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The Responsibility of international organizations in humanitarian action
–Victims’ rights for reparation against impunity

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Tiivistelmä/Referat – Abstract <p>The thesis studies the responsibility of international organizations for wrongful acts under international law, specifically the responsibility of the United Nations (UN). The thesis studies takes the draft articles on the responsibility of international organizations of 2011 (DARIO), that are intended to provide a basis for the responsibility of international organizations. However, the DARIO are considered progressive and their authority depends on how they will be received. The thesis studies the provisions that are considered most controversial; the provisions related to rules of the organization, <i>lex specialis</i> and attribution of conduct.</p> <p>The principles and provisions adopted in the DARIO, relating to the legal personality and the rules of international organizations are challenged in this thesis. International organizations, especially the UN performs functions, that go beyond the scope of traditional international organizations and they perform more and more state-like functions. The rules of the organization are on the one hand equated with internal laws of states, with limited effects on responsibility; on the other hand, they are part of international law and may be considered <i>lex specialis</i> to the general provisions of the DARIO. Recourse to <i>lex specialis</i> could make the DARIO redundant.</p> <p>Article 7 of DARIO attempts to resolve the ambiguity of attribution between two entities in cooperation, e.g. UN peacekeeping operations. The UN does not accept responsibility for wrongful acts that have happened in UN peacekeeping operations. The UN invokes agreements it has made with national contingents, the rules of the organization and claims it does not have effective or overall control over the conduct. The study looks at the DARIO and recent jurisprudence and academic writings in the light of the UN practice.</p> <p>In the recent decade the role of victims and their right to effective legal remedies and reparation have started to gain more interest in the field of human rights. Human rights treaties formally bind states, but this study suggests that due to the increasing amount of governmental functions, that many international organizations exercise, they are also obliged to follow human rights norms. Moreover, the UN, as a patron of the universal human rights treaty system, is morally obligated to uphold human rights in its mission.</p> <p>The last decades have indicated a willingness of the international community to end impunity and even heads of states are no longer considered immune from the jurisdictions of international tribunals for international crimes. The study looks at the immunities of international organizations, and challenges the functional necessity principle. The study looks at the rise of independent international tribunals, which could provide an independent and impartial review of international organizations, in order to carry out their responsibility of human rights obligations.</p>			
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ABBREVIATIONS

ARSIWA	the Draft articles on the responsibility of states
CPIUN	Convention on the Privileges and Immunities of the UN
CPIUNSA	Convention on the Privileges and Immunities of the Specialized Agencies
DARIO	the Draft articles on the responsibility of international organizations
DPKO	United Nations Department of Peacekeeping Operations
EC	European Community
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EJIL	<i>European Journal of International Law</i>
EULEX	the European Union Rule of Law Mission in Kosovo
FRY	Former Republic of Yugoslavia
GA	The General Assembly of the UN
Host nation	State receiving humanitarian assistance
IASC	Inter-Agency Standing Committee
ICCPR	The International Covenant on Civil and Political Rights
ICTY	The International Criminal Tribunal for the former Yugoslavia
IFRC	International Federation of Red Cross and Red Crescent Societies
IGO	Inter-governmental organisation
ILC	International Law Commission
ILR	International Law Reports
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo (1999-2010)
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo (2010-)
NGO	Non-governmental organisation
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	the UN Office of the High Commissioner for Human Rights
OIOS	The United Nations Office of Internal Oversight Services

ONUC	United Nations Operation in the Congo (July 1960 – June 1964)
OSCE	Organization for Security and Cooperation in Europe
SC	The Security Council of the UN
SG	The United Nations Secretary General
SOFA	Status of Armed Forces agreement
TIAS	Texts of International Agreements to which the US is a Party
UN	United Nations
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNJY	<i>United Nations Juridical Yearbook</i>
UNMIK	United Nations Interim Administration Mission in Kosovo
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	<i>United Nations Treaty Series</i>
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
YILC	<i>Yearbook of the International Law Commission</i>

'The essence of government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.'

–James Madison

I. Introduction: Responsibility of international organizations and the development of the rights of victims

In the globalized world today the exercise of governmental authority is no longer in the hands of states alone. International organizations have not only risen in number, but also with regards to their competence and functions in the international fora. International organizations have developed into powerful and independent subjects of international law that create international law binding on states and exercise powers that affect the lives of millions of individuals. International organizations today perform significant governmental functions independently from states and even exercise jurisdiction over territories.¹

The laws and principles regarding international institutions, especially those of responsibility and accountability have unfortunately not developed in similar speed. With international organizations, there is often an assumption that they are a force for good and there is no wrong they could commit.² However, it is a universally accepted principle emanating from the ideals of democracy that with powers of government comes responsibility and that the rights of individuals need to be protected by the rule of law.³

This study looks at the responsibility of international organizations, especially in the context of humanitarian action. Humanitarian actions or humanitarianism is meant as efforts to alleviate suffering of people affected by natural or manmade disasters or conflict. Humanitarian actions are founded upon the Fundamental Principles of the International Red Cross and Red Crescent Movement, such as humanity, impartiality and neutrality.⁴ The principles call for preventing and alleviating human suffering, ‘ensuring the respect for the human being’⁵. The United Nations (UN) General Assembly (GA) has called for the respect of the fundamental principles of humanitarian assistance⁶ and emphasized its own ‘unique role ... in providing leadership and coordinating the efforts of the international community to support the affected countries.’⁷

Humanitarian action includes a variety of functions such as humanitarian relief in the form of food and shelter all the way to bringing peace and security through armed interventions. Armed interventions under the auspices of humanitarianism are possible in the name of protecting international peace and security with aspirations of respect for human rights and supporting

¹ United Nations Security Council resolution 1244 (1999) of 10 June 1999, authorized ‘the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [...]’.

² Jan Klabbers, *An introduction to international institutional law* (Cambridge University Press, Cambridge, 2009), 33.

³ See e.g. the preamble of the Universal Declaration of Human Rights, General Assembly resolution 217A(III), U.N. Doc A/810 at 71 (1948) and Article 2 of International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (hereinafter ICCPR).

⁴ See e.g. The Fundamental Principles of the International Red Cross and Red Crescent Movement regarding its humanitarian work: Jean Pictet, *The Fundamental Principles of the Red Cross*, commentary (1979), at <https://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm> (14 January 2015).

⁵ *Ibid.*

⁶ GA resolutions ‘Strengthening of the coordination of humanitarian emergency assistance of the United Nations’ A/RES/46/182, 78th plenary meeting, 19 December 1991 and Fifty-eighth session A/RES/58/14, 5 February 2004.

⁷ *Ibid.* A/RES/46/182, para 12.

accountability. UN peacekeeping operations are used regularly to pursue these goals. However, as the functions of international organizations in general, UN peacekeeping has also moved beyond its traditional role of monitoring peace agreements. The UN Security Council (SC) authorizations today are not what was originally intended with regard to the level of global governance in the affected areas and the role of the troop contributing states and the international organizations.

International organizations working in the humanitarian field have significant influence and power over their subjects and their fundamental rights. Those subjects, the individuals behind the elaborate mandates of action, are often completely dependent on the assistance of international organizations and their primary protector, the nation state, has failed them. In the recent decades international law has developed to increase human rights protections and to fight impunity in bringing perpetrators of international crimes to justice regardless of their rank or position. However, these developments have not reached international organizations, especially the UN.

Traditionally, states are seen as the primary subjects of international law with international organizations acting under their patronage and control. However, reality has not reflected these attitudes for the better part of the nineteenth century and finally in 2002, the International Law Commission (ILC) started its work on drafting articles on the responsibility of international organizations.⁸ The draft articles on the responsibility of international organizations (hereinafter DARIO) were modelled after the draft articles on the responsibility of states (hereinafter ARSIWA)⁹ and accepted on first reading in 2011. Although the drafting of the DARIO was seemingly effortless and quick, they have received a lot of criticism. Many of its provisions are considered progressive development, rather than codification of international law and some of the provisions are considered unclear, contradictory and not representative of valid rules of international responsibility.

This study will focus on some of the most problematic provisions of the DARIO, which seem to hinder the realizations of the responsibility of international organizations. Part II of the study will first look at the tensions and correlations between states and international organizations as subjects of international law. States are considered *sui generis*, where all states are equal and possess the same rights and obligations. International organizations are recognized as subjects of international law under the principle of speciality, which is seen as limiting its competences compared to those of states.¹⁰ The notion of the legal personality of international organizations

⁸ Draft articles on the Responsibility of International Organizations, with commentaries 2011, Report of the ILC on the Work of its Sixty-third Session, GA Official Records, Sixty-sixth Session, Supp. No. 10 (A/66/10), (hereinafter DARIO commentaries), *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, ILC, fifty-third session, in 2001, (A/56/10) YILC, 2001, vol. II, Part Two, as corrected.

¹⁰ The plethora of different types of international organizations is recognized and for the purposes of this study international organization means intergovernmental organizations (IGO). Proper scrutiny of different types of other international organizations requires further study beyond the scope of this one. There are different ways of categorizing international organizations and emphasis of different characteristic for the purposes of indicating international legal personality, lead to different results. For instance, non-governmental organizations (NGO) are organizations, which are constituted separate from the government of the country in which they are founded. NGOs are generally not established by a treaty governed by international law and often perform functions that may not be described as 'governmental'. However, the separation between IGOs and non-governmental organizations (hereinafter NGO) is not clear and e.g. the ICRC has functions that are considered governmental.

has, however, changed over the course of years and e.g. the UN exercises some powers that go even beyond those of states.

Further, the special nature and functions of international organizations, usually expressed in the founding documents and other rules of the organization, actually allows significant exceptions to the general rules of responsibility unprecedented in light of state responsibility, to the point of making the general provisions of the DARIO redundant. Under the cloak of the principle of speciality, international organizations may pick and choose which provisions of international responsibility they choose to follow. The UN even has its own provision in the DARIO, giving priority to the UN Charter¹¹ over any provisions of the DARIO.

Part II will also focus on the rules regarding the attribution of conduct to international organizations. The study will look at some recent jurisprudence and scholarly opinions, which indicate that the attribution rules that were adopted in the DARIO are considered unclear, lacking support from jurisprudence and progressive law-creating rather than codification.

Part III of the study looks at primary rules of international law, the obligations that are binding on international organizations.¹² The study looks at international human rights norms and the increasing demands to uphold them in all forms of government. Human rights instruments are usually addressed to states, but increasingly also international organizations are considered obliged to fulfil human rights obligations, due to their state-like functions i.e. exercise of governmental authority. Further, the largest humanitarian organization, the UN, is also the creator, protector and guardian of many of the core human rights documents and it names protection of human rights and support of accountability one of its main tasks in its peacekeeping missions.¹³ However, criticism of humanitarian organizations is often met with hostility and is perceived as unwarranted, as looking a gift-horse in the mouth. Not only is the responsibility of international humanitarian organizations difficult to approach morally, but also legally. Questions of accountability and consequences for breaches of international law, such as human rights norms is not emphasized properly and often not even addressed in international treaties or guidelines concerning humanitarian action.¹⁴

In recent decades international organizations, such as the UN, have been implicated in serious human rights violations and international crimes. Humanitarian circles and the academic world has slowly started to accept the fact that even international organizations devoted to humanitarian causes may commit violations of international law, breaching thus the very fundamental rights they are mandated to protect.¹⁵

¹¹ Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, *The United Nations Conference on International Organization, San Francisco, California, April 26 to June 26, 1945: Selected Documents* (United States Department of State: Washington, 1946) xv, and 335; amendments by General Assembly Resolutions in *United Nations Treaty Series (UNTS)* 557, 143/638, 308/892, 119, 173

¹² This study does not address questions of liability for injurious consequences arising out of acts not prohibited by international law.

¹³ Protection of civilians, <http://www.un.org/en/peacekeeping/issues/humanrights.shtml>, 14 January 2015. Human rights, <http://www.un.org/en/peacekeeping/issues/humanrights.shtml>, 14 January 2015.

¹⁴ E.g. Article 9 The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief (1994, publication reference 1067, available at <https://www.icrc.org/eng/resources/documents/publication/p1067.htm>) mentions accountability and transparency, but indicates rather economical prudence and due diligence regarding funds and does not address issues of abuse in other sense.

¹⁵ Michael Singer, Jurisdiction Immunity of International Organizations: Human Rights and Functional Necessity Concerns, 36 *Virginia Journal of international law* (1995) 53-167, at 97-98.

The development of restorative justice, demanding effective procedural rights to victims in legal process, is a central part of this study. Victims are often portrayed as passive, weak and helpless. Subjects of humanitarian actions, individuals, are already considered as victims of some sort, who are passive beneficiaries of charitable aid and goodwill. They are not seen as bearers of rights to effective legal remedies, or having the capabilities of taking an active role in litigation. However, recent studies have showed that victims do actually want a more active role in the process and that brings empowerment. Yet in reality the victims of abuse by international humanitarian organizations are not awarded any moral authority to bring their cases to the forefront and are not seen as legal subjects entitled to legal securities and reparations.¹⁶ International humanitarian organizations have significant influence over the fundamental rights of millions of individuals and it is imperative that they start to follow human rights norms and allow access to effective legal remedies to victims.

Part IV the study looks at another hindrance to the responsibility of international organizations, their privileges and immunities. Most international humanitarian organizations have an agreement that grants them immunity from the national jurisdiction of states, which are often extensive, covering civil as well as criminal matters. International organizations have been able to function in virtual impunity. The UN is said to have absolute immunity and it seems in some respects even more extensive than the personal immunities awarded to highest state officials. Although the UN has the right and the duty to waive immunity when it would impede the course of justice, it has never done it.

What is the reality that follows these practices? One recent example from Haiti is sadly a very common example. In 2012 three Pakistani soldiers working in the UN peacekeeping operation MINUSTAH were convicted of raping a 14-year old Haitian boy while on mission in Gonaïves, Northern Haiti. The men were sentenced to one-year imprisonment by a military tribunal in Pakistan without almost any public record or access to the public.¹⁷ The UN did not provide reparations or take any responsibility in the affair. Amnesty International called the sentences ‘a travesty of justice’. Other similar types of cases have arisen in Haiti and the UN peacekeeping operation has been met with riots and hostility. It is safe to say that the credibility of the UN mission has been seriously compromised. Amnesty has said that ‘[c]ases of sexual abuse should never be dealt with in military courts, rather in civilian courts prepared to deal with human rights issues.’¹⁸

Elisabeth Rehn and Ellen Johnson Sirleaf said it well in their report about their experiences with the peacekeeping forces stating that the UN has to be told ‘what they need to know, not simply what they want to hear.’ and that describing the negative as well as the positive experiences are important in strengthening the UN’s ability to fulfil its mission.¹⁹ The success

¹⁶ Mark Pallis, *The Operation Of UNHCR’s Accountability Mechanisms*, 37 *New York University Journal of International Law and Politics*, (2004-2005) 869-918 at p. 908-909, at 908-909.

¹⁷ Javier Zúñiga, special adviser at Amnesty International in Nita Bhalla: *UN must review policy on peacekeepers who abuse* –Amnesty, <http://www.trust.org/item/?map=un-must-review-policy-on-peacekeepers-who-abuse-amnesty> 16 May 2014.

¹⁸ *Ibid.*

¹⁹ Elisabeth Rehn, Ellen Johnson Sirleaf, *Women, war and peace: the independent experts’ assessment on the impact of armed conflict on women and women’s role in peace-building*, (United Nations Development Fund for Women (hereinafter UNIFEM), 2002), at 61-62.

of missions and the credibility of international organizations as a whole make recognition of responsibility and effective legal remedies to victims imperative.

