UNIVERSITY OF CAPE TOWN

State Responsibility towards Third Parties arising from Activities of International Organisations - a Proposal for the Continuous Protection of Human Rights

Minor Dissertation in partial fulfilment of the requirements of a Masters in Law (LL.M.) in Public International Law

Imke Charlotte Vonalt
(VLTIMK001)

Supervisor: Cathleen Powell

15.09.2013

University of Cape Town

Word count including footnotes and excluding index, bibliography and abbreviations: 25.010 words

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

University of Cape Town

Index

A. INTRODUCTION **3**

B. MAPPING THE PROBLEM: A 'LEGAL BLACK HOLE' **5**

C. THE UNDERLYING LEGAL AND DOCTRINAL PRINCIPLES **9**

I. THE TRADITIONAL CONCEPT OF RESPONSIBILITY IN INTERNATIONAL LAW 10
II. THE LEGAL PERSONALITY OF INTERNATIONAL ORGANISATIONS 11
III. THE INTERNATIONAL RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS 12
IV. THE INTERPLAY OF THESE CONCEPTS 13
V. THE WAY FORWARD 15

D. THE RESPONSIBILITY OF MEMBER STATES IN THE CONTEXT OF ACTS OF IOS .. **16**

I. THE BALANCE OF SOVEREIGN POWERS BETWEEN IOS AND MSS 17
II. MS RESPONSIBILITY FOR ACTS OF THE IO BY VIRTUE OF ITS MEMBERSHIP 20
III. MS RESPONSIBILITY FOR THE STATE'S OWN ACTS IN THE CONTEXT OF ACTIVITIES OF IOS 23
1. The Decision Making Process within the IO *24*
a) State Responsibility for the states act in connection with acts of the IO – applying the provisions of the DARIO 25
b) State Responsibility Independent from the Act of the IO 28
2. The Implementation of Decisions of IOs *30*
a) State Responsibility in Connection with the Act of the IO – Applying the Provisions of the DARIO 32
b) State Responsibility Independent from the Act of the IO 33
(1) The Provision of Organs 33
(2) The Implementation of Decisions within the MS's own Territory 33
3. The Conferral of Sovereign Powers from the MS to the IO *37*
a) The Provisions of the DARIO and DASR 38
b) *Due Diligence* Obligations of States 39
(1) The Case Law of the ECtHR 41
(2) Legal Principles 42
(3) The Standard of Protection: Equivalent or Equal? 44
IV. THE RELATION BETWEEN THE RESPONSIBILITY OF IOS AND MSS: A *GRADUAL TRANSITION* 45

E. APPLYING THE CONCEPT OF *GRADUAL TRANSITION* OF RESPONSIBILITY TO THE LEGAL BLACK HOLE **46**

F. CONCLUSION **47**

BIBLIOGRAPHY **48**

ABBREVIATIONS **55**

University of Cape Town

A. Introduction

> If improvement [of the responsibility of International Organisations] is not forthcoming, then the introduction of member state responsibility can be considered.[1]

> The most difficult and interesting topic in the field of the responsibility of international organizations concerns the responsibility of an organization's members towards third parties for acts undertaken by the organization.[2]

Today there are about 7600[3] International Organisations (IOs) and their number is constantly growing. IOs cover issues as different as trade[4], public health[5], collective security[6], international crimes[7], the exploration of outer space[8] and fishery[9]. They are established to 'strengthen and facilitate international cooperation' among states in their respective fields of activity. Today, almost every aspect of our lives, from the price of our breakfast coffee over the letter we send overseas, the recommendation for a vaccination given by our local doctor, the fish we eat for lunch or the question whether our country goes to war, is influenced by IOs, and their influence is constantly increasing.[10]

The question of responsibility of IOs and their member states (MS) became prominent through the European Union (EU) imposing binding rules on its member states[11] and the North Atlantic Treaty Organisation (NATO)[12] or United Nations (UN) leading armed interventions in conflicts, peace missions[13] or the administration of territories[14] which were not in conformity with international human rights standards. The protection of basic rights in employment relations between individuals and IOs has also been subject to an extensive jurisprudence.[15] The question arises: Which rules are IOs bound by? And if they are subject to some regulations, where can they be held accountable in case of

University of Cape Town

---

[1] R Wilde 'Enhancing Accountability at the International Level: The Tension between International Organisations and Member
[2] M Hirsch *The Responsibility of International Organisations Towards Third Parties: Some Basic Principles* (1995) p 96
[3] *'Historical overview of number of international organizations by type1909-2011' in Yearbook of International Organizations, (2011) available online: http://www.brill.com/downloads/2011_YBIO5_Historical_overview_of_number_of_intl_organizations_by_type.pdf [accessed 09.09.2013]*
[4] World Trade Organization (WTO); Organization of Petroleum Exporting Countries (OPEC)
[5] World Health Organization (WHO)
[6] United Nations Organization (UN); North Atlantic Treaty Organization (NATO)
[7] International Criminal Court (ICC)
[8] European Space Agency (ESA)
[9] Inter-American Tropical Tuna Commission (IATTC)
[10] Hirsch (n2) xiii
[11] *Kadi and Al Barakaat v Council and Commission* EGC Case T-315/01, (21. September 2005) and ECJ Case C-402/05 P, (3. September 2008) both online via http://curia.europa.eu/jcms/jcms/j_6/ [accessed 09.09.2013]
[12] *Bankovic and others v Belguim and others ECtHR (12.12.2001) Application No 52207/99 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]*
[13] The UN Peacekeepers have been alleged to have caused a cholera outbreak Haiti in October 2010 after they had been stationed there to help the country after an earthquake.
[14] Blue helm soldiers have been alleged of human trafficking and sexual violence against women
[15] *Boivin v 34 Member States of the Council of Europe* ECtHR (9.9.2008) Application No 73250/01; *Gasparini v Italy and Belguim* ECtHR (12.5.2009) Application No 10750/03; *Waite and Kennedy v Germany* ECtHR (18.2.1999) Application No 26083/94 all available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

violations? And what about the states that created these IOs: are they free from responsibility for the activities of their *creation*s?

These questions are difficult to address as IOs vary considerably not only in their size and purpose but also in the competences and powers they have. This might also be the reason for the fact, that up to today, there is no encompassing theory on the responsibility of IOs or MS towards third parties for the activities of IOs. The term *third party* refers to individuals, states or other entities, which are not an organ or a MS of the IO.[16]

Several detailed analyses of the responsibility of single IOs in particular situations or comparisons between two or more IOs have been published already.[17] The responsibility of IOs and MS for activities of IOs in a more general manner was discussed extensively in the aftermath of the International Tin Council (ITC) litigation, which focused mainly on international obligations of IOs towards voluntary partners in the field of international private law.[18] This paper will mainly focus on the activities of IOs in the field of international public law, where IOs are exercising powers and rights, which have for a very long time been considered traditional powers of sovereign states.

This paper will first describe three cases from the ECtHR, where the acts of IOs caused damages for third parties and where there was no way for the victims to seek adequate justice. It will be shown that there is a 'legal black hole' in the area of the responsibility of IOs and their MS for activities of IOs. In the second part, this paper will describe the reasons for this legal black hole by looking at some principles and doctrines of international law, namely the traditional, state-centred understanding of the law of international responsibility, the international responsibility of IOs and the interplay of these concepts. After showing the possible ways forward, the paper will focus on the *responsibility of MS* for the activities of IOs. Through a detailed analysis of the different forms of responsibility of MS as well as the different moments when such a responsibility might arise, it will be argued that MS are always responsible in the context of activities of IOs as long as the IO does not provide an equal standard of protection as the state does. On the basis of this argument it will be shown, that a continuous protection of human rights not only desirable but also feasible.

Finally, there will be a comment on the ECtHR jurisprudence in light of the paper's findings and it will be shown that the 'legal black hole' is not a necessity, but a result of the particular jurisdiction of the ECtHR that protects the special interests of it MSs.

University of Cape Town

---

[16] Hirsch (n2) xiv; used in this sense also by R Higgins (Rapporteur of the 5th Commission of the International Law Commission) *The Legal Consequences for Member States of the non-fulfillment by international organizations of their obligations towards third parties* (1995) available online: http://www.ilsa.org/jessup/jessup07/basicmats/iil_higgins_article.pdf [accessed 09.09.2013]; International Law Commission *Draft Articles on Responsibility of International Organisations*, Report of the ILC, Sixty-third session, UN doc. A/66/10 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]; A Sturmer 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' in *Harvard International Law Journal* (2007) pp 553-580

[17] J Klabbers 'Introduction' in *Nordic Journal of International Law* (2001) 283-286:283; for example: T Dannebaum 'Translation the standard of effective control into a system of effective accountability: how liability should be apportioned for violations of human rights by member state troop contingents serving as united nations peacekeepers" in Harvard journal of international law (2010) pp 113-192; N Gal-Or 'From Theory to Practice: Exploring the relevance of the draft articles on the responsibility of International organisations (DARIO) – The responsibility of the WTO and the UN' in German Law Journal (2012) pp 511-541

[18] ITC litigation: R Sadruska 'The Collapse of the International Tin Council: A Case of State Responsibility?' in *Virginia Journal of International Law* (1990) pp 845-890; *Westland Helicopters Ldt v Arab Organization for Industrial Organization and others ICC Court of Arbitration (5.3.1984) case no 3879/AS, International Legal Materials (1984) pp 1071-1089*
C Bröllmann *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (2007); Higgins Report (n16)

The aim of this paper is to provide an argument for international lawyers and international courts to work against the current approach to international responsibility in the context of IOs and MSs and to thereby open up a path for a more just world, in which every victim of injuries caused through the exercise of sovereign powers has access to a remedy and - in the end - to justice. The paper is a theoretical treatise, which needs to be complemented by dedicated lawyers, the consequent practice of the rule of law and legal empowerment of individuals on the grass-root level to reach its goals. Yet, the argument for continuous protection of human rights is not limited to the use by individuals. It can also be applied by third states that seek reparation for injuries caused by an IO in violation of obligations of its MSs.

B. Mapping the Problem: A 'Legal Black Hole'

> A black hole [in Astrophysics] is a region of space time from which gravity prevents anything, including light, from escaping.[19]

The term '*legal* black hole' was first coined in the case *Abbasi v UK*[20] and since then was consequently used in connection with the detention of hundreds of people by the USA in Guantanamo Bay.[21] It describes *non liquets*, translated into English meaning *it is not clear* and in the context of law referring to cases where no law is applicable.

Feroz Abbasi was a UK citizen who had been detained in Guantanamo Bay for several months without access to a lawyer, nor a court or another formal tribunal. The mother of Mr Abbasi instituted proceedings on his behalf against the UK to oblige the state to exercise diplomatic protection about the illegality of his detention. The House of Lords, taking into consideration past judgments against other detainees in Guantanamo, acknowledged that *habeas corpus* proceedings in the US 'have no prospect of success'.[22] US Courts had ruled in the past that they had no jurisdictional competence because Guantanamo Bay lay outside the sovereign territory of the US and the claimants were not US citizens.[23] The Court also recalled that it did not have jurisdictional competence over acts of the US government[24] or over the conduct of the secretary of state in connection with diplomatic protection as there was no duty for the UK under international law to exercise diplomacy on Mr Abbasi's behalf.[25] The Supreme Court found that 'Mr Abbasi has no means of challenging the legality of his detention'[26]. After recalling the many different sources of the right to access courts in the US, the UK and other domestic legal systems as well as on the international plane, the court concluded that

University of Cape Town

[19] Wikipedia http://en.wikipedia.org/wiki/Black_hole#cite_note-1
[20] *Abbasi v UK [2002] EWCA Civ.1598 available online http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html [accessed 09.09.2013]*
[21] R Wilde 'Legal "Black hole"? Extraterritorial State action and international treaty law on civil and political rights' *in Michigan Journal of International Law* (2005) pp 739-806:772; J Steyn 'Guantanamo Bay: The Legal Black Hole' in *The international and comparative law Quarterly* pp 1-15:15
[22] *Abbasi v UK (n20)* 8
[23] *Ibid.* 12
[24] *Ibid.* 67
[25] *Ibid* 79
[26] *Ibid.* 58

> [I]n apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.[27]

This approach, to deny jurisdictional competence by the court over a case and thereby create a 'legal black hole' has also been used extensively in cases involving the responsibility of IOs on which I am focusing in this paper. The examples are taken from the ECtHR as this court ruled on the most (prominent) cases in the field. It is also effectively the only international court, where individuals can challenge acts that occurred on the international plane.[28]

According to Article 1 European Convention on Human Rights (ECHR) the European Court on Human Rights (ECtHR) has jurisdiction over 'the high contracting parties [to the ECHR]' regarding all their human rights violations that fall 'within their jurisdiction'. The term jurisdiction in this context has different senses that are easily confused.[29] The jurisdiction of the court is a procedural aspect, determining the competence of the court to decide over the case. The state jurisdiction on the other hand refers to the state's exercise of sovereign powers, a right which is limited by the sovereign rights of other states. I suggest that both concepts cause different but interdependent legal black holes: to deny the jurisdictional competence of the court creates a *procedural* 'legal black hole' which also contradicts the legal principles *ubi jus ibi remedium* meaning if there is a right, there must be a remedy. To deny that a state was exercising sovereign powers in an act or omission and thereby to deny a potential responsibly and in the end, to deny the existence of rights, deriving from the states obligation, creates a *substantive* 'legal black hole'. Both 'legal black holes' are interdependent especially in the context of ECtHR rulings, because the states jurisdiction is the threshold for the ECtHR jurisdictional competence (Article 1 ECHR).

The case *Behrami v France*[30] concerned the omission to mark and report cluster bombs which had been dropped by NATO in 1999 over Kosovo. This omission led to the death of Gadaf Behrami (then 13 years old) and the serious injury of Bekim Behrami, (then 10 years old) in March 2000. At that time the area was governed by UN established bodies which were supported by troops and personnel of UN Member States. UNMACC, a subsidiary Organ of the UN had the mandate for demining.[31] KFOR, a military force led by NATO 'under UN auspices'[32] and 'under unified command and control'[33] and exercising delegated powers under Chapter VII, had the responsibility to co-operate and work closely together with UNMIK, the superior Organ to UNMACC.[34] This included supporting the de-mining process, in particular to identify, mark and report Cluster Bomb Units (CBUs)

---

[27] *Abbasi v UK* (n20) 64
[28] The European Court of Justice (ECJ) is another court where individual complaints are heard. It is however restricted to complaints against acts of the EU. The most famous example of protection through the ECJ might be the *Kadi* case which will be discussed in section DIII2.b)(2)
[29] M Millanovic *Extraterritorial Application of Human Rights Treaties* (2011) p 19
[30] *Behrami and Behrami v France* ECtHR (2.5.2007) Application No 71412/01 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]
[31] *Ibid.* 67
[32] UN Security Council Resolution 1244, 10th June 1999, Annex 2 Nr. 3, UN doc. S/RES/1244 (1999) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement [accessed 09.09.2013]
[33] *Ibid.* Annex 2 Nr. 4
[34] *Behrami* (30) 118

University of Cape Town

locations.[35] The area, where the CBUs killed Gadaf Behrami and injured Bekim Behrami, was under control of KFOR troops led by France.[36] This French led KFOR brigade had been aware of the CBUs for months before the incident happened, but did not give it priority.[37] UNMACC did not know about the CBUs. The French led KFOR troops did know about the CBUs and, notwithstanding that they had to mark and report the CBUs, did not take any action. In 2007, Bekim Behrami and his father Agim Behrami on behalf of his dead son Gadaf Behrami instituted proceedings against France at the ECtHR for violations of article 2 (right to life) of the ECHR.

Even though it seems from the facts, that the illegal conduct in question is the omission of French contributed KFOR troops to mark the location of the CBUs and to inform UNMIK, the ECtHR found it had no jurisdiction over the case. The court did not find it necessary to examine, whether France had exercised extra-territorial jurisdiction.[38] For the court it was clear 'that the UN SC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO'[39]. The court specified that 'the impugned acts and omissions of KFOR and UNMIK cannot be attributed to [France and others] and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities'[40]. It found that 'the impugned […] inaction [is], in principle, attributable to the UN'[41], a separate international legal person that is not a signatory to the ECHR. The court therefore denied jurisdiction *ratione personae*. In the absence of remedies against the decisions taken under the authority of the UN and the effective command of NATO, the Behramis' quest for justice to this day has proved impossible.

Similarly in *Beric and others v Bosnia and Herzegovina*: the applicants had been removed from all their public and political-party positions in Bosnia and Herzegovina and indefinitely excluded from future holding of such positions or participation in elections by the High Representative.[42] When the ban was lifted after a few months, they did not automatically have their positions back and no compensation was paid.[43] They complained under Articles 6 (right to a fair trial), 11 (freedom of association) and 13 (right to an effective remedy) ECHR about the measures imposed on them.[44] The ECtHR found that the decision of the High Representative was not attributable to the respondent state.[45] The mandate of the High Representative had been set out in the Dayton Peace Agreement to monitor, promote and implement the peace settlement and he had been appointed through a UN SC Resolution.[46] The ECtHR found, that the UN SC retained the 'effective overall control' over the civil administration in Bosnia and Herzegovina and therefore conduct of the High Representative was

[35] *Behrami* (n30) 119, referring to NATO's operational plan for the UNSC Resolution 1244 mission called 'Operation Joint Guardian' (NATO OPLAN 10413).
[36] *Behrami* (n30) 3, 5.
[37] *Ibid.* 6.
[38] *Ibid.* 153; Criteria for extra-territorial jurisdiction: *Bankovic and others v Belguim and others* ECtHR (12.12.2001) Application No 52207/99 and *Al-Jedda v UK* ECtHR (7.07.2011) Application No 27021/08 both available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]
[39] *Behrami* (n30)140
[40] *Ibid.* 151
[41] *Ibid*. 141
[42] *Beric and others v Bosnia and Herzegovina* ECtHR (16.10.2007) Application No 36357/04 at 2, available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]
[43] *Ibid.* 3
[44] *Ibid.* 20
[45] *Ibid.* 27-30
[46] UN *General Framework Agreement for Peace In Bosnia and Herzegovina* (14.December 1995) Annex 10, available online http://www.ohr.int/dpa/default.asp?content_id=368 [accessed 09.09.2013]

University of Cape Town

attributable only to the UN. There were no remedies against the conduct of the UN, Mr Beric and his colleagues had no means to seek justice.

