

The Articles on the Responsibility of International Organisations – Still Up in the Air after More Than a Decade?¹

ÁGOSTON MOHAY

associate professor, University of Pécs Faculty of Law

BENCE KIS KELEMEN

senior lecturer, University of Pécs Faculty of Law

ATTILA PÁNOVICS

senior lecturer, University of Pécs Faculty of Law

NORBERT TÓTH

associate professor, University of Public Service

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The responsibility of international organizations for internationally wrongful acts is a complex issue of international law – a situation that was meant to be changed by the Articles on the Responsibility of International Organisations (ARIO, 2011). Yet the status of the ARIO remains disputed in theory and practice: it is difficult to say whether it qualifies as customary law or rather the progressive development of the law. This paper outlines some of the most important conceptual frameworks regarding this subject, providing insight into the corresponding questions of interpretation.

Key words: international responsibility, ARIO, international organizations, customary international law, shared responsibility

Responsibility for internationally wrongful acts is one of the most complex issues in international law. This is well illustrated by the countless studies and monographs devoted to this field, and by the fact that there is hardly an article on international law that does not deal with some aspect of responsibility, even if in a tangential way.

Understandably, international responsibility was first conceived of in terms of the responsibility of states for breaches of international law, and even this transpired only relatively late, in the 1920s, when the thesis began to appear in international judicial practice that the existence of international

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law necessarily implied the existence of international responsibility, or in other words, ‘responsibility is the corollary of law’.² Subsequently, the regulation of State responsibility has gradually evolved,³ the discussion of which is beyond the scope of this study; it is sufficient to refer to the endpoint of this evolution, namely the final Draft Articles on the International Responsibility of States (hereinafter: ARSIWA), finalised by the International Law Commission in 2001 and recommended to States by the UN General Assembly in a resolution.⁴ Although this codification process did not result in the adoption of an international treaty, the content of ARSIWA, even in the absence of legally binding force, can be seen as having the force of customary international law.⁵ The codification efforts of the International Law Commission did not stop there, however, as in 2011 the final Draft Articles on the Responsibility of International Organisations (hereinafter: ARIO) were adopted, which suffered the same fate as the 2001 final draft, i.e. it was merely ‘recommended’ to States by the UN General Assembly.⁶ Although the customary origin of the norms contained in the ARIO may be debated,⁷ its fundamental provisions, such as the fact that a breach of international law by an international organization (hereinafter: IO) results in international legal responsibility⁸, are undoubtedly binding rules of international law.⁹

In any case, the importance of the responsibility of IOs is easy to understand: the proliferation of international organizations starting with the 20th century has created many new international legal entities whose accountability and responsibility are subject to questions.¹⁰ In this context, it is useful to review and interpret the main conceptual issues of the responsibility of international organisations.

1. Conceptual overview

The basic idea of international responsibility is that states and IOs commit a breach of international law when they act or fail to act in breach of an international legal obligation that is attributable to them. All such conduct gives rise to international responsibility.¹¹ Starting from this basic idea, it is

² J. Bruhács, *Nemzetközi jog I. – Általános rész*, Dialóg-Campus, Budapest–Pécs, 2011, p. 180. (Translation by the Authors.)

³ On the emergence of this development in Hungarian legal literature, see G. Kecskés, *Az államfelelősség és szankciók nemzetközi jogi kérdéskörének megjelenése a magyar jogirodalomban*, Acta Universitatis Szegediensis: acta juridica et politica, Vol. 77, No. 1, August 2014, pp. 289-301.

⁴ GA. Res. 56/83, Responsibility of States for Internationally wrongful acts, 12 December 2001. (hereinafter ARSIWA), point 3.

⁵ P. Kovács, *Nemzetközi közjog*, Osiris, Budapest, 2016, p. 542.

⁶ GA. Res. 66/100, Responsibility of international organizations, 9 December 2011. (hereinafter ARIO), point 3.

⁷ Indeed, even the International Law Commission itself acknowledges that many of the provisions of the draft are progressive developments rather than codification. See United Nations, *Draft articles on the responsibility of international organizations, with commentaries*, (hereinafter ARIO Commentary) in Yearbook of the International Law Commission Vol. 2., Part 2, New York – Geneva, 2011, pp. 46-47, para. 5. However, since the commentary does not distinguish between these provisions, each norm may still have a kind of ‘codification authority’. See F.L. Bordin, *Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law*, International Comparative Law Quarterly, Vol. 63, No. 3, July 2014, pp. 556-557.