II. Responsibility under international law

1. Developments of international responsibility

1.1. States as primary subjects of international responsibility

The responsibility of states for internationally wrongful acts carries longer traditions of responsibility than any other actor in the international field, due to their primacy historically in the international legal system. States have the most international obligations and they carry the primary burden of compliance under international law. However, international organizations have developed into powerful and independent entities in the international for a alongside states. One might even say, they sometimes even surpass the competence of states. This chapter discusses briefly the responsibility of states as a background and comparison point to the responsibility of international organizations. Rules that apply to the responsibility of states affect a great deal the formulation and interpretation of the rules regarding the responsibility of international organizations.

One of the most settled principles of international law is related to international responsibility was first laid down by the Permanent Court of International Justice (hereinafter PCIJ) in the *Chorzów Factory* case. The ICJ held that ‘It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.’²⁰ In the case Germany brought action against Poland demanding reparation for taking possession of two nitrate factories in Chorzów, contrary to an agreement between the states.²¹ The PCIJ has applied the principle in a number of cases.²² States are internationally responsible for their actions and they have to act according to their undertakings, customary international law and binding decisions of the ICJ.²³

The principle is codified in the first article of the ARSIWA formulated by the ILC: ‘Every internationally wrongful act of a state entails the international responsibility of that state.’ The ARSIWA were codified over a period of almost 50 years starting from 1949. Although the articles are not legally binding, they are significant.²⁴

The ARSIWA do not define the content of international obligations, the breaches that give rise to responsibility i.e. primary rules.²⁵ Sources of international law consist of primary rules and

²⁰ *Case Concerning the Factory at Chorzów/Claim for Indemnity*), jurisdiction, [1927] Publ. PCIJ, Series A, judgment no. 8, at 21.

²¹ *Ibid.*, at 5.

²² See e.g. *Phosphates in Morocco* case (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28), the PCIJ affirmed that when a state commits an internationally wrongful act against another state international responsibility is established immediately between the two states. The principle has also been adopted and applied by numerous arbitral tribunals, e.g. the in the *Rainbow Warrior* case (*Rainbow Warrior* affair, UNRIIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), p. 251 para. 75.), where it was held that ‘any violation by a state of any obligation, of whatever origin, gives rise to state responsibility’.

²³ Kari Hakapää, *Uusi kansainvälinen oikeus*, (Talentum, 2010), at 295.

²⁴ *Ibid.* at 297. Some of the provisions of ARSIWA may be considered to express customary rules of international law.

²⁵ ARSIWA commentaries, *ibid. supra* note 10, general section (1) at 31.

secondary rules.²⁶ Formal sources of international law are expressed in Article 38 of the ICJ Statute.²⁷ The Article 38 itself is a material source of secondary rules. The sources of international law are constitutional principles, custom, agreements, general principles of law, instruments issued by international organizations, declarations of principles and case law.²⁸ Primary rules of international law are rules and principles that establish the rights and obligations for international subjects that give rise to responsibility, such as diplomatic privileges and immunities or the prohibition of torture. Secondary rules are applied in order to determine what the primary rules are, how they are created and changed. Secondary rules determine the existence of a breach of an international obligation and its consequences for the responsible entity, but they do not create international responsibilities. The ARSIWA are considered to be secondary rules.²⁹

The binding nature of secondary rules, may be controversial in international law. Article 38 and the whole doctrine of sources are considered controversial and are not agreed upon by international lawyers and is suggested to be out-dated. However, no alternative approach has acquired sufficient endorsement to challenge the doctrine of sources.³⁰

Responsibility of states can be direct or indirect. Direct responsibility means responsibility for actions of state organs, agents or other representatives. Indirect responsibility derives from actions of private entities that can be seen as acting under the state's tutelage, excluding autonomous persons acting on their own account.³¹ In theory, the conduct of all individuals, from natural persons to corporations, that are linked to the state by nationality, habitual residence or incorporation might be attributed to the state, whether or not they have a connection to the government. Responsibility is limited to conduct, which engages the state as an organization or is instigated by public authority. Conduct, which may be attributed to a state at the international level, 'is that of its organs of government, or others who have acted under the direction, instigation or control of those organs, i.e. as agents of the state.'³² The internal laws of a state are primary sources in determining which entities are considered organs of a state and their conduct therefore may be attributed to the State.³³ However, for the purposes of international law it is not sufficient to refer to internal law for the status of state organs. In some legal systems the status and functions of state organs may be determined in practice and law may be silent on the matter. 'A state cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.'³⁴ Further, the different rules of attribution of the ARSIWA have a cumulative effect and 'a [s]tate

²⁶ See e.g. Hugh Thirlway, Sources of international law, in Malcolm D. Evans (ed.), *International Law*, Third edition (Oxford University Press, 2010), at 95-121.

²⁷ *Ibid*, *supra* note 18.

²⁸ Riccardo Monaco, Sources of international law, in R Bernhardt (ed.), *Encyclopedia of Public International Law, Volume IV* (2000), Elsevier Science B.V., Amsterdam, The Netherlands, at 467

²⁹ The distinction between primary and secondary rules comes from book by H.L.A Hart *The Concept of Laws* (Oxford, 1961).

³⁰ Thirlway, Sources of international law (2010), *supra* note 26, at 95-121.

³¹ See e.g. *Rainbow Warrior* case UNRIIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), where France was found responsible when French security service secret agents sank the Rainbow Warrior by exploding the ship in harbour in New Zealand in 1985.

³² ARSIWA commentaries, *supra* note 9, at 38.

³³ *Ibid*. at 40.

³⁴ *Ibid*. at 42.

may be responsible for the effects of conduct of private parties, if it failed to take necessary measures to prevent those effects.’³⁵

A mere factual causal link is not sufficient for the attribution of conduct to the state as a subject of international law, but is based on criteria determined by international law. Attribution establishes that there is an act of the state for the purposes of responsibility, whereas it does not express on the legality of the said conduct. In practice there often exists a close link between the foundation of attribution and the obligation breached.

Under articles 2 and 12 of the ARSIWA responsibility does not require fault for it to be characterized as internationally wrongful, states may be liable under *objective* responsibility.³⁶ In the classic *Corfu Channel* case³⁷ the ICJ held that the Government of Albania couldn’t be imputed merely because of a minefield in its territorial waters. The responsibility cannot arise simply because a state has control over its territory. The fault of Albania was based on the fact that it failed to warn ships passing through the strait in Albanian waters. The case was brought by the United Kingdom against Albania for damages and loss of life it suffered from two mines exploding in Albanian waters. However, the interpretation, of the primary obligation may be that fault is a necessary condition for responsibility.³⁸

In *Bosnia Genocide* case³⁹, the Former Republic of Yugoslavia (hereinafter FRY) was found to have breached its obligation to prevent genocide, relating to the massacre of Srebrenica. In 1995, the Bosnian Serb Army killed nearly 8000 people in Srebrenica, Bosnia and Herzegovina. Bosnia Herzegovina filed an action against the FRY, alleging a violation of the Genocide Convention⁴⁰. When restitution was found to be impossible and compensation not appropriate, due to the lack of a ‘sufficiently direct and causal nexus’ between the breach of the FRY and the massacre, a declaration was considered to be sufficient to satisfaction.⁴¹ The ICJ also declared that Serbia should ‘immediately take effective steps to ensure full compliance’ with its obligation to punish and transfer individuals accused of genocide for a trial by the ICTY and to cooperate fully with the tribunal.⁴² Even if restitution is not possible and there is not a sufficient and direct causal nexus between a breach and the events, states are obligated to ensure full compliance with their international obligations.

Every internationally wrongful act of a state gives rise to new international legal relations additional to those that existed before the act took place, just as in any other system of law.⁴³ According to an established view by international jurists, a wrongful act may give rise to

³⁵ *Ibid.* at 39. See also e.g. *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p. 3.

³⁶ Doctrine according to which international responsibility of states might be incurred despite absence of any fault on its part, on the basis that a state is responsible for all acts committed by its officers or organs and constituting delinquencies under international law, regardless of whether the officers or organs in question have acted within the limits of their competence or have exceeded it.

³⁷ *Corfu Channel case Judgment of April 9th, 1949, ICJ Reports 1949*, p. 4.

³⁸ James Crawford, Simon Olleson, The Nature and forms of international responsibility, in Malcolm D. Evans (ed.) *International Law*, Third edition (Oxford University Press, 2010), 441-471 at 458.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43 (hereinafter *Bosnian Genocide*).

⁴⁰ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by GA Res. 260 (III) A, 9 December 1948, in force 12 January 1951, 78 UNTS 277.

⁴¹ *Bosnian Genocide* (2007), *supra* note 39, paras 460-462, 463, 471(5), (9).

⁴² *Ibid.*, para. 493 (8).

⁴³ ARSIWA commentaries, *supra* note 9, at 33.

several types of legal relations and the consequences of an internationally wrongful act cannot be limited either to reparation or sanction.⁴⁴

1.2. The relationship of the responsibility of states and international organizations – developments and problems

The complex and intertwined relationship between states and international organizations was recognized early on during the drafting of the ARSIWA.⁴⁵ It is difficult to determine where the responsibility of an international organization begins and the responsibility of member states end.⁴⁶ There is a fundamental tension between international organizations and their members; international organizations are on the one hand independent from the members but at the same time fundamentally dependent on them.⁴⁷ The responsibility of international organizations was left outside the scope of the ARSIWA by article 57 and ‘any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization’ reserving two related issues from the scope of the articles: ‘first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any state for the conduct of an international organization.’⁴⁸ The ARSIWA do not cover actions taken by an international organization, even though member states may direct or control its conduct.⁴⁹ Formally the question does fall under the scope of the ARSIWA, but because of the complicated questions related to the functioning of international organizations, the issue was left out.⁵⁰ The scope of article 57 is narrow covering ‘only what is sometimes referred to as the derivative or secondary liability of member states for the acts or debts of an international organization.’⁵¹

The DARIO follows a formulation that seemingly corresponds in most part the ARSIWA, however it has been made for ‘appropriate reasons’ not assuming that the same principles apply.⁵² During the drafting of the DARIO there was continual criticism that the DARIO follows the structure and contents of the ARSIWA too closely. However, according to the Special Rapporteur Giorgio Gaja several draft articles of the DARIO contain significant

⁴⁴ ARSIWA commentaries, *supra* note 9, at 33.

⁴⁵ First report on the responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur ILC Fifty-fifth session Geneva, 5 May-6 June and 7 July-8 August 2003, A/CN.4/532, Section II, at 2-7, paras 3-11. See also A/CN.4/152, Report by Mr. R. Ago, Chairman of the Sub-Committee on State Responsibility Topic: State responsibility, extract from *the Yearbook of the International Law Commission (YILC)* 1963, vol. II, footnote 2, at 228. Further, *YILC*, 1974, vol I, 1278th meeting, para. 39, at 154: On the first reading of the ARSIWA it was suggested that article 6 would have included ‘the conduct of an organ of an organ placed at the disposal by another state or an international organization.’ International organizations were removed from the provision.

⁴⁶ The ILC stipulated later that the attribution rule in article 7 of DARIO rather determines the responsibility between states and international organizations and not general attribution. Dual attribution where both an international organization and a state can be responsible for the same conduct is also possible, DARIO commentaries, *supra* note 8, at 88-93.

⁴⁷ Klabbbers, *International institutional law* (2009), *supra* note 2, at 35-36.

⁴⁸ Article 57 of the ARSIWA: ‘These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any state for the conduct of an international organization.’

⁴⁹ ARSIWA commentaries, *supra* note 9, at 137.

⁵⁰ ARSIWA commentaries, *supra* note 9, at 141-142.

⁵¹ *Ibid.*

⁵² DARIO commentaries, *supra* note 8, at 2.

changes in order to reflect the particular situation of international organizations and that various DARIO articles consider issues that have not been included in the ARSIWA.⁵³

Another criticism has been that some DARIO articles are based on limited practice.⁵⁴ Special Rapporteur Giorgio Gaja recognizes that practice concerning the responsibility of international organizations is limited, mostly due to the fact that practice concerning the responsibility of international organizations has developed only fairly recently.⁵⁵ Further, most organizations are reluctant to submit their disputes with states or other organizations to third-party settlement and the availability of such practice for the ILC has been limited.⁵⁶ Moreover, despite the ILCs efforts to acquire knowledge from relevant practice, states and international organizations have contributed only a few instances of unpublished practice to the ILC and academic writings are not sufficient in bringing relevant practice to light.⁵⁷

It was recognized in the DARIO commentaries that the limited practice behind the articles makes them closer to progressive development of international law than representing codification.⁵⁸ Some of the articles on the responsibility of international organizations have been drawn from some analogous conclusions from the ARSIWA. It has recognized that more so than the ARSIWA, the DARIO is not so much codifying but more law-creating.⁵⁹ The ILC submitted that the DARIO might not necessarily have the same authority as the corresponding articles of the ARSIWA and their level of authority will depend upon how they are received.⁶⁰

The DARIO address the responsibility of states in many of the articles. According to article 1 paragraph 2 of the DARIO ‘the ... draft articles also apply to the international responsibility of a state for an internationally wrongful act in connection with the conduct of an international organization.’ A few draft articles in Part Five of the DARIO, consider the responsibility of a state for the conduct of an international organization in circumstances where the conduct in question would generally be attributed to the international organization. In situations of coercion and circumvention of international obligations by a member state of an international organization, the conduct will not entail the responsibility of an international organization.⁶¹

The responsibility of international organizations is more extensive in some cases than the corresponding provisions on state responsibility. In the commentaries to article 7 of DARIO all acts are included in the conduct that may be attributable to an international organization. State responsibility is limited only to acts that are considered exercise of governmental authority. Also article 6 of DARIO contains organs and agents when article 4 of ARSIWA includes only organs of the state.

Although the independence and competence of international organizations has grown, they are often considered to lack some characteristics that states possess. States are considered *sui generis*; to having a general competence and that each state is equal in its rights and obligations

⁵³ Eighth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, ILC Sixty-third session Geneva, 26 April-3 June and 4 July-12 August 2011, A/CN.4/640, at 5, para. 5.

⁵⁴ *Ibid.*, at 5-6, para. 6.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, at 2.

⁵⁷ *Ibid.*, at 5-6.

⁵⁸ DARIO commentaries, *supra* note 8, at 2-3.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Articles 60, 61 of DARIO.

in the international fora. International organizations are considered to have special competences, due to the fact that they are established by treaties to exercise specific functions. International organizations differ from one another e.g. with regards to their powers and functions, size of membership, relations between the organization and its members, structure and facilities and also regarding the treaty obligations that bind them.⁶² The special nature of the founding documents of international organizations was taken into consideration by the *lex specialis* rule of article 64 of DARIO.⁶³ This provision has proved to be more problematic than expected in finding a balance between the general rules of the DARIO in relation to the special rules on different organizations.

There are many inconsistencies with regards to whether a certain act or omission falls under the responsibility of an international organization or a state by attribution of conduct.⁶⁴ Given the fact that there exists a myriad of different international organizations that have separate rules and relationships with states and other international organizations, one has to assume that often these questions can ultimately be answered on a case-by-case basis.

⁶² See DARIO commentaries, *supra* note 8 at 3, para. (7).

⁶³ The principle *lex specialis derogat legi generali* means that in a situation where two laws govern a similar factual situation, the law governing a specific subject matter (*lex specialis*) overrides a general law (*lex generalis*). The DARIO expresses the *legi generali*, while a specific treaty might express a *lex specialis*. Article 64 of DARIO:

‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.’