In the case of *Boivin v 34 Member states of the Council of Europe* an employee of the European Organization for the Safety of Air Navigation (Eurocontrol) of which the 34 respondent states are members, complained at the ECtHR violations of Article 6 (right of access to court), Article 13 (Right to an Effective remedy) and Article 14 (Prohibition of discrimination) ECHR. He had been appointed to a five year post in an Institute subordinated to Eurocontrol. Five months later however, the appointment had been cancelled by Eurocontrol's Director of Human Resources because there had not been a notice for competition for the post. In a following recruitment procedure the applicant was not shortlisted and therefore could not be appointed to the post again. After several internal complaints Mr Boivin brought his case to the International Labour Organization Administrative Tribunal (ILOAT) to seek compensation for his injuries caused by the cancellation of his appointment. IOLAT partly granted Mr Boivins compensation claim and awarded him damages. Still, Mr Boivin argued that ILOAT had not addressed all his claims adequately. Therefore he introduced the proceedings at the ECtHR. The ECtHR however found that it did not have jurisdiction because 'the applicant cannot be said to have been "within the jurisdiction" of the respondent states for the purposes of Article 1 of the Convention'[47]. The court further clarified that 'the dispute lay entirely within the internal legal order of Eurocontrol, an international organization that has a legal personality separate from that of its member states'.[48] The court therefore could not find any 'act or omission of those states or their authorities [that could be considered] to engage their responsibility under the convention'.[49] Other remedies against the injuries were not available to Mr Boivin.

These three cases are just examples, of a wide practice[50] of the ECtHR to deny its jurisdiction on the ground of two reasons: first that the ECtHR does not have jurisdiction *ratione personae* over IO and second that the alleged conduct did not fall 'within the jurisdiction' of the respondent MS because they were not attributable to the MS. Even though each of these victims suffered human rights violations, none of them had a remedy to address the damage. France, Bosnia and Herzegovina, all EU member states, most of the NATO's MS and many of the UN MS are bound by several international human rights treaties not at least by the European Convention on Human Rights, to respect the human rights that were in question. This obligation to respect the human rights is not limited to the territory of the MS but applies to all people that are under the MS's jurisdiction, also outside the MS's territory.[51] Still, because these states were acting under the veil of international cooperation through NATO, the UN or Eurocontrol their acts, namely the omission to mark and report the CBUs, the exclusion of people from their public positions without compensation and the denial of access to a proper court in a labour dispute did not fall within the state's jurisdiction and as a

[47] *Boivin* (n15) 6
[48] *Ibid* 6
[49] *Ibid*. 6
[50] *Waite and Kennedy* (n15); *Gasparini* (n15); *Kokkelvisserij v The Netherlands* ECtHR (20.1.2009) Application No 13645/05; *Biret v 15 MS of the European Union* ECtHR (9.12.2008) Application No 13762/04 all available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]
[51] Milanovic (n29); *Bankovic* (n38); *Al Jedda* (n38)

University of Cape Town

consequence, the ECtHR held that it did not have jurisdictional competence. There were no remedies against the UN, NATO or Eurocontrol, nor further effective remedies against the states involved (procedural 'legal black hole'). Even if there were remedies against IOs, it is highly questionable, whether IOs did actually breach international law, as their international obligations differ a lot from those of states (substantive 'legal black hole'). As a consequence the Behramis, Mr Beric and his colleagues and Mr Boivin were left without a remedy against the conduct of authorities. To sum up it can be said that because states pass their responsibilities to IOs which are not bound by international treaties, the states cooperate activities are not governed by the ECHR anymore. This creates a situation in which people are arbitrary deprived of protection, just as it happened to the detainees in Guantanamo. Currently, anybody or any entity that is a victim of the activities of IOs is prevented from seeking justice.

I suggest, that this 'legal black hole', in both its dimensions, would not exist, if the states had acted on their own behalf and not within the structures and under the institutional veil of an IO. If France, instead of *KFOR under control of the UN* had had the obligation to mark the CBUs and inform UNMIK, the occurred omission to do so would have been attributable to France and the Behramis would have been successful in their claim for damages at the ECtHR. Similarly in the situation involving Mr Beric and his colleagues, if instead of *the UN* as a legal person a group of states had jointly appointed the High Representative, these states would have been responsible for the High Representatives conduct. Finally, Mr Boivin could have sued the states member to the Council of Europe, if Eurocontrol would not be considered a separate legal entity that acts outside the jurisdiction of the states. The aim of this paper is to 'pierce the institutional veil' and to create continuous human rights protection.

University of Cape Town

C. The underlying Legal and Doctrinal Principles

So what are the legally binding provisions and the doctrinal convictions that govern the actual regime of international responsibility? What reasons account for this legal black hole where neither the IO nor the MS can be held responsible for acts committed under the veil of the IOs? In answering this question, it is necessary to clarify the rules and principles of international responsibility, the status of IOs in international law as well as the legal regime governing their responsibility. The traditional concept of responsibility in international law will be introduced, followed by a description of the international legal personality of IOs, their responsibilities on the international plane and the interplay of these concepts. In conclusion to this part, a comment will be made on the current approach to the problem of the legal black hole and other possible solutions.

I. The Traditional Concept of Responsibility in International Law

The general rule that 'the breach of an engagement involves an obligation to make reparation in an adequate form' has since 1927 been accepted as a general principle of international law.[52] This and other rules of international responsibility developed over the last centuries in a traditional, state-centred system of international law. In this system, states were the only subjects of international law endowed with equal sovereign powers and international legal personality. Because of the state's sovereignty and its coexistence with other sovereign states, it was responsible for its conduct in the same way, as it could invoke the responsibility of other states for their conduct. This state centred understanding of international law is recently changing, due to the emergence of several non-state actors on the international plane. [53] Still, to understand the international law of responsibility, this state centred doctrine has to be considered first as it forms the basis of the current discussion on the topic.

The term responsibility in this context refers to the concept of *legal* responsibility for the breach of an international obligation as opposed to internal accountability or the pure moral or political accountability for unlawful acts, which is also referred to as liability.[54]

To hold a state responsible for a certain act, there are three preconditions which must be met: the harmful conduct in question must be attributable to the state, the conduct must be in breach of an international obligation of the state and there is the need for a forum to realize a claim.

The international obligations of states derive from the traditional sources of international law namely treaties, custom or principles of law (Article 38 ICJ-Statute). They provide the so-called primary rules. These primary rules are the rules that impose substantial obligations on the state, such as obligations concerning the conduct of war, the protection of human rights or environmental standards.[55] The failure to comply with these legal obligations leads to a breach of the primary rule, or in other words, to a wrongful act under international law.

The legal regime on the attribution of a certain conduct to the state is governed by the Draft Articles on State Responsibility[56] (DASR) which has been developed by the ILC and is considered to be reflecting customary international law.[57] These rules are called secondary rules and they come into play after an internationally wrongful act occurs. They cover rules of attribution, grounds of justification, effects of a breach and principles of reparation.[58]

University of Cape Town

---

[52] *Chorzøw Factory (Germany v Poland)* PCIJ Judgment (13.9.1928) p 21, available online http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm [accessed 09.09.2013]

[53] A good overview of the different types of international legal persons gives I Brownlie *Principles of Public International Law* 6ed (2003) pp 57-67

[54] M Tondini 'The "Italian Job": How to make International Organizations compliant with Human Rights and Accountable for their Violation by Targeting Member States' in J Wouters (ed.) *Accountability for Human Rights Violations by International Organizations* (2010 pp 169-212:176

[55] J Combacau '"primary" and "secondary" rules in the law of state responsibility categorizing international obligations' in *Netherlands Yearbook of International Law* (1985) pp 81-109:89

[56] International Law Commission *Draft Articles on State Responsibility for Internationally Wrongful Acts with Commentaries* Report of the ILC, Fifty-third session, UN doc. A/56/10 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]

[57] K Bonn "New Directions in Responsibility: Assessing the International Law Commissions Draft Articles on the Responsibility of International Organizations" in *The Yale journal of International Law Online* 2011 pp 1-10:8; J Alvarez 'Revisiting the ILC's Draft Rules on International Organisation Responsibility' in *Proceedings of the Annual Meeting (American Society of International Law)* (2011) pp 344-348:345

[58] Bonn (n57) 6

Claims of states based on a potential state responsibility can be brought before the International Court of Justice (ICJ) or arbitral tribunals. Individual claims against states are traditionally don't exist on the international plane, as individuals do not have international legal personality and are traditionally considered mere objects of international law. However regional human rights bodies such as the African Court for Peoples and Human Rights, the Inter-American Commission on Human Rights (IACHR) or the ECtHR do allow individual complaints and the two latter ones consider the law of state responsibility highly relevant for their decisions.[59]

II. The Legal Personality of International Organisations

To have certain rights and duties under a law, including responsibilities, an entity needs legal personality.[60] As explained, states are the traditional subjects of international law and therefore have rights and duties on the international plane. IOs on the other hand are created through agreements between states and receive their competences through the transfer of sovereign power from the MS the IO.[61] That alone however does not make them subject to the international legal order since 'without legal personality, [international organisations] do not exist in law'[62]. As long as the international legal personality of an IO is not established, the IO is not more than an assembly of states that are all jointly responsible for their cooperative activities. Only if a distinct legal personality of the IO can be established, can the rights, duties, powers and responsibilities of IOs be considered, as distinct from those of their founding states.[63]

The very fact that IOs can possess international legal personality is no longer disputed.[64] Objective aspects that are considered to determine the existence and extent of international legal personality of an IO were defined by the ICJ in the *Reparations for Injuries*[65] advisory opinion and further developed over the years, and include the permanency of the association, the existence of organs, distinct powers and purposes of the IO and its member states (*volonte distinct*) and the endowment of the IO with legal capacities to perform acts, conclude treaties or bring claims to an international tribunal.[66] Today an IO with legal personality can be defined as 'an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane'[67].

The legal personality of the UN was already in 1949 in the *Reparations for Injuries* advisory opinion by the ICJ. The International legal personality of the EU (and its predecessors) as well as of

[59] For the IACHR: *The Mayanga (Sumo) Avas Tingni community v Nicaragua* IACtHR (31.8.2001) available online http://www.corteidh.or.cr/index.php/jurisprudencia# [accessed 09.09.2013], for the ECtHR see the cases outlined above in section B.
[60] MN Shaw *International Law* 6ed (2008) p 175
[61] More on the different conferrals of powers, especially Sarooshi's categories below in section D I
[62] J Klabbers 'The concept of legal personality' in *Ius Gentium* (2005) 11 pp 35-66:37
[63] N White *The law of international organisations* 2ed (2005) p 31; CF Amerasinghe 'International legal personality revisited' in *Austrian Journal of Public and International Law* (1995) 47 pp 123-145:127; G Gaja 'First Report on Responsibility of International Organisations' UN doc. A/CN.4/532 at 15
[64] J Klabbers 'Presumptive Personality: The European Union in International Law' in M. Koskenniemi (ed.) *International Aspects of the European Union* (1998) pp 231-253:234; P Gaultier 'The Reparations for Injuries Case Revisited: The Personality of the European Union' in Max Planck UNBD (2000) pp 331-361:332
[65] *Reparations for injuries suffered in the service of the United Nations* ICJ Advisory Opinion (11. April 1949) available online http://www.icj-cij.org/ [accessed 09.09.2013]
[66] Amerasinghe (n63) 131; Brownlie (53) 649
[67] P Gautier 'The Reparations for Injuries Case Revisited: The Personality of the European Union' in Max Planck UNBD (2000) pp 331-361:333

University of Cape Town

Organisations such as the Organisation of American States or the African Union has also been explicitly recognised.[68] By contrast the British Commonwealth or the Organisation for Security and Co-operation in Europe (OSCE) do not have international legal personality, the former because it does not have organs or a particular objective[69], the latter because it is not based on a treaty or constitution but emerged out of a conference of states.[70] Further there exist joint agencies of states such as arbitral tribunals or river commissions that have restricted capacities and limited independence with executive and jurisdictional powers and therefore 'legal personality is only a matter of degree'[71]. The problem of determining the scope of the legal personality of IOs has been addressed by Klabbers as follows: 'As soon as an organization performs acts, which can only be explained on the basis of international legal personality, such an organisation will be presumed to be in possession of international legal personality'.[72]

III. The International Responsibility of International Organisations

A necessary precondition for international responsibility of an IO is its distinct legal personality that makes IOs 'more than the sum of their (state) parties'[73]. As pointed out by Higgings, '[a]n international association lacking legal personality, and possessing no *volonté distincte* [...] remains the creature of the states members who are thus liable for its acts'[74]. Therefore, the discussion about responsibility of IOs is limited to those IOs that have a distinct legal personality.

Even though the legal personality of an IO is a necessary precondition for its international responsibility, it is still not a sufficient one: the fact that IOs with distinct legal personality are subject to the system of international law does not necessarily mean they incur responsibility for their conduct. The reason is that there are far fewer primary rules and no universally accepted secondary rules that govern the conduct of IOs and no forums to bring claims against IOs. As outlined by the ICJ

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international, under their constitutions or under international agreements to which they are parties.[75]

Most international conventions however are created between states. In the case of most human rights conventions or environmental agreements it is not even possible for IOs to become parties.[76] The UN for example is not party to any of the Geneva Conventions or its 1977 protocols, nor is it party to any of the human rights treaties or environmental agreements and therefore not bound by them as

University of Cape Town

[68] Brownlie (n53) 650
[69] *Ibid.*
[70] White (n62) 53; Organisation for Security and Cooperation in Europe – The legal Framework (2010) online: http://www.osce.org/mc/87192 [accessed 09.09.2013]; S Brandner 'Making a case for a legal personality of the OSCE' in *OSCE Magazine* (March/April 2009) p 18-23:19 available online http://www.osce.org/secretariat/36184 [accessed 09.09.2013]
[71] Brownlie (n53) 650
[72] Klabbers *International Institutional Law* 2ed (2009) pp 49-50
[73] Wilde (n1) 401
[74] Higgins (n16) 254
[75] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* ICJ report 1980 p 73-98:89
[76] O De Schutter "Human Rights and the Rise of International Organization: the Logic of Sliding Scales in the Law of International Responsibility" in J Wouters (ed.) *Accountability for Human Rights Violations by International Organizations* (2010) pp 51-128:56

such. Most of the IOs are not member to international conventions, even though their member states might be. In May 2011 the EU became a member to the UN Convention on Disability Rights, and it was the first time in history, that the EU became party to an International Human Rights Treaty.[77] Currently, the European Commission and the member states of the Council of Europe are negotiating the accession of the EU to the ECHR.[78] This is seen as 'a major step forward towards a stronger and more coherent system of fundamental rights protection'[79]. It is, however, a unique step. Therefore treaty regimes on human rights or international environmental standards for the most part do not apply to IOs. To address this problem, scholars have discussed different approaches to bind IOs directly to the international obligations of their respective MSs. [80] These attempts however seem unfeasible and neither have courts to date followed these scholarly arguments.[81]

A set of secondary rules has been developed by the ILC, modelled on the DASR, but it is highly disputed, whether these Draft Articles on the Responsibility of International Organisations[82] (DARIO) have already acquired the status of customary international law. A main criticism brought forward is that they were only a 'copy-and-paste-exercise' and are not based on a previous practice.[83]

Further no court has jurisdiction over IOs: The ICJ, the ECtHR and other international regional courts lack jurisdiction *ratione personae;* claims in national courts fall short because of the privileges and immunities of IOs, especially in regard to acts *jure imperii*.[84] As a result, effective remedies against IOs do not exist.[85] Solely, non-binding procedures or interim mechanisms which cannot be compared to international binding regulations exist up to today.[86]

IV. The Interplay of these Concepts

The traditional understanding of international law with respect to activities of IOs and states is that each entity is exclusively responsible for its own conduct. That means that an international wrongful *act of an IO* entails the responsibility of the IO[87] in the same way the international wrongful *act of a state* entails the states' responsibility[88].

University of Cape Town

[77] European Union Press Release *EU ratifies UN Convention on disability rights* online: http://europa.eu/rapid/press-release_IP-11-4_en.htm [accessed 09.09.2013]
[78] Council of Europe *Third negotiation meeting between the CDDH and ad hoc negotiation group and the European commission on the accession of the European Union to the European convention on human rights*, 9th November 2012, CoE doc. 47+1(2012)R03 available online http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp [accessed 09.09.2013]
[79] Polakiewicz *EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?* Available Online: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/Oxford_18_January_2013_versionWeb.pdf [accessed 09.09.2013]
[80] for example De Schutter (n76); N Naert 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations' in J Wouters (ed.) *Accountability for Human Rights Violations by International Organizations* (2010 pp.:129-168
[81] *Kadi* (n11) 192; *Attorney General v Burgoa* ECJ Case 812/79 (14. October 1980) at 9 available online: http://curia.europa.eu/jcms/jcms/j_6/ [accessed 09.09.2013]
[82] DARIO (n16)
[83] Bonn (n57) 8
[84] P Neumann 'Immunity of International Organisations and alternative remedies against the United Nations' Seminar Paper Vienna University available online http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf [accessed 09.09.2013]; Dannebaum (17) 121
[85] Wilde (1) 400
[86] De Schutter (76) 104
[87] Artiucle 3 DARIO (n16)
[88] Article 1 DASR (n56)

The discussion, whether the state or the IO is responsible for a certain act, therefore revolves mainly around the question whether the conduct in question is attributable to the entity.[89] The attribution of conduct is based on the concept of *control* over the organ, entity or person that committed the wrongful conduct. However, the threshold level of control for the attribution is still highly disputed.[90] Conduct can be attributed to several entities, for example when several entities act through a joined organ, but this is rare in practice.[91] Mostly it is only one entity that has the control over an organ.