⁸ ARIO, Art. 3.

⁹ M. Möldner, *Responsibility of International Organizations - Introducing the ILC’s DARIO*, Max Planck Yearbook of United Nations Law, Vol. 16, No. 1, February 2012, p. 286.

¹⁰ A. Delgado Casteleiro, *The International Responsibility of the European Union: from Competence to Normative Control*, Cambridge University Press, Cambridge, 2016, p. 54.

¹¹ ARSIWA, Arts. 1-2; ARIO, Arts. 3-4.

essential to clarify what is meant by attribution. The literature distinguishes between two concepts of attribution: *attribution of conduct* and *attribution of responsibility*.

As regards attribution of conduct, it is simply the case that states and IOs are not in themselves capable of engaging in any conduct, and therefore in order to speak of conduct by a state or an international organisation, action or omission by another actor must be attributed to states or IOs. If the state commits a *de jure* or *de facto* violation through its organs, this generates international responsibility on the state's side - the same is true of wrongful conduct committed by organs or agents of an IO.¹² This issue will be discussed in more detail in Section 3.

As regards attribution of responsibility, by contrast, states or international organisations cause a collective breach to a third party. Examples include *aid or assistance, direction and control, coercion* and *circumvention* of international obligations.¹³ In some cases, these activities are included under the umbrella of *derived responsibility*, effectively treating it synonymous with attribution of responsibility.¹⁴ This is unfortunate, however, if we understand derived liability to mean that one entity assumes liability for the conduct of another entity, while the actor who actually commits the conduct is liable in parallel for his own acts or omissions. A valid criticism of this concept is the fact that a State or an IO will not always be liable for its own conduct if another entity is already liable for the same conduct. A good example is the circumvention of international obligations, where the responsibility of the IO is independent of whether the decision or authorisation was unlawful for its member state(s) or for the international organization itself to implement.¹⁵ It follows that attribution of responsibility does not necessarily imply shared responsibility.¹⁶ Although the concept of derived responsibility is undoubtedly useful and may in some cases be a useful tool for categorising forms of liability, we do not consider it appropriate to use this concept, since, apart from the problems described above, it suggests in name that in such cases responsibility is derived from another responsibility. Categorisation can be made this way as well, but in this case it will not be identical with the attribution of responsibility, it will rather mean a much narrower category of responsibility, which will in any case be a subtype of shared responsibility.

Although international responsibility is primarily understood as independent, individual responsibility (and is treated as such by subjects of international law),¹⁷ it is important to mention a concept that can easily occur in practice and has been referred to above: that is the so-called *shared responsibility*. According to leading literature, shared responsibility occurs when several actors contribute to an individual wrongful result, and where responsibility is shared between actors rather than being borne by a collective - or rather a collective entity. It is also important to note that in a case of shared liability, the individual contribution of the actors to the wrongful result cannot be established separately, i.e. the specific conduct of each actor is not directly causally linked to a specific part of the infringement.¹⁸ It is possible to 'share' responsibility in the case of attribution of conduct and

¹² ARSIWA, Art. 4; ARIO, Art. 6.

¹³ J. D. Fry, *Attribution of Responsibility*, in A. Nollkaemper & I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art*, Cambridge University Press, Cambridge, 2014, pp. 98-100. Although we can see that not all of the examples given can be considered as attribution of responsibility. See *ibid* 104.

¹⁴ See, for example, S.Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, *Oslo Law Review*, Vol. 6, No. 3, December 2019, p. 182.

¹⁵ Fry 2014, pp. 103-104; ARIO Art. 17. (3).

¹⁶ Cf. Johansen 2019, p. 182.

¹⁷ A. Nollkaemper, *The duality of shared responsibility*, *Contemporary Politics*, Vol. 24, No. 5, March 2018, pp. 526-527.

¹⁸ A. Nollkaemper & D. Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, Michigan

attribution of responsibility as well, even in a way where a State or IO becomes responsible for its own acts or omissions, while another entity becomes responsible via attribution of responsibility.

