

This article is published in a peer-reviewed section of the Utrecht Law Review

## Member State responsibility for the acts of international organizations

Cedric Ryngaert  
Holly Buchanan\*

### Introduction

It is a generally settled principle of international law that when a violation of international law occurs, responsibility or liability, and an obligation to make some form of reparation, follow. As far as states are concerned, the International Law Commission (ILC) has laid this down in its Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter Articles on State Responsibility) in 2001.<sup>1</sup> These Articles do not, however, address the issue of the responsibility of *international organizations* (IOs) for internationally wrongful acts.<sup>2</sup> Therefore, after the ILC completed its second reading of the Articles on State Responsibility, the UN General Assembly recommended that the ILC begin work on the topic of the responsibility of IOs.<sup>3</sup> The ILC's work on the responsibility of IOs was clearly informed by the enhanced ability of such organizations to commit wrongful acts given their continuously increasing number, as well as their mandates, scope and influence.<sup>4</sup> More legal clarity as to the responsibility of IOs is all the more required considering that the recent creation of many new IOs provides more opportunities for shielding the collective action of states behind the organizational veil, or separate legal personality of the organization.<sup>5</sup>

---

\* Dr Cedric Ryngaert, Lecturer in International Law, Utrecht University School of Law (the Netherlands), Leuven University (Belgium), email: [C.M.J.Ryngaert@uu.nl](mailto:C.M.J.Ryngaert@uu.nl). Holly Buchanan, Esq., J.D. (Chapman University), LL.M. (Utrecht University), email: [hollybe3@gmail.com](mailto:hollybe3@gmail.com).

1 (Draft) Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, Arts. 1 and 34, UN GAOR 56th Session, Supp. No. 10, UN Doc. A/56/10 (2001), p. 43 (hereinafter Articles on State Responsibility).

2 Ibid. Art. 57 of the ILC's Articles on State Responsibility specifically states that '[t]hese articles are without prejudice to any question of the responsibility under international law of (...) any State for the conduct of an international organization', thus leaving this issue to be dealt with within the framework of the law of international organizations. Ibid. See also J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, 2002, p. 311.

3 International Law Commission, *First Report on Responsibility of International Organizations*, UN Doc A/CN.4/532 (2003).

4 A. Stumer, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections', 2007 *Harvard International Law Journal* 48, no. 2, pp. 553-580, at p. 553.

5 T. Grant, 'International Responsibility and the Admission of States to the United Nations', 2009 *Michigan Journal of International Law* 30, pp. 1095-1185, at p. 1136.

The ILC's work recently culminated in the 2009 Draft Articles on the Responsibility of International Organizations (DARIO),<sup>6</sup> in which it is now laid down that '[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization'.<sup>7</sup> It is not our ambition to discuss these articles in detail in these pages. Rather, we would like to answer one specific question of responsibility arising in an international institutional context: can a *Member State* of an IO be held liable for the wrongful acts of an IO, and if so, under what circumstances? An answer to this question is especially significant given 'the risk that States will resort to the organizations they constitute as a comprehensive means to avoid responsibility for what, in truth, are their own initiatives.'<sup>8</sup>

After defining the terms 'responsibility' and 'liability' in Part 1, Part 2 of this article sets out the theoretical basis of the responsibility framework for IOs. It discusses how the separate legal personality of IOs has an impact on the attribution of IO acts to the IOs themselves rather than to their Member States. It is also argued that IOs incur obligations under international law for the violation of which they can be held responsible. Accordingly, strictly speaking, there is no responsibility gap as regards wrongful acts of IOs.

However, while, theoretically, internationally wrongful acts that are attributable to an IO can engage the organization's responsibility, one cannot deny that there are preciously few *enforcement* mechanisms that have jurisdiction to hold IOs liable for their transgressions.<sup>9</sup> Therefore, it is not surprising that victims of rights violations committed by IOs have attempted to pierce the organizational veil and hold Member States liable, either by virtue of Member States' membership in an IO alone or by virtue of the presence of a specific circumstance. The lawfulness and desirability of holding Member States liable for an IO's acts form the main thrust of this article. Part 3 inquires whether, and under what circumstances, a Member State can incur liability for wrongful acts committed by an IO *by virtue of membership alone*, whereas Part 4 examines whether Member States can be held liable for the IO's acts *on other grounds*.

With respect to basing liability of Member States on their mere membership of an IO, it is argued in Part 3 that, because this ground of liability makes a mockery of the separate international legal personality of IOs, one should be extremely cautious in accepting it. This is also the approach of the ILC and the *Institut de Droit international*.<sup>10</sup> That said, as will be set out in Part 4, in narrowly defined circumstances, where an intervening act of a Member State can be discerned, the separate international legal personality of an IO can justifiably be pierced, and Member States may incur international responsibility for the wrongful acts of the IO. Part 5, finally, concludes.

It should be noted at the outset that this article only deals with Member State responsibility for the wrongful acts of IOs, and not for wrongful acts that may be committed in a context of IO-authorized activity but which are the acts of the Member States in the first place. A good example is provided by wrongful acts committed by troops contributed, or placed at the disposal, by Member States to a UN-led peace-keeping or enforcement mission. To the extent that Member States continue to exercise command and control over such troops – which will often be the

---

6 Draft Articles on the Responsibility of International Organizations, in Report of the Law Commission on the Work of its Sixty-First Session, Art. 2(b), UN GAOR, 64th Session, Supp. No. 10, UN Doc. A/64/10 (2009) (hereinafter DARIO).

7 Ibid., Art. 3.

8 Grant, *supra* note 5, p. 1136.

9 In contrast, there are a considerable number of mechanisms that can hold *states* liable. See, e.g., the International Court of Justice and the regional human rights courts: European Court of Human Rights, Inter-American Court of Human Rights and African Court on Human and Peoples' Rights.