Therefore, when referring to *the act of the state* it is clear that the harmful conduct in question was committed by organs of the state or other entities over which the state had control. If the attributed conduct breaches an international primary obligation of the state, the state has committed a wrongful act.[92] The corresponding conclusion applies to IOs: an act of the IO is a conduct that is attributable to the IO because the IO exercises 'effective control over [the] conduct'[93] and/or it was committed by the IOs organs or agents[94].[95]

This focus on the element of *control* is also reflected in the cases mentioned above: France did not have control over the soldiers that were supposed to mark and report the CBUs but KFOR but the UN did. Therefore it was not France but the UN that should have been responsible for the killing and injury of the Behramis. Bosnia and Herzegovina did not have control over the people taking decisions within the framework of the transitional administration regime that was put in place through the UN Security Council resolution, but the UN did have this control. Therefore Bosnia and Herzegovina was not considered responsible for the procedures. And in the case of Mr Boivin, no state had control over the decisions taken by the Human Resources Management of Eurocontrol. All these activities were, according to the ECtHR, attributable to the IO and not to the MSs that created and benefit from the IO. The IOs were considered potentially responsible for the incidents and no international court has jurisdiction over IOs. National courts are prevented from reviewing acts of IOs because of their immunity of jurisdiction.[96]

Due to the smaller regime of legally binding primary rules and the lack of fora with jurisdiction over IOs, the victims of acts which are only attributable to IOs do not have remedies to seek justice for their damage. The strict understanding of the separate legal personality of IOs does not allow MS responsibility for the wrongful acts of IOs, even though the state would be responsible if it had committed the wrongful act itself. This allows states at the moment to escape their international duties

[89] Dannebaum (n17); *Behrami* (n30); *Boivin* (n15), *Beric* (n42)
[90] 'effective control':*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* ICJ Judgment (Merits) (27.6.1986) available online http://www.icj-cij.org/ [accessed 09.09.2013] and Article 7 DARIO (n16); 'overall control' in *Tadić* ICTY Appeals Chamber (15.7.1999) Case no. IT-94-1-A available online http://www.icty.org/case/tadic/4 [accessed 09.09.2013]; 'control' in Article 8 DASR (n56); 'overall command and control' in Behrami (n30).The controversy on the threshold level of control is not subject to this work and the attribution of conduct is only touched on for reasons of clarification. The argument of this work starts, when the conduct in question is attributable to the IO, regardless of the threshold level employed.
[91] Comment 4 Chapter II DARIO (n16)
[92] Article 2 DASR (n56)
[93] Article 7 DARIO (n16)
[94] *Ibid* 7, 8
[95] *Ibid* 4(a)
[96] M Singer 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' in *Virginia Journal of International Law* (1995) 53-163; E Gaillard 'International Organizations and Immunity from jurisdiction: to restrict or to bypass' *in International and Comparative Law Quarterly* (2002) 1-15.

University of Cape Town

by passing the responsibilities of their activities to IOs when acting under their veil. As a consequence, injured individuals find themselves in the 'legal black hole' in its material and procedural dimension: acts of IOs are often not wrongful at all as IOs are not bound to the same obligations of states. Even if they were, there is no judicial review of acts of IOs.

For an injured state a similar situation exists: if a state is injured by the activity of an IO, it equally has no means to seek redress from the IOs.[97] This 'legal black hole' concerns basically every international obligation of states but it is most visible in the field of human rights.

V. The Way forward

How should courts, international legal scholars and the international community deal with this 'legal black hole'? Two main approaches seem possible: First, we could maintain the strict separation of legal personalities and create a legal framework of binding primary rules for IOs as well as forums where claims could be judicially reviewed. The primary rules would address the substantial dimension of the 'legal black hole' and the judicial procedure would address the procedural dimension of the 'legal black hole'. The creation of the DARIO is a first step towards the codification of (secondary) rules for IOs. Non-binding codes of conduct cannot replace legally binding primary rules and therefore do not provide a holistic solution to the problem. The development of binding case law seems unfeasible as 'a system of judicial review of acts of the Organisation is absent'.[98] To develop binding primary obligations and to make IOs subject to international courts is therefore only possible on the basis of agreement. The question arises whether an IO has at all the competence to bind itself to positive obligations or to the jurisdiction of a court if this is not explicitly provided for in its constituting documents. Most likely, the consent of the MSs would be necessary.

This current understanding of international law as a law created through agreement among its subjects is not able to address the challenges put forward by the different kinds of non-state actors emerging on the global plane. An enormous change in the understanding of the international legal system will be necessary to solve this impasse. Scholars have recently approached this highly theoretical and philosophical problem and proposed a totally new understanding of international law.[99] To challenge the old established columns of the current international legal system will however not be the subject of this paper.

This paper will focus on a second possible way to solve the problem of the legal black hole: it will discuss the different options of MS responsibility in the context of activities of IOs. This approach tries to accommodate the 'organic tension'[100] that is unique to the relationship between MS and IOs:

University of Cape Town

[97] That's why Serbia and Montenegro's claims against the NATO bombing were brought against eight individual states (Belgium, Canada, France, Germany, Italy, The Netherlands, Portugal and the United Kingdom) and not NATO itself: *Case concerning the Legality of the Use of Force (Serbia and Montenegro v Portugal) ICJ Judgment (15.12.2004) available online http://www.icj-cij.org/docket/files/111/8524.pdf [accessed 09.09.2013]*

[98] ILA Report of the Berlin Conference (2004*): Accountability of International Organizations* p 26, available online http://home.heinonline.org or http://www.ila-hq.org/en/publications/index.cfm [accessed 09.09.2013]

[99] J Brunee *Legitimacy and legality in international law* (2010)

[100] C Ahlborn 'Rules of International Organisations and Responsibility' Responsibility' *SHARES Research Paper* 02 (2011), Amsterdam Centre for International Law (ACIL) 2011-03, p 3 available at www.sharesproject.nl [accessed 09.09.2013]; discussed in detail by Bröllmann (n18) 35-54

on the one hand IOs are closed entities with separate legal personality that act as equal partners with other subjects on the international plane. On the other hand they are political communities in which several actors act, mostly states, act vertically according to the rules of the IO.[101] This approach will consider that IOs depend to a large extent on their MS. IOs need the MS's participation in the decision-making process within organs and their financial and material support. Further IOs are created by the MS that gave them competences and a legal framework. Finally the approach accommodates the underlying policy considerations, which have been described by the Institute of International Law as,

> the tensions existing between the importance of the independent responsibility of international organizations on the one hand, and the need to protect third parties dealing with such international organizations, on the other hand[102].

These policy considerations will be outlined in more detail below.[103] For purposes of clarification it has to be emphasised again: when talking about an *act of an IO* the question of attribution of conduct, which includes the threshold level controversy, is already answered. From this starting point, the following part examines MS responsibility in the context of *acts of IOs*.

D. The Responsibility of Member States in the Context of Acts of IOs

Because of the fewer international obligations of IOs and the limited options to hold them responsible for their conduct, scholars have been in search of arguments that would favour state responsibility for the activities of IOs at least since the ITC litigation. As Schermers has noted, there is a 'legal vacuum' and 'the need for member states to closely stay involved in all relevant decision making in the organization, as they may later be held (co)responsible for its actions'.[104] Schermers omits to indicate, on which legal foundation the MS 'may later be held responsible'. To find this legal foundation, will be the subject of the following analysis.

There are two forms of state responsibility that have to be distinguished: the state's responsibility for its *own act* in the context of IOs activities and state's concurrent or secondary responsibility for the *act of the IO* which arises by virtue of membership.[105] The first form of state responsibility respects the separate legal personality of IOs and is accepted in principle as it follows the traditional rules of international responsibility. It arises if there is an *act of the state* that is in itself or in the context of the IO's activity considered as internationally wrongful. On the other hand, several scholars have suggested a state *responsibility by virtue of membership* alone, which would arise without a wrongful act of the state.[106] This form of responsibility has however not been recognised by the ILC in the DARIO. Both grounds of state responsibility will be considered in the following analysis:

[101] *ibid*
[102] ILL Resolution: *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties* (1995) http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf
[103] Part D II
[104] HG Schemers *International Institutional Law* (2003))§§1590A
[105] A similar, categorization has been proposed by C Ryngard 'Member State Responsibility for Acts of International Organizations' in *Utrecht Law Review* (2011) pp 131-146
[106] See Part D II

University of Cape Town

part II analyses MS responsibility for the conduct of IOs by *virtue of membership* and part III analyses MS responsibility for the state's *own acts*. Part IV will comment on the relation between the responsibility of IOs and their MS.

However, before analysing MS responsibility for acts of IOs in depth, the relation between the MS and the IO has to be clarified. This relation is defined by the power balance between IOs and MSs and differs a lot among the different kinds of IOs. Only on the basis of a correct understanding of these power balances between IOs and MS can a discussion about responsibility of MS be fruitful. It is particularly relevant to part III where the MS responsibility for the state's own acts is analysed. Therefore, part I of this section will introduce a categorization of the power balances between MS and IOs developed by Dan Sarooshi.

I. The Balance of Sovereign Powers between IOs and MSs

IOs are creations of states and receive their competences through the transfer of sovereign powers from the states. This nexus has also been pointed out by the ICJ that stated in the *Legality of the use by a state of nuclear weapons in armed conflict* Advisory Opinion that,

> international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of specialty', 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.[107]

Some IOs can act only with the explicit approval of their MS while others can influence the laws and political decisions within their MS even against the MS's will. For example the North Atlantic Treaty Organization (NATO) decisions are taken on the basis of consensus among the MSs.[108] The decisions of the World Health Organization (WHO) are taken with a two-third majority[109] but their effect for the MS can be directly influenced through reservations[110] and the competence to conclude their own contracts on the same topic. The decisions of the United Nations Security Council or the European Union on the other hand are binding for the MS and can directly affect their domestic legal systems. The absence of opportunities to influence the decision-making-process in these cases takes away the possibility of states lawfully resisting such decisions.[111]

Dan Sarooshi has developed a detailed theory on the different power balances between IOs and their MSs.[112] He introduces three different types of conferrals of powers, which lead to three

[107] *Legality of the use by a state of nuclear weapons in armed conflict* ICJ Advisory Opinion (8 July 1996) at 25 available online http://www.icj-cij.org/ [accessed 09.09.2013]
[108] International Law Commission *Responsibility of International Organizations Comments and Observations received from international organizations* (14.2.2011) UN doc. A/CN.4/637 at 4 available online http://untreaty.un.org/ilc/sessions/63/63docs.htm [accessed 09.09.2013]; Webiste NATO *Consensus decision-making at NATO* http://www.nato.int/cps/en/natolive/topics_49178.htm [accessed 09.09.2013]
[109] Article 19, 60 a) Constitution of the WHO
[110] *Ibid* 22
[111] A possibility to lawfully oppose is seen by A Tzanakopolous *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (2011) and by D Sarooshi *International Organizations and their Exercise of sovereign Powers* (2005) 115, 118
[112] Sarooshi (n111)

University of Cape Town

different forms of power balances between IO and MS: the agency relationship, the relationship based on delegated powers and the relationship based on transferred powers.[113] Into which category a particular conferral falls in, depends on the degree of power that has been conferred.[114]

According to Sarooshi's categorization, the degree of power transferred is evaluated with reference to three indicators: first the *revocability* of the transfer of power, secondly the degree, to which the state retains *control over the exercise of the powers* and thirdly, whether the state retains the *right to exercise the transferred power concurrently* to the IO.[115]

The first indicator – revocability – is more an indicator than a precise measurement of the degree of transferred power for two reasons: first, in practice states can always revoke the transferred powers, even though this might be unlawful, secondly because the second and third indicator are more precise and can overrule the aspect of revocability.[116] The second indicator - the right to control the exercise of the powers by the IO - is reflected in the right of the MS to participate and influence the decision making process within the IO and to control the implementation of decisions within their domestic systems.[117] In the third indicator - the right to concurrently exercise the conferred powers with the IO or not - is reflected in the binding nature of the decisions of IOs and the possibility of MS to 'ignore' decisions of IOs.[118]

What relevance do the different forms of conferrals of powers have for the regime with respect to responsibility of MS and IOs? The first category - the agency relationship - has also been recognized in international law.[119] It concerns the situation, where a state (the principal) has empowered an IO (the agent) to act on its behalf.[120] In an agency relationship the power transferred is revocable because of the very nature of the relationship[121], the state can control the exercise of the powers by the IO and the state retains the right to exercise the powers itself.[122] Regarding the responsibility in this relationship, it is a general principal that the principal is responsible for the acts committed by its agents within the authority conferred.[123] In the commentary to the DASR agents are equated to organs of the state.[124] For the question at issue, namely whether MS can be held responsible for international wrongful acts committed by an IOs, this category of conferrals of powers is not of relevance, as the act committed by the IO will be attributed to the state and therefore not be an internationally wrongful act of the IO but one of the state, with the consequence, that the state is fully responsible.

University of Cape Town

[113] *Ibid*. 29
[114] *Ibid*. 29
[115] *Ibid*. 29-32
[116] *Ibid*. 30
[117] *Ibid*. 30
[118] *ibid* 32
[119] *Ibid*. 33
[120] *ibid*.33
[121] *Ibid*.41
[122] *Ibid* 33ff.
[123] *Ibid* 35; A Sereni "Agency in International Law" in *The American Journal of International Law* 1940 p.:638-660:655
[124] Comment 7 to Article 1, Comment 3,5 to Article 2, Comment 2 Article 7 DASR (n56)

In the second category - the delegation of powers - the state has the legal right to revoke the transferred powers which is provided in the instrument of conferral (normally the constitutive treaty).[125] As opposed to the agency relationship, the state does not have the competence to exercise direct control over the way, in which the conferred powers are exercised.[126] This aspect however does not have much impact on the state, as the state retains the right to exercise the delegated powers concurrently with the IO, which means that if the IO decides on something and the state wants or has to do it differently, the state simply uses its right to concurrently exercise the sovereign right in a different way than the IO decided to.[127] For example if the state conferred treaty-making powers to an IO, it can still express the right to contract out of or make reservations to the treaty that is concluded by the IO before this enters into force and the state can still conclude treaties independent of the IO, even in the same areas.[128] Therefore, decisions of the IO in exercise of the delegated powers are not binding upon the state and only 'the state's subsequent acceptance of the decision [...] confers binding force on the organs exercise of powers'.[129] Examples of IOs based on this relationship are the NATO and the WHO: the decisions of the North Atlantic Council (NAC) of NATO are taken in consensus and decisions of the World Health Assembly (WHA) of the WHO are only binding if a member state agreed to them. Therefore, acts of IOs which are based on the delegation of powers are relatable on a short causal chain to an individual decision of the states which agreed or did not make a reservation to the decision of the IO. This causal behaviour will be discussed as a reason for MS responsibility for the activities of IOs below.

The third of Sarooshi's categories is the transfer of powers. This is the category with the highest degree of conferral of sovereign power. In this category, states do not have direct control over the decision making process within the IO.[130] Further, the transferred powers are generally not revocable. As mentioned above, there are some important exceptions to this general rule, when despite the fact that powers are revocable, the conferral of powers has to be categorized as a transfer because the other two indicators (no control over the decision making process and binding nature of decisions) are so dominant. In regard to the third indicator (whether decisions are binding or not) Sarooshi distinguishes between partial transfers and full transfers of powers.[131] Partial transfers are cases, where the state agrees to be bound by the IOs decision on the international plane.[132] Full transfer of powers are those cases, where the state agrees to be bound by the IOs decision not only on the international plane but also within its domestic system, meaning that decisions of IOs have direct effect within the state's domestic legal order.[133] One example for the full transfer is the EU and its power to issue directives. An example for the partial transfer is the UN SC and its power to issue internationally binding resolutions.

[125] Sarooshi (n111) 33
[126] *Ibid*. 55
[127] *Ibid*. 58
[128] *Ibid*. 59
[129] *Ibid*.60
[130] *Ibid*.70
[131] *Ibid*. 69
[132] *Ibid*.70
[133] *Ibid.*

University of Cape Town

For both sub-categories, the full and the partial transfer of powers, it is questionable, whether the state or its organs still have any influence on the IOs exercise of powers. Technically, they don't have any influence anymore, not even the power to determine, whether an IO acts *ultra vires*.[134]

Practically, the effective implementation of the decision of an IO within the state requires the cooperation and implicit consent of all three arms of government. The legislature and judiciary have to accept and apply the decision, as opposed to blocking it. Sarooshi argues that therefore the 'arms of domestic government' still have control over the application of the IOs decision, even in the case of full transfer of powers.[135] Especially the constitutional courts can practically stop the implementation of IOs decisions and fight for sovereign values, including especially human rights provisions.[136] A similar line of reasoning is applied by Tzanakopolous in the context of UN SC decisions who argues for the legality of 'disobeying' the UN SC in certain situation.[137]

For the establishment of MS responsibility for acts of IOs, these three different categories of conferrals of powers from states to IOs have to be born in mind. Depending on the conferral of powers on the basis of which a particular IO is created, different grounds for MS responsibility for the states own acts in the context of IOs can and have to be considered.