2. Basic issues of the responsibility of international organisations

If we start from the above-mentioned basic concept that there is no law without responsibility, then the question with regard to the responsibility of IOs will not be primarily whether the responsibility of an IO *can* be invoked, but rather *under what conditions*. This does not mean, of course, that the question of the responsibility of IOs is not a complex one - quite the contrary. By analogy, the gist of the problem is similar to that of the responsibility of legal persons in criminal law.¹⁹ Just as the issue of the criminal responsibility of associations of persons has long been a matter of legal research, the question of how international organisations can be held responsible is proving to be a similarly complex one. Given that the autonomous legal personality of IOs is not questioned in international law, it is not in itself problematic to accept the possibility of the autonomous international responsibility of IOs in principle²⁰ - irrespective of the derivative and limited nature of their legal personality.²¹

We have already referred to the ARIO's clear starting point that any breach of an existing obligation by an IO entails the responsibility of the organisation. There is no difference compared to ARSIWA as regards the two conjunctive conditions for establishing international responsibility, since ARIO also requires a breach of an existing international obligation of the organisation which is at the same time attributable to the organisation. However, both conditions may raise some questions of interpretation.

2.1. What are the international law obligations of an IO?

In this respect, international treaties concluded by international organisations have a clear position: the Vienna Convention of 1986 between States and International Organizations or between International Organizations refers in Article 26 to the principle of *pacta sunt servanda*. But what about the general rules of international law?

It is hardly realistic to think that *ius cogens* norms, the most fundamental rules of the international legal order, which apply to all international legal entities,²² should not bind international organisations. In view of the hierarchical position of *ius cogens* in the international legal order, *ius cogens* should take precedence over the international treaties establishing international organisations and

Journal of International Law, Vol. 34, No. 2, 2013, pp. 2-3, pp. 366-368.

¹⁹ For an overview of the criminal liability of legal persons - with a focus on Hungarian and EU law - see Zs. Fantoly, *A jogi személyek büntetőjogi felelőssége*, HVG-Orac, Budapest, 2008, p. 334.

²⁰ D. J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, Virginia Journal of International Law, Vol. 36, No. 2, 1996, p. 277. Of course, Bederman also summarizes in this paper that the legal personality of international organizations was not self-evident from the beginning - indeed, and in this context, the rules of domestic law on legal persons had analogous relevance. Ibid 275-378, on the analogous approach in particular pp. 353-357.

²¹ A. Blahó & Á. Prandler (Eds.), *Nemzetközi szervezetek és intézmények*, Akadémiai Kiadó, Budapest, 2014, pp. 58-59.

²² All obligations arising from *ius cogens* are obligations of an *erga omnes* nature. See Bruhács 2011, p. 143.

should bind organisations in the same way as States.²³ Mention should be made as well of the obligation not to recognise a situation created by a serious breach of *ius cogens*, which should also apply to IOs by virtue of the general binding force of *ius cogens*.²⁴

As for customary international law, which is also not relative in scope, but - with the exception of *persistent objector* states - generally binding. At a theoretical level, it can be stated that customary international law is also binding on IOs, in so far as this is compatible with their specific characteristics (other than those of States).²⁵ According to the dominant view, international organisations are thus bound by customary law *mutatis mutandis*, or at least by a substantial part of customary law - this includes, of course, the law of international treaties, but also the above-mentioned foundational rule of responsibility.²⁶

As far as general principles of law are concerned, since international organisations have legal personality under international law and are members of the international community, they should - by the logic of international law - also be bound by these sources of general international law. *Mutatis mutandis*, therefore, the observations made with regard to customary law can be considered valid here as well.

To sum up, and also with reference to the advisory opinion of the International Court of Justice on the agreement between Egypt and the World Health Organization, it can be said that international organizations, as subjects of international law, are bound by general international law.²⁷

2.2. What behaviour can be attributed to the international organisation?

As noted in the introduction, it is important to distinguish between *attribution of conduct* and *attribution of responsibility*. In this section, we briefly discuss the former. Attribution of conduct is dealt with in Articles 6 to 9 of the ARIO as follows.

On the one hand, the ARIO provides for the conduct of the organs or agents of the IO, which will be attributable to the organisation, irrespective of the function/responsibility or position of the organ or agent in the institutional system of the organisation.²⁸ This can be considered the simplest case. However, the ARIO, like the ARSIWA, broadens the scope of attributable conduct to a certain extent.²⁹

Where a State or an IO places an organ or agent at the disposal of another international organiza-

²³ A. A. Cançado Trindade, *Some Reflections on Basic Issues Concerning the Responsibility of International Organizations*, in M. Ragazzi (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, Leiden – Boston, 2013, p. 7.

