The Responsibility of International Organisations and their Member States: an Overview of Outstanding Questions of Interpretation[1]

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The responsibility of international organisations has been on the agenda of the international community for some time now, as evidenced among other things by the preparation of the Draft Articles on Responsibility of International Organizations (DARIO). However, the DARIO has not been adopted as a binding instrument, and various questions of interpretation remain. This brief problem-raising paper outlines some of the main contentious questions in this context and suggests further consideration of a number of related issues.

Keywords: responsibility of international organisations, attribution, member states

1. Introductory Remarks

Responsibility in international law is in and of itself a difficult and contentious issue – it is enough here to refer to the fact that the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA)[2] took almost 50 years, and even so did not result in the adoption of an international treaty. A more recent but nonetheless complex and intensely debated issue is that of the responsibility of international organisations: between 2002 and 2011, the International Law Commission (ILC) has produced its Draft Articles on Responsibility of International Organizations (DARIO) under the guidance of Special Rapporteur Giorgio Gaja.[3] It is perhaps not all too surprising that the DARIO has suffered – at least until the time of writing of this paper – a similar fate to its counterpart, as it not been adopted as a binding international treaty either – leaving this field of responsibility governed arguably by customary international law. Yet the matter of the responsibility of international organisations continues to grow in importance: this is *inter alia* evidenced by the fact that a number of international judicial forums have begun addressing some of its aspects. The topic has special relevance as regards international military operations and the protection of human rights. Furthermore, the responsibility of the European Union (EU) as a *sui generis* supranational organisation requires special attention, perhaps most notably in the context of the Union's justice- and home affairs cooperation and its common foreign and security policy.

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[2] UN Doc A/56/10 (2001).

[3] UN Doc A/CN.4/L.778.

This paper aims to serve as a brief problem-raising overview of the main issues that need to be addressed in this context.

2. The Responsibility of International Organisations: Main Issues

In line with the above, an analysis of the responsibility of international organisations and their member states needs to be based primarily on the DARIO and subsequent practice by states and organisations, having special regard to relevant judicial decisions and paying special attention to the situation of the European Union as a *supra*national organisatin. The research described below has both theoretical and practical relevance.

In a theoretical sense, the principles laid down in DARIO (which are heavily based on the DARSIWA) are often complex and riddled with exceptions and special rules and were openly disputed by some organisations – notably the European Commission[4] – and scholarly opinion. Thus, the logical structure of DARIO-based international responsibility requires detailed analysis and the pinpointing of its problematic elements, in order to be able to reconcile possible interpretations.

However, this issue is far from being merely theoretical in nature. *Exempli gratia:* in relation to the 1995 Srebrenica genocide, the question of responsibility of the United Nations (UN) and/or Dutch troops was raised before Dutch courts – which were faced with the absolute immunity of the UN.[5] In relation to a cluster bomb left behind in Kosovo following the 1999 NATO air strikes, the European Court of Human Rights inferred that the lack of proper de-mining activities was in principle attributable to the (UN), but ultimately declared that it had no jurisdiction to rule on the ECHR compliance of the UN as it was not a party to the ECHR.[6] These classic examples not only highlight the practical significance of the research but also the need to clarify rules on attribution and eventual shared or joint responsibility between international organisations and their member states, as a 'responsibility gap' can easily present itself before various judicial forums based on a lack of jurisdiction *ratione personae*. To name a much more recent example: the activities of FRONTEX, the EU's Border and Coast Guard Agency are put into practice mostly by seconded national officers and/or in cooperation with such staff. How will attribution for a specific wrongful act – which may also constitute an infringement of fundamental rights – take place in the framework of such operations? Against which actor(s) – if any – could claims be directed?

The responsibility issue has at least five significant dimensions in this context, which will be listed and briefly outlined below (decidedly without attempting to be comprehensive).

a) When and how can an international organisation incur responsibility for internationally wrongful acts directly?

International organisations are considered subjects of international law, with a legal personality that is separate from that of its Member States, yet it is also derivative therefrom and limited in scope. The limitations of their legal personality mean *inter alia* that international organisations

[4] Responsibility of International Organizations: Comments and Observations received from International Organizations, 14 February 2011, UN doc A/CN.4/637, p. 7.

[5] N. Blokker, *Member State Responsibility for Wrongdoings of International Organizations. Beacon of Hope or Delusion?* International Organizations Law Review, Vol. 12, No. 2, 2015, pp. 326-327.