University of Cape Town

II. MS Responsibility for acts of the IO by Virtue of its Membership

State responsibility by virtue of membership alone means that the state would be responsible concurrently or on a secondary basis for acts of the IO without having breached any obligation itself. This approach is also referred to as 'piercing the institutional veil' and aims at 'ignoring' the separate legal personality of the IO behind which states are accused of hiding.[138] This approach was first discussed during the ITC litigation in British courts in the 1980ies. The ITC was an IO with 32 MS (including the European community) that bought and sold tins on the world marked with the aim of keeping the prices stable.[139] However, in 1985, the ITC announced its bankruptcy; its liabilities were estimated between 700-900 million British pounds.[140] The creditors tried to sue the MS in Britain, where the ITC had its headquarters, to seek redress. One of their arguments was that the IO was comparable to a corporation and the MS comparable to the shareholders and therefore, should be equally responsible for the loss.[141] Another argument was that there were no norms that limit the states liability, and therefore the responsibility by virtue of membership should be assumed.[142] A third argument for state liability by virtue of membership was built on an *argumentum e contrario*: some constitutions of IOs do limit the MS responsibility, thus these provisions must be modifying a general

[134] Sarooshi (n111) 70
[135] *Ibid*. 71
[136] *Ibid*. 76
[137] Tzanakopolouzs (n111)
[138] Hirsch (n2)169, Broellmann (n18); Klabbers (n72) 291
[139] Klabbers (n72) 276; C Greenwood 'The Tin Council Litigation in the House of Lords' in *The Cambridge Law Journal* (1990) pp 8-13:9
[140] Greenwood (n139) 8
[141] *J.H. Rayner (mincing lane) Ldt v Department of Trade and Industry and Others and related appeals Maclaine Watson & Co . Ldt. V Department of Trade and Industry* British Court of Appeal Judgment (27th April 1988) available online http://www.uniset.ca/other/cs5/1989Ch72.html [accessed 09.09.2013]
[142] Wilde (1) 402

rule of liability.[143] These arguments were rebutted[144] and the British Court of Appeal found in a case that became precedent that there was no

> rule of international law, binding on the member states of the ITC, whereby they can be held liable, let alone jointly and severally, in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name.[145]

In the aftermath of the ITC litigation the MS responsibility by virtue of membership was only suggested by 'a minority of academic commentators'[146] but rejected in the Institute of International Law (IIL) Resolution[147], by the International Law Commission (ILC) in the DARIO[148], by the International Law Association (ILA)[149] and by most scholars in the field.[150] This dominant view is based on the concern about the 'efficient and independent functioning of international organizations'[151]. The fear is that the purpose of IOs, to foster cooperation among states would be jeopardised if MS could incur responsibility for acts of IOs. As the Rapporteur of the 5th commission of the Institute of International Law (IIL) Mrs Higgins pointed out

> if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations.[152]

She further saw the 'status of the organization as truly independent, not only from the host state, but from its membership'[153] in danger if a responsibility of states for wrongful acts of IOs were established. The assentation that MS responsibility would contradict the distinction between the separate legal personalities had also previously been expressed by Amerashinge who stated that

> [i]f member states are concurrently or secondarily liable as a matter of law, they may be inclined to attempt to control the daily transactions of the organization in such a way as to jeopardize, and virtually cripple, its smooth operation as an independent entity with a separate identity.[154]

However, an indirect responsibility by virtue of membership, meaning a responsibility to cover the financial obligations of IOs that result from wrongful acts has been accepted widely.[155] This indirect responsibility however is not the subject of this paper.

University of Cape Town

---

[143] Wilde (1) 403
[144] *Ibid*
[145] *J.H. Rayner* (n141)
[146] Wilde 402
[147] Article 6a) ILL Resolution (n 102)
[148] See part 5 DARIO (n16) especially Comment to Article 62.
[149] ILA Report (n98) 34
[150] Hirsch (n2) 137, 150, 154; P Sands *Bowetts Law of International Institutions* 5th ed (2001) at 15-105; Schermers (n104) §1587; Sadruska (n18) 888
[151] Higgins (n16) 288
[152] *Ibid* .
[153] *Ibid.*
[154] CF Amerashinge 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent' in *The American Journal of International Law* (1991) pp 259-280:278
[155] Schermers (n104) §§1589, 1790, Hirsch (n2) 158; Sands (n150) 531

The whole discussion in the 1990 surrounded activities of IOs in the field of contractual activities of IOs.[156] The Report of Mrs Higgins explicitly excluded the question, whether 'a distinction *jure gestionis* and *jure imperii* should be made in the case of international organisations'[157]. Up till today, there is surprisingly little written on the question of responsibility by virtue of membership of MS for IOs performing acts *jure imperii*. However, in the context of non-voluntary relations, which is the subject of this paper, the establishment of responsibility seems even more pressing: the victims of the IOs activities were not in a position to choose to be exposed to the risk of dealing with an IO, as opposed to investors or contractual partners

Even though, the responsibility by virtue of membership is currently not accepted, there are good arguments to establish such a rule. From a policy point of view it seems unacceptable that MS can hide behind the *institutional veil* of their IOs. The current legal regime contradicts not only the legal principle *ubi jus ibi remedium,* (meaning that if there is a right, there is a judge). But by not providing sufficient primary rules binding upon IOs it also upsets the international legal order itself, of which, responsibility is the 'necessary corollary'[158]. Presumably building on this idea, Brownlie advanced the argument that a

> State cannot by delegation (even if this be genuine) avoid responsibility for breaches of its duties under international law […]. This approach of public international law is not *ad hoc* but stems directly from the normal concepts of accountability and effectiveness.[159]

It has further been argued that the international community does have an 'important interest' in creating responsibility of MS as without such liability, 'some governments will not make adequate efforts beforehand to prevent such injuries'.[160]

The assertion that the responsibility of MS would be contradictory to the distinct legal personalities has been rebutted with the claim that '[i]t is unrealistic to claim that an international organization is an entity independent from the States which created it'[161]. And even if the strict separation of legal personalities is accepted, that would only mean that IOs can be held responsible but does not necessarily preclude the concurrent liability of MS.[162]

D'Aspremont brings a very particular point into the discussion: he argues against 'a rigid understanding of the distinct legal personality of International Organizations in terms of international responsibility' when MS 'have abused the international legal personality of the organization at the decision-making level'.[163] He proposes that 'when member states effectively and overwhelmingly

[156] Hirsch (n2) 169; Broellmann (n18)
[157] Higgins (n16) 7
[158] I Pellet 'The Definition of Responsibility in International Law' in *The law of International Responsibility* (2010) pp 3-16:4
[159] I Brownlie 'State responsibility: the problem of delegation' in Ginther K. (Eds) *Völkerrecht zwischen normativen Anspruch und politischer Realität* (1994) pp 300-301
[160] Hirsch (n2) 150, 151
[161] Sadruska (n18) 888
[162] Hirsch (n1)151; Sturmer (n16) 570
[163] J D'Aspermont 'Abuse of Legal Personality of International Organizations and the responsibility of Member states' in *International Organizations law Review* (2007) pp 91-119:118

University of Cape Town

controls the decision making process of an IO'[…] the legal personality of that organization can no longer constitute a shield behind which member states can evade a responsibility that they would have incurred if they had themselves committed the contested action'[164] Referring to the case of *Bustani*,[165] where the US influenced the decision making process within the Organization for the Prohibition of Chemical Weapons (OPCH), he argues that the US conduct 'evidences of overwhelming, effective control by one state leading to a joint or concurrent responsibility for the wrongful act'[166]. Hirsch argues in a similar direction and suggests to 'pierce […] the corporate veil'[167] in situations, where an IO 'is under complete, or almost complete, control of a single member and the organization is functionally identical with that member'[168].

On a first view, their arguments seem identical to the provisions of the DARIO concerning 'direction or control' or 'coercion' which were developed timely after their considerations. This is however not the case: they argue for the concurrent responsibility of the state for the act of the IO without the need for own wrongful conduct of the state. The provisions of the DARIO on the other hand do require wrongfulness of the state's conduct as it will be shown below.[169] D'Aspermont's and Hirsch's considerations might have been the inspiration for the corresponding articles in the DARIO. Due to the different preconditions for MS responsibility, their arguments still have their own, separate value parallel to the provisions of the DARIO.

III. MS Responsibility for the State's own Acts in the Context of Activities of IOs

The responsibility of a MS for its own acts arises when conduct is attributable to the state and breaches an international obligation of the state.[170] In the context of activities of IOs, this form of responsibility can only arise in the three moments in which the MS actually acts: the decisions making process within the IO, the implementation of decisions of the IO and the original conferral of sovereign powers from the MS to the IO.[171] The following analysis will be aligned at these three moments. In light of this tripartite structure, a presentation will be made on the different approaches that have been taken to establish MS responsibility, where some have been accepted as legally binding while others have been highly disputed.

Prior to the analysis, the general distinctions between two potential grounds of state responsibility for the MS own acts in the context of IOs have to be clarified: MS responsibility can arise from the states own acts *in connection* with the conduct of another entity (state or IO) or from

[164] D'Aspermont (n163) 101
[165] *Bustani v. Org. for the Prohibition of Chemical Weapons*, ILO Administrative Tribunal, Judgment No. 2232 available http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=95&p_and_or=AND&p_page=2 [accessed 09.09.2013]
[166] D'Aspermont (n163) 110
[167] Hirsch (n2) 169ff
[168] *Ibid*. 172
[169] D II a)
[170] Article 1, 2 DASR (n56)
[171] This tripartite has been used before by De Schutter (76) and Naert (n80); The first two moments reflect the indicators 'control over the exercise of powers' and 'the right to exercise the transferred powers concurrently' used by Sarooshi (n111) to develop his taxonomy of power conferrals (section DII).

University of Cape Town

the states own acts *independent* from the act of an IO. This distinction between the state's acts and the state's acts in connection with the acts of another entity was introduced in the DASR and is based on 'the principle independent responsibilities' meaning that 'each state is responsible for its own internationally wrongful conduct'.[172] It reflects the distinction that is made in several domestic systems of criminal law between perpetration (German: *Täterschaft*) and participation/complicity (German: *Teilnahme*). This had been considered 'appropriate since each state has its own range of international obligations and its own correlative responsibilities'.[173] However, the question of MS responsibility for acts of IOs had not been covered in the DASR which is explicitly stated in Article 57 DASR and explained in the following comment that these issues

> raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations[174]

Therefore, rules of responsibility of MS in connection with the acts of IOs were codified in Articles 58-62 DARIO. Surprisingly, the ILC did not address the 'controversial substantive questions' which arise in the context of responsibility of MS for IOs: the articles 58-62 are, for the most part, symmetrical to the Articles in the DASR that concern state responsibility in connection with acts of other states.[175]

Therefore the state's responsibility for the state's own acts, *independent* from the conduct of an IO is mostly codified in the DASR while the state's responsibility for the state's acts *in connection* with the conduct of an IO is codified in the DARIO. The relevant norms in the DARIO concern the state's involvement through *aid or assistance*, *direction and control*, or *coercion* in the act of the IO. It is important to notice that the reason for the state's responsibility according to the DARIO is not an attribution of the act of the IO to the state but the state's own acts of involvement which are attributable to the state.[176] Therefore, the state 'will not be concurrently or jointly held responsible for the wrongful act itself [but] on a different, independent ground, namely their complicity or assistance [to the act of the IO]'.[177] The following analysis will distinguish between these two grounds of MS responsibility in the subsections regarding the *decision-making process* (1.) and the *implementation of the decision* (2.). With regards to the third instance of *conferral of sovereign powers* (3.), this distinction is unnecessary because by then an act of the IO is not existent.

1. The Decision Making Process within the IO

IOs are entities with a separate legal personality from that of their MS. Therefore, it has been argued that 'a member state neither incurs special liability nor avoids existing liability according to whether it is or it is not a member of a particular organ'[178]. However this argument does not take into

[172] Comment 1 to Chapter IV DASR (n56)
[173] *ibid*
[174] *Ibid*. 57
[175] Comment 1 to Article 58, 59, 60 DARIO (n16)
[176] P Klein 'The attribution of acts to international organisations' in J Crawford (ed.) *The Law of International Responsibility* (2010) pp 297-329:306; D'Aspermont (n163) 98
[177] D'Aspermont (n163) 98;
[178] ILA Report (98) 26

University of Cape Town

account, that the collective conduct of an organ (mostly a decision fully attributable to the IO), must be distinguished from the individual conduct of the organ's members (mostly a vote or other influence).[179] As D'Aspermont pointed out 'all decisions adopted by an international organization require the backing of all member states or at least a majority of them'.[180] This is at least the case for IOs which exercise delegated powers: in this relation between MS and IO it is clear, that the MS have influence on the decision making process within the IO through veto, reservation or other measures and might therefore be responsible in connexion with the IOs act for their own conduct.[181] On the other hand, in a situation of a *transfer of powers*, where MSs cannot influence the decision making process within the IO, it is clear that MS responsibility cannot arise in the context of the decision making process. Examples are the before mentioned EU decisions and UN SC resolutions or 'truly international (e.g. executive or judicial) offices where the office holder may not take instructions from a state'[182] like the European Commission or the UN Secretary-General.

As Naert has pointed out, the state's representatives often act in a 'dual capacity': on the one hand they act as organs of their sending state, on the other hand as part of the organ of the IO.[183] Therefore, he suggests that the vote, which is a conduct attributable to the state, 'must be distinguished from the collective conduct of the organ'.[184] It has been doubted whether such a distinction is possible.[185] However, more recent case law of the ECtHR supports the view that states can bear responsibility for their voting behaviour within an IO: in *Mathews v UK* the Court found that the Maastricht Treaty was 'freely entered into by the United Kingdom' and that the UK therefore 'is responsible *ratione materiae* under Article 1 of the [ECHR] for the consequences of that Treaty'.[186] Therefore the own conduct of a state's representative within an organ of an IO might give rise to the state's responsibility.

The following analysis will explore the grounds on which MS responsibility for acts related to the decision making process within an IO can be established. The MS responsibility for acts *in connection* with the act of the IO (according to the provisions of the DARIO) and MS responsibility *independent* from an act of the IO will be distinguished.

University of Cape Town

a) State Responsibility for the states act in connection with acts of the IO – applying the provisions of the DARIO

It has been suggested, that states that cast a vote in favour of a decision that leads to a wrongful act have to be considered accomplices of the wrongful act even when the mere voting is not

[179] Naert (n80) 162
[180] D'Aspermont (n163) 101; the UN Security Council is however an important exception: only 15 MS make binding decisions through a majority vote for all 200 MS of the UN and only 5 of them have the right to veto a decision
[181] Details on delegated of powers above section D II
[182] Naert (n80) 163
[183] *ibid*
[184] *Ibid* 164
[185] I Pernice 'Völkerrechtliche Verträge internationaler Organisationen' *in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1988) pp 229-250:240 footnote 44; *C.F.D.T v the European Communities* ECtHR (10.7.1978) Application No 8030/77 at 7 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]; Higgins (n16) 11; Wilde (n1) 402
[186] *Matthews v UK* ECtHR (18.2.1999) Application No 24833/94 at 32, 33 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]; similar argumentation by Naert (n80) 164

a wrongful act of the state.[187] This is however still a purely theoretical proposal as there is no case where this construct has been addressed.[188]

The DARIO provides norms for MS responsibility for their own acts of complicity in the act of an IO: Article 58 DARIO covers 'Aid and assistance by a state in the commission of an internationally wrongful act by an international organisation'. It could be applicable, if a state deliberately votes or lobbies in favour of a wrongful decision and this decision would, if taken by the state, be a wrongful act of the state. Similarly article 59 DARIO, concerning the 'direction and control exercised by a state' could be applicable for the behaviour of state representatives towards the other MS or towards independent office holders of the IO during the decision making process.[189]

These norms however contain several problems: First the responsibility of the MS can arise only if there is a *wrongful* act of the IO. As IOs are bound to far less international obligation than states, many activities of IOs are not wrongful acts of the IO. Under the regime of the DARIO it is therefore not possible to create state responsibility for complicity in a lawful act of an IO. A second problem is the causality of a vote for the final decision of the IO. Even though neither Article 58 nor the commentary mentions the requirement of causality, it is explicitly stated that it is oriented at Article 14 DARIO and Article 16 DASR which both require a 'causal contribution'[190] to the wrongful act. The causality of the single vote of one MS in the decision making process of an IO will raise complex questions. These problems are well known from the discussions in domestic criminal law on the causality of single votes in panel decisions.[191] Finally and maybe most relevant: if the behaviour of the state during the decision making process is in accordance with the rules of the IO, the articles are not applicable and the state can only be responsible under the DASR for its own conduct.[192] For example the voting behaviour of permanent members of the SC could in some cases easily be qualified as 'direction and control' but it takes place in accordance with the rules of the UN and can therefore not give rise to responsibility under Article 59. Probably all votes that count for a decision of an IO will be in accordance with the IO internal rules and can therefore not qualify as causal aid or assistance to the decision in the sense of Article 58.

Article 60 DARIO concerns the act of coercion by a state of an IO. The conditions for responsibility to arise under Article 60 DARIO are 'identical to those that are listed in Article 18 [DASR]'[193]. Therefore, coercion can be defined as conduct, giving the IO 'no effective choice but to comply with the wishes of the coercing State'[194]. The act of coercion does not have to be unlawful conduct under international law and, according to the ILC, does not even have to violate the rules of the IO; it however 'seems highly unlikely that an act of coercion could be taken by a state member of an [IO] in accordance with the rules of the organization'.[195] The conduct of coercion can therefore be

[187] P (n176) 308
[188] *Ibid*.
[189] This latter norm seems to be inspired by D'Aspermont's considerations about MS responsibility in a situation of 'abuse of the legal personality' described above (section D II), however it is different in some very relevant points.
[190] Article 14 DARIO (n16), 'causal link' is required by Article 16 DASR (n56)
[191] *Lederspray* case, German High Court, BGHSt 37, 106
[192] Article 58 (2) and Comment 5 to Article 58 DARIO (n16)
[193] *Ibid*. Comment 2 Article 60
[194] Comment 2 Article 18 DASR (n56)
[195] Comment 3 Article 60 DARIO (n16)

University of Cape Town

behaviour of the state that is in accordance with the IO's rules and with other international obligations of the state and still create the state's international responsibility for complicity in the act of the IO. However, the act of the IO must be an act, that if it was not for the coercion would have been 'an internationally wrongful act of the coerced [IO]'.[196] The problem that IOs are bound by much fewer international obligations than states becomes apparent again: it is very likely that the act of the IO is not a *wrongful* act under international law.