²⁴ See ARIO Arts. 41-42 and see for example M. Dawidowicz, *The obligation of non-recognition of an unlawful situation*, in J. Crawford & A. Pellet & S. Olleson (Eds.), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 677-686.

²⁵ This thesis is mostly accepted, although there are some doubtful commentators. See on this T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre*, Springer, Berlin-Heidelberg, 2011, p. 596.

²⁶ Ibid p. 598.

²⁷ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 37.

²⁸ ARIO, Art. 6 (1).

²⁹ J. Bruhács, *Az államok nemzetközi felelősségéről szóló végleges tervezet*, in K. Tóth (Ed.), *In memoriam Nagy Károly egyetemi tanár (1932–2001)*, Szegedi Tudományegyetem, Szeged, 2002, p. 122.

tion, the conduct of that organ or agent will be deemed to constitute the conduct of that organ or agent, provided that the latter organization exercises *effective control* over the organ or agent.³⁰ The introduction of the condition of effective control is necessary, since the organ or agent placed at the disposal of the organisation will not necessarily be controlled exclusively by the international organisation, but will continue to act in some respects as an agent of the ‘providing’ State - this is typically the case, for example, in UN peacekeeping operations, where the State continues to exercise disciplinary and criminal jurisdiction vis-à-vis members of its contingent offered to the UN.³¹ The situation is nuanced by the fact that in the context of peacekeeping missions, the UN emphasises, ‘for a number of reasons, notably political’, the UN’s responsibility towards third parties, which is understandable from a metajuridical perspective, but, as the ARIIO commentary emphasises, the attribution of conduct must nevertheless rest on an objective, factual basis.³² However, the assessment of effective control is neither straightforward nor uncontroversial - especially in the light of the relevant ECtHR case law and its critique.³³

The international organisation will also be held responsible for the conduct of its organs or agents if the conduct exceeds the organisation’s competences or is contrary to its instructions. However, for such conduct to be attributable, the organ or agent must be acting within the scope of its official functions and in accordance with its general function within the organization.³⁴ Under the ARIIO, therefore, *ultra vires* conduct may also be attributable to the organisation and responsibility cannot be avoided on the ground that the organisation or agent exceeded its powers. Attribution to the organisation does not, of course, have any bearing on, or regard to, the ‘internal’ assessment of the conduct, i.e. its invalidity under the rules of the IO.³⁵ It should be noted, however, that in practice, because of the derivative and limited, functional legal personality of international organisations, the concept of *ultra vires* acts can only be interpreted in a scope and content significantly different from that of *ultra vires* acts of States.³⁶

In addition to the above, ARIIO also attributes³⁷ to the international organisation the conduct it has recognised and accepted as its own. This concerns conduct which would not be attributable to the organisation on the basis of the grounds of responsibility discussed previously.³⁷ It is important to note that under the ARIIO, conduct recognised and accepted by the organisation as its own is attributable to the *extent to which* it has recognised it as its own - recognition may therefore be differentiated and may relate to a specific part of the conduct in question.³⁸

The complexity of the attribution issue is increased by the fact that, as Giorgio Gaja, ARIIO Special Rapporteur, explains in his seventh report, the attribution of *responsibility* does not always depend on whether the *conduct* is attributable to the international organisation: by way of example, he refers to the possibility that, if an IO coerces a State or another IO into an action which, in the absence

³⁰ ARIIO, Art. 7.

³¹ ARIIO, Commentary p. 56.

³² Ibid pp. 57-58.

³³ See also section 4. Regarding the ECtHR case law, Gaja laconically stated in 2009 that the approach chosen by the court, which differs from the ARIIO logic, is not convincing *from a policy point of view*. Seventh report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, Document A/CN.4/610, p. 80.

³⁴ ARIIO, Art. 8.

³⁵ ARIIO Commentary, p. 61.

³⁶ V. J. Proulx, *An Uneasy Transition? Linkages between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations*, in M. Ragazzi (Ed.), *Responsibility of International Organizations*. Essays in Memory of Sir Ian Brownlie, Martinus Nijhoff, Leiden – Boston, 2013, p. 116.

³⁷ ARIIO, Art. 9.

