the auspices of an international organization (Stumer, 2007). These may be done through their agents, such as in violations by UN Peacekeepers, or by the organization as a whole, such as the allegation against the International Monetary Fund and World Bank

for 'rewarding' Rwanda and Uganda's actions during the Second Congo War. Economic actions under the EU or military interventions by International organizations like ECOWAS in Sierra Leone in 1997 are also close examples to the latter (Levitt, 1998).

## C. Responsibility of International Organizations

### 1. The Legal Personality

For an entity to bear international obligations and liability for breaches of international law, it must be a legal person. Since the *Reparations* case ("Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations," 1949), it has come to be accepted that an international organization is capable of possessing personality under international law, separate from the personality of the organization's member states.

It is widely agreed that the legal personality of an organization arises out of an (express or implied) will of the member states. The organization must also, in fact, be endowed with the functional, material and organic means necessary to express a will distinct from that of its member states (d'Aspremont, 2011).

By establishing a new legal person, States could then undertake collectively what none of them could achieve individually (Sarooshi, 2004). It is important to note that by becoming members of an international organization, States do not give up their legal personality under national or international law. By conferring powers to the international

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<sup>7</sup> See for example, Article 6 of the Vienna Convention of 21 March 1986, Article 2(a) of the ILC Draft Articles on the Responsibility of International Organizations. See also, *Reparations* Case, ICJ Advisory Opinion.

<sup>8</sup> See Article 24 of the United Nations Charter and Article 5 of the Inter-American Democratic Charter of the Organization of American States.

organization, they merely limit their own autonomy, but continue to co-exist side-by-side with the international organization ("Case of the S.S. Wimbledon," 1925).

## 2. **Attributing Responsibility to International Organizations**

Having concluded that a legal personality is necessary for international organizations to bear responsibilities, the issue now turns to attribution. In analyzing the interplay of the laws of responsibility, it is imperative that it involves the discussion of the ILC Articles on State Responsibility of 2001 [ASR] and the ILC Draft Articles on the Responsibilities of International Organizations of 2011 [DARIO] (Hoffmeister, 2010).

In general, although international organizations are endowed with international personality differing in nature from that of states, they bear responsibility generally mirroring the obligations of states in general pursuant to ASR.<sup>9</sup> Many of the articles in DARIO are based on upon ASR. However, it must be noted that DARIO is not conclusive evidence of the law, but serves as both a starting reference and persuasive evidence (d'Aspremont & Ahlborn, 2011).

## 3. **Attributing Responsibility to Third States and Member States**

### a. **Effective Control**

Articles 6, 7, 8 & 9 of DARIO mirror its counterpart in Chapter II of ASR. These articles seem to have gained widespread acceptance and generally impose that,

subject to the exceptions below, an act or agent under the auspices of an international organization entails the responsibility of that organization (Talmon, 2005).

The commentaries to Article 7 of DARIO makes it clear that when organs or agents of a state are fully placed at the disposal of an international organization, any responsibility would fall to that international organization. This is analogous to how states act through and are responsible for their agents ("German Settlers in Poland", PCIJ).<sup>10</sup> Thus, when control of a conduct is in the hands of the international organization, states are not held liable.

A dispute arose exemplifying the possible use of an international organization as a shield when the European Court of Human Rights [ECtHR] in the cases of *Behrami & Behrami v. France*, found that acts of forces in Kosovo under the UN –acting under Security Council Resolution– must have *prima facie* acted under the effective control of the Security Council [SC],<sup>11</sup> imputing exclusive responsibility to the UN.

This decision has drawn widespread criticism from academics, and threatens to open the gates to an abuse (Bell, 2010). However, subsequent decisions ("*Al-Jedda v. United Kingdom*", ECtHR; "*Nuhanovic v. Netherlands*", Dutch Court of Appeals) attempted to rectify this finding by looking at which party had "effective control"<sup>12</sup> (Dannenbaum, 2010). No definitive consensus exists as to which test is to be used, leading to legal uncertainty in attributing responsibility and possible abuse.

<sup>9</sup> See *Reparations* case, ASR and DARIO. DARIO has been often said to "reflect" the ASR (Ahlborn, 2011). However, there are key differences, and the two are not identical.