On the basis of the foregoing arguments it is clear that it will be very difficult to establish MS responsibility for complicity in the act of IO on the basis of the DARIO. The question arises, whether a MS responsibility for complicity, independent from the provisions of the DARIO, is feasible. One could assume that where MS responsibility for complicity in the act of an IO cannot be created under the DARIO 'it shall not exist'. [197] This *argumentum a contrario* is not necessary, but with the growing acceptance of the DARIO it is very likely to be argued this way.[198] The lack of custom and practice[199] concerning responsibility of MS in connection with IOs also has its share in the difficulties of opposing the DARIO regime.

As mentioned before, this approach to establish MS responsibility for complicity in the decision making process has never been subject to a court's decision. There have however been at least two cases in which this form of responsibility could have been discussed if the courts had had jurisdiction: the *Bustani*[200] case at the ILO and the search for reparations by Bosnia Herzegovina against the UK[201].

The conduct of the United States prior to the institution of the proceedings in the *Bustani*[202] case might serve as one example for *direction or control* or *coercion* in the sense of the before mentioned articles: Mr Bustani claimed the unlawful termination of his employment contract with the OPCH and the court found that 'at the insistent request of the United States, the Conference of the States Parties felt bound to terminate the complainant's appointment'[203]. The ILO could, however, not judge the US conduct for a lack of jurisdiction *ratione materiae*.[204]

Another situation where the complicity in the IO's act through a vote could have been considered was in a conflict of Bosnia Herzegovina against the UK before the ICJ. In 1993 the Republic of Bosnia and Herzegovina declared its intention to sue he UK at the ICJ for 'complicity in genocide' by imposing and maintaining an arms embargo through SC Resolution 713[205] and for facilitating the genocide by opposing the efforts of Bosnia and others to have the embargo lifted. This conflict however was finally settled politically so that the ICJ did not have a chance to decide on it.[206]

---

[196] Article 60 (a) DARIO (n56); also interpreted in this sense by De Schutter (n76) 87
[197] De Schutter (n76) 87
[198] *ibid*
[199] Alvarez (n57) 345
[200] *Bustani (n165)*
[201] Bosnia and Herzegovina and the UK issued a joined statement in December 1993 in which Bosnia and Herzegovina revoked its decision to institute proceedings, see 'Editors note' in *International Comparative Law Quarterly* 1994 at 714
[202] *Bustani (n165)*
[203] *Ibid.* 15
[204] D'Aspermont (163) 109
[205] Available online http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement
[206] see 'Editors note' in *International Comparative Law Quarterly* 1994 at 714

University of Cape Town

As these cases show, the theoretical considerations about MS responsibility for complicity, assistance or coercion in a wrongful decision of an IO are highly relevant. However, to bring such a case before a court seems unlikely at present, besides the uncertainty of the binding nature of the DARIO[207] it is further unclear, where the responsibility based on Articles 58-60 DARIO should be invoked. The ECtHR stated that it will not judge over the conduct of an IO that is not party to the convention.[208] To establish the IO's responsibility is however a necessary precondition to decide whether a state can be responsible for the (just then *wrongful*) act of the IO.

b) State Responsibility Independent from the Act of the IO

The question as to whether a state can be held responsible for its own conduct independent from the act of the IO during the decision making process is of high relevance. It is an alternative path for situations, where the state cannot be held responsible for its complicity in the act of the IO because of the difficulties described above.[209] The analysis of MSs responsibility for their own wrongful acts is based on the conviction that states cannot leave their international obligations at the door sill of the IO's organ, hence states are still bound by their international obligation when participating in *international cooperation* the decision making process of an IO.

Naert suggests that 'the mere vote [of a MS] itself amounts to a violation of an international obligation' of the state, independently from a potential breach of an international obligation in succession of the decision.[210] An international obligation of a state that can be violated through a mere vote has to include the provision 'not to tolerate/encourage/incite', to 'take all measures to prevent' or 'to ensure respect for' a certain conduct.[211] An example for this form of obligation is the provision of the ICESCR

> to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means[212]

This obligation can be violated by voting in favour of a decision that would jeopardise the conventions rights in their own or in another country. Then the voting state has not 'take[n] steps […] to the maximum of its available resources' to achieve the fulfilment of the ICESCR as it is obliged to. Examples for situations where states vote in breach of this international obligation include decisions of international financial institutions such as the IMF or the World Bank, which impose cost-cutting programs on indebted countries or economic sanctions imposed by the UN SC. In all these

[207] The DARIO is not itself binding, there is little to no evidence of state practice to consider these rules binding as customary international law, view supported by: Alvarez (n57) 345,347
[208] Behrami (n30) 144-152
[209] D III 1. a)
[210] Naert (n80)164
[211] *Ibid*.
[212] Article 2(1) ECESCR

University of Cape Town

committees, states are free to decide what to vote. If they decide to cast a vote that violates their international human rights obligations, they should be held responsible for that decision.

Naert however sees an exception from the responsibility of states for their voting behaviour in respect of decisions of the UN SC under Chapter VII. He bases this point on the ECtHR considerations in *Behrami*.[213] The ECtHR emphasised the importance of the UN SC's mission 'to secure international peace and security'[214] and its necessity to rely for that mission on the support of the UN MS. The court further found that it could not rule over 'the acts and omissions of the contracting parties' if they were in accordance with the SC resolution as this 'would be to interfere with the fulfilment of the UN's Key mission'.[215] The court stated

> [t]his reasoning equally applies to voluntary acts of the respondent States *such as the vote* of a permanent member of the UN SC in favour of the relevant Chapter VII Resolution […][216]

One should however not simply accept this statement of the ECtHR as its reasoning is insufficient. Why should a state that violates its international obligations by voting in favour a SC resolution be excluded from international responsibility for this wrongful act? The international obligations of states are binding while the voting behaviour of states within the UN SC is voluntary. There is no convincing reason as to why the international mission 'to secure international peace and security' of the UN SC should prevail over the international obligations of individual states, particularly where these obligations ought to protect individual human rights. The argument that the UN depends on the support of its MS to fulfil its mission is not specific to the UN SC – it is a general feature of all IOs and therefore not reason enough to allow an exception.

Finally, to sacrifice human rights obligations of states and the general principle of *pacta sunt servanda* on the altar of *world peace and security* pursued by the UN SC should not be allowed. As long as there is no answer to the question 'who guards the guardian'[217] MS have to be held responsible for their votes within the organ of an IO, including the UN SC, if this vote itself amounts to the breach of an international obligation of the state.

This has also been pointed out by the committee on Economic, Social and Cultural Rights, which found that

> […] the provisions of the Covenant, […] cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State […] It should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States of America) have yet to ratify it. Most of the non-permanent members at any given time are parties.

[213] Naert (n80) 165
[214] *Behrami* (29) 149
[215] *Ibid;*, more on the implementation of decisions below
[216] *Ibid.* (emphasis added)
[217] This question is elaborated in detail in G Verdirame *The UN and Human Rights – Who guards the Guardian?* (2011)

University of Cape Town

Therefore I argue that all votes of MS within organs of IO, including the decisions of the UN SC, can violate the MS international obligations and can therefore be subject to the scrutiny of courts that have jurisdiction over the voting state.

A second ground for the responsibility of the MS for its voting behaviour could be article 61 DARIO. According to this article, a MS can be held responsible in connection with the harmful conduct of an IO if,

> […] by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.[218]

This Article concerns the abuse of the separate legal personality of the IO by intentionally circumventing the MS's own international obligations.[219] It excludes the 'unintended result of the member states conduct'.[220] A case concerning the circumvention of international obligation during the decision making process however has not occurred yet. Still, it would be relevant for international obligations of the state that are not already breached by the mere vote of the state as described above. This would be the case for obligations that purely name the international obligation but no further duty 'not to tolerate/encourage/incite', 'take all measures to prevent' or 'to ensure respect for' a certain conduct.[221] If a state then causes the IO 'to commit an act that, if committed by the State, would have constituted a breach of the [state's] obligation'[222] the state is responsible for its own voting behaviour under international law. Under Article 61 DARIO, the act of the IO does not have to be an internationally *wrongful* act of the IO.[223] Therefore, international courts cannot *escape* from ruling over this conduct with the argument that they would not have jurisdiction over the IOs activities.

As it has been shown, to establish MS's responsibility for their own wrongful conduct during the decision making process in an IO is feasible: either on the basis of general international law which obliges states to comply with their international obligations (even when acting within the organ of an IO) or on the basis of article 61 DARIO which prohibits the circumvention of the state's international obligations.

2. The Implementation of Decisions of IOs

State responsibility can further arise, when MS comply with or help to implement the decisions taken by the IO. This seems to be the most widely discussed at the moment, especially in the context of human rights protection and UN peace operations.[224] This paper however seeks to describe the laws and theories that govern the implementation of decisions of IOs in a more general context.

[218] Article 61 DARIO (n16)
[219] *Ibid*. Comment 2,3 to Article 61
[220] *Ibid*.
[221] Naert (80)164
[222] Article 61 DARIO (n16)
[223] *ibid*
[224] Tondini (n54); Dannenbaum (n17)

University of Cape Town

Without the cooperation of the MS, no IO would be able to put its decisions into action as it would lack sufficient personnel and sovereign powers[225] to implement a decision within the territory of a sovereign state. There are two forms of implementation of binding decisions that have to be distinguished: first the provision of organs and personnel to the IO to assist with the implementation of a decision by the IO (mostly outside the state's territory); and secondly, the implementation of decisions within the state's territory through the state's own organs.[226]

The first form concerning the provision of personnel to the IO occurs in almost every IO. Most relevant however are the NATO operations and UN Peace Missions for which the IOs do not have own troops and entirely rely on the provision of organs and personnel from their MS.

The second form of implementing decisions, which is by the state itself and with its own organs, can be distinguished in two sub forms which are also reflected in Sarooshi's categories of full and partial transfer of powers. One is the passing of national legislation that transforms the state's international obligations towards the IO into nationally enforceable rules. Typical examples are the incorporation of EU directives or UN SC resolutions under chapter VII of the Charter. These provisions are binding upon the MS on the international plane but have to be transformed into national legislation to achieve the desired effect. The other form is the enforcement of directly binding rules issued by an IO. The most prominent example is the EU's regulations which have direct effect within the MSs.

To establish MS responsibility for the activities IOs which are based on *transferred* powers, the moment of implementation of an IO's decision is especially relevant: we recall that in this relation the MS does not have influence on the decision making process. [227] The MS can therefore not be held directly responsible for the decision of an IO on the grounds of its voting behaviour.[228] The implementation of the decision is then the only instance where the MS actually contributes to the committal of the harmful act of the IO. It is the only moment, in which the MS *acts*, hence the only moment where we have a chance to blame it for its own act in the context the activities of the IO.[229]

In the case of *delegated* powers, the MS that voted in favour of the decision might already be responsible for the act of the IO because of its participation in the decision making process.[230] This however should not exclude a second ground for responsibility in the moment of implementing the decision.

The following analysis will explore how to hold MS responsible for their acts related to the implementation of an IO's decision. Again[231] the MS responsibility for acts in connection with the act

[225] an important exception of course is the SC that can pass Resolutions under Chapter VII which then also allow to infringe the territorial sovereignty of a state
[226] De Schutter (n76) 94
[227] Sarooshi (111) 70, also see section D I above
[228] *Ibid*.
[229] The only moment besides the MS's act of creating the IO which will be discussed below in section D III 3
[230] See above section D III
[231] This distinction has been explained above in the introduction to III and has been used in III 1

University of Cape Town

of the IO (according to the provisions of the DARIO) and MS responsibility independent from an act of the IO will be distinguished.

a) State Responsibility in Connection with the Act of the IO – Applying the Provisions of the DARIO

The implementation of an IO's decision within the state's own territory through its own personnel and organs might be seen as *aid and assistance* (in the colloquial sense) to the IO. How else should the IO implement its decision if not with this help of the MS? But, the implementation of a decision within the MS territory with its own organs occurs 'under direction and control' of the state and without an involvement of an IO on the level of implementation. The implementation of an IO's decision on a state's own territory is therefore always an act, attributable only to the state. For that reason, rules concerning the MS's conduct in connection with the *act of the IO* are not applicable to this form of decision-implementation.

On the other hand the provision of personnel and organs of the state to the IO is aid and assistance to *the act of the IO*. Without this support no IO has enough own personnel to implement its decisions. The DARIO however makes it again difficult to establish MS responsibility: according to Article 58 (2) the conduct of a MS 'does not as such engage in the international responsibility of the state' if it is in accordance with the internal rules of the IO. But the provision of organs or personnel by the state to an IO will most likely be in accordance with the internal rules of the IO: it would be very odd if one and the same IO could effectively decide that a state has to provide organs and personnel to the IO and this provision would at the same time violate internal regulations of the IO. Therefore it is extremely unlikely that art 58 DARIO can be applied on the case.

The other provisions, namely articles 59-61 DARIO, are equally unlikely to be applicable to MS at the stage of implementation of the decision of an IO: If a state *directs and controls* (article 59 DARIO) an IO in the implementation of a decision, the wrongful act will most likely be attributable to the state as the state's own act according to Article 8 DASR. That would then be the easier path to establish responsibility.[232] *Coercion* by a state of an IO (article 60 DARIO) is more likely to happen during the decision making process, as a decision logically precedes every implementation of a decision. The pure implementation of a decision is therefore also unlikely to be subject of coercion in the sense of the DARIO.

Therefore, MS responsibility in connection with the act of the IO at the level of implementation of a decision seems an unfruitful path for the creation of MS responsibility. The provisions of the DARIO are too limited in their scope. To establish MS responsibility for aid, assistance and coercion on a different ground than the DARIO will face the *argumentum e contrario* that has been mentioned before: if a provision concerning these acts is not in the DARIO 'it shall not exist'.[233]

[232] More details on that below in D III 2. b)
[233] De Schutter (n76) 87

University of Cape Town

b) State Responsibility Independent from the Act of the IO

This section analyses the MS responsibility acts that occur in the context of activities of IOs but that can be judged *independent* from the act of the IO. First, the responsibility of the MS for the act of providing personnel will be analysed. Secondly, an emerging hierarchy of norms in international law will be evaluated. With this hierarchy the conflict of competing international obligations which include the MS obligation to implement an IO's decision on the one hand and its international human rights obligations on the other hand will be solved.

(1) The Provision of Organs

When a state provides organs and personnel to an IO[234], the IO exercises the *control* over the conduct of these organs and therefore the conduct is attributable to the IO.[235] The conduct is only attributable to the providing MS if that MS continues to exercise *control* over the organs.[236] Even though there has been evidence that states continue to control their troops after having lent them to an IO, this is difficult to proof in practice.[237] Purely legally speaking, MS give away the control over the conduct of those personnel. Without the control, the personnel's conduct is not attributable to the state and the state cannot be hold responsible for resulting harmful activities.

But, even if the state cannot be hold responsible for the conduct of its personnel and organs, it might be held responsible for providing the personnel and organs at first. If an international obligation of the state prohibits the state from encouraging or inciting certain conduct (such as the violation of human rights) or simply obliges the state to promote human rights, the mere provision of organs to armed forces can breach this obligation. But, to assume the encouragement of a breach of human rights obligations, the prohibited conduct should be foreseeable in the moment of providing the organs in my opinion. Most harmful activities of IOs will however not be foreseeable in the moment of providing organs. A state should then not be blamed for the mere provision of organs, personnel or other aid to a mission which is not in itself contrary to international obligation of the state but only in the execution of individual activities.[238]

(2) The Implementation of Decisions within the MS's own Territory

When a MS implements a decision of an IO in its own territory with its own organs, it is clear that the conduct of those organs occurs under the *control* of the MS and is only attributable to the MS. It therefore constitutes an act of that MS for which the state alone is responsible. This is not disputed. It has however been doubted, whether such an act of the state still constitutes an *unlawful* act. [239] To incur responsibility, this *unlawfulness* is a necessary precondition (Article 1 DASR).

---

[234] The legal basis are so called *borrowed administration agreements*
[235] Article 7 DARIO (n56)
[236] *Argumentum e contrario* to Article 7 DARIO (n56), Article 8 DASR (n16)
[237] Klein (n176) 307
[238] A possible duty to ensure adequate protection of the interests of third parties when providing organs or personnel will be discussed below in section D III c) (2)
[239] *HT v Ahmed UK* Supreme Court (27.1.2010) Judgment [2010] UKSC 2, On appeal from: [2008] EWCA Civ 1187 at 204 available online http://www.supremecourt.gov.uk/docs/uksc_2009_0016_judgment.pdf [accessed 09.09.2013]

University of Cape Town

By complying with an IO's decision a MS might, at the same time, violate other international obligations they have towards third parties. Examples for this situation are sanctions imposed against Iraq or Libya by the UN SC or the UN SC sanction regime against Al Qaeda members that developed on the basis of the SC Resolution 1267(1999). The UN MSs were on the one hand bound towards the UN to implement these sanctions, on the other hand by implementing them they were violating human rights duties to which most of the states are bound.[240] In such situations, the individual state is in a dilemma: it has two binding obligations under international law and cannot comply with one, without breaching the other.