³⁸ ARIIO Commentary, p. 62.

of coercion, would be an internationally wrongful act for the coerced actor, responsibility will fall on the coercing organisation, even though the conduct is not attributable to it.³⁹

3. Relations of responsibility between IOs and their Member States

We have previously clarified that, in the case of attribution of responsibility, several entities necessarily cause collective harm to a third party. As regards the relationship between international organisations and their member states, several variations are conceivable with regard to the attribution of – as well as the sharing of – responsibility. As a starting point, it should be emphasized again that the responsibility of an IO is not necessarily based on the attributability of a given conduct.⁴⁰

The responsibility of a Member State may, of course, arise under an express provision to that effect in the founding treaty of the IO (or an express intention to do so), or where the organisation is under the *direct control* of the State or where the organisation has acted under specific circumstances as an agent of the State, with the unilateral undertaking of obligation or guarantee by the State.⁴¹

IOs have a *separate will* from their Member States,⁴² and therefore, as a rule, Member States cannot be held responsible for the actions of an international organisation.⁴³ This has been confirmed by the judgments of UK courts in the *International Tin Council* case. The Tin Council was originally set up in 1956 to operate an international agreement (the International Tin Agreement) concluded two years earlier.⁴⁴ The main purpose of the organisation, which operated essentially much like a cartel, was to stabilise the world price of tin by influencing the long-term balance between supply and demand.

In 1981, the then 23 members of the organisation (22 countries⁴⁵ and the European Economic Community) signed a five-year agreement,⁴⁶ but the market price of tin fell dramatically as demand fell.⁴⁷ As a result, the International Tin Council soon became insolvent and unexpectedly went bankrupt on 24 October 1985. The bankruptcy of the organisation not only caused huge losses to the creditor banks and others, but also led to a temporary and significant downturn in the international market for some other products as well (e.g. cocoa, coffee, rubber).⁴⁸ Negotiations to save the organisation were concluded with unprecedented speed in March 1986, when two of the main tin-producing member states (Malaysia and Thailand) announced that they would not participate in the recovery

³⁹ Seventh report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur. DOCUMENT A/CN.4/610, p. 77.

⁴⁰ Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur. DOCUMENT A/CN.4/541, para. 11.

⁴¹ M. N. Shaw, *International Law*, 7th edn., Cambridge University Press, Cambridge, 2014, p. 954.

⁴² N. D. White, *The law of international organisations*, Manchester University Press, Manchester, 2005, p. 30.

⁴³ ARIO Commentary, p. 100.

⁴⁴ Since 1960, the Agreement has been regularly renewed by the member states of the Organisation.

⁴⁵ Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, the Netherlands, Nigeria, Norway, Spain, Sweden, Switzerland, Thailand, Zaire and the United Kingdom. See I. A. Mallory, *Conduct Unbecoming: The Collapse of the International Tin Agreement*, *American University International Law Journal*, Vol. 5, No. 3, 1990, p. 835.

⁴⁶ UNCTAD, Sixth International Tin Agreement, TD/TIN.6/14

⁴⁷ This was due, among other things, to the spread of substitute materials and increased recycling of waste.

⁴⁸ Mallory 1990, p. 892.

plan. Despite the fact that, with some exceptions⁴⁹, the behaviour of the governments of the member states was at least not ‘appropriate’, the *Court of Appeal* held⁵⁰ that the member states were not liable for the debts of the organisation because it acted as a mediator with independent international entity between the Member States and the creditors (for example, it was a party to commercial transactions) and enjoyed internal legal immunity in the United Kingdom.⁵¹ Although the judgment was in line with the general principle of international law that treaties do not create obligations for third countries without their consent (*pacta tertiis nec nocent nec prosunt*),⁵² it also illustrated the legal uncertainty surrounding the responsibility of international organisations and sparked heated debates that continue to this day.

4. Parallel attribution

As indicated above, international law is essentially based on independent individual responsibility, which usually implies exclusive responsibility, i.e. one entity is responsible for one conduct. Consequently, the parallel attribution of conduct to two or more entities (*dual* or *multiple attribution*) is rare in international law.⁵³ However, the possibility of dual attribution has been accepted by the International Law Commission in both ARSIWA and ARIO, while international judicial fora have so far rather tended to stick to the well-established concept of individual responsibility.⁵⁴ It is important to note that we are talking here about attribution of conduct, not attribution of responsibility.⁵⁵ The above statement should be complemented by the literature that suggests that parallel attribution is the ‘default’ concept of attribution in cases where States and IOs act jointly.⁵⁶