⁶⁴ Report of the ILC, Sixty-first session (4 May-5 June and 6 July-7 August 2009), GA Official Records, Sixty-fourth session Supplement No. 10 (A/64/10), para. 27 that:

‘Certain issues concerning international responsibility between States and international organizations have not been expressly covered either in the articles on the responsibility of States for internationally wrongful acts or in the draft articles on the responsibility of international organizations. These issues include the following questions: (a) when is conduct of an organ of an international organization placed at the disposal of a State attributable to the latter?; (b) when is consent given by an international organization to the commission of a given act by a State a circumstance precluding wrongfulness of that State’s conduct?; (c) when is an international organization entitled to invoke the responsibility of a State? One could argue that these questions are regulated by analogy in the articles on the responsibility of States for internationally wrongful acts. However, one may wish that the Commission addresses these questions expressly. If the latter view is preferred, in what form (draft articles, report or other) should these questions be considered?’

2. Responsibility of international organizations

2.1. International organizations as subjects of international law: separate legal personality

International organizations have existed throughout recorded history, but modern international organizations in the form they are known today have developed since the nineteenth century.⁶⁵ Modern international organizations have quickly developed with regards to their competence in international affairs, creating their own bodies of international law, binding also their former masters, states. Their internal institutions have formed into sophisticated administrations that operate independently from their members. The League of Nations (1920-1946) was the first international organization to set aims to guaranteeing peace and a system of collective security for its members. Although it failed to fulfil its purpose of preventing war, it paved way for the UN that was established after the Second World War. Today the UN is a powerful global organization and its functions include the maintenance of international peace and security.⁶⁶

Although international organizations may have similar competences than states, they are still often regarded as limited to exercise specific functions, under the principle of speciality. Unlike states, who are *sui generis*, treated as equals and similar, international organizations are a motley crew, based on not only their functions, but also regarding the relations between the organization and its members, the primary rules which bind them, etc. This has made it harder to develop a cohesive body of law regarding all international organizations and the principle of speciality brings a complicating element in applying general rules to the responsibility of international organizations.

The principle of speciality that indicates the special functions of international organizations is also origin to another principle, the functional necessity principle. Functional necessity means that international law grants substantive rights and obligations to international organizations conditionally, as opposed to states that have rights and obligations simply by their statehood, and are immune from suit for governmental activities, (*acta jure imperii*). Although it may seem limiting the competences of international organizations, functional necessity is actually biased in favour of international organizations and is based on assumption that international organizations are for the good and the actions they make are infallible and cannot be regarded as ill-motivated in any way.⁶⁷ Therefore, especially the responsibility of international humanitarian organizations and e.g. the UN is hard to reason, because the international community assumes and accepts blindly that they are working for the greater good and any misconduct is seen as a mistake within the boundaries of functional necessity.

International organizations are established by international treaties or other instruments governed by international law, and may in addition have decisions, resolutions and other acts binding on them. Among those instruments, the provision on the accountability and responsibility of the organization is often left unaddressed. This seems to be due to the fact that international organization are still seen as annexes of states, although in situations of foul play,

⁶⁵ Klabbers, *International institutional law* (2009), *supra* note 2, at 14.

⁶⁶ Article 1 of the Charter of the United Nations, *supra* note 11.

⁶⁷ Klabbers, *International institutional law* (2009), *supra* note 2 at 33.

states are quick to defer responsibility to the independent international organization instead of them.

The responsibility of international organizations gained more attention in the 1980s after the collapse of the International Tin Council (ITC), when the issue of responsibility for the undertakings of the ITC.⁶⁸ The situation was ensued by numerous litigations. One of the biggest problems was that there was no responsibility clause in the constituent document of the ITC.

Because international organizations are often creations of states, it is not easy to determine whether the organization can be held responsible independently for internationally wrongful acts and whose actions qualify and who is responsible.⁶⁹ The ARSIWA do not address the issue of separate responsibility of international organizations and states in situations where for example an internationally wrongful act of an organization is actually an expression of the will of its member states.

Critical legal studies have pointed out, that there exists an unsolvable tension between considerations of community and sovereignty. With regards to law of international organizations, this means tensions between the implied powers doctrine on the one hand, according to which an international organization may possess implied legal powers even though they have not been explicitly granted to it. On the other hand there is the principle of attribution of powers or principle of speciality according to which international organizations can only act within the limits of the powers that have been attributed to it. Although taking away from legal certainty, the critical theory can provide the reader to relativism that is present in making legal decisions and to realize there are no certainties to offer.⁷⁰

Although the DARIO were accepted on the first reading by the ILC, the responsibility of international organizations is still considered to be an under-developed area.⁷¹

2.1.1. Theories of international law

The legal theory of international organizations is quite underdeveloped.⁷² Especially in the field of international responsibility there are a number of questions; whether and under what circumstances an international organization can be held responsible and what is the relationship of the organization to its members and to their responsibility under international law. One point of contention in accepting the international organization as subjects of international law is the definition; what types of international organizations are considered to have a legal personality, similar to that of states. The responsibility under international law may arise only for a subject of international law.⁷³ A subject must possess a legal personality and be the bearer of rights and obligations under international law. In order to have a legal personality, an international

⁶⁸ *Ibid.* at 272.

⁶⁹ *Ibid.*, at 271.

⁷⁰ *Ibid.* at 3-6.

⁷¹ Crawford, Olleson, the Nature and forms of international responsibility, in *International Law* (2010), *supra* note 38, at 441. First report on the responsibility of international organizations, (2003), *supra* note 45, at 17, para. 31: The DARIO do not handle questions of civil liability and international liability for acts not prohibited by international law.

⁷² Klabbers, *international institutional law* (2009), *supra* note 2 at 3-4.

⁷³ First report on responsibility of international organizations (2003), *supra* note 45, at 8, para. 15.

organization has to be a separate legal entity with a will and powers to act on its own i.e. have independence from its members.

There are many legal theories under which legal personality is defined. One of those theories is the ‘will theory’, according to which the will of the founders of an international organization determines whether the organization has a legal personality.⁷⁴ If the will of free states is for an organization to have legal personality, it should be respected. However, very few constituent treaties establishing an organization explicitly express the intention of its founders in this matter. Also, other states or entities might not recognize those intentions, which could make the declaration of a legal personality unavailing. According to Klabbbers, the emphasis of the recognition of third parties, which is often resorted to by the ‘will theorists’, render the primary notion of the will of the founders unsustainable.⁷⁵

According to the ‘objective-theory’, an entity has international legal personality as soon as it exists as a matter of law (not including or depending on the will of the founders).⁷⁶ The objective theory sets criteria to reaching legal personality, the important one being the possession of a will distinct of its members. However, the notion of ‘distinct will’ can also be called into question, especially decisions made by unanimous expression of the members.⁷⁷

Under the ‘presumptive personality’ theory an organization is presumed to have international legal personality, once the organization performs acts that can only be explained on the basis of international legal personality. Legal personality is presumed and may be rebutted in case evidence points to the other direction.⁷⁸ The landmark *Reparations for Injuries* case⁷⁹ before the ICJ, is said to reflect the presumptive theory, despite the fact that the States establishing the UN had specifically expressed that the UN should not have a separate legal personality⁸⁰:

‘fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.’

The 1949 *Reparations for Injuries* case is significant, because for the first time international organizations were recognized as having a legal personality, as subjects of international law. The case stemmed from the assassination of Count Folke Bernadotte, UN Mediator and several of his associates in Palestine, in 1948. The UN GA asked the ICJ whether the UN has the capacity, in the circumstances where a UN agent has suffered injury involving the responsibility of a state to bring an international claim against the responsible government, and secondly, if the UN has such capacity, how does it relate to the rights of the state whose national the injured agent was.⁸¹ The ICJ recognized the UN as an *international person* under the decision.⁸² Although Article 104 of the UN Charter obliges member states of the UN to give legal capacity for the organization to exercise its functions and to recognize it under their

⁷⁴ Klabbbers *International institutional law* (2009), *ibid. supra* note 2, at 47.

⁷⁵ *Ibid.* at 48.

⁷⁶ *Ibid.* 49.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 49-51.

⁷⁹ *Reparations for Injuries suffered in the service of the United Nations*, ICJ Reports 1949, p.174, at 185.

⁸⁰ Klabbbers, *International institutional law* (2009), *supra* note 2, at 50.

⁸¹ *Ibid.* at 5.

⁸² *Reparations for injuries* (1949), *supra* note 79, 179.

national laws, it is only binding on members. The problem with defining legal personality solely based on constitutive documents of an organization is the relationship and status with non-members. Constitutive documents or rules of an international organization do not bind non-members.

A treaty is binding only on the members of that treaty (*res inter alios acta nec nocet nec prodest*). The basis for the binding nature of treaties comes from the principle of *pacta sunt servanda*. It is expressed e.g. in VCLT Article 26: ‘Every treaty is binding upon the parties to it and must be performed by them in good faith.’ A rule may also be taken and applied in practice by a non-member state to a treaty to an extent that it can become a customary rule. A rule of international law may form into a customary rule when two requirements are met: factual and psychological. The first element requires that the rule is applied in state practice uniformly and continuously over years of the same behaviour. The psychological element indicates *opinio juris*, which means conviction to the behaviour, state practice.⁸³ In the *North Sea Continental Shelf* case, concerning the determination of maritime borders of the North Sea, expressed the two-element theory of customary law. The case was a dispute between Germany, Denmark and the Netherlands, when Denmark and the Netherlands wanted to apply the equidistance principle the Continental Shelf Convention⁸⁴ to the delimitation of the maritime borders. Germany disagreed and wanted to apply the just and equitable apportionment. The verdict, contemplating whether the equidistance principle is a customary rule of international law, expressed the two-element theory:

‘Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, Le., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.’⁸⁵

The elements of practice and *opinio juris* are intertwined, but especially *opinio juris* is difficult to attribute, because it is a ‘state of mind’⁸⁶ element by nature and the attribution requires a consciousness of conforming to a rule. Unless the psychological motivations are different in conforming to a rule, *opinio juris* does not apply. Treaties may also be ‘law-making type’ of treaties where a state may be bound simply by its conduct, however very limitedly, as expressed in the *North Sea Continental Shelf* case.⁸⁷ The ICJ held that ‘only a very definite, very consistent course of conduct on the part of a state’, could justify the application of a treaty to a non-member state.⁸⁸

There are also views that consider the premise of determining the legal personality of an international organization from the ‘standard’ of the state is problematic.⁸⁹ According to Professor Catherine Brölmann, ‘next to the necessity to fill a conceptual lacuna regarding international organizations, the central issue in practice is that the flexible institutional veil

⁸³ Monaco, Sources of international law (2000), supra note 28, at 469.

⁸⁴ Convention on the Continental Shelf, Geneva, 29 April 1958, UNTS, vol. 499, p. 311.

⁸⁵ *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at 44 para. 77. (See also e.g. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment I.C.J. Reports 1985, p. 13, para 27; *Military And Paramilitary Activities In And Against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 14, paras 183 and 207.

⁸⁶ Hugh Thirlway, Sources of international law (2010), see supra note 26, at 103.

⁸⁷ *North Sea Continental Shelf*, (1969) at 3.

⁸⁸ *Ibid*, at 26-27, para. 27-28. See also e.g. Thirlway, Sources of international law (2010), at 95-121.

⁸⁹ Catherine Brölmann, *The Institutional Veil in Public International Law, International Organisations & the Law of Treaties*, Hart Publishing, Oxford (2007).

creates uncertainties about accountability at the various levels of decision-making authority.⁹⁰ The institutional veil refers to the structure of international organizations as partly closed in the way of states and partly open in the way that it blends with general international law; international organizations are formed by competing parts of serving as a forum for states but also as an independent actor.⁹¹ The treaty making of international organizations, when looked at broadly, changes the institutional veil in appearance depending on the context.⁹² Brölmann discusses the different legal theories regarding the legal personality of international organizations, stating that there still is no general agreement whether the will theory, as a more subjective theory, or the objective theory is more convincing.⁹³

2.1.2. Elements of separate legal personality

An entity is considered to possess a legal personality, as a subject of international law, if even a single obligation has been imposed on it under international law.⁹⁴ Legal personality under domestic law does not imply legal personality under international law. When an organization does not operate under international law, but under national legal systems of states, even it may be founded by states, it is not a subject of international law.⁹⁵ On the other hand, the absence of legal personality under domestic law does not mean the absence of legal personality under international law.⁹⁶

An international organization must also have an *objective legal personality*; it needs to act independently from its members.⁹⁷ An objective legal personality is often considered narrow, regarding only its relationship with the members of the organization. However, it is not a logically necessary assumption and e.g. concluding headquarters agreements between an international organization and a non-member, in itself, includes recognition of the legal personality.⁹⁸

An international organization has to have permanence with regards to its organs and its functions. However, an international organization can be terminable and founded for a set period of time.⁹⁹ Other characteristics are the treaty basis of the organisation, functions, stability and organs and the fact that it is not under any other subject of international law.¹⁰⁰

Considering the variety and heterogeneous nature of international organizations, the ILC has taken the approach that international organizations have a legal personality when they are in fact acting as separate entities and expressing independent will from their member states by

⁹⁰ *Ibid.* at 6.

⁹¹ *Ibid.* at 30.

⁹² *Ibid.*

⁹³ *Ibid.* at 97.

⁹⁴ First report on the responsibility of international organizations (2003), *supra* note 45, at 8, para 15.

⁹⁵ Hakapää (2010), *supra* note 21, at 117.

⁹⁶ First report on the responsibility of international organizations (2003), *supra* note 45, at 8, para. 18.

⁹⁷ *Ibid.* at 8, para. 19.

⁹⁸ *Ibid.* at 11, para 19.

⁹⁹ Hakapää (2010), *supra* note 21, at 117.

¹⁰⁰ *Ibid.*

being able to produce consequences outside the organization itself, i.e. have an ‘objective legal personality’.¹⁰¹

Defining the actions and functions performed by international organizations bring a key element in defining the ‘international organization’. The ILC stressed the exercise of ‘governmental’ functions as being the critical factors rather than the foundation and form of an international organization.¹⁰² Governmental functions mean legislative, executive or judicial acts and functions usually exercised by states.¹⁰³ The exercise of these governmental functions, separate from its member states, amount to that organization being responsible under international law.¹⁰⁴

2.1.3. The ‘Intergovernmental Organization’

International organizations that have separate legal personality under international law are generally specified as intergovernmental organizations, possessing certain features that not all international organizations have. Although, the ILC stressed the importance of the exercise of *governmental* functions over the foundation and the form of an organization,¹⁰⁵ intergovernmental organizations are generally established by a treaty, whereas NGOs are established by instruments that are not governed by international law.¹⁰⁶ It has been submitted though that the *Reparations for injuries* opinion of the ICJ means that subjects of international legal system can change and expand depending on the needs of the international community and requirements of international life.¹⁰⁷ Many NGOs have strong missions in humanitarian action, however their mandates are not endorsed by states in a similar way as with intergovernmental organizations and are self-created.¹⁰⁸

¹⁰¹ First report on the responsibility of international organizations (2003), *supra* note 45, at 11, para 19, see also text in note 54.

¹⁰² *Ibid.* at 15, para. 26.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* at 15, para. 27. If an international organization exercises a certain governmental function as an organ of a state, the conduct should be attributed to the state or states concerned.

¹⁰⁵ *Ibid.* at 15, para. 26.

¹⁰⁶ *Ibid.* at 8, para. 14.

¹⁰⁷ Robert McCorquodale, *The Individual in the International Legal System*, in Malcolm D. Evans (ed.), in *International Law*, Third edition (Oxford University Press, 2010), 284-310, at 287. See *Reparations for injuries* (1949), *supra* note 79, at 178-179:

‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. . . . In the opinion of the court, the UN Organization was intended to exercise and enjoy, and is fact exercising and enjoying, functions and rights which can only be explained on the basis of a possession of a large measure of international personality and the capacity to operate upon an international plane. . . . That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane. What it does mean is 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.’

¹⁰⁸ Law and legal issues in international disaster response: a desk study, International Federation of Red Cross and Red Crescent Societies, Geneva, 2007, at 33.