In order to determine whether one international obligation or other, on rule of international law, takes precedence over the other, a hierarchy of norms has to be established.[241] The conflict can only be solved, if the two obligations are of different levels in the hierarchy of norms, because then the hierarchically higher norm invalidates the lower norm. If the two obligations are of the same hierarchical level of norms, there is no other solution than for the state to choose freely, with which rule it wants to comply with and which one it prefers to breach and thus, incur responsibility for that breach.[242]

The hierarchical structure in international law is 'traditionally underdeveloped'[243] but there are some basic rules. In practice, 'a vocabulary that gives expression to something like an informal hierarchy in international law' has developed, namely article 103 UN Charter, *jus cogens* and obligations *erga omnes*.[244] Article 103 of the UN Charter states that

> [i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Besides the obligations that derive directly from the UN Charter, such as the respect and promotion of human rights and fundamental freedoms in Article 55c, Article 103 also encompasses binding decisions of UN organs.[245] This includes resolutions of the UN SC made under Chapter VII of the Charter which have to be carried out by all UN MS according to Article 25 UN Charter.[246] Therefore scholars assume primacy of UN SC resolutions over other international obligations.[247] This however is limited to decisions, which are taken within the limits of the powers of the SC, as 'decisions *ultra vires* do not give rise to any obligations to begin with'[248].[249]

University of Cape Town

---

[240] A Tzanakopolous *Collective Security and Human Rights* (2010) p 2 available online http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677477 [accessed 09.09.2013]
[241] *Ibid*. 4,5
[242] *Ibid*. p4
[243] *Ibid*. 5
[244] Koskenniemi, M. (Rapporteur) *Fragmentation of International Law: Difficulties arising from the diversification and Expansion of International Law* International Law Commission fifty-eighth session (2006) UN doc. A/CN.4/L.682 at 327 available online http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf [accessed 09.09.2013]
[245] *Ibid*. 331
[246] *Ibid*.
[247] *Ibid*. 331; R Bernhardt 'Article 103' in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (2002) p. 1295
[248] Koskenniemi (244) 331; Tzanakopolous (240) 166
[249] Tzanakopoulos (n111) 166

It is generally recognised that *jus cogens* or peremptory norms of international law are superior to all other rules of international law.[250] They are defined in the Vienna Convention on the Law of Treaties as

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[251]

There are very few norms with *jus cogens* status. Examples have been provided by the ILC and include the prohibition of the use of force[252], aggression, slavery, genocide[253], piracy, racial discrimination and torture.[254] However, the details of these rules, as well as examples from other areas are still disputed.[255] It can be assumed that all *jus cogens* norms are *erga omnes* obligations.[256]

Article 103 *prevails* over any other agreement, which means that other obligations deriving from treaties (public or private law) remain valid but the state has the obligation 'not to give effect to such contracts'.[257] This includes, in principle[258], even human rights obligations under regional treaties such as the ECHR.[259] As Koskenniemi acknowledges, 'this may give rise to difficult issues of liability and compensation for non-performance'[260] which are the subject of this paper.

In the situation of a conflict of Article 103 UN Charter with *jus cogens*, however, obligations deriving from Article 103 Charter become invalid.[261] Other obligations that conflict with *jus cogens* norms also become invalid, such that they do not give rise to any 'legal consequence whatsoever'.[262]

Other obligations of states, such as customary law or treaty obligations, are hierarchically below *jus cogens* norms and article 103 UN-Charter. To determine primacy among these obligations, mere 'conflict rules' like *lex posterior derogat legi priori* or *lex specialis derogare lege generali* have to be applied. For treaties, the rule of *res inter alios acta,* meaning a treaty does not affect third parties, are further of relevance. States that are not party to the UN[263] can, in theory, claim this principle in relation to obligations under article 103 UN Charter.[264]

This hierarchy and its consequences has been subject to the ECtHR jurisdiction, which ruled that MS of the EU remain responsible under the ECHR for acts committed by their organs in fulfilment

University of Cape Town

---

[250] De Schutter (n76) 96; Koskenniemmi (244) 365
[251] Article 53 Vienna Convention on the Law of Treaties
[252] *Nicaragua* (n90)
[253] *Armed activities on the territory of Congo (New Application 2002) (Congo v Rwanda)* ICJ Judgment (3rd February 2006) at 64 available online http://www.icj-cij.org/ [accessed 09.09.2013]
[254] Comment 5 to Article 26 DASR (n56)
[255] Shaw (n60) 118
[256] Koskeniemmi (244) 404
[257] *ibid*. 332,333; *Nicaragua* (n90) 107
[258] Insofar as the duties (under the ECHR) are not yet recognized as *jus cogens*
[259] Koskenniemi (n244) 338,
[260] *Ibid*. 332
[261] *Ibid*. 346;
[262] *Ibid*. 365
[263] All states are member to the UN, those which are listed as non-members are states, whose quality as a state is disputed, such as the Palestinian Territories or Western Sahara. A list of the current member states to the UN is available online http://www.un.org/en/members/index.shtml
[264] Koskeniemmi (n244) 343

of obligations towards the EU and other IOs.[265] In *Bosphorus*, a case that is representative of this point, the Court stated that

> absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer [of sovereign powers] would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards […]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.[266]

This solution of a conflict of obligations can be based on the principle of *lex posterior derogat legi priori* as the EU was established consequently to the ECHR as well as the principle *res inter alios acta,* as the MS of the EU are not all the same as the MS to the ECHR.

In *Behrami*, the ECtHR interpreted the ECHR 'in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties […] [including] Articles 25 and 103'[267] and thereby affirmed that obligations under the UN Charter prevail over the obligations under the ECHR. Therefore the ECtHR insisted that 'acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions' cannot be reviewed by the court.[268] In *Al Jedda* the court again acknowledged the supremacy of article 103 UN Charter but also found that article 103 has to be interpreted in accordance with the international human rights obligations of states.[269]

In the *Kadi* case, which concerned the application of the UN SC sanction regime under SC Resolution 1267(1999), the European General Court (EGC) examined whether the UN SC had violated *jus cogens* norms and could not find such a violation.[270] In its judgment of appeal, the European Court of Justice (ECJ) considered the deliberations of the EGC but found that it was not relevant whether the SC Resolution violated *jus cogens* or not, but only whether the act of implementation was in accordance with basic values of the EU. The Court stated

> […] that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights […][271]

The court thereby tried to safeguard basic rights and values which it found to be insufficiently protected on the international level.[272] This situation of different standards of basic rights protection

---

[265] *Mathews* (n186) 32; *Bosphorus Hava Yollaru v Ireland* ECtHR (30.6.2005) Application No 45036/98 at 145 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]; *Cantoni v France* ECtHR (11.11.1996) Application No 17862/91 at 30 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]; *Waite and Kennedy* (n15) 67; M*& Co v Germany* Application No. 13258/87 at 7 available online http://hudoc.echr.coe.int/
[266] *Bosphorus* (265) 145
[267] *Behrami* (30) 147
[268] *Ibid.* 149 (emphasis added)
[269] *Al Jedda* (38) 102
[270] Kadi EGC (11) 238; J Kokott 'The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?' in *European Journal of International Law (EJIL)* pp 1015-1024:1018
[271] Kadi ECJ (11) 185

University of Cape Town

within the different levels of the international hierarchy is similar to the moments in which the ECtHR ruled in *Bosphorus* and *Mathews* or the German Constitutional Court decided *Solange I*. [273]

The *Kadi* judgment, however, shows that the hierarchy of norms in international law and their consequences are not curved in stone and exceptions are possible. In line with this *rebellion* of the ECJ against the UN SC resolutions are the arguments for the lawful 'disobedience' of the UN SC through national and regional courts that have been brought forward by Tzanakopoulus. He suggests that 'states can respond to unlawful sanctions imposed by the SC in a decentralised manner by disobeying the SC command […]'[274]. A similar argument is developed by Sarooshi, who argues that states can 'object' to IOs exercise of delegated or transferred sovereign powers and that especially national courts can 'block' decision from IOs from having effect within the domestic system.[275]

There is, therefore, a hierarchy of norms, which determines which of the conflicting obligations has to be fulfilled or whether a state can freely choose. If the conflicting obligation is a norm of the same hierarchy or an obligation conflicting with the UN Charter, it remains valid. If the obligation in question conflicts with a *jus cogens* norm, it becomes invalid. Only in this latter case, the state responsibility towards third parties perishes. In all other situations of normative conflicts, the state duty remains to either fulfil its obligation or to take responsibility for the failure.

In the light of the foregoing arguments is clear that the fact that a certain conduct is obligatory under the rules of an IO does not give the MS *carte blanche* to act according to this obligation and thereby escape its other obligations under international law. Therefore, there is a high chance to hold MS responsible for the implementation of decisions of IOs within their own territory.

University of Cape Town

3. The Conferral of Sovereign Powers from the MS to the IO

This last part analyses the state's responsibility for the act of conferring sovereign powers to the IO. It is recalled that IOs are created by their MS through the transfer of sovereign powers.[276] Therefore the MS lay the causal ground for any activity of the IO, including harmful acts of IOs that would, if committed by a state, constitute the breach of the state's international obligation. With regard to IOs which are based on *transferred* powers and act outside the MS territory this moment is of particular importance considering that the state cannot influence the decision making process within those IOs. Further, if the activities of the IO happen outside the alleged MS's territory without the assistance through personnel or organs, the state practically does not act at all. Even if the MS provides personnel, organs or other aid to a mission, the wrongful act of the IO is often not foreseeable, hence the MS cannot be held responsible for providing the aid.[277] The moment of

[272] Kokott (270) 1018; C Tomuschat 'The *Kadi* Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?' in *Yearbook of European Law* (2009) pp.:654-666:660
[273] More in detail below in section D III 3 b) and D IV
[274] Tzanakopoulos (111) 154; similar Kokott (270) 1018
[275] Sarooshi (111) 115, 118
[276] See above section D I
[277] See above section D III 2b) 1)

conferring the sovereign powers to the IO is then the only moment, where responsibility for the *act of the state* might be established.

Therefore it has been argued that when a state confers its sovereign powers to an IO, the state incurs international responsibility for the acts of the IO which are based on these conferred powers. Older version of the DARIO seemed to intent a codification of this rule. The DASR is understood by some scholars to codify this otherwise unwritten norm. These provisions will be presented at first. Secondly, currently existing *due diligence* obligations of MSs will be analysed and extended to the *due diligence* obligation of states to ensure that after a conferral of sovereign powers to an IO the rights of third parties continue to be secured. The ECtHR's case law and its *equivalent protection* formula as well as general legal principles that support the *due diligence* concept will be considered.

a) The Provisions of the DARIO and DASR

Sarooshi and other scholars suggest that MS are responsible for acts of the IO on the basis of article 5 DASR.[278] Article 5 DASR[279] states that

> [t]he conduct of a person or entity which is not an organ of the State under article 4 [DASR] but which is *empowered* by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

At first blush this argument seems valid, as the pure text of the norm can be understood as encompassing IOs: and IO is an 'entity' which 'is empowered by the law of the state' with the sovereign powers of the state 'to exercise elements of the governmental authority'. Their analysis however does not go beyond the mere wording of the norm. They do not address the commentary to article 5 DASR or the *travaux préparatoires* which mention several examples for the application of the norm but do not list IOs. Further to that, there is also no consideration for article 57 DASR which explicitly stipulates that the DASR should not prejudice questions of responsibility under international law of states for the conduct of an IO. These two latter points however exclude, in my view, the applicability of article 5 DASR for acts of IOs.

The prohibition on states against circumventing their international obligations through the creation of IOs was discussed early in the creation of the drafting process of the DARIO by the ILC.[280] The 2006 version of the prohibition stipulated that

> [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

[278] Saroohsi (111) 102; Naert (80) 157; V Lowe 'Can the European Community Bind the Member States on Questions of Cusotmary international Law?' in M. Koskeniemmi (ed) *International Law Aspects if the Euroean Union* (1998) pp 149-168:163,164
[279] Emphasis added
[280] Article 28 ILC *Report on the fifty-eight session* (2006) UN doc..A 61/10 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]

University of Cape Town

> commits an act that, if committed by that State, would have constituted a breach of that obligation.[281]

The commentary explained further that 'a specific intention of circumvention is not required' and that states therefore could not avoid their responsibility for the IOs acts with the argument that they had not intended to circumvent their international obligations.[282] The norm however excluded MS responsibility for 'unwitting results of providing the IO with competence'.[283] On the basis of this proposed norm, some scholars argue for the responsibility of MS for acts of IOs.[284]

This proposal did not, however, survive the extensive discussions around it: today, the prohibition against circumventing the international obligations of states is codified in Article 61 DARIO and has a substantially different content. The new article 61 DARIO no longer refers to the original transfer of powers from the state to the IO. Circumvention according to this new norm is 'taking advantage of the act that the organization *has* competence in relation to the subject matter'[285] and 'causing the organization to commit an act that, if committed by the state would have constituted a breach of the obligation [of the state]'. Article 61 refers to the use of the *existing* separate legal personality of IOs.[286] To apply this article, a 'significant link' between the act of the IO and the circumvention by the MS has to be established - a condition which is not fulfilled by the mere creation of the IO.[287]

Therefore, the establishment of the IO no longer falls into the wording of this latest article. The 'intention to avoid compliance' is, in this latest version of the article is seen as implicit in the word circumvention and therefore a necessary precondition of the responsibility.[288] Because of these latest developments, the prohibition to circumvent international obligations in the sense of Article 61 DARIO can no longer be applied to establish state responsibility in the moment of the creation of the IO when sovereign powers are transferred for subsequent acts of IOs.

University of Cape Town

b) *Due Diligence* Obligations of States

Traditionally, *due diligence* imposes on states the duty to prevent the use of their territory in a way contrary to the rights of other states.[289] This obligation applies to any situation where such acts are committed within a state's territory, regardless of the author.[290] This *due diligence* obligation to protect other state's interests has been extended to the duty to protect the rights and interests of foreign and national individuals within the state's territory, particularly against human rights

[281] Article 28 ILC Report (n280)
[282] *Ibid* Comment (2)
[283] *Ibid*
[284] De Schutter (76) 77, 78; Naert (80) 157
[285] Emphasis added
[286] Comment (1) to article 61 DARIO (n16)
[287] *Ibid*. Comment (7) to article 62
[288] *Ibid.* Comment (2) to article 61
[289] *Island of Palmas case (Netherlands, USA)* Arbitratior: Max Huber (4.4.1928) in *Reports of International Arbitral Awards* Volulme II pp 829-871:839 available online http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf [accessed 09.09.2013]
[290] Klein (176) 310

violations.[291] Today, this extended understanding of the state's *due diligence* obligation to protect individuals is well established and regularly applied by international human rights courts.[292]

Under the law of international responsibility acts and omissions are equated[293] and only the state's duty differs: whereas the wrongful character of an action results from an international prohibition or other the obligation 'not to do'[294], the wrongful character of an omission derives from the non fulfilment of an international 'obligation to act'[295] or 'the fact of not doing that which ought to be done'[296]. Therefore the omission to exercise *due diligence* gives rise to MS responsibility if an obligation to exercise the due diligence exists.

If an IO commits an act that violates human rights on the territory of the state and the state omits to exercise his *due diligence* obligations, it incurs international responsibility.[297] If the state has previously agreed to the act of the IO, the question of conflicting international obligations of the state arises again and has to be solved according to the principles described above.[298] It has to be emphasised again, that the MS is then not responsible for the *act of the IO*, but for *its own act*, namely the omission to exercise *due diligence*.[299] In regard to IO's activities on the states territory, these *due diligence* considerations are not disputed.

Beyond this '"territorial" responsibility'[300] a wider understanding of due diligence obligations has been proposed in different fields of law. In the context of activities of transnational corporations, a growing number of authors suggest to extend the duties of states to protect third interests to the extraterritorial activities of those (corporate) nationals.[301] Regarding the relation of IOs and their MSs, Klein puts forward that 'due diligence would require, that states *ensure* that the rights and interests of third parties are not violated in the course of activities of the organization which they have created'.[302] Klein points out that some international conventions, such as the UN Convention on the Laws of Seas (UNCLOS)[303], do provide for *due diligence* obligations of MS towards IOs.

University of Cape Town

---

[291] C Benninger-Budel *Due Diligence and its Application to Protect Women from Violence* (2008) at 13; N Jaegers *Corporate Human Rights Obligation: In Search of Accountability* (2002) at 148, Velásquez-Rodríguez v. Honduras (merits) IACtHR (29.7.1988) available online http://www.corteidh.or.cr/index.php/jurisprudencia [accessed 09.09.2013]

[292] *Osman v United Kingdom* ECtHR (28.10.1998) Application No 23452/94 at 115 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]; *E and others v The United Kingdom* ECHR (26.11.2002) Application No 33218/96 at 88 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]; *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* African Commission on Human and Peoples' Rights Comm. No. 74/92 (1995) available onlinhttp://www1.umn.edu/humanrts/africa/comcases/74-92.html [accessed 09.09.2013] and *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso* African Commission on Human and Peoples' Rights, Comm. No. 204/97 (2001) para 42 available online http://www1.umn.edu/humanrts/africa/comcases/204-97.htmlhttp://www1.umn.edu/humanrts/africa/comcases/74-92.html [accessed 9.9.2013]; for a comprehensive examination of regional courts jurisprudence see A Clapham *Human Rights Obligations of Non-State Actors* (2006) Chapter 9

[293] Article 2 DASR (56); *Affaire relative à l'acquisition de la nationalité polonaise (Allemane c Pologne)*, 24 July 1924, 1 RIAA 401-428:425, available online http://untreaty.un.org/cod/riaa/cases/vol_I/401-428.pdf [accessed 9.9.2013]; *Corfu Channel (UK v Albania)* ICJ Judgment (9.4.1949) at 23 available online http://www.icj-cij.org/ [accessed 09.09.2013]

[294] F Latty 'Actions and Omissions' in (Crawford, J. ed.) *The Law of International Responsibility* (2010) pp 355-363:356

[295] *Ibid*. 357

[296] *Ibid*. 358

[297] Klein (176) 310

[298] See section D III 2. b) (2)

[299] Klein (176) 310

[300] *Ibid*. 311

[301] M Sornarajah "Linking State Responsibility for Certain Harms Caused by Corporate National abroad to Civil Recourse in the Legal System of the Home State" in G. Scott (ed.) *Torture as Tort* (2001) Hart Publishing: Oxford and Portland, Oregon pp 491 – 512:509; Jägers (291) 171-172; R McCorquodale 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by corporations of International Human Rights Law' in *Modern Law Review* (2007) pp 599-626:618.