<sup>10</sup> See also, Article 4, 6 & 8 of ASR.

<sup>11</sup> The ECtHR acknowledged that NATO retained operational matters over matters on the field but

argued that ultimate authority nevertheless rested on the SC as they had initially mandated the mission.

<sup>12</sup> The standard of effective control here differs in the sense that responsibility lies in the hands of the party who had 'operational command' over the troops over the given act.

The notion of “exclusive responsibility”, a form of responsibility entailed solely to a single subject of law (in this case the concerned international organization), has however been regularly debated amongst academics, fearing the possibility of wrongful attribution of responsibility towards member states who did not possess an equal control over the decision-making process of the organization (d'Aspremont, 2007).

These scholars would opt for an alternate type of responsibility, namely joint or concurrent responsibility only to those member states exercising “overwhelming control” over the decision-making process of the organization leading to the breach of international law, further referring to Article 17 of the ASR.

However, this threshold of “overwhelming control” only relates to the “domination over the wrongful conduct” and is alien to any exercise of “oversight” or “influence” of those member states. Given the application of such high standards, general influence exerted does not incur the joint or concurrent responsibility of member states.

Mere domination of one (or a few) state over an international organization or one of its organs –common in international relations– is not sufficient for there to be overwhelming control. Such imbalance opens the possibility of abuse of the legal personality of the organization at the decision-making level. Even though domination itself does not systematically pave the way for overwhelming control, it makes such an abuse of the legal personality of the organization more probable.

Thus, given the above circumstances, a state could avail itself behind the veil of an international organization if its control over the organization did not meet the high standards of responsibility as stipulated under

the ASR and DARIO. In this regard, an international organization is an effective tool for avoidance of responsibility.

**b. *Aiding and Abetting, Direction and Control, Coercion and Circumvention***

Concern also lies in Articles 58, 59, 60 & 61 of DARIO regulating the responsibility of states and member states in relation to an international organization.

Article 58 and Article 59 offer no exemption to non-member states when they direct or aid an international organization to commit a wrongful act. Article 60 on coercion goes further and imputes liabilities to members and non-member states alike. These articles have found established practice in European courts (“*Bosphorus*”, ECtHR; “*Waite v. Kennedy*”, ECtHR; “*M v. Germany*”, ECtHR).

However, Articles 58(2) and 59(2) both exempt member states from responsibility so long as the action was taken ‘in accordance with the rules of the organization’. This inevitably leads back to the high standard of determining effective control to determine attribution of responsibility.

Article 61 envisions protection against member states using international organizations to circumvent their obligations under international law. However, as noted by the commentaries and applied in *Gasparini v. Italy & Belgium* at the European Court of Human Rights [ECtHR], this liability only applies when a state intentionally attempts to transfer its obligation to the international organization. To prove such intent is difficult, and while the commentaries to DARIO states that Article 61 seems to have acceptance (“*Bosphorus*”, ECtHR), it finds little practice outside the EU. Thus, although Article 61 may seem to provide an antidote to the abusive use of international organizations, its non-

customary status has not yet allowed for its general application.

**c. Acceptance and Reliance of Responsibility by Member States**

Finally, Article 62 concludes by laying out two ways by which member states incur liability through an international organization. First, under Article 62(1)(a) is if the member state had accepted responsibility for the act towards the injured party.<sup>13</sup> This is unlikely to be invoked by states acting in bad faith. The more protective clause under Article 62(1)(b) forces a state to become liable if 'it has led the injured party to rely on its responsibility'. Article 62(1)(a) seems to have general acceptance while 62(1)(b) stands on more tenuous grounds (Higgins, 1995).

Leading to reliance ("*Westland Helicopters*", ICC) requires that third states must have indispensably relied upon the support and contribution of an international organization's member states in deciding to engage with that international organization (Higgins, 1995).

The commentaries to DARIO however, found that there is a strong opinion that states do not generally become liable for act of international organizations merely by virtue of membership,<sup>14</sup> and 'leading reliance' bears a heavy burden of proof based on a specific set of circumstances such as the small size of membership.