Several international conventions concisely define the ‘international organization’ as meaning specifically ‘intergovernmental organization’, where members consist only of states as members. For instance, the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT)¹⁰⁹ Article 2.¹¹⁰ The text of some other codification conventions add further elements to the definition: e.g. the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 only applies to those intergovernmental organizations that have the capacity to conclude treaties.¹¹¹ In each convention, the given definition was only meant for the purposes of the relevant convention and not for general application.

The definition of an international organization is more elaborate in the DARIO than the aforementioned treaties: ‘International organizations may include as members, in addition to states, other entities’.¹¹² The DARIO definition means that international organizations may include as members, e.g. other international organizations.¹¹³

In general the competence of international organizations is delimited to the sovereignty of its member states. However, some organizations have supranational competence and features, in particular the UN SC resolutions and the EU decision-making processes.¹¹⁴

The ICJ gave an advisory opinion in *WHO v. Egypt*.¹¹⁵ The case was regarding the interpretation of a WHO resolution to remove a Regional Office of the WHO from Alexandria, Egypt. The ICJ submitted 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 constitution or under international agreements that they are parties.’¹¹⁶

2.1.4. Legal personality of the UN

¹⁰⁹ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; 8 International Legal Materials (1969) 679

¹¹⁰ The definition is found in similar form in article I(1)(1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975 (A/CONF.67/16.), Extract from Volume II of the Official Records of the UN Conference on the Representation of States in Their Relations with International Organizations (Documents of the Conference), article 2(1)(n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978 (United Nations, Treaty Series, vol. 1946, p. 3.), and article 2(1)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 (A/CONF.129/15).

¹¹¹ See article 1 (1) (1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, A/CONF.67/16, art. 2 (1) (n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, United Nations, Treaty Series, vol. 1946, p. 3; and article 2 (1) (i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15. See article 6 of the Convention (*ibid.*). As the Commission noted with regard to the corresponding draft articles: ‘Either an international organization has the capacity to conclude at least one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.’ Yearbook ... 1981, vol. II (Part Two), p. 124.

¹¹² Article 2 (a) of DARIO.

¹¹³ DARIO commentaries, *supra* note 8, at 8, para (5).

¹¹⁴ Hakapää (2010), *supra* note 21, at 133.

¹¹⁵ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, p. 73.

¹¹⁶ *Ibid.* at 89-90, para. 37.

The UN has a legal personality in the territory of its member states, under article 104 of the UN Charter. The international legal personality of the UN was recognized by the above quoted advisory opinion of the *Reparations for injuries* case¹¹⁷.

The *Reparations for Injuries* case¹¹⁸ dealt with two main question regarding the legal competence of the UN; first whether the UN has the capacity, in the circumstances where a UN agent has suffered injury involving the responsibility of a state, and secondly, if the UN has such capacity, how does it relate to the rights of the state whose national the injured agent was.¹¹⁹ The ICJ gave an advisory opinion where it found that, even though the answer cannot be found exactly from Article 104 of the UN Charter, the tasks, rights and obligations afforded to the organization mean such legal personality that includes the competence to make claims against states.¹²⁰ In the key passage of the opinion the ICJ formulated as follows:

‘In the opinion of the Court, the [UN] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person.’¹²¹

The UN has been afforded specific features that are unprecedented and unlikely applicable to any other organization.¹²² Many of its powers can be exceeding those of states and other international organizations acting superior to them.¹²³ According to article 1 of the UN Charter, one of the organization’s primary purposes is to foster international cooperation in solving humanitarian problems. UN Secretariat and specialized agencies have particular mandates in this field, through resolutions of the GA or a special treaty.

The UN Charter established six principal organs of the UN: the GA, the SC the Economic and Social Council, the Trusteeship Council, the ICJ, and the Secretariat. In addition the UN includes 15 agencies and several programmes (e.g. the UNHCR) and bodies. The UN and its Specialized Agencies (SA) have a specified legal personality under the Convention on the Privileges and Immunities of the UN (hereinafter CPIUN) and the Convention on the Privileges and Immunities of the SAs (hereinafter CPIUNSA).¹²⁴

¹¹⁷ *Reparations for injuries* (1949), *supra* note 79.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at 5.

¹²⁰ Hakapää, 2010, *supra* note 21, at 114.

¹²¹ *Reparations for injuries* (1949), *supra* note 79, at 179.

¹²² First report on the responsibility of international organizations (2003), *supra* note 45, at 9, para. 16.

¹²³ DARIO commentaries, *supra* note 8, at 104.

¹²⁴ The Convention on the Privileges and Immunities of the United Nations New York, 13 February 1946, UNTS, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1). The Convention on the Privileges and Immunities of the Specialized Agencies New York, 21 November 1947, UNTS, vol. 33, p. 261.

SAs are autonomous intergovernmental organizations that have been created through an independent legal instrument and are normally mandated to address a specific issue, need or function. SAs are linked to the UN through the UN Charter whereby member states have pledged themselves to ‘joint and separate cooperation’ on social and economic issues including those related to standards of living, economic and social progress, health, human rights, culture and education.¹²⁵

UN Programmes are considered subsidiary organs of the GA under Article 22 of the UN Charter. Many of the Programmes have limited legal personality as necessary to carry out their work and operational independence. Decisions taken by UN Programmes and other subsidiary organs do not become effective until they have been reviewed and adopted by the UNGA. Many UN subsidiary organs have secretariats to implement the work of the organ.¹²⁶ UN Peacekeeping and political missions are a subsidiary body of the SC.¹²⁷

2.1.5. Development of international organizations as institutions: state-like functions

Although international organizations have a recognized legal personality comparable to states, they are considered different from states also in other respects than the principle of speciality. Even though the governmental functions were recognized as a critical feature in defining an international organization for the purposes of the DARIO¹²⁸, the exercise of certain state-like functions are not commonly associated with international organizations.

The DARIO do not cover attribution as expressed in articles 9 and 10 of ARSIWA, because these articles handle exercise of governmental authority and indicate control over a territory, which international organizations are not generally considered to possess.¹²⁹ The articles deal with absence of default of official authorities and conduct of an insurrectional or other movement, and are considered ‘unlikely’ according to the ILC, because they presume control over a territory by the entity to which the conduct can be attributed.¹³⁰

International organizations do not often have control over a territory, although, the UN SC authorized ‘the Secretary-General (SG), with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [...]’.¹³¹ International governance by international organizations over territories does exist and their governance contains significant governmental powers that have effects on the human rights of individuals in those territories

¹²⁵ Articles 55 and 56 of the UN Charter, *supra* note 11.

¹²⁶ UN Specialized Agencies versus United Nations Programmes -Note by the Executive Director, The Consultative Group of Ministers or High-level Representatives on Broader International Environmental Governance Reform, UNEP 7 June 2010. (available: http://www.rona.unep.org/documents/partnerships/IEG/UN_Specialised_Agencies_Vs_UN_Programmes.pdf (10.11.2014).

¹²⁷ http://www.un.org/en/aboutun/structure/pdfs/UN%20system%20chart_lettercolor_2013.pdf (29.1.2015)

¹²⁸ First report on the responsibility of international organizations (2003), *supra* note 45, at 15, paras 26-27.

¹²⁹ ARSIWA commentaries, *supra* note 9, at 49–50. See also DARIO commentaries, *supra* note 8, at 86.

¹³⁰ Second report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, ILC Fifty-fifth session, Geneva, 3 May-4 June and 5 July-6 August 2004, A/CN.4/541, Geneva (2004), at 29, para. 67.

¹³¹ SC Res. 1244 (1999), *supra* note 1.

and therefore should be addressed more thoroughly in regards to the responsibility of international organizations.

Another example of ‘territorial legislation’ as Paul C. Szasz put it, is Regulation No. 4¹³² in exception to the Headquarters Agreement concluded in 1947 between the United Nations and the United States.¹³³ According to the regulation the UN limited its liability on damages regarding any tort action against the organization or persons acting on its behalf. From the perspective of international law, Szasz submits that the Regulation 4. does not rely on the immunity of the UN, but rather is ‘an exercise in legislation, establishing a particular tort regime’ under its jurisdiction on the territory of the UN headquarters.¹³⁴

The exercise of state-like functions by international organizations, especially for the UN, does seem to exist in practice much more than is formally recognized. States are reluctant to recognize that an international organization may hold power over their territory, or threaten their governmental hegemony, but that actually leads to a more severe responsibility of the states for breaches that should be attributed to the international organization. Further, the lack of recognition of governance of international organizations, in situations where the state is not the primary provider of legal protection to individuals in its jurisdiction, have lead to situations of no accountability of any kind, as was demonstrated in the *Behrami-Saramati* cases.¹³⁵

In the commentaries to DARIO, however, it is submitted that the responsibility of international organizations should be looked at broadly and in practice the rules of Articles 9-10 ARSIWA may be applied to international organizations.¹³⁶

¹³² UN Doc. A/41/PV.101, at 26 (1986). GA Resolution 41/210 (Dec. 11, 1986).

¹³³ Agreement between the UN and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, TIAS No. 1676, 11 UNTS 11. Section 7(b) specifies that ‘except otherwise provided...the federal, state and local laws of the [US] shall apply within the headquarters district.’ Under Section 8 the UN may make such ‘otherwise’ regulations operative within the headquarters district.

¹³⁴ Paul C. Szasz, The United Nations Legislates to Limit its Liability, 81 *American Journal of International Law*, No. 3 (July 1987), 739-744.

¹³⁵ App. No. 71412/01 *Agim Behrami and Bekir Behrami v. France*, and App. No. 78166/01 *Ruzhdi Saramati v. France, Germany and Norway*, Grand Chamber decision of 2 May 2007 (hereinafter *Behrami-Saramati*). See also Marko Milanovic and Tatjana Papic, As Bad As It Gets: The European Court Of Human Rights's Behrami And Saramati Decision And General International Law, 58 *International and Comparative Law Quarterly*, 2009, 267-296.

¹³⁶ DARIO commentaries, *supra* note 8, at 16-17. See also Documents of the twenty-seventh session including the report of the Commission to the General Assembly, A/CN.4/SER.A/1975/Add.1, *YILC* 1975, vol. II, document A/10010/Rev.1, chap. II.B.2, para. (12) of the commentary to proposed article 13 on the ARSIWA, at 90, when an organ of an international organization acts on the territory of a state: ‘the conduct of organs of an international organization acting in that capacity is not attributable to a State by reason only of the fact that such conduct has taken place in the territory of the State in question or in some other territory under its jurisdiction’.

2.2. 'Rules of the organization' - *lex specialis* challenging the DARIO

2.2.1 Rules of the organization as internal laws of international organizations

Rules of the organization that govern international organizations are 'in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'.¹³⁷ In other words, rules of the organization include the constituent instrument of the organization and the rules flowing from it.

Rules of the organization are considered to be the equivalent to national, internal laws of states.¹³⁸ They determine the organs and agents and other entities whose conduct may be attributed to an international organization. Similarly as the equivalent provision regarding state responsibility.¹³⁹ However, equating internal laws of states and rules of international organizations is problematic; the responsibility of states is unaffected by internal laws of a state, while the rules of the organization of international organizations are part of international law due to their treaty origin. Internal laws of states are national laws that are considered inferior to international laws and may not affect their application. Although they are significant in determining the organs of a state regarding attribution, international law provides the rules for interpreting internal laws of a state. Rules of the organization are different, because regarding intergovernmental organizations, they are international treaty law, primary sources that may be interpreted as special rules, *lex specialis*, overriding the general provisions and principles of the DARIO in a way that internal laws of states may not, relating to the international responsibility of states.

The ILC has submitted regarding the terminology used of the laws of an international organization as rules of the organization: 'there would be problems in referring to the "internal law" of an organization, for while it has an internal aspect, this law has in other respects an international aspect.'¹⁴⁰

For years there have been debates about the *sui generis* nature of international organizations.¹⁴¹ International organizations are not equipped with 'the totality of international rights and duties recognized by international law'¹⁴² as states and during the drafting of the DARIO, most international organizations took the position that the founding premise should be speciality not generality when applying international legal framework to them and found the *lex specialis* article to be a key provision to express that.¹⁴³ The UN commented that the ILC 'should be

¹³⁷ Article 2 (b) of DARIO.

¹³⁸ Second report on responsibility of international organizations (2004), *supra* note 130, at 10-11, para. 20.

¹³⁹ Article 3 of ARSIWA: The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

¹⁴⁰ *YILC 1982*, vol. II, Part Two, Report of the Commission to the GA on the work of the thirty-fourth session A/CN.4/SER.A/1982/Add.I (Part 2), at 21, Question of treaties concluded between states and international organizations or between two or more international organizations.

¹⁴¹ Kristen E. Boon, The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations, in Maurizio Ragazzi (ed.) *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, Leiden, Boston, 2013), 135-147, at 135.

¹⁴² *Reparation for injuries* (1949), *supra* note 79, at 180.

¹⁴³ Boon, *Lex Specialis* in the DARIO (2013), *supra* note 141, at 135-136.

guided by the specificities of the various international organizations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures—in brief, their special character'.¹⁴⁴

The rules regarding *lex specialis* echo the concept of speciality in international law.¹⁴⁵ Rules of the organization are special and different to each organization and that limits their competence, but also their exposure to the scope of claims regarding responsibility.¹⁴⁶ The principle of speciality was recognized by the ICJ, in the advisory opinion on *the Legality of Nuclear Weapons*:

The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.¹⁴⁷

Article 32 of DARIO states that an international organization may not rely on its internal rules as a justification for non-compliance with its obligations under international law. Internal rules may, however, influence the rules of responsibility, e.g. in relation to agreements on attribution of conduct between the international organization and its members.¹⁴⁸ The ILC has discussed this problematic dynamic in a confusing way itself:

‘The internal law of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; some further parts of the internal law of the organization may be viewed as belonging to international law... On the other hand, with regard to non-member states, Article 103 of the UN Charter may provide a justification for the organization’s conduct in breach of an obligation under a treaty with a non-member state. Thus, the relations between international law and the internal law of an international organization appear too complex to be expressed in a general principle.’¹⁴⁹

Professor Maurizio Arcari has put it well by submitting that:

‘state responsibility and the responsibility of international organizations may appear as parallel worlds, where parallel problems invite the search for parallel solutions. However, in the legal field the transposition of identical clauses from one ambit to another does not necessarily guarantee coherent legal effects. In this case [...] very different and unintended legal consequences may develop in the parallel worlds of international responsibility.’¹⁵⁰

Although the ILC has followed the structure and contents of the ARSIWA well while drafting the DARIO, even the seemingly parallel provisions seem lead to strikingly different

¹⁴⁴ Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1), at 4.

¹⁴⁵ Boon, *Lex Specialis in the DARIO* (2013), *supra* note 141, at 140.

¹⁴⁶ *Ibid.* See also footnotes on the page. The approach is called the ‘functionalist’ approach in international law.

¹⁴⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996*, p. 66, at 78, para. 25.

¹⁴⁸ DARIO commentaries, see *supra* note 8, at 126.

¹⁴⁹ Report of the ILC fifty-fifth session (5 May to 6 June and 7 July to 8 August 2003), GA Official Records Fifty-eighth session Supplement No. 10 (A/58/10), at 48, para. (10).

¹⁵⁰ Maurizio Arcari, *Parallel Worlds, Parallel Clauses: Remarks on the Relationship between the Two Sets of ILC Articles on International Responsibility and the UN Charter*, in Maurizio Ragazzi (ed.) *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, Leiden, Boston, 2013) 97-109, at 107.

interpretations and difficulties. Are there enough common denominators to provide general rules on the responsibilities of international organizations and to what extent is it possible?