10 DARIO, *supra* note 6, Art. 61 (*a contrario*).

case<sup>11</sup> – their acts are their own and thus *ab initio* attributable to them, and not to the IO (UN) which has only authorized the mission.<sup>12</sup>

## 1. ‘Responsibility’

This article uses the terms ‘responsibility’ and ‘liability’ interchangeably. It will focus on the responsibility/liability of IOs for wrongful acts that amount to violations of international law, while not entirely excluding such responsibility/liability for wrongful acts that do not rise to the level of a violation of international law (e.g., responsibility/liability of IOs in domestic tort law or the law of contracts). After all, as far as Member State responsibility/liability for the acts of IOs is concerned, the conceptual issues are the same, whether responsibility/liability relates to acts that were wrongful under international law or domestic law.<sup>13</sup>

Schermers and Blokker have noted that ‘the term ‘responsibility’ is used in relation to acts that involve breaches of international law’, whereas “‘liability’” has a broader meaning; it also refers to acts that are not unlawful (but cause damage)’.<sup>14</sup> The ILC has similarly separated the question of liability for acts that are not prohibited by international law, but nevertheless have injurious consequences, from the question of international responsibility for acts that are linked with a breach of an obligation under international law.<sup>15</sup>

However, Schermers and Blokker also note that ‘[t]here is no generally agreed use of the terms “responsibility” and “liability”’.<sup>16</sup> The DARIO Commentary is however replete with references to the term ‘liability’ as used by various IOs, courts, and authors as regards acts that may have well been unlawful under international law.<sup>17</sup> The *Institut de Droit international*, for its part, in its influential resolution on ‘The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties’, only uses the term ‘liability’, although being an institute concerned with international law clearly it does not exclude acts that are prohibited by international law.<sup>18</sup>

---

11 Cf. T. Dannenbaum, ‘Translating 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’, 2010 *Harvard International Law Journal* 51, no. 1, pp. 113-192, at pp. 142-151.

12 DARIO, supra note 6, Art. 6 (*a contrario*) (‘The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.’). The Commentary to this article cites at length from UN peacekeeping practice. It is noted, however, that the decision of the European Court of Human Rights in *Behrami v. France and Saramati v. France, Germany and Norway*, Application Nos 71412/01 & 78166/01, 45 EHRR 85, Paragraph 133 (2007), is in tension with this article, where it considered that the decisive factor was whether ‘the United Nations Security Council retained ultimate authority and control so that operational command only was delegated’. This decision has been severely criticized in the literature, which overwhelmingly supports the use of the effective control standard now laid down in the DARIO. Cf. A. Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’, 2008 *Human Rights Law Review* 8, pp. 151-170; K. Mujezinovic Larsen, ‘Attribution of Conduct in Peace Operations: the “Ultimate Authority and Control” Test’, 2008 *European Journal of International Law* 19, no. 3, pp. 509-531; M. Milanovic & T. Papic, ‘As Bad As It Gets: the European Court of Human Rights’s Behrami and Saramati Decision and General International Law’, 2009 *International and Comparative Law Quarterly* 58, no. 2, pp. 267-296; Dannenbaum, supra note 11.

13 It is noted in this context that international organizations may enjoy both international legal personality and domestic legal personality. Both ‘personalities’ are aspects of the legal status or position of international organizations in international and domestic law. Cf. J. Klabbbers, *An Introduction to International Institutional Law*, 2009, pp. 38-52.

14 H. Schermers & N. Blokker, *International Institutional Law*, 2003, § 1583, p. 1005.

15 DARIO, supra note 6, Art. 1, Commentary (5), p. 40.

16 Schermers et al., supra note 14, § 1583, p. 1005.

17 See, e.g., DARIO, supra note 6, Commentary 2009, pp. 57, 64, 73, 165.

18 66-II *Inst. Int’l L.* (1995). Art. 2(b) of this resolution defines liability as meaning both concurrent and subsidiary liability, and clarifies: ‘i) Concurrent liability means a liability that allows third parties having a legal claim against an international organization to bring their claim, at their choice, against either the organization or its members. ii) Subsidiary liability means a liability by which third parties having a legal claim against the international organization will have a remedy against States members only if and when the organization defaults’.

One may then be tempted to believe that liability is a broader category than responsibility, as the latter only applies to violations of international law. Moshe Hirsch, however, in his important work entitled ‘The Responsibility of International Organizations Toward Third Parties: Some Basic Principles’,<sup>19</sup> also includes acts that do not amount to violations of international law. In the final analysis, liability perhaps only refers to the *consequences* of a finding of responsibility at the level of reparation/compensation. As the UN noted in a 2004 letter, an act of a UN peacekeeping force ‘if committed in violation of an international obligation entails the international *responsibility* of the Organization and its *liability in compensation*.’<sup>20</sup> Nevertheless, as noted we will use the terms responsibility and liability interchangeably.<sup>21</sup> While emphasizing responsibility/liability under international law, reference may also be made to responsibility/liability under domestic law where necessary, to the extent that it highlights the same conceptual problem of holding the Member State responsible for acts of the IO.

## 2. From international legal personality to the international responsibility of international organizations

The ILC defines an IO as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality’.<sup>22</sup> The international legal personality of IOs, or at least of the UN, was confirmed for the first time by the International Court of Justice (ICJ) in 1949 in the case of *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>23</sup> In this case, the ICJ stated that ‘the Organization [of the United Nations] is an international person’, which means ‘that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims’.<sup>24</sup> According to the ILC, the Court appeared to be of the view that if an organization is found to have legal personality, it is an ‘objective’ personality.<sup>25</sup> Thus, when determining whether an IO may be held responsible for a wrongful act, it would not be necessary to determine whether an injured state has recognized the organization’s legal personality.<sup>26</sup> That view is open to some doubt, as the Court in fact only found the *UN* to have objective legal personality given its quasi-universal membership. In any event, stating that IOs have a legal personality is stating that they have a legal personality distinct from their Member States’ legal personalities, or as Wilde put it, ‘legally, they are more than the sum of their (state) parts’.<sup>27</sup> As a result of this distinct legal personality, the organization itself, rather than its Member States, is responsible for its acts.<sup>28</sup> It follows that when Member States perform acts as part of an organization, such as voting for a project in the World Bank, such acts are, as a matter of institutional law, considered as acts of the organization – for which the organization is responsible – rather than collective acts of states.

---

19 M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, 1995.

20 Cf. Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, UN Doc. A/CN.4/545 (cited in DARIO, *supra* note 6, Commentary (5) to Art. 6, p. 64 (emphasis added)).

21 Stumer, *supra* note 4, also uses these terms interchangeably.

22 DARIO, *supra* note 6, Art. 2(a).

23 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Reports, p. 174.

24 *Ibid.*, p. 179.

25 DARIO, *supra* note 6, Art. 2, Commentary (9), p. 47.

26 *Ibid.*

27 R. Wilde, ‘Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake’, 2005 *ILSA Journal of International and Comparative Law* 12, pp. 395-415, at p. 401.

28 *Ibid.*

While the principle that an organization may possess separate international legal personality is generally accepted,<sup>29</sup> there are differing views on how to determine at what point an IO starts enjoying separate international legal personality. These views range from requiring merely that an organization exists, to requiring that several elements must be satisfied.<sup>30</sup> Still, as the ILC rightly indicates, the ICJ's dicta concerning legal personality suggest that the Court takes a liberal view of an IO's acquisition of international legal personality.<sup>31</sup> According to this view, for instance, the international legal personality of the international financial institutions (IFIs) – the World Bank and the International Monetary Fund (IMF) – can readily be inferred from their operations at the international level.<sup>32</sup> It has also been observed, however, that the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), which forms part of the World Bank Group, and those of the IMF 'convey legal personality per se but not necessarily international legal personality'.<sup>33</sup> If these institutions do possess international legal personality, they may have the ability to hold obligations under international law, including human rights obligations,<sup>34</sup> and thus internationally wrongful acts attributed to them will generally be their responsibility, and Member States will not normally be held liable for such acts.