There is further a wide consensus in the mainstream legal scholarship on the idea that member states do not incur responsibility for

the wrongful act of the organization even though it would breach their international obligations if it were formally attributed to them.<sup>15</sup>

Thus, only through these above measures (Effective Control, Circumvention, Acceptance or Reliance) may member states become liable for the actions of an international organization. Although member states may be contractually responsible by virtue of specific agreements with international organizations,<sup>16</sup> generally they are not held liable.

**D. Implication of Exclusive Responsibility of International Organizations**

Exclusive responsibility of international organizations may make international cooperation through them appealing, since member states are shielded for acts under the auspices of that international organization. In that sense, exclusive responsibility of the organization may thus prove very attractive to them.

Such exclusive responsibility may even embolden states to resort more systematically to international organizations (even to further intervene in the decision making process) as it allows them to conduct their policies at a low cost, without bearing the risk of individual responsibility. It has even been argued that exclusive responsibility constitutes the *raison*

<sup>13</sup> This is in line with Article 11 of ASR.

<sup>14</sup> For discussions where courts have concurred, see *Senator Lines ECtHR & Legality of Use of Force* cases by Serbia before the ICJ.

<sup>15</sup> See the debate at the International Law Commission on the inappropriateness to include a provision stating a general residual about the absence of

responsibility of member States for the wrongful act of an international organization. See Report of the ILC (2006), A/61/10, at 287.

<sup>16</sup> For example, in UN peacekeeping operation, see Article 9 of the model contribution agreement as found in A/50/995 and A/51/957. See also, Article 5 of the NATO (Washington).

*d'être* for international organization's legal personality.<sup>17</sup>

## **E. Legal Remedies**

Whenever a duty established by any rule of international law has been breached by an act or an omission, the responsible party must respond by making adequate reparation to the injured ("Factory at Chorzow (Germany v. Poland)," 1928).

This principle applies to all international persons, including states ("Draft Articles of State Responsibility," 2001) and international organizations ("Draft Article on Responsibility of International Organizations," 2007).

### **1. Legal Remedies through Domestic Courts**

Current practice, however, has shown that in domestic courts, member states have been absolved of responsibility, even in cases where control of the international organization over the actions leading to the breaches is weak.

UN practice has shown such a reality. In domestic courts ("*Mothers of Srebrenica v. Netherlands*", Dutch Court; "*H.N. v. Netherlands*", Dutch Court) governments have hid behind the veil of the U.N. as an international organization to avoid responsibility for their actions. It was held in these courts, that unless troop contingents followed their own government's explicit directives to *disobey* orders received from U.N. Command, the wrong of peacekeeper are attributable exclusively to the United Nations, even if the organization and its appointees had no significant influence over the impugned conduct (Dannenbaum, 2010).

The United Nations, in turn is immune from civil process in any national or supranational court ("Convention on the Privileges and Immunities of the United Nations," 1946). The International Court of Justice (ICJ) has confirmed that these provisions grant the United Nations full immunity from legal process in national courts for any acts attributable to the organization ("Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights," 1999).

This is also the case with many other jurisdictions. International organizations in Italy for example, are immune for actions taken related to their institutional purposes ("*FAO v. INPDAl*", Italy Court of Cassation). The United States has also adopted this principle (UN Office of Legal Affairs, 1999). In fact, the general rule seems to be that unless otherwise regulated, international organizations exercise immunity in domestic courts for all necessary to conduct of their duties (Neumann, 2006). Thus, as evidenced through practice, international organization proves to be an effective shield in domestic courts.

### **2. Legal Remedies through International Courts**

In submitting claims for the wrongful act of states, an array of relatively more effective legal remedies exist: through the International Court of Justice [ICJ] and bodies such as the Human Rights Commission or regional courts or specialized court such as the European Court of Justice [ECJ], ECtHR and dispute settlements in the World Trade

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<sup>17</sup> See the debates mentioned by the ILC Special Rapporteur in his second addendum to the fourth report, A/CN.4/54/Add/2, at 9-10.

Organization [WTO] or through the International Centre for the Settlement of Investment Disputes [ICSID].