Professor Brölmann discusses the ‘semi-closed’ nature of international organizations, saying that the autonomous status of the internal laws of international organizations have two-fold effects; on the one hand the internal rules and laws of an international organizations do not have a normative force in general international law, but on the other hand general international law may not automatically have normative force within the legal order of the international organization.¹⁵¹ This makes a barrier for general international law, such as the law of responsibility from operating inside international institutions.¹⁵² To summarize the problem of *lex specialis*: there seems to be no general rule of responsibility that can override institutional law of international organizations.¹⁵³

2.2.2. Lex specialis nature of the rules of the organization

According to *lex specialis*, if a general standard as well as a more specific rule is regulating a matter, the latter should take precedence over the former. The principle that special law derogates from general law is widely accepted adage in legal interpretation and resolving normative conflicts.¹⁵⁴ The relationship between the general rule (*lege generali*) and the special rule (*lex specialis*) can be approached on the one hand from a view that the special rule should be within the confines or background of the general rule, elaborating or specifying the latter, with both rules ultimately pointing in the same direction.¹⁵⁵ On the other hand *lex specialis* can be seen as hierarchically unrelated to the general rule, pointing to a different direction, where the special rule is seen as more suitable.¹⁵⁶

Distinguishing the general and the special is often hard depending on the point of observation; conclusions may be different whether one is looking at the substance of the norm or the legal subjects to whom it is addressed.¹⁵⁷ It may be determined that one of several rules prevail or it could be resolved that they may coexist.¹⁵⁸ Further, *lex specialis* has an unclear relationship to other maxims of interpretation and resolving norm conflicts, e.g. the principle *lex posterior derogat legi priori*.¹⁵⁹ One interpretation gives priority to the rule that is later in time over the special rule.¹⁶⁰

¹⁵¹ Brölmann, *the Institutional veil of international law* (2007), *supra* note 89, at 254.

¹⁵² *Ibid.* at 265.

¹⁵³ *Ibid.*

¹⁵⁴ The principle *lex specialis derogat lege generali* has a long history going back to the Corpus Iuris Civilis where the principle was included.

¹⁵⁵ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the ILC Finalized by Martti Koskenniemi A/CN.4/L.682, 13 April 2006, para. 56.

¹⁵⁶ *Ibid.*, para 57.

¹⁵⁷ *Ibid.* para. 58.

¹⁵⁸ ARSIWA commentaries, *supra* note 8, at 140.

¹⁵⁹ Later law overrides prior law.

¹⁶⁰ See paragraph 3 of article 30 of the 1969 Vienna convention on the law of treaties, *ibid.* *supra* note 109.

Article 64 of DARIO expresses the *lex specialis* rule in relation to the *lege generali*, the provisions of DARIO:

‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.’

The ‘special rules’ mean the constituent instruments and other rules and principles deriving from it and they may contain important provisions also resulting as *lex specialis* overriding the DARIO.¹⁶¹ The ICJ submitted in the *Legality of the Use of Nuclear Weapons* case that:

[...] the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret those constituent treaties.’¹⁶²

The ICJ reiterated that the constituent instrument of an international organization has to be interpreted ‘in the light of [...] the practice followed by the Organization’.¹⁶³ The ‘established practice’ of an international organization is strongly emphasized in the DARIO.¹⁶⁴ According to the ILC the emphasis of practice brings a balance between the constituent instrument of international organizations and its needs to develop as an institution.¹⁶⁵ Practice is an important element in interpreting the constituent instruments of international organizations. In *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the ICJ, interpreted the UN Charter in light of practice of the SC and held that the constituent instrument has to be interpreted in the light of the practice followed by the organization.¹⁶⁶ According to Special Rapporteur Gaja, related to attribution of conduct a wider interpretation should not be accepted and when the practice of an organization develops in a manner that is inconsistent with its

¹⁶¹ Boon, *Lex Specialis in the DARIO* (2013), *supra* note 141, at 143. See also NATO remarks on the Responsibility of international organizations, Comments and observations received from international organizations (A/CN.4/637), at 40 (‘[T]he fundamental internal rule governing the functioning of the organization—that of consensus decision-making—is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization.’).

¹⁶² *Legality of the Use of Nuclear Weapons* (1996), *supra* note 147, at 75, para. 19.

¹⁶³ *Ibid.*, at 76, para. 21. See also *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Merits)* I.C.J. Reports 1960 p. 44: the ICJ made reference to a specific practice that had been accepted between states parties to the case and eschewed the examination of general custom. The case was concerning the right of passage of Portugal through the territories of India, in order to access two enclaves of Portugal that were surrounded by India.

¹⁶⁴ Second report on responsibility of international organizations (2004), *supra* note 130, at 11-13, para. 22.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 12 at 22, para. 22.

constituent instrument, and the organization may not be exempt from responsibility where a conduct goes beyond the scope of the organization's competence.¹⁶⁷

Although it seems, the *lex specialis* provision gives a very wide margin of applying the rules of the organization to the detriment of general provisions of international law, international organizations cannot justify non-compliance with their international obligations or escape responsibility based on rules of the organization as expressed in article 32 of DARIO.¹⁶⁸ The ICJ has submitted in the *Reparations for injuries* case that 'There is nothing in the character of international organizations to justify their being considered as some form of "super-State"'.¹⁶⁹ International organizations 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.

The concept of *lex specialis* should not allow international organizations to disregard general rules of international law and the thresholds of specificity and genuine inconsistency must be fulfilled. Nonetheless, there remains significant opacity in the approach to *lex specialis* in the DARIO.¹⁷⁰ The ILC has recognized that the concept of *lex specialis* cannot be codified, especially due to its dependence on the normative context, which changes from one international organization to another and depends on the circumstances at hand.¹⁷¹

Relating to the responsibility of international organizations, where states or international organizations have agreed upon otherwise or responsibility has been addressed elsewhere in certain contexts, those special rules will be applied instead over the general provisions of the DARIO.¹⁷² According to Professor of law Kristen E. Boon, the *lex specialis* provision and some other provisions of the DARIO, emphasize the role of the rules of the organization and *lex specialis* while the DARIO is left in a 'residual' role.¹⁷³ In practice the *lex specialis* in relation to the DARIO means that, if the DARIO provisions are in conflict with a treaty, the treaty prevails.¹⁷⁴ There may also be instances where also non-treaty standards are at odds with the DARIO and the lack of a binding instrument does not mean the clash could not be fundamental with the DARIO provisions.¹⁷⁵

According to Boon, in order to make a case for *lex specialis* over the DARIO, four criteria must be fulfilled: there must be an actual inconsistency between the rules; one body of law has to be more specific than the other; the sources of law leading to the conflict support the

¹⁶⁷ Second report on responsibility of international organizations (2004), *supra* note 130, at 13, para. 24.

¹⁶⁸ Maurizio Arcari, *Parallel Worlds, Parallel Clauses* (2013), *supra* note 150, at 103. See Article 2(b) on the 'use of terms', for the definition of 'rules of organization', and Article 32 on the 'relevance of the rules of the organization'.

¹⁶⁹ *Reparations for Injuries* (1949), *supra* note 79, at 179.

¹⁷⁰ Boon, *the Role of lex specialis in the DARIO* (2013), *supra* note 141, at 138.

¹⁷¹ Fragmentation report, Koskenniemi (2006), *supra* note 155, para. 119.

¹⁷² Boon, *the Role of lex specialis in the DARIO* (2013), *supra* note 141, at 138- 139. They may concern also the responsibility of a state in connection with the conduct of an international organization as set out in Part 5 of DARIO.

¹⁷³ *Ibid.* at 137.

¹⁷⁴ *Ibid.* at 142.

¹⁷⁵ *Ibid.* at 143. Also NATO submitted to the ILC that non-treaty standards may contain vital rules and according to the World Bank took the strong stance that only *jus cogens* norms should prevail over the internal rules of an international organization and the DARIO play only a subsidiary role. Responsibility of international organizations, Comments and observations received from international organizations (A/CN.4/637), 40-41.

application of *lex specialis*; and the application of *lex specialis* does not alter the rights or obligations of the beneficiaries of the agreement.¹⁷⁶

The *lex specialis* principle comes down to interpretation and in order to apply, the inconsistency must be an actual one between the colliding norms or there has to be an intention that one provision is to exclude the other. In the *Neumeister*¹⁷⁷ case, the European Court of Human Rights (hereinafter ECtHR) held that the specific obligation for compensation of article 5, paragraph 5, of the European Convention of human rights (hereinafter ECHR) for unlawful arrest or detention did not prevail over the more general provision for compensation in Article 50, because the application of the *lex specialis* principle to article 5, paragraph 5, would have led to ‘consequences incompatible with the aim and object of the [ECHR]’.¹⁷⁸ The ECtHR considered it was sufficient that the specific provision was taken into account when applying the general rule.

The rules of the organization and the way in which they are interpreted are important, because the answer to whether a certain conduct is attributable to an international organization is deduced from the rules of the organization. It may be necessary to establish whether an entity is an organ or an agent of the international organization to which a certain conduct may be attributed.¹⁷⁹ In relation to the responsibility of the UN, the rules of the organization and agreements between its members, may affect the applicability of the general attribution rules. Related to the principles regarding the rules of the organization and *lex specialis*, the UN has its own provision in the DARIO, according to which, the UN Charter prevails over the DARIO.

2.2.3. The Charter of the United Nations as *lex specialis* to the DARIO

Article 67 of the DARIO expresses a *lex specialis* rule regarding the UN stating that ‘these draft articles are without prejudice to the [UN Charter].’ According to the commentaries, ‘the reference to the Charter includes obligations that are directly stated in the Charter as well as those flowing from binding decisions of the SC which according to the ICJ similarly prevail over other obligations under international law on the basis of article 103 of the UN Charter’.¹⁸⁰ Article 103 of the UN Charter stipulates that ‘in the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.’

Article 59 of ARSIWA includes a similar provision. According to the commentaries the article 103 of the UN Charter gains importance in situations where decisions made by political organs of the UN may affect state responsibility and cause conflicts between obligations that arise

¹⁷⁶ Boon, the Role of *lex specialis* in the DARIO (2013), *supra* note 141, at 141.

¹⁷⁷ App. No. 1936/63, *Neumeister v. Austria*, Judgment of 7 May 1974, at 13, para. 29-30. Neumeister brought an action to the ECtHR against Austria, complaining of the length of time he had spent in detention while on remand.

¹⁷⁸ *Ibid.* paras. 28–31, especially para. 30.

¹⁷⁹ DARIO commentaries, *supra* note 9, 3 para. (8).

¹⁸⁰ DARIO commentaries, *supra* note 9, at 171. The ICJ case referenced above are from orders on provisional measures in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America)*, I.C.J. Reports 1992, p. 15, at 126.

from the UN Charter and other international treaty obligations. In the *Lockerbie* cases,¹⁸¹ for example, it appears that the UN Charter was interpreted to being hierarchically superior to the ARSIWA.¹⁸² Libya filed proceedings in the ICJ in 1992 against the United States (US) regarding a dispute over the interpretation or application of the Montreal Convention¹⁸³ arising from the aerial incident over Lockerbie, Scotland in 1988.

The ILC found that there was no reason to question a similar provision regarding international organizations, even though international organizations are not members of the UN and not legally bound by the UN Charter.¹⁸⁴ The ILC went on to use an example of an arms embargo where the UN SC resolutions are binding on international organizations as well as states and considered it not the purpose of the DARIO to determine the extent to which the responsibility of international organizations is affected.¹⁸⁵ The DARIO seem to portray an approach where the collective security measure of the UN Charter regime have been left out of the scope of the DARIO, which could mean that they are seen as separate and complementary or a parallel regime in relation to the DARIO.¹⁸⁶

The UN Secretariat made observations during the drafting of the articles on the responsibility of international organizations, where it stated that:

Unlike other organizations, however, which . . . may not rely on their rules as a justification for failure to comply with their international obligations, the UN could invoke the Charter . . . and SC resolutions—to the extent that they reflect an international law obligation—to justify what might otherwise be regarded as non-compliance.¹⁸⁷

According to this reasoning, the UN Charter obligations and related SC resolutions have a ‘quasi-constitutional’ status and should be granted supremacy in the international legal system.¹⁸⁸ The UN Secretariat went as far as suggesting that the DARIO commentaries should include a statement that the DARIO have to be interpreted in conformity with the UN Charter.¹⁸⁹ According to Arcari, the interpretations go beyond the scope and effects of the UN

¹⁸¹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3; (Libyan Arab Jamahiriya v. United States of America) Ibid.* p. 114.

¹⁸² Maurizio Arcari, *Parallel Worlds, Parallel Clauses* (2013), *supra* note 150, at 101.

¹⁸³ Convention for the Suppression of unlawful acts against the safety of civil aviation (the Montreal Convention of 23 September 1971), UNTS Vol 974, no. 14118 (1975).

¹⁸⁴ DARIO commentaries, *supra* note 9, at 172.

¹⁸⁵ *Ibid.*

¹⁸⁶ Vera Gowlland-Debbas, *Responsibility and the United Nations Charter*, J. Crawford et al. (eds.), *The Law of International Responsibility* (Oxford, 2010), 115-138, at 118.

¹⁸⁷ Secretariat observations, *Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1)*, at 36, para. 3. See also the comment to draft art. 31 on first reading, concerning the irrelevance of the rules of the organization: ‘The Secretariat also notes that, in the case of the UN, whose ‘rules’ include the Charter of the UN, reliance on the latter would be a justification for failure to comply, within the meaning of draft article 31, paragraph 1.’ *Ibid.*, 30, para. 1.

¹⁸⁸ Maurizio Arcari, *Parallel Worlds, Parallel Clauses* (2013), *supra* note 150, at 104.

¹⁸⁹ Secretariat observations, *Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1)*, 36, para. 4. The ILC did not include the provision to the commentaries. See Report of the Drafting Committee to the ILC during the 3097th meeting of Jun. 3, 2011 (A/CN.4/SR.3097), at 34: ‘The Committee had also considered a proposal to indicate that the draft articles had to be interpreted in conformity of the Charter, as had been done in the commentary to the equivalent provision in the articles on State responsibility. It had decided against such a clarification in either the provision itself or in the commentary, however, because it felt that such an assertion could be more easily sustained in the context of State responsibility than in that of the responsibility of international organizations.’

Charter 103 and the non-prejudice clause could render the DARIO completely irrelevant in any case related to the responsibility of the UN and, especially when acting through the SC.¹⁹⁰

Although the commentaries to Article 67 of the DARIO finish off by stating that ‘the present article is not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the UN.’ Considering the extensive interpretations the article may have, the effect of it could end up irreconcilable in relation to the DARIO.¹⁹¹

There is case law that has challenged the superiority of the UN SC resolutions, such as the *Kadi* cases¹⁹² before the European Court of Justice (hereinafter ECJ) and the *Nada* case¹⁹³ before the ECtHR.¹⁹⁴ In both cases individuals were listed by the Sanctions Committee of the UN SC, which was established by resolution 1267 (1999), with the power to identify individuals and entities that were suspected of involvement with the Taliban and Al Qaida. The individuals were not awarded recourse to any independent judicial process to challenge their listings. Both decisions gave preference to human rights standards over UN SC sanctions stemming from the resolution 1267 (1999) sanctions regime.

The *Al-Jedda* case¹⁹⁵ before the ECtHR addressed a norm conflict between the European Convention on Human Rights¹⁹⁶ (ECHR) and UNSC resolution 1546¹⁹⁷ and the role of Article 103 of the UN Charter. In the case the British Forces in Iraq detained the applicant under the authority of the UN SC Resolution 1546. The ECtHR held as follows:

In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the UN was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the UN Charter, the third subparagraph provides that the United Nations was established to “achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms”. Article 24(2) of the Charter requires the SC, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the UN”. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the SC does not

¹⁹⁰ Maurizio Arcari, *Parallel Worlds, Parallel Clauses* (2013), *supra* note 150, at 105.

¹⁹¹ *Ibid.* at 106.