Of course, for an IO to be held liable for its acts, and for a Member State to be held liable for the acts of the IO (the conditions of which will be discussed below), it is generally a precondition that the organization commits an internationally wrongful act.<sup>35</sup> It follows that the international responsibility of an IO is connected to a breach of an international obligation held by the organization.<sup>36</sup> The ICJ has recognized that 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.<sup>37</sup> Still, it is not clear precisely what types of obligations IOs are under.<sup>38</sup> The ongoing debate on the specific international obligations held by IOs is beyond the scope of this article,

---

29 Stumer, *supra* note 4, p. 572.

30 DARIO, *supra* note 6, Art. 2, Commentary (8), pp. 46-47. Cf. for a number of indicators of 'subjectivity' or legal personality: Klabbers, *supra* note 13, pp. 39-44 (listing treaty-making capacity, the right to send and receive legations, and the right to bring and receive claims). Note that there is a certain circularity in requiring that a number of elements/criteria/indicators be satisfied: the existence of the very criteria may depend on the organization's already having legal personality.

31 DARIO, *supra* note 6, Art. 2, Commentary (8), pp. 46-47. See, e.g., *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, [1980] ICJ Reports, pp. 89-90, Para. 37; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, [1996] ICJ Reports, p. 79, Para. 25.

32 Academic commentators have indeed recognized both the IMF and the World Bank as possessing independent international legal personality. A. McBeth, 'A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights', 2009 *George Washington International Law Review* 40, pp. 1101-1156, at p. 1105 n.6; N. Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability', 2006 *U.C. Davis Journal of International Law and Policy* 12, pp. 331-407, at p. 367. A full analysis of the legal personalities of the IMF and the World Bank is outside the scope of this article. For the purposes of this article, it is sufficient to note that the IMF and World Bank are generally viewed as possessing separate international legal personality. See Wahi, *supra*, for an analysis of the legal personalities of the IMF and the World Bank.

33 McBeth, *supra* note 32, p. 1105 n.6; Articles of Agreement of the International Monetary Fund, Art. IX, 27 December 1945, 2 UNTS 39; Articles of Agreement of the International Bank for Reconstruction and Development, Art. VII, s. 2, 27 December 1945, 2 UNTS 134 (as amended on 16 February 1989).

34 See McBeth, *supra* note 32, p. 1104.

35 See in respect of Member State liability: DARIO, *supra* note 6, Arts. 57-59.

36 *Ibid.*, Art. 1, Commentary (5), p. 40.

37 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *supra* note 31, pp. 89-90, Para. 37.

38 Klabbers, *supra* note 13, p. 284 (who derives from the ICJ's dictum merely that IOs are bound by *jus cogens* and the secondary rules of the system.). See for arguments in favour of the binding character of international (human rights) law for the international financial institutions: M. Darrow, *The World Bank, the International Monetary Fund and International Human Rights Law*, 2002, pp. 120-121; A. McBeth, 'Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions', 2006 *International Journal of Human Rights* 10, no. 4, pp. 385-404, at pp. 389-394; S. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, 2001, pp. 78-105.

however. With regard to internationally wrongful acts committed by IOs, it will be presumed, for the purposes of this article, that IOs have at least *some* obligations under international law. Presuming that IOs possess separate international legal personality and are thus capable of holding obligations under international law, including human rights law, this article now considers the circumstances in which Member States can be held liable for these organizations' violations of international obligations.

### 3. Member State liability for the acts of an international organization by virtue of membership alone

As noted, most international lawyers accept the theory of the separate legal personality of IOs and the related concept of a separate legal responsibility on the part of IOs. There is, however, disagreement on the issue of whether, in addition to IOs being held liable, Member States can *also* be held liable, in a secondary or concurrent manner, for the wrongful acts of an organization.<sup>39</sup> In this part, we will discuss Member State liability for the acts of IOs based merely on their membership. In the next part, we will discuss the other specific circumstances – going beyond mere membership – under which Member States can be held liable for the acts of IOs, as provided in the ILC's DARIO.

Some scholars have argued that states, by virtue of their membership of IOs, could be held responsible for the organization's international (human rights) law violations<sup>40</sup> and have brushed aside concerns that Member States' secondary or concurrent liability would interfere with the autonomy of IOs by encouraging interference from Member States.<sup>41</sup> In the absence of an authoritative precedent, these scholars have primarily invoked policy considerations in support

---

39 Typically, the *International Tin Council* (ITC) litigation and the *Westland Helicopters Ltd. v. Arab Organization for Industrialization* arbitration are cited as informative on the issue of Member State responsibility for acts of an organization. It is not the aim of this article to revisit these cases – which after all date back to the 1980s – in detail. It suffices to state that in the ITC litigation, lower courts reached different conclusions on the subsidiary or complementary liability of Member States for the ITC's debts, although ultimately, the Court of Appeal and the House of Lords determined that no general rule existed under international law providing for the secondary responsibility of Member States. See for a detailed discussion of the string of ITC-related cases and references: Hirsch, *supra* note 19, pp. 115-121. The relevance of the ITC litigation for our purposes may however be limited, since it did not concern liability for violations of *international law*, and the outcomes were mainly based on *English law*. See also Klabbers, *supra* note 13, p. 306. Similarly, the relevance of the *Westland Helicopters* arbitration (Award of 5 March 1984, 80 ILR 600, p. 613) is open to some doubt, since it appears to have been focused on internal arrangements of the IO in question, the Arab Organization for Industrialization (AOI). Cf. S. Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, 2005, pp. 437-38, n.10. In *Westland Helicopters*, the arbitrators held that the Member States of AOI could be held liable *vis-à-vis* third parties that contracted with AOI, on the ground that AOI's constituent documents did not exclude the liability of the Member States. This award was annulled, however, by the Court of Justice of Geneva, a judgment that was upheld by the Federal Supreme Court of Switzerland, on the ground that the arbitrators wrongly assumed jurisdiction over Egypt without its consent. In an interesting passage, the Federal Supreme Court doubted that 'when organs of the AOI deal with third parties they *ipso facto* bind the founding States', thus doubting whether Member States could be held liable for the acts of IOs. *Arab Organization for Industrialization and Others v. Westland Helicopters Ltd.*, decision of 19 July 1988, Federal Supreme Court (First Civil Court), in 80 ILR 652.