Parallel attribution can occur when the acts or omissions of one actor trigger the application of the attribution rules by two or more actors, or when an act is jointly performed by two or more actors whilst their conduct is attributable to two or more actors.⁵⁷ In fact, only the former category can be called *dual attribution*, but this will not always entail the international responsibility of both entities involved, since, for example, IOs and States are subject to different international legal obligations, and dual attribution can be envisaged only by establishing the responsibility of one of the parties.⁵⁸ An example of this concept is the creation of joint bodies or where a person has an institutionalised attribution relationship with a specific entity. For example, a *de jure* State organ may simultaneously be under the direction and control of another State or even an IO.

The other case of parallel attribution, on the other hand, presupposes a rather rare situation where the joint action of two persons belonging to two separate actors, for example the joint wrongful

⁴⁹ For example, the UK, Canada, Japan and the EEC. See *ibid*

⁵⁰ *Maclaine Watson & Co. Ltd v International Tin Council*, 26 October 1989, 81 ILR 670.

⁵¹ See *The International Tin Council (Privileges and Immunities) Order*, S.I. 1972, No. 120.

⁵² See 1969 Vienna Convention on the Law of Treaties, Art. 34.

⁵³ Nollkaemper & Jacobs 2013, p. 383; J. d’Aspremont & A. Nollkaemper & I. Plakokefalos & C. Ryngaert: *Sharing Responsibility Between Non-State Actors and States in International Law: Introduction*, *Netherlands International Law Review*, Vol. 62, No. 1, June 2015, pp. 58-59.

⁵⁴ Nollkaemper & Jacobs 2013, p. 385.

⁵⁵ Cf. Fry 2014, pp. 98-99.

⁵⁶ F. Messineo, *Attribution of Conduct*, in A. Nollkaemper & I. Plakokefalos (Eds.), *Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art*, Cambridge University Press, Cambridge, 2014, p. 97.

⁵⁷ *Ibid* p. 67.

⁵⁸ Johansen 2019, pp. 182-183.

conduct of soldiers of two separate states, results in parallel attribution to both entities.⁵⁹ In both of the above categories, we can speak of shared responsibility, but this should not be confused with the concepts of derived responsibility or the attribution of responsibility.⁶⁰ It should be stressed, however, that the concept of parallel attribution cannot be used in all cases where an act or omission is potentially attributable to more than one entity: the principle does not apply to seconded organs.⁶¹

This paper is not intended to go in-depth into the case law on parallel responsibility, but it needs to be pointed out that this notion has mainly been raised in the context of peacekeeping missions, and that the cases have resulted in a variety of decisions on the question of international responsibility. However, noting its importance, the case law of the European Court of Human Rights (ECtHR) deserves specific mention: the ECtHR first had to deal with the possibility of parallel attribution in relation to IOs in the joined *Behrami* and *Saramati* cases. Here, the ECtHR rejected the concept of shared responsibility and thus of parallel attribution, and attributed the wrongful conduct underlying the facts of the case to the UN alone.⁶² The decision has been the subject of much criticism in the literature, as the ECtHR applied the so-called *ultimate authority and control* test in assessing attribution, rather than that of *effective control*.⁶³ The ECtHR's jurisprudence later became more nuanced and, like some national courts, accepted the possibility of shared responsibility and even the concept of parallel attribution.⁶⁴

Part 5 of the ARIIO contains provisions on the liability of Member States for the unlawful activities of an international organisation.⁶⁵ According to Article 58(2), an international organisation will be liable if its Member State provides *aid or assistance 'in accordance with the rules of the organisation'* to the commission of the wrongful act. However, a non-Member State may also be held liable if it knowingly assists a wrongful act committed by an IO, provided that (1) it is aware of the circumstances of the conduct and (2) the conduct would be wrongful if the State itself were committing it.⁶⁶ Under Article 60 ARIIO, the State, and not the international organisation, will be responsible if its Member State knowingly compels the organisation to commit the breach,⁶⁷ or if it attempts to 'hide' behind the organisation in order to circumvent its own international legal obligations.⁶⁸

⁵⁹ For further examples, see Messineo 2014, pp. 67-79; for a simplified typology of liability in such cases, see Johansen 2019, p. 190.

⁶⁰ Johansen 2019, pp. 98-99.