¹⁹² Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and the Council of the EU v. Yassin Abdullah Kadi* (18 July 2013) (hereinafter *Kadi II*). The case was preceded by Case T-315/01, *Yassin Adullah Kadi v. Council of the EU and Commission of the European Communities* [2005] ECR II-3649 (21 September 2005); Joined Cases C-402/05 P and C-415/05, P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the EU and Commission of the European Communities*, [2008] ECR I-6351 (3 September 2008) (hereinafter *Kadi I*);

¹⁹³ App. No. 10593/08, *Nada v. Switzerland*, Judgment [Grand Chamber] 12 September 2012. The case concerns an Italian national resident in the Italian enclave of Campione in Switzerland, who at Switzerland’s request was placed on a terrorist suspect list by the UN SC Res 1267 Committee, and subjected to targeted sanctions. Among these sanctions was a travel ban, which Switzerland implemented through its domestic legal mechanisms. Accordingly, the applicant was denied permission to transit through Switzerland from Campione, thus rendering him unable to move even to other parts of Italy, let alone anywhere else, essentially confining him. Mr Nada complained that the Swiss travel ban violates his rights under Articles 5 and 8 ECHR.

¹⁹⁴ See further Erika deWet, *From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, 12 *Chinese Journal of International Law* (2013), 787–807.

¹⁹⁵ App. No. 27021/08, *Al-Jedda v. United Kingdom*, 7 July 2011.

¹⁹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, Entry into force: 3 September 1953.

¹⁹⁷ SC res. 1546 (2004) (on formation of a sovereign Interim Government of Iraq).

intend to impose any obligation on member states to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a SC Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the UNs' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the SC to intend states to take particular measures which would conflict with their obligations under international human rights law.¹⁹⁸

Article 5 of ECHR was considered to apply and Mr. Al-Jedda's detention was deemed unlawful.¹⁹⁹ Even though the letters annexed to the resolution expressly referred to security internment,²⁰⁰ the ECtHR found that the resolution expressly referred to the need to comply with international human rights law. Furthermore, the UN SG and his special representative in Iraq frequently objected to the use of internment.²⁰¹ The ECtHR however, did not address the issue of whether authorizations are capable of being covered by Article 103.²⁰² According to Professor Marko Milanovic, the *Al-Jedda* case is an important development, where the ECtHR has made a clear statement rule for interpreting SC resolutions that can go a long way in providing a meaningful human rights check on the UN SC.²⁰³

Even though the ILC makes reference to its earlier text and has adopted a very specific definition of the rules of the organization, it does not resolve the inconsistencies that result from the dual nature of the rules of the organization as rules international law and internal rules for the purposes of specifying hierarchies and competences within the international organization. There is an unavoidable clash between rules of the organization in developing as *lex specialis* on the one hand and the calls for end to impunity and general accountability on the other. An application of rules of the organization should not be allowed to lead to lack of accountability.

¹⁹⁸ *Al-Jedda*, *supra* note 195, at para. 102.

¹⁹⁹ *Ibid.* at paras 109–110. The ECtHR awarded the applicant €25,000 in damages *ibid.*, at para. 114.

²⁰⁰ SC Res. 1546(2003), *supra* note 197, at op. para. 10 and annex: 'the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.' The letters referred to were sent to the Council by the then U.S. Secretary of State, Mr. Colin Powell, and the interim prime minister of Iraq, Dr. Ayad Allawi. Mr. Powell's letter outlined the duties of the MNF forces, stating that these 'will include combat operations against members of [insurgent] groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security'.

²⁰¹ *Al-Jedda*, *supra* note 195, at paras 105–106.

²⁰² See, in that regard, the dissenting opinion by Judge Poalelungi.

²⁰³ Marko Milanovic, Al-Skeini and Al-Jedda in Strasbourg, 23 *The European Journal of International Law*, no. 1 (2012), 121–139, at 137.

2.3. Attribution of conduct as an element of responsibility

2.3.1. General

As the international legal personality of international organizations is consolidated in international law, it is essential to determine the juridical regime of their international responsibility in order to determine their obligations and to avoid breaches.²⁰⁴ The elements of an internationally wrongful act of an international organization are set out in Article 4 of the DARIO:

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) is attributable to that organization under international law; and
- (b) constitutes a breach of an international obligation of that organization.

The international obligation that is breached is determined by the primary rules, treaty or other source of international law that are binding on the international organization. The following sections are focused on the first element, rules regarding the attribution of conduct to international organizations. As stated in Article 4 of the DARIO, the conduct may be action or omission. The DARIO set out the positive criteria for attribution of conduct and do not express when conduct may not be attributed to an international organization.

Attribution of conduct is a distinct concept from the breach of an obligation and says nothing on the legality or illegality of a certain conduct. The content of the responsibility depends ultimately on the obligation alleged to have been breached (primary rule) and on the circumstances at hand. In practice there is often a close link between the attribution of conduct and the obligation that is alleged to have been breached.²⁰⁵

Attribution of conduct is separate from attribution of responsibility, which is often the approach in practice. Attribution of conduct is not necessarily implied as opposed to in e.g. Article 5 of Annex IX to the United Nations Convention on the Law of the Sea²⁰⁶, which represents attribution of responsibility. The Article states that international organizations and their member states are required to declare their respective competence with regard to matters covered by the Convention. In article 6 it is submitted that ‘Parties which have competence under article 5 [...] shall have responsibility for failure to comply with obligations or for any other violation of this Convention.’²⁰⁷

The draft articles on the attribution of conduct to an international organization are modelled from the attribution rules adopted in the ARSIWA (Articles 4-11). While the ARSIWA are not directly pertinent in relation to international organizations, the responsibility of states was

²⁰⁴ Antônio Augusto Cançado Trindade: Some Reflections on Basic Issues Concerning the Responsibility of International Organizations, in *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, Leiden, Boston, 2013), 3-15, at 4.

²⁰⁵ ARSIWA commentaries, see *supra* note 8, at 39.

²⁰⁶ UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, UNTS vol. 1833, p. 397 at p. 580.

²⁰⁷ Second report on responsibility of international organizations (2004), *supra* note 130, at 6, para. 12, also DARIO commentaries, see *supra* note 9, at 83.

taken fully into account in the drafting of the DARIO, when the attribution rules and wording in relevant articles are similar.

In order for a conduct to be attributed to an international organization, it has to be performed by an organ or agent of the international organization. Secondly, a conduct that is performed by organ of a state or an organ or agent of another international organization, which is placed at the disposal of an international organization, may be attributed to the organization, if it retained sufficient level of control over the conduct. Finally, it is submitted that a certain conduct may be attributed to more than one entity by dual attribution.

As discussed above, the nature of rules of the organization as part of international law, with the *lex specialis* provisions of the DARIO, bring certain complications to applying the general rules of the DARIO to international organizations, which is especially prevalent regarding attribution of conduct. Further, there is a shortage of consistent practice or jurisprudence regarding the attribution of conduct to international organizations.

2.3.2. Organs and agents of an international organization: the functional link

In order for a certain conduct to be attributable to an international organization, it has to be performed by certain entities connected to the international organization, in most cases its 'organs' or 'agents'. The rules of attribution are mostly determined by rules of the organization. Accordingly Article 6 of DARIO is as follows:

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
2. The rules of the organization apply in the determination of the functions of its organs and agents.'

According to Article 6 of the DARIO the organ or agent of an international organization conduct is attributable to an international organization 'in the performance of functions of that organ or agent' meaning functions that have been given to that organ or agent. When the organ or agent acts in a private capacity, the conduct is not attributed to the organization.²⁰⁸ Article 7 of DARIO does not specify what type of acts may be attributable and covers a wider scope of actions than the corresponding Article 5 of ARSIWA, which is limited to the exercise of 'governmental authority'.²⁰⁹ With international organizations the 'exercise of governmental authority' does not apply in general and the scope of acts that are attributable to an international organization, are any of its acts with unlimited description.

The attribution of conduct to an international organization differs from the principles regarding states also in respect of the entities whose conduct is attributable to the international organization.²¹⁰ The notion of organs and agents widens the scope of the rule from that

²⁰⁸ DARIO commentaries, see *supra* note 9, at 18. Attribution of conduct *ultra vires* is addressed in article 8.

²⁰⁹ Blanca Montejo, The Notion of 'Effective Control' under the Articles on the Responsibility of International Organizations, in *Responsibility of International Organizations, Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, Leiden, Boston, 2013), 389-405, at 393. See also Second report on the responsibility of international organizations (2004), *supra* note 130, at 22, para. 47.

²¹⁰ Crawford, Olleson, the Nature and forms of international responsibility, in *International Law* (2010), see *supra* note 38, at 443.

concerning states, when the ARSIWA makes provision only on organs of the state.²¹¹ An individual with no official status within the international organization who carries out conduct upon its direction and control will be regarded as its agent and the conduct will be attributable to the organization on that basis.²¹²

In relation to state responsibility, international law follows the principle of unity of the state according to which the acts or omissions of all state organs should be regarded as acts or omissions of the state for the purposes of international responsibility.²¹³ The ICJ has affirmed the rule in *Immunity from Legal Process of a Special*: ‘According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule ... is of a customary character.’²¹⁴ Although the internal laws of a state, have an important role in attribution of conduct, the status and functions of state representatives, officials and other entities as organs, may not be determined only by internal law, but through practice as well.²¹⁵ With regards to the rules of the organization (above section), the rules of international organizations include their established practice, which allows for them to develop as an institution.²¹⁶ The established practice of international organizations has influence in attribution of conduct.

Similarly as with states, while the rules of the organization are significant in classifying a certain entity as an organ or agent of an international organization, they alone may not provide the answer.²¹⁷ In the *Reparations for injuries* case the ICJ found that, while the UN Charter only mentions ‘organs’ as entities of the organization, ‘agents’ that have been conferred functions by an organ of the UN are considered attributable to the UN:

‘The Court understands the word ‘agent’ in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions —in short, any person through whom it acts.’²¹⁸

²¹¹ ARSIWA commentaries, *supra* note 8, at 40-42.

²¹² Crawford, Olleson, the Nature and forms of international responsibility, in *International Law* (2010), see *supra* note 38, at 443.

²¹³ ARSIWA commentaries, see *supra* note 8, at 40. The conduct may be legislative, judicial, executive or any other functions and there is no distinction between superior or subordinate officials or organs of central government or local authorities.

²¹⁴ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 87, para. 62, referring to the draft articles on State responsibility, article 6 (now article 4).

²¹⁵ Yearbook of the International Law Commission 2001, Volume 2, Part 2, A/CN.4/SER.A/2001/Add.1 (Part 2), Official Records of the GA, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, para. 11 of the commentary, at 90: ‘Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of ‘organs’. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an ‘organ’, internal law will not itself perform the task of classification.’

²¹⁶ Second report on the responsibility of international organizations (2004), *supra* note 130, at 11-12, para 22.

²¹⁷ *Ibid.* at 8, para 15.

²¹⁸ *Reparations for injuries* (1949), *supra* note 79, at 177.

In general, most international organizations usually act through their various organs and agents, it can be considered a rule that acts and omissions by any of those organs in the exercise of their competences, may be attributed to the organization.²¹⁹

In *Applicability the Convention on the privileges and immunities of the UN*²²⁰ case before the ICJ, the UN Economic and Social Council (hereinafter ECOSOC) requested the ICJ to give an opinion on the applicability of the aforementioned convention to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The ICJ gave value to the practice of the UN where persons, who did not have official status of UN officials, had been entrusted missions and that their administrative position does not provide the answer of their status with UN, but ‘the nature of their mission’ is of the essence.²²¹

The ICJ has submitted, In relation to damages incurred resulting from acts or omissions by the UN, that the conduct of the UN includes acts and omissions of its officials and ‘agents’, apart from its primary and subsidiary organs.²²² This means not only officials of the UN, but also persons who are acting for the organization based on functions granted by an organ of the UN.²²³ Legal scholars have agreed that a functional link between the agent and the organization would premise attribution of conduct to the organization. The functional link is usually established on the basis of the constituent instrument of the organization.²²⁴

The general rule of attribution of conduct as set out in Article 6 provides a seemingly clear basis for attribution. However, often times with international organizations, there is multiple and multilateral co-operation with other international organizations and with states, which all act under different mandates and retained by special agreements. UN peacekeeping is a good example of a situation, where the general clear-cut rule of Article 6 of DARIO, does not apply. UN Peacekeeping fall under the scope of Article 7 of DARIO.

²¹⁹ Second report on the responsibility of international organizations (2004), *supra* note 130, at 10, para. 18. See also a decision of the Swiss Federal Council of 30 October 1996, Doc. VPB 61.75, published on the Swiss Federal Council’s web site.

²²⁰ *Applicability of article VI, section 22, of the Convention on the privileges and immunities of the United Nations I.C.J. Reports 1989, p. 177, at 194.*

²²¹ *Ibid.* paras 47-48.

²²² The main bodies of the UN are UNSC; UNGA, ECOSOC, ICJ, Trusteeship Council, Secretariat, Repertory of Practice of UN Organs. Subsidiary organs of the GA are e.g. Boards, Commissions, Committees, Councils and Panels, and Working Groups and others. UN SC subsidiary organs are e.g. Peacekeeping operations and Sanctions committees, the ICTR and the ICTY etc.

²²³ *Difference relating to immunity* (1999), p. 62 at 88, para. 66. Second report on the responsibility of international organizations (2004), *supra* note 130, at 9, para. 16.

²²⁴ Second report on the responsibility of international organizations (2004), *supra* note 130, at 9, para. 17.

2.3.3. Conduct of organs placed at the disposal of an international organization

2.3.3.1. General

Article 7 of DARIO deals with attribution of conduct of organs of a state or organs or agents of an international organization that are placed at the disposal of another international organization:

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.’

While Article 6 deals with situations where an entity is fully seconded to an organization, Article 7 applies to cases where a seconded entity still acts ‘to a certain extent’ as an organ or agent of the sending state or organization.²²⁵ Article 7 stipulates that the international organization at which disposal an organ or an agent has been placed is only responsible for their conduct if they had ‘effective control’ over the conduct, in an effort to stipulate on the boundaries between different acting entities.

Questions of attribution of conduct have been debated especially in situations relating to Article 7 of DARIO. The problem lies with distinguishing whether a certain conduct should be attributed to the international organization itself or to the state or international organization that has placed organs or agents at its disposal. The rules of the organization, the agreements made between the international organization and the state or international organization providing assistance and the established practice between the parties, provide tools in determining to which a certain conduct may be attributed. Article 7 of DARIO does not resolve whether a certain conduct is attributed to a state or an international organization at all, but rather resolve to which entity certain conduct has to be attributed.²²⁶

Article 7 of DARIO originates from Articles 6 and 8 of ARSIWA. According to the ARSIWA, the acts need to be performed in the ‘exercise of governmental authority’²²⁷, whereas Article 7 of DARIO applies to any acts and the scope of Article 7 of DARIO is wider than the corresponding provisions of the ARSIWA. Any act committed by an organ of a state or an organ or agent of an international organization that has been placed at the disposal of an international organization, may be attributed to the receiving organization, if the organization has ‘effective control’ over such conduct.²²⁸

The state or an international organization may conclude an agreement with the receiving international organization over the placement of an organ or agent at the latter organization’s

²²⁵ DARIO commentaries, *supra* note 9, at 87, para. 1. In its commentaries to the ILC, the UN Secretariat mentioned that ‘the residual control exercised by the lending state in matters of disciplinary and criminal prosecution, salaries and promotion for the duration of the operation, is inherent to the institution of UN peacekeeping, where the UN maintains, in principle, exclusive “operational command and control” and the lending state such other residual control. For the United Nations Secretariat, as long as such residual control does not interfere with the UN operational control, “residual control” is of no relevance for the purposes of attribution’. (A/CN.4/637/Add.1, at 14, para. (4).)’