40 See, e.g., S. Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law', 2006 *Columbia Journal of Transnational Law* 44, pp. 691-800 (arguing that states, as Member States of an international financial institution, could be held responsible for the institution's economic, social and cultural rights violations). However, even Narula recognizes that the question of Member State responsibility in ensuring that human rights under the ICESCR are secured when they act as part of an international financial institution in forming economic policies of weaker States is an unsettled issue. *Ibid.*, p. 744.

A softer version of this responsibility discourse is, for that matter, espoused by the Committee on Economic, Social and Cultural Rights, General Comment no. 15, E/C.12/2002/11 (2002), Para. 36 ('States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures').

41 Stumer, *supra* note 4, p. 554.

of their views on the issue,<sup>42</sup> in particular as regards the rights of third parties. A major concern is indeed that an IO may not be subject to *any* process that affords a third party an opportunity to obtain reparation.<sup>43</sup> A second policy consideration is that even if an organization is subject to a legal process, once relief is obtained, a third party may discover that the organization lacks the funds necessary to pay reparation.<sup>44</sup>

At a legal level, the view that Member States can be held responsible for the acts of IOs has been advanced through two approaches. The first approach relies on the absence of international law norms providing for the limited liability of IOs, as opposed to limited liability treatment of corporations by various municipal legal systems.<sup>45</sup> However, as Wilde explains, the argument that Member States incur secondary liability on this basis can be challenged on the ground that the absence of such norms is matched by the absence of affirmative rules imposing secondary liability.<sup>46</sup> The second approach then suggests that the inclusion of limited liability clauses in the constitutions of some IOs implies that, if an organization's constitution does *not* have such a clause, Member States would be liable for the acts of the organization.<sup>47</sup> Under this approach, the clauses are interpreted as modifying a rule of general international law.<sup>48</sup> However, as Wilde also notes, such clauses could simply reflect an organization's uncertainty about the current state of international law on this subject or could serve as a warning to third parties on the issue of liability.<sup>49</sup> Therefore, these two approaches are challengeable and do not appear to provide sound arguments supporting the secondary or concurrent liability of Member States for the acts of an organization by virtue of membership alone.

In fact, a key concern regarding imposing such liability is that it might 'interfere with the operation of international organizations, depriving them of their independence and impartiality'.<sup>50</sup> Indeed, it has been suggested that if Member States are faced with the risk of potential liability for the acts of an organization, they will intervene in essentially all decision-making processes of the organization.<sup>51</sup> As far as IFIs are concerned, for instance, this fear of interference with an organization's decision-making processes is likely increased due to the significant financial risks involved in actions taken by these institutions. Interference with an organization's independence can reduce the efficiency of an organization's operations, and if independence is substantially diminished, the separate legal personality of the organization could potentially cease to exist.<sup>52</sup> There is also a concern that interference with the autonomy of IOs caused by the threat of Member State liability could reduce the effectiveness of IOs as a means of international cooperation.<sup>53</sup> Some commentators have gone even further to suggest that this reduction in the efficacy of IOs would deter states, particularly poorer states, from becoming members of IOs, such as IFIs.<sup>54</sup>

---

42 Klabbers, *supra* note 13, p. 288.

43 Grant, *supra* note 5, p. 1134. As Wilde emphasizes, 'no standing international court or tribunal enjoys jurisdiction to hear complaints brought directly against international organizations, and such complaints are usually barred on the domestic level due to the enjoyment of privileges and immunities'. Wilde, *supra* note 27, pp. 408-09.

44 Grant, *supra* note 5, pp. 1134-1135.

45 Wilde, *supra* note 27, p. 402.

46 *Ibid.*

47 *Ibid.*, p. 403.

48 *Ibid.*

49 *Ibid.*

50 Stumer, *supra* note 4, p. 569.

51 R. Higgins, 'Report on the Legal Consequences for Member States of the Non-fulfillment by International Organizations of Their Obligations toward Third Parties', 66-*I Y.B. Int'l Law*, p. 249, at p. 419 (1995). See also Stumer, *supra* note 4, p. 565.

52 Stumer, *supra* note 4, p. 569.

53 *Ibid.*

54 *Ibid.*, pp. 568-569.

A second but related prominent policy concern raised by the imposition of liability on Member States for the acts of an IO is that such liability is inconsistent with, and jeopardizes, the established principle that IOs possess separate legal personality.<sup>55</sup> This concern is closely related to the first policy consideration regarding interference with the autonomy of an IO because an organization's independence could arguably be diminished to the point where the organization's separate personality is completely dismantled.<sup>56</sup> In Rosalyn Higgins's words, '[i]f members were liable for the defaults of the organization, its independent personality would be likely to become increasingly a sham'.<sup>57</sup> This explains why some IOs, such as the IMF and the World Bank, have sought to ensure the protection of their legal personality by incorporating limited liability clauses in their constituent documents.<sup>58</sup> Nevertheless, as already argued, this does not mean *a contrario* that Member States of those IOs that have *not* incorporated such clauses in their constitutions do incur liability for acts of those IOs. Indeed, the well-recognized principle of the separate international legal personality of IOs could be in jeopardy if the circumstances under which Member States can be held liable for acts of an IO are not interpreted strictly.

Based on these considerations, the majority view is that a principle pursuant to which Member States are responsible for the acts of IOs does not appear at present to be sufficiently anchored in general international law. This view was notably endorsed by a resolution of the *Institut de Droit international* in 1995, on the basis of a report drafted by (then) Professor (and later ICJ President) Rosalyn Higgins. In Article 6(a) of the said resolution, the *Institut de Droit international* states that 'there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members'.<sup>59</sup> Similarly, in its commentary to Article 61 DARIO, the ILC states that '[i]t is clear that (...) membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act'.<sup>60</sup> According to this majority view, the liability of Member States for acts of an IO by virtue of membership can only exist where the constituent instruments of the organization specifically provide for such liability,<sup>61</sup> which the constituent documents of IFIs, for instance, generally do not.<sup>62</sup>

Accordingly, it appears that general international law does not presently support the view that Member States of an IO can be held liable for the internationally wrongful acts of the organization based solely on their membership. Only in limited circumstances – notably those in which an intervening act of a state occurs – will Member States be held liable for the wrongful acts of IOs. These circumstances are envisaged in Part Five of the DARIO, entitled 'Responsibility of a State in Connection with the Act of an International Organization'.<sup>63</sup> Since these articles provide for Member State liability for acts of IOs under certain circumstances, they could represent a middle ground between Member State liability based on membership alone and the traditional view of non-liability for Member States.

---

55 *Ibid.*, p. 570.

56 *Ibid.*, p. 569.

57 Higgins, *supra* note 51, p. 419.

58 Klabbers, *supra* note 13, pp. 272, 289-290.

59 Institut de Droit international, 'The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations toward Third Parties', 66-II *Y.B. Inst. Int'l L.*, Art. 6(a), p. 445 (1995). See also Grant, *supra* note 5, p. 1139.