⁶¹ Messineo 2014, p. 83; ARSIWA Art. 6 and ARIIO Art. 7.

⁶² *Behrami v. France*, 71412/01; *Saramati v. France, Germany and Norway*, 78166/01, Decision of 2 May 2007. para. 144.

⁶³ See, for example, A. Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, Human Rights Law Review, Vol. 8, No. 1, February 2008, pp. 151-170, 164. Nevertheless, there is also a view in the literature that the ECtHR did apply the effective control test, but in a special presumption-opposition format. See Y. Okada, *What's Wrong with Behrami and Saramati? Revisiting the Dichotomy between UN Peacekeeping and UN-authorized Operations in Terms of Attribution*, Journal of Conflict & Security Law, Vol. 24, No. 2, March 2019, pp. 362-365.

⁶⁴ See, for example, Hárs 2015, pp. 72-73; Johansen 2019, p. 189; P. Perisic, *Attribution of Conduct in UN Peacekeeping Operations*, Pécs Journal of International and European Law, Vol. 2020/I, May 2020, pp. 17-23.

⁶⁵ ARIIO, Arts. 58-61.

⁶⁶ ARSIWA, Art. 16(a)-(b) "(a) the State does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

⁶⁷ In this context, it cannot be ruled out that this coercion is in accordance with the rules of the organisation, although it is difficult to imagine coercion in accordance with the rules of the organisation. Cf. ARIIO Commentary p. 98.

⁶⁸ According to Art. 61(2) of the ARIIO, this rule applies even if the act in question does not constitute a breach on the part of the international organisation.

However, in the case of a non-member State that directs and controls an international organisation or knowingly instructs it to commit a breach, international responsibility lies with the latter.⁶⁹ Finally, as an additional element, a Member State is also responsible for an international organization's wrongful conduct if it has admitted its responsibility, expressly or implicitly, to the injured party⁷⁰ or it has led the injured party to rely on its responsibility.⁷¹

5. Concluding thoughts

The ARIO took much less time to create than ARSIWA, partly because the ARIO essentially follows the structure, principles, and provisions of the ARSIWA: this feature has been criticised as much as praised. The International Labour Organisation, for example, in its comments during the codification process, criticised the fact that the overly 'parallel' provisions of the ARIO did not take sufficient account of the significant differences between legal entities; Alain Pellet (who was a member of the International Law Commission at the time of the codification), on the other hand, pointed out - in agreement with Special Rapporteur Gaja - that international responsibility as such cannot reasonably have several different basic concepts.⁷²

That being said, the ARIO raises even more questions of interpretation than its predecessor. In fact, if we go into the details, we can see that the two documents differ considerably in terms of content,⁷³ and therefore we cannot speak of the existence of fully coherent rules in the international liability regime. Indeed, the International Law Commission has in many cases refrained from using analogies, which has made the interpretation and application of ARIO more uncertain and unpredictable from this point of view - there is no question, of course, that there are much greater differences between international organisations than between States in terms of their various specificities, but it seems more important to emphasise similarities and similarities in order to ensure the coherence of the liability regime.⁷⁴

As shown above, the ARIO's rules have left a number of questions open as to the different possible variations in the division of responsibilities between IOs and their member states. In order to fill these gaps, there is a need for clear practice by international organisations and their member states, from which conclusions can be drawn as to the relevant international legal norms. At the same time, amendments to the founding treaties of IOs clarifying this issue could also help to resolve the debated elements of the ARIO.

As for parallel attribution, although its possibility seems now to be accepted in principle by international and national judicial fora, it is still not a secure basis for holding international organisations responsible in the absence of jurisdictional fora that have jurisdiction covering IOs.⁷⁵

⁶⁹ ARIO, Arts. 59 (1) and 60.

⁷⁰ The aggrieved party in this context cannot only be a state or an international organisation. See ARIO Commentary p. 101.

⁷¹ ARIO, Art. 62.

⁷² Cf. A. Pellet, *International organizations are definitely not states. cursory remarks on the ILC articles on the responsibility of international organizations*, Martinus Nijhoff, Leiden – Boston, 2013, p. 44.

⁷³ See for example ARIO Arts. 6, 17 and 61. See on this C. Ahlborn, *The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations - An Appraisal of the 'Copy-Paste Approach'*, *International Organizations Law Review*, Vol. 9, No. 1, January 2012, pp. 53-66.