²²⁶ DARIO commentaries, *supra* note 9, at 88.

²²⁷ Montejo, *Effective Control*’ under the DARIO, (2013), *supra* note 209, at 393.

²²⁸ *Ibid.* at 390-391.

disposal. The agreement may state which state or organization would be responsible for the conduct of the seconded organ or agent.²²⁹ UN peacekeeping operations are usually arranged with agreements between the UN and the member state providing troops. Most of the practice that was referred to during the drafting of the Article 7 of DARIO deals with UN peacekeeping.²³⁰

UN peacekeeping forces are regarded as subsidiary organs of the UN, but peacekeeping forces can consist of UN staff, volunteers, independent contractors and members of national armed forces and therefore the question of attribution of conduct is not clear-cut.²³¹ Peacekeeping operations consist of military, police and civilian personnel in an effort to ‘maintain peace and security, ... facilitate the political process, protect civilians, assist in the disarmament, demobilization and reintegration of former combatants; support the organization of elections, protect and promote human rights and assist in restoring the rule of law..’²³²

Originally, UN military operations under Chapter VII of the UN Charter were supposed to be under complete UN control. It was envisaged that member states would provide their armed forces to the SC, but member states were unwilling to make the arrangements.²³³ In the current model, the SC authorizes willing member states to engage in military action in UN operations, where the SC finds it necessary for international peace and security.

Peacekeeping operations are divided into UN-led operations and UN-authorized operations, due to different ways in which the command and control is administered in the operations. In the case of the former, armed military peacekeepers of member states are put at the disposal of the UN and deployed as a contingent to a UN peacekeeping operation, which has the legal status of a subsidiary organ of the SC.²³⁴ The military members are under the ‘operational control’ of the UN Force Commander, while a contingent commander, commands these forces, In UN-authorized peace operations, authorized by the SC, the UN has a limited formal involvement in the day-to-day management of the operation. In such operations, the SG’s role is restricted to acting as the conduit by which the multinational force reports to the SC.²³⁵ In such operations, the UN has no command or control over the military peacekeepers.²³⁶ Command and control would generally lie with a particular state or international organization, other than the UN.²³⁷

²²⁹ DARIO commentaries, *supra* note 9, at 87.

²³⁰ Second report on the responsibility of international organizations (2004), *supra* note 130, at 16, para. 34.

²³¹ Susan A. Notar, Peacekeepers as perpetrators: Sexual exploitation and abuse of women and children in the Democratic Republic of the Congo, 14 *American University Journal of gender, social policy & the law*, issue 2 (2006) 413-429, at 421.

²³² <http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml> (10.11.2014).

²³³ Papis, Milanovic, *As bad as it gets* (2009), *supra* note 135, at 276. Under Article 43 of the UN Charter (*supra* note 11), member states would make their armed forces available and Article 49 of the UN Charter creation of a Military Staff Committee was made possible.

²³⁴ Montejo, ‘Effective Control’ under the DARIO (2013), *supra* note 209, at 402-403.

²³⁵ *Ibid.* The SC itself never uses the term ‘delegation’, but it uses ‘authorization’ in its resolutions concerning use of force, however, the separation of these terms is considered an academic debate.

²³⁶ E.g. the 1992 US-led Unified Task Force (UNITAF) in Somalia, the 1994 French-led Operation Turquoise in Rwanda, and the 1999 NATO-led Kosovo Force (KFOR).

²³⁷ Command and control functions are performed through an arrangement of personnel, equipment, communications, facilities, and procedures employed by a commander in planning, directing, coordinating, and controlling forces and operations in the accomplishment of the mission. In relation to command and control, military forces may use the same terms with different meanings. This may have considerable operational and

According to the model contribution agreement relating to military contingents placed at the disposal of the UN by one of its member states in peace operations, the UN is regarded as liable towards third parties, but has a right of recovery from the contributing state under circumstances such as ‘loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the government’.²³⁸ The agreement is not conclusive because it governs the relations between the contributing state or organization and the receiving organization and may thus not deprive a third party of any right that the party may have towards the state or organization which is responsible under the general rules.²³⁹ Arrangements that are concluded between the UN and the contributing state only concern the parties and do not affect the question of attribution of conduct under general international law.²⁴⁰

In practice, depending on the nature of claims, the UN has acknowledged its responsibility for the conduct of national contingents many times and concluded many agreements with states.²⁴¹ The first time UN resumed responsibility, was in 1965 when the SG settled claims with Belgium and some other states for damages suffered by the state nationals in the Congo resulting of harmful acts of United Nations Operation in the Congo (ONUC)²⁴² personnel. The agreement stated: ‘The UN has stated that it would not evade responsibility where it was established that UN agents had in fact caused unjustifiable damage to innocent parties.’²⁴³ No provisions have been made in any of the agreements that would indicate that the state contingents would be held responsible.²⁴⁴ Further, the position taken by the UN has been reasserted repeatedly over the years.²⁴⁵ The conduct of the UN is also attributed to the organization with regards to responsibility under international law.²⁴⁶

legal consequences, See Montejo ‘Effective Control’ under the DARIO (2013), *supra* note 209, at 403, footnote 59.

²³⁸ Article 9 of the UN Model Contribution Agreement (A/50/995, annex; A/51/967, annex).

²³⁹ DARIO commentaries, *supra* note 9, at 87, para. 3.

²⁴⁰ Second report on the responsibility of international organizations (2004) *supra* note XX, at 21, para. 43.

²⁴¹ The UN Secretary-General has summed up the position concerning responsibility of the UN for conduct of peacekeeping forces in the Secretary-General’s report of the financing of UN Peacekeeping operations, September 20, 1996, A/51/389, at 4, paras 7-8:

‘In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties. [...] The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims [...] evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization.’

²⁴² July 1960 – June 1964.

²⁴³ Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals. New York, 20 February 1965, UNTS, vol. 535, p. 191 at p. 199.

²⁴⁴ Second report on the responsibility of international organizations (2004), *supra* note 130, at 17, para. 35.

²⁴⁵ See e.g. UN agreements with Greece (UNTS, vol. 565, p. 3), Italy (Treaty Series, vol. 588, p. 197), Luxembourg (UNTS, vol. 585, p. 147), Switzerland (*ibid.*, vol. 564, p. 193), Zambia (*United Nations Juridical Yearbook* (1975), p. 155.). See also a memorandum of the Office of Legal Affairs stated with regard to an accident that occurred to a British helicopter which had been put in Cyprus at the disposal of the United Nations Peacekeeping Force in Cyprus (UNFICYP), *United Nations Juridical Yearbook* (1980), pp. 184-185. See also Secretary-General report of the financing of UN Peacekeeping operations, September 20, 1996, A/51/389, see *supra* note 241, at 4, paras 7-8.

²⁴⁶ UN Legal Counsel Mr. Hans Corell, wrote on 3 February 2004 to the Director of the Codification Division, Mr. Václav Mikulka: ‘As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.’

Regarding private law claims the UN has asserted many times, that it does not evade responsibility where UN agents have in fact caused unjustifiable damage to innocent parties. With regard to an accident that occurred to a British helicopter that had been put in Cyprus at the disposal of the United Nations Peacekeeping Force in Cyprus (UNFICYP), the Office of Legal Affairs stated:

‘The crew members of the helicopters are members of the British contingent of UNFICYP and the helicopter flights take place in the context of the operations of UNFICYP. Through the chain of command, the operations in which the helicopters are involved take place under the ultimate authority of the UNFICYP Force Commander and are the responsibility of the UN. The circumstances under which the British-owned helicopters are put at the disposal of UNFICYP thus lead to the conclusion that these helicopters should be considered as United Nations aircraft. As the carrier, it is the UN that could and normally would be held liable by third parties in case of accidents involving UNFICYP helicopters and causing damages or injuries to these parties; therefore third-party claims should normally be expected to be addressed to the UN.’²⁴⁷

However, in agreements between the UN and states regarding peacekeeping it is usually specified that the national state of the troops that are contributed to a UN peacekeeping operation, retain control over disciplinary matters and have exclusive jurisdiction over criminal affairs, international or otherwise, and therefore bear the responsibility for such conduct involving state personnel.²⁴⁸ According to several legal scholars the decisive factor on attribution may not be deduced merely from the agreements, but is decided based on who retained the effective control over the conduct.²⁴⁹ Based on this assessment, UN could be held accountable also for criminal conduct by national contingents, if they had effective control over the conduct.

The UN Secretariat has submitted that UN peacekeeping operations are subject ‘to the executive direction and control of the Secretary-General, under the overall direction of the SC or the GA, as the case may be.’²⁵⁰ Therefore, an act of a UN peacekeeping force would always be attributable to the UN.²⁵¹ If committed in violation of an international obligation, such conduct would entail ‘the international responsibility of the UN and its liability in compensation’. For any such act having been performed by members of a national military contingent ‘does not affect the international responsibility of the UN vis-à-vis third states or individuals’.²⁵² While the UN apportions responsibility on the basis of whether the conduct of the personnel at UN disposal amounts to gross negligence or wilful misconduct, towards third states and individuals, the international responsibility and liability of the UN is, in the first place, assumed by the UN without prejudice to its ability to seek recovery from the contributing

²⁴⁷ Liability of the UN for UNFICYP, UNJY (1980), pp. 184-185.

²⁴⁸ Second report on the responsibility of international organizations (2004) *supra* note 130, at 18, para. 38. See e.g. UN Peacekeeping Force in Cyprus (UNFICYP), UNJY (1966), at 41. More generally on these clauses, the Secretary-General’s report ‘Command and Control of the UN Peacekeeping Operations’ (21 November 1994) (A/49/681), para. 6.

²⁴⁹ Second report on the responsibility of international organizations (2004) *supra* note 130, at 19, para. 40, esp. sources listed footnote 64.

²⁵⁰ Responsibility Of International Organizations, [Agenda item 2], Comments and observations received from international organizations, Document A/CN.4/545, at 28.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

member state concerned.²⁵³ Why this practice of compensating third parties is not applied to criminal cases, is curious.

According to the UN Secretariat the principle of attribution for UN operations is premised on the assumption that the operation is conducted under UN ‘command and control’ and the conduct is, therefore, exclusively attributable to the UN. On the other hand, operations authorized under chapter VII of the Charter, conducted under national command and control (UN-authorized), the conduct of the operation is attributable to the states exercising command and control. Also in joint operations under joint command and control, international responsibility lies with who exercises effective command and control. According to Legal Officer at the UN Office of Legal Affairs Montejo in non-UN and joint operations, troops are not put at the disposal of the UN and do not fall under the purview, of attribution rules of Article 7 on the responsibility of international organizations.²⁵⁴

The effective control test needs to be applied and on a case-by-case basis and according to the attribution criteria should be based on factual criteria.²⁵⁵

2.3.3.2. Effective control

The assumption behind Article 7 of DARIO appears to be that, when organs or agents are put at the disposal of an international organization, the level of control by the latter over those organs and agents is often limited. Hence the need for a factual test over ‘effective control’.²⁵⁶

The notion of effective control is addressed in the commentaries to Article 8 of ARSIWA referencing the *Nicaragua* case.²⁵⁷ In the case the ICJ had to decide upon whether breaches of international humanitarian law that were committed by contras (armed opposition groups) who were fighting against Nicaragua’s Sandinista government forces in the 1980s, were attributable to the US. The US was funding the contras and acknowledged it officially and made specific provisions for submitting funds to US intelligence agencies in order to support the contras. Nicaragua alleged that the US had effective control of the contras. The ICJ applied a test of ‘effective control’ when deciding whether the conduct of the contras should be attributed to the US and ended up rejecting the responsibility of the US for the said violations:

‘Despite the heavy subsidies and other support provided to them by the US, there is no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf [...]

All the forms of US participation mentioned above, and even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the US directed or enforced the perpetration of the acts

²⁵³ *Ibid.*

²⁵⁴ Montejo, ‘Effective Control’ under the DARIO, *supra* note 209, at 397. ‘Operations under national command and control are undertaken pursuant to SC authorization. In the case of joint command and control, part of the contingent would consist of troops put at UN disposal for purposes of that particular mandate as well as troops under national command and control authorized by the Security Council to undertake a military (peacekeeping operation) alongside the UN troops.’

²⁵⁵ Second report on the responsibility of international organizations (2004) *supra* note 130, at 20, para. 41.

²⁵⁶ Montejo, ‘Effective Control’ under the DARIO(2013), at 404.

²⁵⁷ See *Nicaragua (1986)*, *supra* note 85, at 64, para. 115.

contrary to human rights and humanitarian law alleged by the applicant state. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.²⁵⁸

The *Tadić* case also relates to Article 8 of ARSIWA involving the conduct of Bosnian Serb armed groups acting on behalf of the Federal Republic of Serbia.²⁵⁹ However, the ICTY applied a test of ‘overall control’ as opposed to ‘effective control’. Both cases concerned the applicability of certain rules of international humanitarian law and the *Nicaragua* case dealt with attribution of conduct to a state, while the *Tadić* case handled jurisdictional issues regarding the applicability of IHL.²⁶⁰ Duško Tadić was charged with persecution, murder, beatings and other offences alleged to have been committed in 1992 in Bosnia and Herzegovina.

The commentaries to Article 8 of ARSIWA seem more favourable to the ‘effective control’ test.²⁶¹ Article 8 requires that the conduct be the result of acting ‘on the instructions’, ‘under the direction’ or ‘control’, of the state that is carrying out the conduct. Whether a conduct may be attributed to a State, it is decided on a case-by-case basis.²⁶² However, the ICTY stated that the ‘effective control’ standard only applied for the attribution to a state for conduct by single private individuals. Judicial decisions, even succeeding *Tadić*, support the view that whenever the conduct of organized armed groups or military units is at stake it is sufficient to show that the state to which they may be linked exercises ‘overall control’ over them, in order for the conduct of those groups or units to be legally attributed to the state.²⁶³ According to Professor Antonio Cassese, the *Nicaragua* test has only been adopted by the ILC and the ICJ and has not been adopted by states or courts.²⁶⁴ On the contrary, he finds that state practice speaks rather on behalf of the ‘overall control’ test than ‘effective control’.

The ‘effective control’ test, to the extent that it is also applied to organized armed groups, is inconsistent with a basic principle ‘underpinning’ state responsibility, according to which states may not evade responsibility towards other states when they, use groups of individuals instead of officials, to undertake actions that are intended to damage, or in the event do damage, other states.²⁶⁵ States must answer for such actions of those individuals, even if such individuals have gone beyond their mandate or what was agreed.²⁶⁶

²⁵⁸ *Ibid.* at 62 and 64–65, paras 109 and 115.

²⁵⁹ See *Prosecutor v. Duško Tadić* (Appeal Judgement), International Criminal Tribunal for the former Yugoslavia (IT-94-1-A), Jul. 15, 1999.

²⁶⁰ It has been submitted that the cases cannot be compared, because the facts were so different. However, Antonio Cassese has argued in, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 *European Journal of International Law*, no. 4 (2007), 649–668, that the differences in the facts is not crucial.

²⁶¹ ARSIWA commentaries, *supra* note 8, at 47–48.

²⁶² Montejo, ‘Effective Control’ under the DARIO (2013), at 391–392. See also ARSIWA commentaries, *supra* note XX, at 48–49.

²⁶³ Antonio Cassese, *The Nicaragua and Tadić Tests Revisited*, *European Journal of International Law* (2007), 649–668.

²⁶⁴ *Ibid.* at 665.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.* at 654. The rule is set in Article 7 of ARSIWA.