60 DARIO, *supra* note 6, Art. 61, Commentary (2), p. 167.

61 Wilde, *supra* note 27, p. 404.

62 While few international organizations' constituent documents include responsibility clauses for member States, many IFIs include such clauses in their constituent documents, which generally provide for the limited liability of Member States. Klabbers, *supra* note 13, p. 272.

63 DARIO, *supra* note 6, Arts. 57-61.

#### 4. Member State liability for the acts of an international organization by virtue of a special circumstance being present

The regime concerning Member State responsibility is subject to some exceptions in which the separate international legal personality of an IO can be disregarded. Those exceptions are codified in Part Five of the DARIO. They seek to prevent states from hiding behind the organizational veil to shield themselves from liability for internationally wrongful acts committed either by an organization alone or with the aid or assistance of the Member State.<sup>64</sup> Thus, they permit third parties to hold Member States liable for certain acts of IOs.<sup>65</sup> As opposed to the idea that Member States can be held liable for the acts of an IO by virtue of membership alone, which was discarded in Part 3, the imposition of liability on the Member States rests, pursuant to Articles 57 to 61 DARIO (Part Five), on the presence of some *positive action* by a Member State.

The articles under Part Five of the DARIO are divided into two categories: (1) the category of wrongful acts of an organization that are attributable to a state, whether it is a member or not, according to the general rules of attribution under international law, and (2) the category of wrongful acts that are committed by a Member State in connection with an act of the organization.

##### 4.1. Member State liability on the basis of general rules of attribution

The ILC's DARIO recognize forms of liability where an act of an IO is attributable to a state based on the general rules of attribution under international law. The relevant rules mirror the attribution rules of the 2001 Articles on State Responsibility: attribution based on direction or control (Article 58), coercion (Article 59), and the acceptance of responsibility (Article 60).

##### 4.1.1. Direction and control

Article 58 DARIO attributes responsibility for an internationally wrongful act by an IO to a state when the state directs and controls the organization in the commission of the act.<sup>66</sup> Pursuant to this control theory, Member States of an IO could be liable for the wrongful acts of the organization when they exercise control over the organization by their participation in its functions.<sup>67</sup> Prior to the adoption of the DARIO, a similar argument based on a Member State's exercise of control over an organization was made in the *Westland Helicopters* arbitration. The argument was unsuccessful, however, as the Swiss Federal Tribunal determined that 'the predominant role played by [the founding member] states and the fact that the supreme authority of the [Arab Organization for Industrialization] is a Higher Committee composed of ministers cannot undermine the independence and personality of the organisation'.<sup>68</sup>

Due to the autonomous nature of IOs, only in exceptional circumstances will Member States have the ability to assert the requisite direction or control over an organization.<sup>69</sup> Since the

---

64 J. Crawford, 'Holding International Organisations and Their Members to Account', Fifth Steinkrau-Cohen International Law Lecture, 15 March 2007, School of Oriental and African Studies, Para. 30.

65 Compare Hirsch, *supra* note 19, p. 169.

66 DARIO, *supra* note 6, Art. 58.

67 Stumer, *supra* note 4, p. 528.

68 *Arab Organization for Industrialization and Others v. Westland Helicopters Ltd.*, decision of 19 July 1988, Federal Supreme Court (First Civil Court), in 80 ILR 652, p. 658. Similarly, in *Maclaine Watson & Co Ltd v. Department of Trade*, Millett J. concluded that with regard to a Member State of the ITC, 'in the absence of actual authority, which must be distinctly alleged and proved, no such authority can be inferred from the fact of membership alone'. 29 July 1987, 80 ILR 39, p. 46. See also D.W. Bowett et al., *Bowett's Law of International Institutions*, 2009, pp. 526-29. See note 39, *supra* for a brief summary of the *ITC* and *Westland Helicopters* litigation.

69 As noted in *Bowett's Law of International Institutions*, '[i]t is all in all rather exceptional that members would have at their disposal means—legal or others—enabling them to exercise a decisive influence on the organisation's behavior'. Bowett, *supra* note 68, p. 528.

distinct autonomy of IOs is an important requirement for their separate legal personality, under normal conditions, Member States do not exercise direction and control over an organization.<sup>70</sup>

Thus, although Article 58 DARIO does provide for the possibility that Member States may incur liability for a wrongful act of an organization if a state directs and controls the IO in the commission of the act, such direction and control would need to be clearly established and cannot be inferred from mere involvement in the operation of the organization.<sup>71</sup> While the ILC admittedly points out that such direction and control could occur within the framework of the organization,<sup>72</sup> it explains that a distinction must be made between mere participation by a Member State in the general decision-making process of an organization pursuant to the organization's rules – which will not engage the liability of the Member State – and the direction and control required for liability under Article 58.<sup>73</sup> In its Commentary, the ILC clarifies that the meaning of the terms 'direction and control' in Article 58 is based on the Articles on State Responsibility.<sup>74</sup> Accordingly, the term 'directs' implies 'actual direction of an operative kind', not mere incitement, while the term 'control' connotes domination over the wrongful conduct rather than oversight.<sup>75</sup> Given the limited scope of this meaning of direction and control, under ordinary circumstances a Member State will not direct and control an IO.

That said, it has been argued, rather persuasively in our view, that when Member States exercise *overwhelming* control in the decision-making process of an organization, these states should be held jointly and concurrently liable for any wrongful acts resulting from the decision.<sup>76</sup> It could for instance be submitted – although we would not necessarily agree with this view – that the responsibility of certain powerful Member States of military alliance or defence organizations, for example NATO or the former Warsaw Pact, could be engaged where these organizations commit wrongful acts. It is interesting to note in this respect that, after the accidental NATO bombing of the Chinese embassy in Belgrade during the NATO humanitarian intervention regarding Kosovo, the United States (NATO's dominant state) – and not NATO itself – entered into an agreement with China to compensate the damage suffered.<sup>77</sup>

It has also been argued, albeit somewhat less persuasively, that a situation in which a state directs and controls the conduct of an IO could exist where a treaty between an IO and one of its members, or even a non-Member State, is formed which confers the power on an organization to perform certain tasks on behalf of the state.<sup>78</sup>

---

70 Stumer, *supra* note 4, p. 561.

71 *Ibid.*, p. 528.

72 DARIO, *supra* note 6, Art. 58, Commentary (2), pp. 161-162.

73 *Ibid.*

74 *Ibid.*, Commentary (1), p. 161.

75 Articles on State Responsibility, *supra* note 1, Art. 17, Commentary (7).

76 This argument has been advanced by Jean D'Aspremont in his article 'The Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 2007 *International Organizations Law Review* 4, pp. 91-119, at p. 101. In particular, D'Aspremont takes issue with the fact that, in his opinion, the ILC's DARIO exclude Member State responsibility where a state exercises control over an organization's decision-making process. *Ibid.*, pp. 102-103.