⁷⁴ Ahlborn 2012, p. 61. This is also emphasized by Pellet in the above-mentioned work (ibid).

⁷⁵ Nollkaemper & Jacobs 2013, p. 436.

The above issues also need to be discussed as regards the European Union as a *sui generis* international organisation. The specific supranational nature of the Union and its autonomous legal order with its own judicial mechanism may well have implications for the way in which responsibilities are shared and attributed between the Union and its Member States. Despite its specific characteristics, which are different from those of international law, the European Union is not a state, but is, at least from the point of view of international law, a unique international organisation. In the various codification processes of the International Law Commission, the EU initially referred to itself as a rather specific international organisation which goes well beyond the usual attributes of classical international organisations, and then, being less successful in this, began to position itself as a regional (economic) international organisation.⁷⁶

One possible distinction, which emphasises the EU's exceptionalism, is that in the course of integration the European Union became a 'constitutional international organisation', while the others remained 'functional international organisations'.⁷⁷ In any case, it is clear that EU law cannot exist without interactions with international law, if only because the Union itself is subject to international law⁷⁸ and as such can become a party to international treaties and even conclude them on behalf of itself and its Member States.⁷⁹ The Union must also be bound by customary international law, *mutatis mutandis*, in view of the jurisprudence of the CJEU.⁸⁰

The ARIO and ARSIWA are the results of a codification process of international law and are therefore presumed to incorporate the relevant rules of customary international law. According to the case law of the CJEU, the rules of customary international law are part of the EU legal order and must be taken into account when EU secondary legislation is drafted. This position is also in line with the rules of international law in force, since, as the International Court of Justice has stated in relation to international organisations with international legal personality, these organisations are bound by obligations arising from the general rules of international law.⁸¹ In the case of the Union, therefore, the system(s) of rules of liability based on customary law cannot be ignored, although neither can the *sui generis*, autonomous character of the Union (which it itself emphasises rather powerfully) - the specific rules of the organisation, its internal responsibility system, its own system of legal remedies, etc. at the very least raise the possibility of *lex specialis* rules in many instances. The EU's insistence on the uniqueness of its legal order – as something other than international law – is strongly reflected for instance in Opinion 2/13 of the CJEU as well.⁸² This, among other things, has a strong bearing on the EU's (still only planned) accession to the European Convention on Human Rights; the CJEU's abovementioned opinion has had a direct impact on the revised accession negotiations. In March 2023, the CDDH Ad Hoc Negotiation Group reached unanimous provisional agreement on solutions to the issues raised by Opinion 2/13 – save for the jurisdiction

⁷⁶ T. Molnár, *Leválás, majd saját képre formálás: az Európai Unió és a nemzetközi jog fejlesztése, különös tekintettel az ENSZ Nemzetközi Jogi Bizottság munkájára*, in G. Kajtár & P. Sonnevend (Eds.), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században. Tanulmányok Valki László tiszteletére*, Eötvös Kiadó, Budapest, 2021, pp. 383-384.

⁷⁷ L. Gasbarri, *The Concept of an International Organization in International Law*, Oxford University Press, Oxford, 2021, p. 64.

⁷⁸ The European Union is a legal person as per Art. 47 TEU.

⁷⁹ See Arts. 3(2) and 216-217 of the Treaty on the Functioning of the European Union (TFEU).

⁸⁰ Of course, this issue is not without its uncertainties and divergences in the jurisprudence. See, for example, Á. Mohay, *A nemzetközi jog érvényesülése az uniós jogban*, PTE ÁJK Európa Központ – Publikon Kiadó, Pécs, 2019, pp. 83-95.

⁸¹ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I. C.J. Reports 1980, pp. 89-90.

⁸² EU:C:2014:2454

issue tied to the Common Foreign and Security Policy (hereinafter: CFSP), which the EU intends to resolve internally, by introducing a ‘re-attribution’ concept.⁸³ The CFSP-conundrum is indeed one of jurisdiction, but is at the root of it an responsibility question, revolving around attribution. This further underscores the need for a clear interpretation and consistent implementation of responsibility rules applicable to international organizations – be they ‘traditional’ or supranational.

⁸³ 46+1(2023)35FINAL, 30 March 2023. For an overview of the outcome of the renegotiations see J. Krommendijk, *EU Accession to the ECHR: Completing the Complete System of EU Remedies?* SSRN, pp. 3-4 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418811 (2 May 2023).