[302] Klein (176) 311 (emphasis added)

[303] Article 129 (3), 139 (1)(2) UN *Convention on the Laws of Seas (1982)* available online http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm [accessed 09.09.2013]

I want to further develop and specify Klein's ideas on *due diligence* obligations of MS towards IOs. I argue, that states have a *due diligence* obligation in the moment of conferring sovereign powers to the IO. This obligation is to ensure, that the sovereign powers are not used contrary to the states international obligations. That means the state has to ensure, that the IO provides the same protection of rights towards third parties as the state would have to, if the state itself was exercising the conferred sovereign powers. In practice that would mean that the state has to ensure two things: first that the IO is bound by the same international obligations as the state (substantial obligations) and second, that the acts of IOs are subject to judicial review in independent courts in the same way, the MS's acts can be reviewed (procedural obligations). Therefore, when conferring sovereign powers to the IO the state has to oblige the IO to subject itself to international tribunals such as the ECtHR, the IACtHR or the ICJ. I have to emphasise again, that this suggestion is not yet accepted in international law. The case law of the ECtHR as well as general principles of law however do support this view.

(1) The Case Law of the ECtHR

The case of *Matthews v United Kingdom* concerned the right of citizens of Gibraltar to vote in the election for the European Parliament. This right was denied by Britain (who partly governs Gibraltar as overseas territory), even though Gibraltar was subject to EU legislation and bound by EU laws. The ECHR decided that Britain had to ensure the right to vote of the people of Gibraltar and stated that 'the Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be "secured". The member states' responsibility therefore continues even after such a transfer'[304].

The case *M & Co v Germany* concerned a German limited partnership that had a dispute with the EC regarding price agreements with other companies. The plaintiffs complained, that their right to a fair hearing and the access to a court among other basic rights were denied by the EC. The court found in an *obiter dictum* that

> […] the Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless, The Commission recalls that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty" […]. The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. [305]

In the case *Waite and Kennedy* concerning a labour dispute with the European Space Agency the ECtHR similarly found that

[304] *Matthews* (186) 32
[305] *M & Co* (265) 8

University of Cape Town

> where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.[306]

In the *Bosphorus* case the ECtHR confirmed this rule that the responsibility of MS continues even after the transfer of sovereign powers. Quoting the cases of *Waite and Kennedy* and *M & Co*, the Court explained that a state that transfers parts of its sovereignty to an international organization cannot be completely freed from its responsibility under the Convention in the areas transferred as this would contradict the purpose of the Convention.[307]

According to these cases, there is a rule according to which MS's can be held responsible for conferring sovereign powers to IOs without ensuring that the rights of third parties continue to be secured. It should be noted that all these cases concerned only human rights violations within the alleged states territory. Therefore I suppose that they support the proposal for a *due diligence* obligation in the moment of conferring sovereign powers only to that extent, that the MS have to ensure that human rights protection is secured within their territory.

(2) Legal Principles

In addition to the case law, there are two internationally recognised legal principles that support the proposal of due diligence obligations to secure human rights protection. One is the principle *nemo plus iuris transferre potest quam ipse habet* which means that one can only transfer those powers or rights that oneself possesses. The other one is the principle *pacta sunt servanda*. Both support the view that MS have certain *due diligence* obligations when transferring their sovereign powers to an IO.

Through the transfer of sovereign powers by a MS to an IO, the MS reduces its own set of sovereign powers. If it then wants to transfer sovereign powers to another IO it is axiomatic, that the state can only transfer the powers it retains (*Nemo plus iuris transferre potest quam ipse habet*). In practice that would mean that the sovereign powers which a MS transferred to the UN cannot subsequently be transferred to another IO, for example to the European Union (EU), whose predecessor the European Community (EC) was established chronologically after the UN. Equally, the duties of the MS under the UN Charter should not be overwritten by the duties of the EU. [308] This view was supported by *Kadi* when the EGC held that

[306] *Waite and Kennedy* (n15) 67
[307] *Bosphorus* (n265) 154
[308] De Schutter (n76) 58; Tomuschat (272) 656; P Pescatore 'External relations in the case law of the Court of Justice of the European Communities' in *Common Market Law Review* (1979) pp 615-645:638

University of Cape Town

> insofar as the powers necessary for the performance of the Member States' obligations under the Charter of the United Nations have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those powers to that end [to comply with the pre-existing treaty obligations][309].

Therefore, when establishing the EU, the MS of the UN had the obligation to secure that their obligations under the UN-Charter are ensured through the EU. More generally, when states create IOs they have to exercise due diligence in ensuring that the IOs they create complies with obligations towards other IOs.

The idea of *nemo plus iuris transferre potest quam ipse habet* is complemented by the principle of *pacta sunt servanda.* Through the conclusion of agreements with third parties states do restrict their rights to exercise their sovereign powers in regard to the treaty topic. Therefore, from the moment that a state restricts its right to lawfully exercise its own sovereign powers through an agreement, it should only be allowed to transfer the restricted form of its sovereign powers. For example the sovereign power to make laws in whatever manner is restricted through the states obligations under the ECHR or the United Nations Covenants on Human Rights to only make laws which are in accordance with the human rights obligations under the treaty. The sovereign right of a state to use its territory in whatever manner is restricted by bilateral agreement on the use of border regions[310], multilateral environmental agreements (MEA)[311], human rights agreements or any other international agreements that gives third parties particular rights in regard to the use of the land. In my view, the state can then only confer the sovereign power afflicted with the duties from the agreement which has been concluded prior to the establishment of the IO. If this was not so, states could easily circumvent the principle *pacta sunt servanda* by transferring the sovereign powers which are necessary to comply with the treaty duties to an IO. Therefore, the principle of *pacta sunt servanda* supports the argument for the duty to exercise *due diligence* to ensure, that the IO secure the same standard of protection towards third parties as the state had to, before transferring its sovereign power.

A problem might be seen in the fact, that the most powerful IO, namely the UN, is older than most agreements of states regarding the protection of third parties, particularly the human rights treaties. Therefore one may ask whether it is possible to establish the duty to ensure equal protection retroactively. That is however a difficult task that might not be necessary in my view. As it has been shown above[312] the provision of personnel to an IO is the only constellation where MS responsibility at the level of implementing the decision cannot always be established. The reason was that harmful acts are often not foreseeable at the moment of providing the personal. Therefore, the state cannot be

[309] *Kadi* EGC (11) 198
[310] United States Environmental Protection Agency *US border agreements concerning safety and protection of air* available online http://www.epa.gov/international/air/agreements.htm[accessed 09.09.2013]; German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety *German bilateral agreements in the field of nuclear safety* available online: http://www.bmu.de/en/topics/nuclear-safety-radiological-protection/nuclear-safety/international/bilateral-collaboration/ [accessed 09.09.2013]
[311] Today there are over 250 MEAs in place: World Trade Organisation (WTO) *The Doha mandate on multilateral environmental agreements (MEAs)*available online http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm) [accessed 09.09.2013]
[312] in part D II b)

University of Cape Town

blamed for the mere provision of organs. I argue, that the state can be blamed for providing the organs without ensuring, that the rights of third parties, which might possibly be affected by the conduct of these organs, are secured. The reason is that these organs are equipped and trained by the state and they execute the transferred powers of the MS (under the *control* of the IO). Their existence is based on the sovereign power of the lending state as well as their performance, which normally happens under the control of the MS. Therefore the provision of organs is a second transfer of sovereign powers which complements the original transfer at the moment of creation of the IO. Therefore, when providing organs and personnel to an IO to assist with the implementation of the IOs decision, the state has due diligence obligations: the state has to ensure, that the IO that *controls* the MS's organs provides an equivalent standard of human rights protection towards third parties. This duty can be based on the same principles of *nemo plus iuris transferre potest quam ipse habet* and *pacta sunt servanda* as the duty to ensure equivalent protection when creating an IO.

One may further ask whether it is possible to impose a duty on states to only transfer sovereign powers under the premise that IOs exercise those powers in accordance with *subsequently* arising restriction of the sovereign powers of states. But strictly speaking, when a state has already *transferred* its sovereign powers to an IO, it does not have the right to restrict this power through human rights conventions or other agreements anymore. On the other hand, if the sovereign powers are *delegated*, the state retains the power to concurrently exercise the sovereign powers. Hence, a restriction of the states sovereign powers through an international agreement should then also have an effect on the power that has been delegated.

These legal principles are of high use to the due diligence argument, because they complement the already existing jurisprudence. They are applicable to all international obligations of states, including the international obligations of states concerning their extraterritorial activities.

(3) The Standard of Protection: Equivalent or Equal?

Now that the *due diligence* obligation to ensure that the rights of third parties continue to be secured after the transfer of sovereign powers is established, the applicable standard of protection still has to be developed. The ECtHR regularly decided that an *equivalent standard* of protection has to be secured. In *M & Co* the court stated that 'the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an *equivalent protection'*.[313] In *Bosphorus* the ECtHR found that act of states which are taken in compliance with the states obligations under an IO are justified

> as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling

[313] *M & Co* (n265) p 8 (emphasis added)

University of Cape Town

> their observance, in a manner which can be considered at least *equivalent* to that for which the Convention provides.[314]

The ECtHR ruled that equivalent protection only means 'comparable' protection, as the requirement of equal protection could contradict the purpose of the establishment of the IO.[315] This argument is supported by scholars that argue that it would be 'unfeasible' to bind IOs to the equal obligations of their MS as states have different international obligations.[316] Such a duty would either lead to incompatible obligations of the IO or it would split up the exercise of the sovereign powers and the corresponding international obligations which would be inapplicable in practice.[317]

However, the principles of law which establish the duty to provide the equivalent protection do not limit it to equivalent protection. They do, in fact, require equal protection. The courts' argument that the requirement of equal protection would contradict the purpose of the establishment of an IO makes sense only if the purpose of the IO's establishment is for the state to circumvent its international obligation. That however is not something, a legal scholar or a court should simply accept. The unfeasibility argument is not convincing: states should carefully weigh, whether to pursue international cooperation or the compliance with their own international obligations. If the international cooperation is more attractive, they should have to pay the price of being held responsible for this choice.

IV. The Relation between the Responsibility of IOs and MSs: a *Gradual Transition*

As it has been shown, MSs can be held responsible for their own acts in connection with the activities of IOs in *all* moments that lead to the act of the IO: during the decision making process within the IO, during the implementation of the decision and when transferring the sovereign powers to an IO. In fact, there is not one act of an IO for which it is impossible to find a causal *act of a MS* and establish MS responsibility for that act. At the end of the day it will be always arguable, that the MS did exercise *due diligence* when transferring sovereign powers to the IO.

Does that mean that MS are always responsible when an IO commits a harmful act? Continuous protection of human rights would then be ensured. Concurrent and secondary responsibilities have been suggested in the context of the MS's *responsibility by virtue of membership*.[318] When it comes to *responsibility of the MS for its own acts*, it would be strict to always hold the state responsible. The reason is that the cause for the responsibility of MS and IO are different ones, namely their respective *own acts*. On the other hand I think that *as long as* MS comply with their *due diligence* obligations and ensure the *equal standard* of protection that has just been discussed, it should be possible to release them from their responsibilities without waiving the claim for continuous protection of human rights.

[314] *Bosphorus* (265) 155
[315] *Ibid.*
[316] Naert (80) 134
[317] *Ibid*.
[318] Hirsch (n2) 154, 155

University of Cape Town

This idea has been inspired by the German Constitutional Court famous *Solange I*[319] decisions that stated that *as long as* (in German *solange*) the European Community (EC) does not provide a comprehensive catalogue of basic rights that is comparable to the German *Grundrechtskatalog* (Basic Rights), the Court is allowed to review acts of the EC. Later the Court found in *Solange II* [320] that as long as the European Union provides an effective protection of the *Grundrechte*, the Court will not exercise its jurisdiction over acts that are based on European Community law. Also the ECtHR used this expression in its case law.

This 'as long as'-formula provides for a flexible and *gradual transition* from the responsibility of MSs to the responsibility of IOs. It should be applied on a case to case basis to be able to take into account the individual circumstances of each case. In our times, where the regime of responsibility of IOs is not yet fully developed victims can refer to MSs. As soon as the MS do their homework and ensure an *equal standard of protection* through the IOs, victims can hold the IO responsible for its acts. This gradual transition does best accommodate the interests of the weakest objects in the system, the individual. But also for other third parties, such as states or transnational cooperation a *gradual transition* approach is adequate until the endless structural challenges the international community is facing are settled.

E. Applying the Concept of *Gradual Transition* of Responsibility to the Legal Black Hole

The suggested *gradual transition* approach to the apportionment of responsibility between the MSs and the IO were not employed in *Behrami*, *Beric* or *Boivin*. The responsibility *by virtue of membership* was denied, the separate legal personality was emphasised[321] and a responsibility for the MS *own acts* was not considered. The ECtHR considered only the act of the IO itself and whether this act had fallen within the MS jurisdiction which had to be denied.[322] As the ECtHR only has jurisdiction *ratione personae* over its member states, it found that it could not hear the cases.[323] As this paper has shown, it would have been possible to fill the legal black hole of human rights protection. Still, the ECtHR failed, without arguments, to establish a continuous protection of human rights.

In *Behrami*, the ECtHR focused on the question of attribution, or other, who had the *control* over the conduct in question (the omission to demine).[324] The ECtHR did not pronounce on a possible MS responsibility at the moment of transferring powers to the NATO or the UN, an act surely attributable to the state. Through the failure to consider the MS own acts, independent from any question of attribution of the finally harmful conduct, the ECtHR created the legal black hole. It denied its jurisdiction *ratione personae* over a case, in which the act of providing personnel to the UN and NATO and the standard of *equal protection* should have been considered. The court should have

[319] BVerfGE 37, 271, (*Solange I*).
[320] BVerfGE 73, 339, (*Solange II*).
[321] *Behrami* (n30) 144; *Boivin* (n15) 6;
[322] *Behrami* (n30) 152; *Beric* (n42) 30; *Boivin* (n15) 6,7
[323] *Ibid*
[324] *Behrami* (n30) 121

University of Cape Town

applied a *gradual transition* approach in connection with an examination of the MS's *own acts.* This would have enabled it to rely on its jurisdiction *ratione personae* as it would only have to examine the *act of the MS* vis-á-vis the ECHR. Instead the court escaped with the argument that it could not 'subject the acts and omissions of Contracting Parties which are covered by UN SC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court' as this would interfere with the UN's key mission.[325] This argument has already been rebutted above.[326]

In *Beric* the applicants just argued that the conduct in question was attributable to Bosnia and Herzegovina and did not, alternatively, argue for the responsibility of the UN MSs for transferring the sovereign powers to the UN without ensuring equivalent protection of third party rights.[327] That argument would have given the ECtHR another chance to pronounce on MS responsibility for the omission of *due diligence* duties.

Finally in *Boivin*, the applicant did argue for a responsibility of the MS because of their acts and omissions that are linked to their membership in Eurocontrol.[328] The court however could not find an *act of a state* in the context of Eurocontrol's activities.[329] It further refused to examine the MS's original conferral of sovereign powers and the provision of immunities to Eurocontrol. [330] It thereby rejected a *due diligence* approach to MS responsibility.

F. Conclusion

In parts B and C, this paper described the problems that arise from the increasing activity of IOs in the international public sphere. In part D, various possible ways of holding the MS of IOs responsible in the context of activities of IOs were explained. It has been shown that in theory the MSs can be held responsible for their *own acts* in the context of activities of IOs at every stage that leads to a harmful act of an IO. The *due diligence* obligations of MSs have been extended to the extraterritorial activities of IOs. The idea of the duty of 'equivalent protection' and how it has been developed by the ECtHR has been explained and extended to a proposal for *equal protection.* With these extensions and the proposed *gradual transition* of responsibility, continuous human rights protection can be ensured: either it is the state or the IO that can be held responsible for the cooperate activities of states on the international plane. The whole concept works without having to ignore the separate legal personality of IOs. It therefore does not affect the highly appreciated 'efficient and independent functioning of international organizations'[331]. Now it is the turn of the international lawyers and courts to implement this idea and thereby to establish a path for every victim of the harmful and unlawful exercise of sovereign powers to seek remedies and - in the end - justice.