77 This event has, amongst other things, led Gazzini to even doubt the separate international legal personality of NATO. T. Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)', 2001 *European Journal of International Law* 12, pp. 391-435, at pp. 424-425 (arguing that 'each member state bears international responsibility for the acts committed by its forces engaged in NATO operations').

78 See Stumer, *supra* note 4, p. 561. However, Stumer points out that since it is the constituent instrument that primarily defines the relationship between an international organization and its members, such a scenario would be more likely to occur with respect to an international organization acting under a non-Member State's direction and control. *Ibid.*

#### 4.1.2. Coercion

Article 59 DARIO assigns responsibility to a state when it coerces an IO to commit an act that would, but for the coercion, be an internationally wrongful act of that organization.<sup>79</sup> A distinction similar to the one that must be made under Article 58 (regarding direction and control) must be made between coercion and mere participation in the decision-making process of the organization.<sup>80</sup> The relationship between a Member State and an IO does not normally involve direction, control or coercion by Member States because this would conflict with the organization's separate international legal personality.<sup>81</sup> However, economic pressure could arguably constitute coercion if such pressure is sufficiently powerful that it leaves the organization with essentially no other choice but to comply with the coercing state's desires.<sup>82</sup> Such economic pressure could arise if, for example, a Member State threatens to withhold its contribution payments to an organization unless the organization follows through with a wrongful act. In so doing, the Member State essentially blackmails the organization to comply with the state's wishes.<sup>83</sup> A hypothetical example could be a threat by the United States – the leading contributor to the UN budget – to withhold its contribution payments if the UN Security Council does not endorse a resolution that would impose wide-ranging economic sanctions on Iran, as a result of which the human rights of that state's citizens, and their economic and social rights in particular (right to food, right to health/medicine), are adversely affected.<sup>84</sup> Such a threat, if executed, would not only amount to a violation of the United States' duty to contribute to the budget of the United Nations,<sup>85</sup> it could also engage the United States' international responsibility toward third parties (Iran's citizens).

Still, the liability threshold of Article 59 DARIO is a tall order: in order for the organizational veil to be pierced and a Member State to be held liable, the coercion must relate specifically to a wrongful act committed by an organization<sup>86</sup> and the coercing state must have knowledge of the circumstances surrounding the wrongful act.<sup>87</sup>

#### 4.1.3. Accepting responsibility

Article 61(1)(a) DARIO provides that a Member State is responsible for an internationally wrongful act of an IO if the Member State 'has accepted responsibility for that act'.<sup>88</sup> This form of responsibility appears to fall under the general rule of customary international law, which was already codified in the Articles on State Responsibility, and which provides that if a state acknowledges and adopts conduct then such conduct may be attributed to the state.<sup>89</sup> This type of liability is a result of a state's acceptance, either express or implied, of responsibility for the organization's conduct and does not arise merely by virtue of its membership of the organization.

---

79 DARIO, *supra* note 6, Art. 59.

80 *Ibid.*, Art. 59, Commentary (2) p. 163.

81 See Stumer, *supra* note 4, p. 561.

82 D'Aspremont, *supra* note 76, p. 100.

83 *Ibid.*

84 See, e.g., UN Subcommission on the Promotion and Protection of Human Rights, 'The adverse consequences of economic sanctions on the enjoyment of human rights', Working paper prepared by Mr. Marc Bossuyt, UN Doc. 3/CN.4/Sub.2/2000/33 (21 June 2001) (on the adverse human rights impact of UN sanctions, in particular as taken against Iraq when it was ruled by Saddam Hussein). See also E. de Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Art. 41 of the United Nations Charter and the Iraqi Sanctions Regime', 2001 *Leiden Journal of International Law* 14, pp. 277-300.

85 Cf. Art. 17.2 of the Charter of the United Nations, 26 June 1945, 892 UNTS 119 ('The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly').

86 D'Aspremont, *supra* note 76, p. 101.

87 DARIO, *supra* note 6, Art. 59(b).

88 *Ibid.*, Art. 61.

89 Articles on State Responsibility, *supra* note 1, Art. 1.

A Member State's acceptance of responsibility can be expressed in a variety of ways and does not need to necessarily stem from an organization's constituent instrument.<sup>90</sup> According to the ILC, acceptance of international responsibility by a Member State for an act committed by an organization is the least controversial ground for holding a state liable for an act committed by an international organization.<sup>91</sup>

Questions remain as to whether, under Article 61 DARIO, a third party may rely on a provision in a constituent document stating that a Member State would be liable for the debts of an organization.<sup>92</sup> Even if such reliance is permitted, the ILC's commentary to DARIO states that when acceptance of responsibility arises from a constituent document, such a document could only provide for the responsibility of certain Member States.<sup>93</sup>

#### ***4.2. Member State liability for wrongful acts committed in connection with an act of the organization***

The ILC's DARIO also apply to circumstances where a Member State commits an internationally wrongful act in connection with an act of the organization. A Member State can commit such an act (1) by aiding or assisting an IO in the commission of an internationally wrongful act (Article 57 DARIO), (2) by seeking to avoid compliance with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the IO to commit a wrongful act (Article 60 DARIO), or (3) by leading a party injured by an act of an IO to rely on its own responsibility (Article 61(1)(b) DARIO).

##### *4.2.1. Aid or assistance*

Article 57 DARIO provides that a state can be held internationally responsible if it 'aids or assists an international organization in the commission of an internationally wrongful act', provided that the state acts with knowledge of the circumstances and the act, if committed by the state, would be internationally wrongful.<sup>94</sup> As with Articles 58 and 59, Article 57 involves a Member State influencing the actions of an IO.<sup>95</sup> However, the ILC's commentary makes it clear that the amount of influence required to constitute 'aid or assistance' must be more than, for example, a Member State's participation in the organization's decision-making process.<sup>96</sup> The ILC, nevertheless, recognizes that aid or assistance can arise from a Member State's conduct within the framework of the organization, depending on the particular facts, such as the number of members and the nature of the involvement.<sup>97</sup>

The imposition of Member State liability where a state 'aids or assists' an organization in a violation of international law is generally considered uncontroversial.<sup>98</sup> However, interpretive issues could arise where, for example, a Member State that is also a States Party to the International Covenant on Economic, Social and Cultural Rights votes in favour of a dam project in the World Bank despite the fact that it is foreseeable that local residents' economic, social or cultural rights will be violated as a result of the project. In such a case, local residents could lose their

---

90 D'Aspremont, *supra* note 76, p. 98.

91 DARIO, *supra* note 6, Art. 61, Commentary (6), pp. 168-169.

92 Stumer, *supra* note 4, pp. 563-64.

93 DARIO, *supra* note 6, Art. 61, Commentary (12), pp. 170-171.

94 *Ibid.*, Art. 57.