[6] See Joined cases Behrami and Behrami v. France and Saramati v. France, Germany and Norway (Applications no. 71412/01 and 78166/01). Cf. P. J. Kuijper*, Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?* International Organizations Law Review, Vol. 7, No. 1, 2010, pp. 16-17.

traditionally do not have standing before international courts, including the International Court of Justice – this obviously has an effect on any judicial enforcement of responsibility. The DARIO proclaims of course as a general principle that every internationally wrongful act of an international organization entails the international responsibility of that organization (Art. 3). While the DARIO is based on DARSIWA, each of its provisions need to be analysed from the specific perspective of international organizations; this is made all the more difficult due to the "limited availability of pertinent practice."[7] Nonetheless, organisations can undertake obligations by concluding international treaties, but it is often the case that compliance with said obligations depends on Member State conduct. The differences between attribution of conduct and attribution of responsibility also need to be drawn up in order to be utilized in the subsequent phases of the research.

b) When can an international organisation be responsible for the acts of its Member States?

According to the DARIO, when an organ of a State is placed at the disposal of an international organization, it is not the State but the Organisation that can eventually be held responsible (Article 7), yet the criterion for attribution is not clear and can only be decided in context, on a case-by-case basis, having regard to the level of factual control exercised by the relevant actors – in this sense, the meaning of factual control needs to be elaborated upon as well. It is also difficult to differentiate in reality between a member state acting in accordance with the rules of the organisation (as per Article 59 of the DARIO) on the one hand and the member state exercising control over the organisation on the other. The criteria relevant for such attribution based on the control theory require further clarification and elaboration. This question (and in fact not only this one) also brings up the issue of differentiation between jurisdiction and responsibility, for example in the context of military operations conducted outside the state in a situation where extraterritorial human rights jurisdiction may be relevant.[8]

c) When can the Member States of an international organisation be responsible for the acts of the organisation?

As mentioned, international organisations possess a separate legal personality and thus a degree of autonomy from their Member States, even if this does not ultimately change the fact that it is the Member States (or a required majority thereof) that use international organisations to achieve their common goals. In principle however, internationally wrongful acts of the organisation do not entail the responsibility of its Member States – *unless* the exceptional situations described in Arts. 58-62 of the DARIO transpire. From among these, Art. 61 contains the probably most disputed provision as it regulates a situation where a State seeks to *circumvent* its international obligations by "taking advantage" of the organisation's competences in the field in question. Not only is the actual remit of this provision debatable but also its relation to Art. 59, which regulates the responsibility of states for exercising direction and control over the commission of an internationally wrongful act by an international organization. It thus deserves further scrutiny to what extent decisions of an international organisation (which are normative in nature) may constitute factual direction and control – if at all.

d) When may the concept of dual or shared attribution be applicable?

Dual responsibility is based on the simultaneous attribution of conduct to both an international organisation and a State – more precisely a *member* state of said organisation. It needs to be analysed

[7] Draft articles on the responsibility of international organizations, with commentaries. Yearbook of the International Law Commission, 2011, p. 46.

[8] A. Sari, *Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions*? Military Law and Law of War Review, Vol, 53, No. 1, 2015, pp. 287-318.

under what conditions such dual (or multiple) attribution may take place, having regard also to the rather diverse institutional structures and decision-making procedures that various international organisations can have. The result of dual attribution – shared international responsibility – also needs to be examined as to its consequences. A useful example to illustrate the possible relevance of this issue could be that of a peacekeeping mission lead by an international organisation: it is the organisation that conducts the mission, yet the states that have seconded troops to the organisation may retain a certain degree of command.[9] The case law of the ECtHR may play a crucial role in the analysis, especially in light of the *Al Jedda* judgment and its aftermath[10], as may some relevant decisions taken in the WTO dispute resolution system.[11]

e) To what extent does the supranational nature of the EU have an effect on the foregoing considerations in relation to itself and its Member States?

The EU is a supranational organisation of a constitutional character, utilizing legislative competences transferred from its Member States to adopt binding legislative acts which enjoy primacy of application vis-à-vis national law. This raises questions as to how the DARIO could be applied to the European Union, bearing in mind that the relationship between the EU and its members is quite intensive and arguably unique – the EU's situation thus requires analysis from the point of view of the considerations raised in points 3.3. and 3.4. above. The research into attribution and shared responsibility can have special relevance in the field of fundamental rights protection (see most notably the relationship of the EU and the ECHR), FRONTEX operations, military missions in the framework of the Common Foreign and Security Policy or even investment disputes. Furthermore, the so-called mixed agreements concluded by the EU and its Member States with third countries without a declaration on competences brings up questions relating to the joint responsibility of both the EU and its Members for conduct which however is attributable to only one of them – thus this could be an example of attribution of responsibility *without* attribution of conduct, based on competence.[12]

3. Instead of a Conclusion: Some Outstanding Questions of Interpretation – and Application

In line with the issues raised above, a number of unresolved or unclear issues can be identified. To clarify the interpretation and application of the law applicable to the responsibility of international organisations, (at least) the following are required.