This is not the case however, for claims made towards the wrongful act of an international organization. UN rules, have made the only recourse available to an aggrieved party is for the UN General Assembly, Security Council or other authorized bodies to request an advisory opinion (i.e. a non-binding declaration) from the ICJ ("Convention on the Privileges and Immunities of the United Nations," 1946). The lack of an international judicial forum, let alone an obligatory one, reflects the fact that existing international dispute resolution mechanisms were designed to deal with states, not international organizations, a scenario that "poses an obstacle to binding international organizations to adjudicate in such forums" (Hirsch, 1995).

Both for the UN and for other international organizations, recourse to the ICJ is barred for two reasons. First, international organizations do not fall under its jurisdictional ambit in Article 34, which only allows for states. In any case, attempting to drag an international organization or one of its constituent members to the ICJ will inevitably lead to decision which infringes the right of other members as third states (ICJ, *Legality of Use of Force* cases).<sup>18</sup> This is against the non-third party principle (*Monetary Gold Case*, ICJ) and would render the decision void. It has been suggested that this principle also applies to international organizations,

(d'Aspremont, 2007) and could apply in other courts where consent is necessary and such a rule is also present. It is furthermore evidenced by courts such as the ECtHR,<sup>19</sup> that states have yet again hid behind the veil of an international organization (in this case, the UN) to avoid culpability. In these cases, states would shift the liability towards the international organization to render the dispute *rationae personae nonjusticiable*.<sup>20</sup>

With regards to international trade law however, the WTO does seem to provide a mechanism where an international organization could be held directly responsible ("EC-Hormones", WTO; "EC-Bananas", WTO).<sup>21</sup>

*Ad hoc* methods of dispute resolution between an international organization and those whose actions it affects are in principle possible (Rios, 2012). One may envision *ad-hoc* dispute settlement systems and corresponding rules of responsibilities in an international organization's charter, or in specific agreements involving international organizations. However in practice they do not seem to be implemented.

Thus, observing this relative legal vacuum, especially in civil claims for reparation, there is a need for a specific forum where the international organization has submitted itself to compulsory jurisdiction. As few effective forums exist, many breaches become nonjusticiable.

<sup>18</sup> Assuming the other member states of the international organization has not accepted compulsory jurisdiction.

<sup>19</sup> See ECtHR cases of *Behrami v. France and Saramati v. France, Germany and Norway*.

<sup>20</sup> *Ibid.* In the cases above, the court held that it had no jurisdiction to hold the UN liable as they were

not parties to the European Convention on Human Rights.

<sup>21</sup> In these cases the European Community was held directly responsible for regulations affecting the import and marketing of third country goods.

### 3. Legal Remedies through Countermeasures and Negotiations

The rules regarding countermeasures against international organizations generally mirror its counterpart the ASR. There seems to be support for the analogous use of the rules on countermeasures.<sup>22</sup> Examples for such actions are limited, but the *EC-Hormones* case for example, has allowed for the use of countermeasures against international organizations.

Negotiated dispute resolutions still work much in the same way as it would in state to state disputes, except for the expanded scope of interested parties, which would complicate matters. The shortcomings here are also similar with those found in non-legal remedies of state disputes, which generally revolve around political, diplomatic or economic leverage and the difficulty to reach consensus (Merrills, 2005).

#### F. Conclusion

Thus, it can be concluded that international organizations generally have exclusive responsibility given the circumstance that its member states endow the organization with legal personality. Though in principle, the legal personality imposed upon these organizations would enable them to act as states, the laws on attribution of responsibility

and legal remedies available to impose liability upon international organization have yet come to place for an effective claim against this legal personality.

For member states, responsibility can only be pierced under effective control, circumvention of obligation, acceptance and reliance. All of which pose their own separate issues of applicability and implementation. This severely limits the means of piercing the veil of the international organization and may lead to other 'innocent' member states being responsible.

When an international organization does have exclusive responsibility, legal remedies are few and far between. It is extremely difficult to bring them to a court and non-legal remedies are likewise fraught with ineffectiveness. Furthermore, there exists considerable tension between the wariness of academics and the pragmatic interests of states in cementing the responsibility of international organizations. Though attempts have been made to fill this legal vacuum, uncertainty still exists in the law of international organizations which consequently leads to the impunity of states. Therefore, it must be concluded that, unfortunately, international organizations can and are being used as shields against member state responsibility.

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<sup>22</sup> See discussions in A/CN.4/609 and A/CN.4/637.

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