95 Grant, *supra* note 5, p. 1146.

96 DARIO, *supra* note 6, Art. 57, Commentary (2), p. 160.

97 *Ibid.*

98 Stumer, *supra* note 4, pp. 562-63.

land, shelter and employment, and may face food insecurity, all in violation of the Covenant.<sup>99</sup> Although the text of Draft Article 57 does not directly address this issue, the ILC's commentary suggests that such a vote, if in accordance with the pertinent rules of the organization, would not rise to the level of 'aid or assistance'.<sup>100</sup>

The ILC arguably takes an unduly narrow view of 'aid or assistance'. Some scholars have argued that Member State liability based on 'aid or assistance' can include situations in which a Member State votes in favour of a decision of the organization that results in the commission of a wrongful act.<sup>101</sup> Klein, for example, has posited that in such situations a Member State acts as an accomplice to the wrongful act even though the act of voting itself is not wrongful.<sup>102</sup> While not dismissing Klein's understanding of Article 57's imposition of Member State responsibility, D'Aspremont has gone even further. He has argued that if a Member State's participation in an organization's decision-making process constitutes 'overwhelming control', the Member State must be held responsible, either jointly or concurrently, for the wrongful act that was made possible by the organization's decision.<sup>103</sup> In this context, it is noted, in passing, that the distinction between the standard of 'aid or assistance' and the control standard may be a fine one, as aid and assistance may at some point blend into direction and control.

In any event, while Article 57 sets forth the possibility that the organizational veil may be pierced in situations where a Member State aids or assists an organization in a wrongful act, the parameters within which such situations could arise are not clear. In the absence of an authoritative precedent on the scope of Article 57's exception, the analogous provision under the ILC's Articles on State Responsibility remains informative.<sup>104</sup> Article 16 of the Articles on State Responsibility provides that a state which aids or assists another state in the commission of an internationally wrongful act is responsible for the act to the extent that its conduct caused or contributed to the act. Both Article 16 of these Articles and Article 57 DARIO limit the scope of responsibility for aid or assistance in three ways: (1) the aiding or assisting state must be aware of the circumstances which make the conduct internationally wrongful;<sup>105</sup> (2) the aid or assistance 'must be given with a view to facilitating the commission of that act, and must actually do so';<sup>106</sup> and (3) the act must be such that it would have been wrongful if committed by the aiding or assisting state.<sup>107</sup> The ILC's commentary to Article 16 of the Articles on State responsibility also provides examples of behaviour that constitutes aid or assistance, such as knowingly providing a necessary facility to the organization or financing the wrongful conduct.<sup>108</sup> From that perspective, a state's financial backing of an IFI's activities which result in human rights violations with knowledge of the circumstances surrounding such conduct could constitute aid or assistance.

---

99 Cf. M. Cernea, *Risks, Safeguards, and Reconstruction: A Model for Population Displacement and Resettlement*, The World Bank, 2000.

100 DARIO, supra note 6, Art. 57, Commentary (2), p. 160. See also Grant, supra note 5, p. 1147. However, this is by no means a clear-cut issue. Whether such a vote can constitute 'aid or assistance' will depend on the particular facts involved.

101 See D'Aspremont, supra note 76, p. 98 (citing P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, 1998, pp. 469-470).

102 Ibid. Under this view, a Member State that voted in favour of, for example, the World Bank's financing of industrialization projects in the Singrauli region of India should be liable as an accomplice for the forced evictions and other alleged human rights violations that have occurred as a result of such financing. D. Clark, 'The World Bank and Human Rights: The Need for Greater Accountability', 2002 *Harvard Human Rights Journal* 15, pp. 205-226, at p. 213.

103 D'Aspremont, supra note 76, p. 98.

104 In its Commentary (4) to Art. 57, the ILC states that the rule applied in Art. 16 of the ILC's Articles on State Responsibility is the same as the rule under Art. 57 of the DARIO, aside from the fact that the aided or assisted entity under the DARIO is an international organization. DARIO, supra note 6, Art. 57, Commentary (4), p. 161.

105 Articles on State Responsibility, supra note 1, Art. 16, Commentary (3).

106 Ibid.

107 Ibid.

108 Ibid., Art. 16, Commentary (1).

#### 4.2.2. *Circumvention of international obligations*

Article 60 DARIO provides that a Member State will incur international responsibility if it attempts to avoid complying with one of its own obligations by taking advantage of the organization's competence with respect to that obligation, thereby prompting the organization to commit an act that, if committed by the state, would have constituted a breach of the obligation. In other words, as the Commentary to this article notes, Article 60 'concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member'.<sup>109</sup>

It should be noted that Article 60 DARIO does not allow holding Member States liable for the acts of IOs by virtue of their membership alone. The Commentary makes it clear that, although Article 60 does require the existence of a specific intention of circumvention, it excludes the wrongful acts of IOs that have 'to be regarded as an unwitting result of prompting a competent international organization to commit an act'.<sup>110</sup> Thus, Member States do not automatically incur international responsibility in the event that the organization commits a violation of international law. The liability standard, however, is not prohibitively strict: it is not required that one establishes that a Member State has abused its rights, e.g., by deliberately setting up an IO in order to evade responsibility for certain acts under international law.<sup>111</sup> Instead, a Member State is under a *due diligence* obligation not to take advantage of an organization's competence in order to avoid its own obligations,<sup>112</sup> thereby prompting the IO to commit an internationally wrongful act.<sup>113</sup>

The issue of Member State liability on the basis of avoiding compliance with its own international obligations, through transferring competences to an IO, has mainly been explored by the European Court of Human Rights in a line of cases starting with *Bosphorus v. Ireland*.<sup>114</sup> One of the authors has discussed these cases, and their relationship with Article 60 DARIO, in a separate paper.<sup>115</sup> A detailed examination of the Court's relevant case law is therefore beyond the scope of this article. It may suffice to point out here that in all these cases, the Court has required some positive state action for Member State responsibility for violations of the European Convention on Human Rights to be found (notably an act implementing an IO's decision, such as an EU/EC Member State impounding an aircraft that is subject to a sanctions regime promulgated by the EU/EC, i.e., the *Bosphorus modus operandi*). Further, even in situations where there is such state action, the Court has held that liability will only ensue if the IO has failed to provide human rights protection that is 'equivalent' to the level of protection offered by the Convention. In one recent case, however, the Court abandoned the requirement of state action and found the presence of a structural due process lacuna in the IO's procedures (notably in respect of the mechanism where employees of the IO can bring their employment-related claims against the IO) to suffice for a finding of Member State liability, albeit the Court also eventually found that the IO offered 'equivalent' human rights protection.<sup>116</sup> In light of the particularities of the European Court's case law, it is not entirely clear whether this case law is a mere application of the

---

109 DARIO, supra note 6, Art. 60, Commentary (1), p. 163.

110 Ibid.

111 Ibid.

112 See Stumer, supra note 4, p. 563.

113 DARIO, supra note 6, Art. 60, Commentary (2), (7), pp. 164, 166.

114 2005-VI; 41 EHRR 1.