(1) The most prevalent legal problems in the field of the responsibility of international organisations need to be identified.

(2) Concurrent and conflicting practice of international organisations and their member states as regards the responsibility of international organisations needs to be mapped out.

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[9] S. Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, Oslo Law Review, Vol. 6, No. 3, 2019, pp. 183-184.

[10] Al-Jedda v. the United Kingdom (Application no. 27021/08) and for example Hirsi Jamaa and others v. Italy (Application no. 27765/09).

[11] See e. g.: European Communities – Customs Classification of Certain Computer Equipment. Report of the Panel of 5 February 1998 WT/DS62/R and subsequent decisions.

[12] See J. D. Fry, *Attribution of Responsibility,* in: A. Nollkaemper & I. Plakokefalos, Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art. Cambridge University Press, Cambridge 2014, p. 106.

(3) Case law trends to support or counter some of the more theoretical and speculative provisions of the DARIO need to be ascertained.

(4) The rules of attribution (including dual and shared attribution) between international organisations and their member states need to be clarified.

(5) The abovementioned international responsibility issues need to be analysed in light of the (arguably) unique character of the European Union and its relationship with its Member States.

A comparative approach is necessary to be able to evaluate and contrast the different practices of international organisations, and the case law of different international judicial forums; the rule systems of the DARIO and the DARSIWA also necessitate a comparative review. Customary international law also requires analysis in the light of the DARIO, i. e. it needs to be verified to what extent the DARIO can actually be regarded as a codification of existing customary law and to what extent it constitutes a development of international law in this field. Looking at the drafting process of the DARIO may help to shed light on this latter issue.

Almost ten years after the adoption of the DARIO, and considering recent developments in practice and case law, it is both possible and timely to systematically examine the application (or non-application) of these rules and to attempt to draw conclusions, formulating guidelines of interpretation for the future. In the framework of a three-year-long research project[13] supported by the Hungarian National Research, Development and Innovation Office, a project team established at the Faculty of Law of the University of Pécs consisting of four researchers will endeavour to map out the issues described above – and to provide guidelines of interpretation of the rules of the DARIO and other relevant rules pertaining to the responsibility of international organisations and their member states.[14]

[13] Hungarian Scientific Research Fund (OTKA) Research Project FK-134930.

[14] The members of the research team are Ágoston Mohay, Bence Kis Kelemen, Attila Pánovics and Norbert Tóth. The team members have previously conducted research into some aspects of the issue, including issues such as the responsibility of the European Union and its Member States for implementing obligations under the UN Charter (Á. Mohay, *A Kadi-doktrína és a nemzetközi jog érvényesülése az uniós jogrendben*, Közjogi Szemle, Vol. 10, No. 4, 2017, pp. 36-45.), responsibility questions concerning private military and security companies taking part in EU border control activities (B. Kis Kelemen & J. van Rij: Private Military and Security Companies on E.U. Borders: Who Will Take Responsibility for their Human Rights Violations? - A Theoretical Analysis, in B. Kis Kelemen Bence & Á. Mohay (eds.), EU Justice and Home Affairs Research Papers in the Context of Migration and Asylum Law. Centre for European Research and Education, Pécs, 2019. pp. 95-110.), the identification of norms of customary international law as well as international responsibility in the context of territorial autonomy (N. Tóth, *A területi autonómia külső dimenziója: nemzetközi jogalanyiság, nemzetközi felelősség, külkapcsolatok*, In: Cs. Fedinec & Z. Ilyés & A. Simon & B. Vizi (eds.), A közép-európaiság dicsérete és kritikája. Kalligram Kiadó, Pozsony 2013, pp. 248-267.) and the responsibility of the European Union in the framework of the Aarhus Convention (A. Pánovics: *Case ACCC/C/2008/32 and Non-compliance of the EU with the Aarhus Convention*, Pécs Journal of International and European Law, Vol. 4, No. 2, 2017, pp. 6-18).