[325] *Behrami* (n30) 149
[326] D III 1 b)
[327] *Beric* (n42) 22
[328] *Boivin* (n15) 4
[329] *Ibid*. 6
[330] *Ibid*.
[331] Higgins (16) 288

University of Cape Town

Bibliography

Cases, Advisory Opinions and Arbitration Awards

Abbasi v UK [2002] EWCA Civ.1598 available online http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html [accessed 09.09.2013]

Affaire relative à l'acquisition de la nationalité polonaise (Allemane c Pologne), 24 July 1924, 1 RIAA 401-428, available online http://untreaty.un.org/cod/riaa/cases/vol_I/401-428.pdf [accessed 09.09.2013]

Al-Jedda v UK ECtHR (7.07.2011) Application No 27021/08 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Armed activities on the territory of Congo (New Application 2002) (Congo v Rwanda) ICJ Judgment (3rd February 2006) available online http://www.icj-cij.org/ [accessed 09.09.2013]

Attorney General v Burgoa ECJ Case 812/79 (14. October 1980) online: http://curia.europa.eu/jcms/jcms/j_6/ [accessed 09.09.2013]

Bankovic and others v Belguim and others ECtHR (12.12.2001) Application No 52207/99 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Behrami and Behrami v France ECtHR (2.5.2007) Application No 71412/01 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Beric and others v Bosnia and Herzegovina ECtHR (16.10.2007) Application No 36357/04 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Biret v 15 MS of the European Union ECtHR (9.12.2008) Application No 13762/04 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Bosphorus Hava Yollaru v Ireland ECtHR (30.6.2005) Application No 45036/98 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Boivin v 34 Member States of the Council of Europe ECtHR (9.9.2008) Application No 73250/01 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Bustani v. Org. for the Prohibition of Chemical Weapons, ILO Administrative Tribunal, Judgment No. 2232 available online http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=95&p_and_or=AND&p_page=2 [accessed 09.09.2013]

C.F.D.T v the European Communities ECtHR (10.7.1978) Application No 8030/77 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Cantoni v France ECtHR (11.11.1996) Application No 17862/91 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Case concerning the Legality of the Use of Force (Serbia and Montenegro v Portugal) ICJ Judgment (15.12.2004) available online http://www.icj-cij.org/docket/files/111/8524.pdf [accessed 09.09.2013]

Chorzøw Factory (Germany v Poland) PCIJ Judgment (13.9.1928) available online http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm [accessed 09.09.2013]

University of Cape Town

Commission Nationale des Droits de l'Homme et des Libertes v. Chad African Commission on Human and Peoples' Rights Comm. No. 74/92 (1995) available online http://www1.umn.edu/humanrts/africa/comcases/74-92.html [accessed 09.09.2013]

Connolly v 15 Member States of the European Union ECtHR (9.12.2008) Application No 73274/01 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Corfu Channel (UK v Albania) ICJ Judgment (9.4.1949) available online http://www.icj-cij.org/ [accessed 09.09.2013]

E and others v The United Kingdom ECHR (26.11.2002) Application No 33218/96 at 88 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Gasparini v Italy and Belguim ECtHR (12.5.2009) Application No 10750/03 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

HT v Ahmed UK Supreme Court (27.1.2010) Judgment [2010] UKSC 2 *On appeal from: [2008] EWCA Civ 1187* available online http://www.supremecourt.gov.uk/docs/uksc_2009_0016_judgment.pdf [accessed 09.09.2013]

Island of Palmas case (Netherlands, USA) Arbitratior: Max Huber (4.4.1928) in *Reports of International Arbitral Awards* Volulme II pp 829-871 available online http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf [accessed 09.09.2013]

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt ICJ report 1980 p 73-98

J.H. Rayner (mincing lane) Ldt v Department of Trade and Industry and Others and related appeals Maclaine Watson & Co . Ldt. V Department of Trade and Industry British Court of Appeal Judgment (27th April 1988) available online http://www.uniset.ca/other/cs5/1989Ch72.html [accessed 09.09.2013]

Kadi and Al Barakaat v Council and Commission ECJ Case T-315/01, (21. September 2005) available online http://curia.europa.eu/jcms/jcms/j_6/ [accessed 09.09.2013]

Kadi and Al Barakaat v Council and Commission ECJ Case C-402/05 P, (3. September 2008) online via http://curia.europa.eu/jcms/jcms/j_6/ [accessed 09.09.2013]

Kokkelvisserij v The Netherlands ECtHR (20.1.2009) Application No 13645/05 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Lederspray case, German High Court, BGHSt 37, 106

Legality of the use by a state of nuclear weapons in armed conflict ICJ Advisory Opinion (8 July 1996) available online http://www.icj-cij.org/ [accessed 09.09.2013]

M*& Co v Germnay* ECmHR (9.2.1990) Application No. 13258/87 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Matthews v UK ECtHR (18.2.1999) Application No 24833/94 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) ICJ Judgment (Merits) (27.6.1986) available online http://www.icj-cij.org/ [accessed 09.09.2013]

Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso African Commission on Human and Peoples' Rights, Comm. No. 204/97 (2001) para 42 available online http://www1.umn.edu/humanrts/africa/comcases/204-97.htmlhttp://www1.umn.edu/humanrts/africa/comcases/74-92.html [accessed 09.09.2013]

Osman v United Kingdom ECtHR (28.10.1998) Application No 23452/94 at 115 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

University of Cape Town

Reparations for injuries suffered in the service of the United Nations ICJ Advisory Opinion (11. April 1949) available online http://www.icj-cij.org/ [accessed 09.09.2013]

Solange I Bundesverfassungsgericht (German Constitutional Court) (1974) BVerfGE 37, 271 available online http://www.servat.unibe.ch/dfr/bv037271.html [accessed 09.09.2013]

Solange II Bundesverfassungsgericht (German Constitutional Court) (1986) BVerfGE 73, 339 available online http://www.servat.unibe.ch/dfr/bv073339.html [accessed 09.09.2013]

Tadić ICTY Appeals Chamber (15.7.1999) Case no. IT-94-1-A available online http://www.icty.org/case/tadic/4 [accessed 09.09.2013]

The Mayanga (Sumo) Avas Tingni community v Nicaragua IACtHR (31.8.2001) available online http://www.corteidh.or.cr/index.php/jurisprudencia# [accessed 09.09.2013]

Velásquez-Rodríguez v. Honduras IACtHR Jugement (29.7.1988) available online http://www.corteidh.or.cr/index.php/jurisprudencia# [accessed 09.09.2013]

Waite and Kennedy v Germany ECtHR (18.2.1999) Application No 26083/94 available online http://hudoc.echr.coe.int/ [accessed 09.09.2013]

Westland Helicopters Ldt v Arab Organization for Industrial Organization and others ICC Court of Arbitration (5.3.1984) case no 3879/AS, *International Legal Materials* (1984) pp 1071-1089

Official Documents

Council of Europe *Third negotiation meeting between the CDDH and ad hoc negotiation group and the European commission on the accession of the European Union to the European convention on human rights*, 9th November 2012, CoE doc. 47+1(2012)R03 available online http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp [accessed 09.09.2013]

Gaja, G *First Report on Responsibility of International Organisations* UN doc. A/CN.4/532 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]

Higgins, R (Rapporteur of the 5th Commission of the International Law Commission) *The Legal Consequences for Member States of the non-fulfillment by international organizations of their obligations towards third parties* (1995) available online: http://www.ilsa.org/jessup/jessup07/basicmats/iil_higgins_article.pdf [accessed 09.09.2013]

Institute of International Law (Resolution) *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties* (1995) http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf [accessed 09.09.2013]

International Law Commission *Responsibility of International Organizations Comments and Observations received from international organizations* (14.2.2011) UN doc. A/CN.4/637 available online http://untreaty.un.org/ilc/sessions/63/63docs.htm [accessed 09.09.2013]

International Law Commission *Draft Articles on Responsibility of International Organisations with Commentaries*, Report of the ILC, Sixty-third session, UN doc. A/66/10 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]

International Law Commission *Draft Articles on State Responsibility for Internationally Wrongful Acts with Commentaries* Report of the ILC, Fifty-third session, UN doc. A/56/10 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]

International Law Commission *Report on the fifty-eight session* (2006) UN doc..A 61/10 available online http://www.un.org/en/documents/ods/ [accessed 09.09.2013]

University of Cape Town

International Law Association Report of the Berlin Conference (2004): Accountability of International Organizations available online via http://home.heinonline.org or http://www.ila-hq.org/en/publications/index.cfm [accessed 09.09.2013]

Koskenniemi, M. (Rapporteur) *Fragmentation of International Law: Difficulties arising from the diversification and Expansion of International Law* International Law Commission fifty-eighth session (2006) UN doc. A/CN.4/L.682 available online http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf [accessed 09.09.2013]

UN *Convention on the Laws of Seas (1982)* available online http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm [accessed 09.09.2013]

UN Security Council Resolution 1244, 10th June 1999, Annex 2 Nr. 3, UN doc. S/RES/1244 (1999) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement [accessed 09.09.2013]

UN General Framework Agreement for Peace In Bosnia and Herzegovina (14.December 1995) available online http://www.ohr.int/dpa/default.asp?content_id=368 [accessed 09.09.2013]

Books

Benninger-Budel, C. *Due Diligence and its Application to Protect Women from Violence* (2008) Martinus Nijhoff Publishers: Leiden

Bernhardt, R. "Article 103" in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (2002) p. 1295 Oxford University Press: New York

Brownlie, I. *Principles of Public International Law* 6ed (2003) Oxford University Press: Oxford

Brownlie, I. 'State Responsibility: the problem of delegation' in Ginther K. (Eds) *Völkerrecht zwischen normativen Anspruch und politischer Realität* (1994) Duncker & Humblot: Berlin, pp 300-301

Bröllmann, C. *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (2007) Hart Publishing: Oxford

Brunee, J. *Legitimacy and Legality in International Law* (2010) University Press: Cambridge

Clapham, A. *Human Rights Obligations of Non-State Actors* (2006) Oxford University Press: Oxford

De Schutter, O. "Human Rights and the Rise of International Organization: the Logic of Sliding Scales in the Law of International Responsibility" in J Wouters (ed.) *Accountability for Human Rights Violations by International Organizations* (2010) Intersentia: Antwerppp, pp 51-128

Hirsch, M. *The Responsibilty of Internatiional Organisations Towards Third Parties: Some Basic Principles* (1995) Martinus Nijhoff Publishers: Dordrecht

Jaegers, N *Corporate Human Rights Obligation: In Search of Accountability* (2002) Intersentia: Antwerpen

Klabbers, J. *International Institutional Law* 2ed (2009) Cambridge University Press: Cambridge

Klabbers, J. 'Presumptive Personality: The European Union in International Law' in M. Koskenniemi (ed.) *International Aspects of the European Union* (1998) Kluwer Law International: Amsterdam pp:.231-253

Klein, P. 'The attribution of acts to international organisations' in J Crawford (ed.) *The Law of International Responsibility* (2010) University Press: Oxford, pp 297-329

University of Cape Town

Latty, F 'Actions and Omissions' in Crawford, J. (ed.) *The Law of International Responsibility* (2010) University Press: Oxford, pp 355-363

Lowe, V 'Can the European Community Bind the Member States on Questions of Cusotmary international Law?' in M. Koskeniemmi (ed) *International Law Aspects if the Euroean Union* (1998) Martinus Nijhoff Publishers: Dordrecht, pp 149-168:163

Milanovic, M. *Extraterritorial Application of Human Rights Treaties* (2011) Oxford University Press: Oxford

Mosler, H. 'General Principles of Law' in R. Bernhard (ed.) *Encyclopaedia of Public International Law (EPIL)* Volume I (1992) pp.:511-527:515.

Naert, N. 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations' in J Wouters (ed.) *Accountability for Human Rights Violations by International Organizations* (2010) Oxford University Press: Oxford pp.:129-168

Sands, P. *Bowett's law if international institutions* 6th ed (2009) Sweet & Maxwell: London

Sarooshi, D *International Organizations and their Exercise of sovereign Powers* (2005) Oxford University Press: Oxford

Schemers, HG *International Institutional Law* (2003) Martinus Nijhoff Publishers: Dordrecht

Shaw, MN *International Law* 6ed (2008) Cambridge University Press: Cambridge

Sornarajah, M. "Linking State Responsibility for Certain Harms Caused by Corporate National abroad to Civil Recourse in the Legal System of the Home State" in G. Scott (ed.) *Torture as Tort* (2001) Hart Publishing: Oxford and Portland, Oregon pp 491 - 512

Tondini, M 'The "Italian Job": How to make International Organizations compliant with Human Rights and Accountable for their Violation by Targeting Member States' in J Wouters (ed.) *Accountability for Human Rights Violations by International Organizations* (2010) Oxford University Press: Oxford pp 169-212

Verdirame, G *The UN and Human Rights – Who guards the Guardian?* (2011) University Press: Cambridge

White, ND *The law of international organisations* 2ed (2005) Manchester University Press: Manchester

Tzanakopolous, A. *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (2011) University Press: Oxford

University of Cape Town

Journal Articles

Alvarez, J. 'Revisiting the ILC's Draft Rules on International Organisation Responsibility' in *Proceedings of the Annual Meeting (American Society of International Law)* (2011) pp 344-348

Amerasinghe, CF 'International legal personality revisited' in *Austrian Journal of Public and International Law* (1995) 47 pp 123-145

Amerashinge, CF 'Liability to Third Parties of Member States of International Organizations: Practice, Principleand Judicial Precedent' in *The American Journal of International Law* (1991) pp 259-280

Bonn, K. "New Directions in Responsibility: Assessing the International Law Commissions Draft Articles on the Responsibility of International Organizations" in *The Yale journal of International Law Online* 2011 pp 1-10:6

Combacau, J. '"primary" and "secondary" rules in the law of state responsibility categorizing international obligations' in *Netherlands Yearbook of International Law* (1985) pp 81-109:89

Dannebaum, T. 'Translation the standard of effective control into a system of effective accountability: how liability should be apportioned for violations of human rights by member state troop contingents serving as united nations peacekeepers" in *Harvard Journal of International law* (2010) pp 113-192

D'Aspermont, J. 'Abuse of Legal Personality of International Organizations and the responsibility of Member states' in *International Organizations law review* (2007) pp.:91-119:

Gal-Or, N. 'From Theory to Practice: Exploring the relevance of the draft articles on the responsibility of International organisations (DARIO) – The responsibility of the WTO and the UN' in *German Law Journal* (2012) pp 511-541

Gaultier, P 'The Reparations for Injuries Case Revisited: The Personality of the European Union' in Max Planck UNBD (2000) pp 331-361

Gaillard, E. 'International Organizations and Immunity from jurisdiction: to restrict or to bypass' in *International and Comparative Law Quarterly* (2002) 1-15.

Greenwood, C. 'The Tin Council Litigation in the House of Lords' in *The Cambridge Law Journal* (1990) pp 8-13

Klabbers, J. 'Introduction' in *Nordic Journal of International Law* (2001) pp 283-286

Klabbers, J. 'The concept of legal personality' in *Ius Gentium* (2005) 11 pp 35-66

Kokott, J 'The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?' in *European Journal of International Law (EJIL)* pp 1015-1024

McCorquodale, R. 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by corporations of International Human Rights Law' in *Modern Law Review* (2007) pp 599-626

Pellet, I. 'The Definition of Responsibility in International Law' in *The law of International Responsibility* (2010) pp 3-16

Pernice, I 'Völkerrechtliche Verträge internationaler Organisationen' *in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1988) pp 229-250

Pescatore, P. 'External relations in the case law of the Court of Justice of the European Communities' in *Common Market Law Review* (1979) pp 615-645

Ryngard, C. 'Member State Responsibility for Acts of International Organizations' in *Utrecht Law Review* (2011) pp 131-146

Sadruska, R. 'The Collapse of the International Tin Council: A Case of State Responsibility?' in *Virginia Journal of International Law* (1990) pp 845-890

Singer, M. 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' in Virginia Journal of International Law (1995) 53-163

Sereni, A. 'Agency in International Law' in *The American Journal of International Law* 1940 p.:638-660

Steyn, J. 'Guantanamo Bay: The Legal Black Hole' in *The International and Comparative law Quarterly* pp 1-15

Sturmer, A. 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' in *Harvard International Law Journal* (2007) pp 553-580

Tomuschat, C. 'The *Kadi* Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?' in *Yearbook of European Law* (2009) pp.:654-666

University of Cape Town

Wilde, R. 'Legal "Black hole"? Extraterritorial State action and international treaty law on civil and political rights' *in Michigan Journal of International Law* (2005) pp 739-806

Wilde, R. 'Enhancing Accountability at the International Level: The Tension between International Organisations and Member State Responsibility and the underlying policy issues at stake' in *ILSA Journal of International & Comparative Law* (2006) pp 395-415

Other scholarly articles

Ahlborn, C. 'Rules of International Organisations and Responsibility' *SHARES Research Paper* 02 (2011), Amsterdam Centre for International Law (ACIL) 2011-03, available at www.sharesproject.nl[accessed 09.09.2013]

Neumann, P. 'Immunity of International Organisations and alternative remedies against the United Nations' Seminar Paper *Vienna University* http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf [accessed 09.09.2013]

Tzanakopolous, A. *Collective Security and Human Rights* (2010) available online http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677477 [accessed 09.09.2013]

Online sources

Brandner S 'Making a case for a legal personality of the OSCE' in *OSCE Magazine* (March/April 2009) p 18-23 available online http://www.osce.org/secretariat/36184 [accessed 09.09.2013]

European Union, Press Release *EU ratifies UN Convention on disability rights* online: http://europa.eu/rapid/press-release_IP-11-4_en.htm [accessed 09.09.2013]

German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety *German bilateral agreements in the field of nuclear safety* available online: http://www.bmu.de/en/topics/nuclear-safety-radiological-protection/nuclear-safety/international/bilateral-collaboration/ [accessed 09.09.2013]

'Historical overview of number of international organizations by type1909-2011' in *Yearbook of International Organizations*, Martinus Nijhoff Brill, 2011 available online: http://www.brill.com/downloads/2011_YBIO5_Historical_overview_of_number_of_intl_organizations_by_type.pdf [accessed 09.09.2013]

Organisation for Security and Cooperation in Europe – The legal Framework (2010) online: http://www.osce.org/mc/87192 [accessed 09.09.2013]

Polakiewicz *EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?* Online: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/Oxford_18_January_2013_versionWeb.pdf [accessed 09.09.2013]

United States Environmental Protection Agency *US border agreements concerning safety and protection of air* available online: http://www.epa.gov/international/air/agreements.htm[accessed 09.09.2013];

Webiste NATO *Consensus decision-making at NATO* http://www.nato.int/cps/en/natolive/topics_49178.htm [accessed 09.09.2013]

Wikipedia *Black Hole* http://en.wikipedia.org/wiki/Black_hole#cite_note-1 [accessed 09.09.2013]

World Trade Organisation (WTO) *The Doha mandate on multilateral environmental agreements (MEAs)* available online http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm[accessed 09.09.2013]

University of Cape Town

Abbreviations

CBU	Cluster Bomb Units
DARIO	Draft Articles on the Responsibility of International Organizations
DASR	Draft Articles on State Responsibility
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission on Human Rights
ECtHR	European Court for Human Rights
EGC	European General Court
ESA	European Space Agency
EU	European Union
Eurocontrol	European Organization for the Safety of Air Navigation
EWCA	England and Wales Court of Appeal
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court for Human Rights
IATTC	Inter-American Tropical Tuna Commission
ICC	International Criminal Court
ICCPR	the International Covenant on Civil and Political Rights
ICESCR	Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILL	Institute of International Law
ILO	International Labour Organization
ILOAT	International Labour Organization Administrative Tribunal
IO	International Organisation
ITC	International Tin Council
MEA	Multilateral Environmental Agreements
MS	Member State
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organisation
OPCH	Organization for the Prohibition of Chemical Weapons
OPEC	Organization of Petroleum Exporting Countries
OSCE	Organisation for Security and Co-operation in Europe
UN	United Nations
UNCLOS	United Nations Convention on the Law of Seas
UN SC	United Nations Security Council
WHA	World Health Assembly
WHO	World Health Organization
WTO	World Trade Organization

University of Cape Town