115 C. Ryngaert, 'The responsibility of member States for the acts of international organizations: the recent case law of the European Court of Human Rights in light of the ILC's Draft Articles on the Responsibility of International Organizations', paper finalized in August 2010 and on file with the author, forthcoming.

116 *Gasparini v. Italy and Belgium*, Application No. 10750/03, Admissibility Decision of 12 May 2009.

circumvention standard of Article 60 DARIO, as the Commentary to this article seems to suggest,<sup>117</sup> or whether it goes beyond Article 60 by using a more relaxed standard to hold Member States liable for the acts of IOs.<sup>118</sup>

#### 4.2.3. Reliance on Member State responsibility

Lastly, under Article 61(1)(b) DARIO, a Member State is responsible for an internationally wrongful act committed by an organization if '[i]t has led the injured party to rely on its responsibility'.<sup>119</sup> This form of liability, which appears to originate from the principle of estoppel,<sup>120</sup> applies when 'the conduct of member States has given the third party reason to rely on the responsibility of member States'.<sup>121</sup> For example, Article 61(1)(b) could be triggered if a state's conduct gives a third party reason to believe that if the organization lacks the necessary funds for making reparation, the state would stand in.<sup>122</sup> However, the ILC has clarified that there is 'no presumption that a third party should be able to rely on the responsibility of member States'.<sup>123</sup> Ultimately, whether reliance by a third party exists will depend on the particular circumstances at hand. In the context of the *Westland Helicopters* arbitration, for instance, some third parties may have been led to assume that, given the continuous support provided to the IO in question by the Member States, the organization was financially backed by its Member States.<sup>124</sup>

That said, as Article 61, like the other articles in Part Five of DARIO, serves as an exception to the general rule that Member States cannot be held liable for the acts of IOs, it should be interpreted restrictively. The Commentary to Article 61 also derives from the limited nature of the cases arising under the article that 'when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended'.<sup>125</sup> This implies that Member State liability based on Article 61 adds to, but does not supplant, the liability of the IO.

## 5. Conclusion

From the above discussion, it can be concluded that Member States do not normally incur liability for the acts of the IOs of which they are members. The imposition of liability on Member States for the internationally wrongful acts of an organization based merely on a state's membership within the organization is generally considered off limits, as it jeopardizes the autonomy and separate legal personality of the organization.<sup>126</sup> Furthermore, it is difficult to justify why a Member State should be held liable if it was not involved in the IO's activities. Still, Part Five of the ILC DARIO reserves some room for the limited liability of (Member) States for the acts of IOs, notably if some state conduct can be discerned. As long as these exceptions are inter-

---

117 DARIO, supra note 6, Art. 60, Commentary (2), (3), p. 164.

118 See Ryngaert, supra note 115 (noting, in particular, the *Gasparini* principle and the relaxed state due diligence standard espoused by the Court, although also noting that, so far, the application of the standard of equivalent protection has prevented the Court from holding Member States liable for the acts of IOs that violate the European Convention).

119 DARIO, supra note 6, Art. 6.

120 Stumer, supra note 4, p. 563.

121 DARIO, supra note 6, Art. 61, Commentary (8), p. 169.

122 Ibid. See also, C.F. Amerasinghe, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Juridical Precedent', 1991 *International and Comparative Law Quarterly* 85, pp. 259-280, at p. 280.

123 DARIO, supra note 6, Art. 61, Commentary (10), p. 170.

124 See Paragraph 56 of the second arbitral award of 21 July 1991 in *Westland Helicopters v. Arab Organization for Industrialization and Others*, as cited in DARIO, supra note 6, Art. 61, Commentary (9), p. 170. See also Grant, supra note 5, p. 1145. However, as discussed in Part 2, supra, many IFIs incorporate non-liability clauses for their Member States in their constituent instruments, which should alert third parties that the Member States do not intend to be held responsible for the acts of the institution.

125 DARIO, supra note 6, Art. 61, Commentary (13), p. 171.

126 Stumer, supra note 4, p. 564.

preted strictly, they deserve support. Indeed, a strict interpretation of the exceptions reinforces the general rule that Member States cannot be held liable for the wrongful acts of international organizations by virtue of their membership alone. It prevents Member States from intervening in the internal affairs of a supposedly autonomous international organization for fear of being held liable through the backdoor. While the precise contours of (Member) State liability under Part Five of the DARIO are not yet drawn (e.g., under what circumstances does a Member State circumvent its own obligations, or under what circumstances does a (Member) State aid or assist an IO in committing a violation?), the ILC should be commended for its efforts to codify the rules regarding such liability. Upon receiving comments by states, IOs and other entities by 2011, the ILC may want to offer more concrete guidance. That said, the impact that the DARIO, and specifically Part Five, will in practice have on Member State liability, and thus on the formation of customary international law, is yet to be seen.

In any event, any solution concerning Member State liability for the wrongful acts of IOs will have to negotiate the competing demands of preserving the autonomy and international legal personality of IOs, and the protection of the rights of third parties. It is observed that this is not a false dichotomy. Indeed, as long as the accountability mechanisms within IOs remain undeveloped, third parties will continue to have an interest in seeking reparations from states rather than from IOs. Thus, they will continue to press for Member State liability for acts of IOs, be it on the basis of mere IO membership or on the basis of some intervening act (however insignificant) of a state in the adoption or implementation of an act of an IO. As far as the UN is concerned, for instance, the organization may finally want to act on Section 29 of the 1946 UN Convention on Privileges and Immunities, pursuant to which, as a counterpart of the conferral of immunity on the UN, the UN shall make provisions for appropriate modes of settlement of disputes to which the UN or a UN official is a party. As a general matter, if an IO fails to provide for adequate dispute-settlement mechanisms, domestic courts may possibly want to lift the immunity of the organization.<sup>127</sup> Ultimately, the international responsibility of the Member States that fail to bring sufficient pressure to bear on IOs to provide for such mechanisms may be engaged, possibly by an international court, as the recent *Gasparini* case before the European Court of Human Rights indicates.<sup>128</sup>

---

127 C. Ryngaert, 'Immunity of International Organizations before Domestic Courts: Recent Developments', 2010 *International Organizations Law Review* 6, pp. 121-148.

128 *Supra* note 116.