In *Tadić*, the Appeals Chamber did not reject the Nicaragua test, but applied two rules, the Nicaragua test, that it considered to apply to private individuals, and another degree of control over actions by organized and hierarchically structured groups, such as military or paramilitary units. In this case overall control by the state over the group was adequate, thus specific instructions were not required for each individual operation.²⁶⁷ Such ‘overall control’ resided not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity.²⁶⁸ UN bodies have embraced the ‘overall control’ test.²⁶⁹

Cassese proposes the ‘overall control’ test to the use of national military contingents by international organizations for peacekeeping or other military operations, as opposed to the effective control test, which requires meticulous evidence of every single action being effectively directed by the responsible authority.²⁷⁰ Looking from a procedural perspective for victims of foreign military contingents, this seems an almost impossible burden of proof to bear to private individuals, who may not get access to specific chains of command, rules of engagement etc. or other materials that could provide evidence of effective control.

The ECtHR took the overall control approach in the famous *Behrami/Saramati* case²⁷¹. The question there was whether the death of some Kosovar Albanians (Behrami) caused by undetonated cluster bombs and the allegedly unlawful arrest and detention of another individual (Saramati) were to be attributed to the state contingents complained of, or rather to the NATO Forces (KFOR) or to UN forces (UNMIK) that had the mandate to de-mine and detain persons suspected of criminal offences, hence ultimately to the UN (since both forces acted under the authority of the UN Security Council). The states claimed that the KFOR exercised effective control in Kosovo, and that UN had ultimate or overall authority and control.²⁷² The ECtHR decided that the claims of the plaintiffs were inadmissible, because the conduct was not attributable to the states that were under the ECtHR’s jurisdiction, nor was it attributable to NATO but the ultimate authority and control was exclusively with the UN, which authorized their presence in Kosovo.

The *Behrami/Saramati* case was plagued by so many inconsistencies, also with the ECtHR’s own jurisprudence and therefore it was rejected by the ILC.²⁷³ It has been suggested that the ECtHR mistakenly focused on questions of attribution rather than resolving the jurisdiction of the ECtHR.²⁷⁴ The ECtHR decision was also confusing, because it seemed to refer to the ‘overall control’ test, but used the expression of ‘ultimate authority and control’ and failed to separate it with the notion of ‘effective control’.²⁷⁵

²⁶⁷ *Tadić* (1995), *supra* note 259, para. 104, 120.

²⁶⁸ *Ibid.* paras 130, 137.

²⁶⁹ The UN Working Group Report on Arbitrary Detention in 2000, A/CN.4/2000/4, at para. 15. The question was whether arbitrary detention in the Al-Khiam prison in South Lebanon was to be imputed to Lebanon, Israel, or the South Lebanese Army (SLA).

²⁷⁰ Cassese, Nicaragua and Tadić Revisited (2007), *supra* note 263, at 667.

²⁷¹ *Behrami/Saramati* (2007), *supra* note 135.

²⁷² *Ibid.* paras 82, 87, 133-134.

²⁷³ DARIO commentaries, *supra* note 9, at 90–1, para. (10). See also Seventh report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, ILC Sixty-first session, Geneva, 4 May-5 June and 6 July-7 August 2009 A/CN.4/610, ILC, Geneva (2009), at 10–12.

²⁷⁴ More about the case, see Milanović, Papić, As Bad As It Gets (2009) *supra* note 135, at 271-273.

²⁷⁵ *Ibid.* at 285.

Nevertheless, the *Behrami/Saramati* case does demonstrate the complexity of applying the attribution of conduct rule in Article 7 of DARIO and the ambiguous concept of ‘effective control’, not to mention the confusion that even international tribunals seem to have in resolving the internal rules of an international organization as *lex specialis* deserving of an exception to or as unaffected in the realm of international law.

In the *Behrami/Saramati* case the ECtHR did not address the issue of the supremacy of Article 103 of the UN Charter and the ECtHR failed to argue effectively in favour of the overall, or ultimate and overall control test and the default rule of attribution continues to apply: being organs of the state the conduct of the troops will be attributable to the state, under Article 4 of the ARSIWA.²⁷⁶ The same conduct may also be attributable to an organization, but it requires more than mere attribution to the organization for that conduct to cease being attributable to state.²⁷⁷

The ILC has said it to be ‘hardly controversial’²⁷⁸ argument that the effective operational command or control by an organization is required for attribution of conduct to that organization and it seems to be the scholarly consensus.²⁷⁹ However, there is a relatively high threshold for fulfilling the requirements of effective control.²⁸⁰ Further, the notion of effective control is closely linked with the military concept of ‘command and control’ and its applicability in non-military circumstances as fitting by analogy is questionable.²⁸¹ Although DARIO commentaries provide examples on the applicability of the ‘effective control’ test in non-military circumstances, it does not make specific elaborations.²⁸²

According to the Special Rapporteur Gaja, what matters is not exclusiveness of control, which for instance the UN never has over national contingents, but the extent of effective control. This leaves the way open for dual attribution of certain conducts.²⁸³

²⁷⁶ Milanovic, Al-Skeini and Al-Jedda in Strasbourg (2012), *supra* note 203, at 134.

²⁷⁷ *Ibid.* at 134.

²⁷⁸ ILC Report on its 56th Session (3 May to 4 June and 5 July to 6 August 2004), GA Official Records, Fifty-ninth Session, Supplement No 10, UN Doc A/59/10, at 102, para. 5.

²⁷⁹ Milanović and Papić, *As Bad As It Gets* (2009), *supra* note 135, at 289.

²⁸⁰ See Antonio Cassese, *Nicaragua and Tadić Revisited* (2007), *supra* note 263.

²⁸¹ DARIO commentaries, *supra* note 9, at 90, para (9), citing ‘Legal Status of Disaster Relief Units Made Available through the United Nations (Excerpt from a report by the Secretary-General)’, United Nations Juridical Yearbook (1971), 187–93, which discusses the legal status of a disaster relief unit of a member state placed at the disposal of the UN. See also Montejo, *Effective Control’ under the DARIO* (2013), *supra* note 209, at 394 submits that the analogy of ‘effective control’ covers rather the administrative status of disaster relief units in the UN system than the application of the principles of attribution in a non-military context.

²⁸² DARIO commentaries, *supra* note 9, at 93, para. (16). Also ILO commented that it has practice where officials of a state that are put at the disposal of the ILO while they retain their employment relationship with the sending state or organization. In this case the rules regarding ‘effective control’ are ‘not so obvious’ and asked the ILC to make provisions to clarify the expression, A/CN.4/568/Add.1, at 14.

²⁸³ Second report on the responsibility of international organizations (2004), *supra* note 130, at 23, para 48.

2.3.3.3. Dual attribution and joint responsibility: the relationship of state and international organization

Relating to attribution of conduct, one usually assumes that the fulfilment of positive criteria of an international organization corresponds to negative criteria with regards to a state or another international organization. However, similarly, as with the responsibility of states, under Article 7 of DARIO, a conduct can be ‘simultaneously attributed to an international organization or one or more of its members,’ states or other international organizations.²⁸⁴ Legal subjects are evaluated on their own actions and nothing prevents concurring responsibility for the same wrongful conduct.²⁸⁵ Responsibility for certain conduct may be attributed to more than one subject of international law by dual attribution. Dual attribution often, but not necessarily leads to joint or joint and several responsibility.²⁸⁶ Joint or joint and several responsibility does not necessarily depend on dual attribution. The responsibility of an international organization, jointly with a state or another international organization may come into question also in a situation where an international organization ‘aids or assists’ or ‘directs and controls’ the commission of an internationally wrongful act or ‘coerces another’ entity to commit an internationally wrongful act or circumvents its international obligation through member states.²⁸⁷

With regard to infringements of international humanitarian law, according to the Secretary-General of the UN, a ‘concurrent responsibility’ of the UN and the state might take place depending on the circumstances.²⁸⁸ One may have to conclude for joint attribution of the same conduct; however, one could also consider that the infringing acts are attributed to either the state or the UN, while omission, if any, of the required preventive measures is attributed to the other subject.²⁸⁹ Similar conclusions may be reached regarding infringements by members of UN peacekeeping forces, that affect the protection of human rights.²⁹⁰

According to the Special Rapporteur Giorgio Gaja, however, even though a conduct that is required by an international organization and is exercised by member states, does not mean that the conduct is attributed to the international organization and not to the member states.²⁹¹ Looking at the practice within the European Communities (EC) in relation to the UN SC

²⁸⁴ *Ibid.* at 3, para. 6.

²⁸⁵ An example can be found from cases surrounding the NATO bombings of the Federal Republic of Yugoslavia 1999. Several members of NATO were sued by Serbia and Montenegro in cases were examined by the ECtHR in App. no. 52207/99, *Bankovic*, Decision 12 December 2001. The application was declared inadmissible by the ECtHR. The English text of the decision was reproduced in *Rivista di diritto internazionale*, vol. 85 (2002), at 193; and ICJ in *Legality of use of force cases*. Eight cases are still pending while the ICJ removed two cases from the Court’s list.

²⁸⁶ Second report on the responsibility of international organizations, *supra* note 130, at 3-4, paras 6-8.

²⁸⁷ DARIO Chapter IV, Articles 14-17.

²⁸⁸ *Financing peacekeeping operations*, A/51/389, *supra* note 241, at 11, para. 44. The Secretary-General’s ‘Bulletin on observance by UN forces of international humanitarian law’ (ST/SGB/1999/13, at 1) does not address the question.

²⁸⁹ Second report on the responsibility of international organizations, *supra* note 130, at 20-21, para. 42.

²⁹⁰ *Ibid.* The United Nations Office of Internal Oversight Services (OIOS) has conducted investigations on charges of sexual exploitation in various countries. See also e.g. Jennifer Murray, *Who will police the peace-builders? The failure to establish accountability for participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina*, 34 *Columbia Human Rights Law Review*, (2002-2003), at 475-527, especially p. 518 ff.

²⁹¹ App. No. 13258/87, *M. & Co. v. Federal Republic of Germany*, European Commission of Human Rights, Decision of 9 February 1990, *Decisions and Reports*, vol. 64, at 138.

resolutions, it seems that the two international organizations are not evaluated in the same way. For instance a claim for damage caused by a search of weapons on a ship in Djibouti the Office of Legal Affairs of the UN Staff stated that ‘The responsibility for carrying out embargoes imposed by the SC rests with member states, which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo.’²⁹²

In the EC practice the approach is different. The EC has exclusive competence related to the common commercial policy. The implementation of the requirements of these types of agreements is left to member states’ officials and according to the Director-General of the Legal Services of the EC, due to the ‘vertical’ structure of the EC system, the actions of member states authorities should be attributed to the EC itself regarding both actions taken on the EC level and member state level.²⁹³ The attribution to the international organization in this case is due to its exclusive competence; otherwise it may apply, according to ILC, in a situation where an organization commits to an obligation where the compliance depends on its member states. When the member states would fail, the responsibility would be attributed to the organization.²⁹⁴ Applying the ARSIWA, the conduct would be attributed to the member states, but according to the ILC ‘special developments’ in an organization with regards to integration, could indicate the responsibility of the international organization, such as the EC and the attribution of conduct does not need to be addressed.²⁹⁵ According to a decision by the ECJ both EC and its member states are jointly liable for ‘commitments that they have undertaken’²⁹⁶ The responsibility of an organization could be engaged by way of attribution of responsibility when no reference is made to attribution of conduct.²⁹⁷

The question of dual attribution has been contended in many courts, related to the debate over the responsibility for the Srebrenica massacre in Bosnia in 1995. In July 1995, during the Bosnian war, the UN Peacekeeping force of the Netherlands, the DUTCHBAT, created a safe haven in Srebrenica. Around 300 people were residing in the compound when the Serb forces surrounded Srebrenica and the safe haven fell the Serb forces took over Srebrenica. The relatives of more than 7000 victims of the massacre have held the Netherlands and the UN responsible for the deaths. In the latest verdict, in July 2014 the Hague District Court found that the Netherlands was responsible for the deaths of 300 individuals who were sheltering in the safe haven created by the DUTCHBAT,²⁹⁸ upholding earlier verdicts in the matter, e.g. *Nuhanovic and Mustafic-Mujic et al.*²⁹⁹

²⁹² Memorandum of 21 April 1995, *UNJY* (1995), at 464-465.

²⁹³ Information note dated 7 March 2003, attached to a letter from the Director-General of the Legal Service of the European Commission, Mr. Michel Petite, addressed to the United Nations Legal Counsel, Mr. Hans Corell, p. 2.

²⁹⁴ Second report on the responsibility of international organizations (2004), *supra* note 130, at 6, para. 11.

²⁹⁵ *Ibid.* para. 12.

²⁹⁶ Judgement of 2 March, case C-316/91, *Parliament v. Council*, European Court Reports (1994), p. 1-625 at pp. I-661-662 (recital 29).

²⁹⁷ Second report on the responsibility of international organizations (2004), *supra* note 130, at 6-8, paras 12-13.

²⁹⁸ *Stichting Mothers of Srebrenica et al. v. Netherlands and the UN*, the Hague District Court Trade Team, Case / C/09/295247 / HA ZA 07-2973, Judgment of July 16th 2014.

²⁹⁹ *Hasan Nuhanovic v. the Netherlands*, Court Of Appeal in the Hague, case 200.020.174/01, 265618/HA ZA 06-1672, 5 July 2011, *Mehida Mustafic-Mujic et al. v. the Netherlands*, Court of Appeal in the Hague, case 200.020.173/01, 265618/HA ZA 06-1672, 5 July 2011.

The Court of Appeal of The Hague in Netherlands has taken a strong approach to dual attribution and in *Nuhanovic*, it held that under Articles 7 and 48³⁰⁰ of DARIO, it was possible that both the Netherlands and the UN had effective control over the same wrongful conduct.³⁰¹ Attributing the conduct to the Netherlands does not, according to the Court, determine whether the UN also had effective control so that it could be attributed with the wrongdoing.³⁰² Regarding the responsibility of the UN, the Dutch Courts and the ECtHR have found the UN immune from process and its responsibility therefore outside its jurisdiction.³⁰³ The District Court of The Hague pronounced on the immunity of the UN:

‘[U]nder the UN Charter the state has bound itself to warrant as much as possible the immunity laid down in the Charter, irrespective how far it extends’ and that “pleading the immunity [of the UN] in proceedings before a national court of law at least falls within the bounds of possibility”.³⁰⁴

It should be noted in comparison that in *Behrami/Saramati*³⁰⁵ the ECtHR did not even consider the possibility that attribution of conduct may be dual or even multiple, i.e., that the same action or inaction can be attributable both to a member state or states and to an international organization. Fast-forwarding to 2001, in *Al-Jedda*, the ECtHR essentially admits the possibility of dual or multiple attribution of the same conduct to the UN and to a state.³⁰⁶ The ECtHR did not acknowledge any of the criticism that the *Behrami/Saramati* decision received, but was content to say that the situation in Iraq does not satisfy either the ILC’s ‘effective control’ test or its own test of ‘ultimate authority and control’, without telling which one applies and why.³⁰⁷

³⁰⁰ Article 48 Responsibility of an international organization and one or more states or international organizations:

1. Where an international organization and one or more states or other international organizations are responsible for the same internationally wrongful act, the responsibility of each state or organization may be invoked in relation to that act.
2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.
3. Paragraphs 1 and 2: (a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered; (b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

³⁰¹ See *Nuhanovic*, *supra* note 299, at para 3.11.2.

³⁰² *Ibid.* See also *Dutch Supreme Court Affirms that Dutchbat Acted Unlawfully in Srebrenica*, Tom Dannenbaum, September 8 2013, EJIL:Talk!, <http://www.ejiltalk.org/dutch-supreme-court-affirms-that-dutchbat-acted-unlawfully-in-srebrenica/> (last visited 17.4.2015).

³⁰³ *Mothers of Srebrenica Association v. Netherlands and the UN*, First Division, 10/04437 EV/AS Judgment of 13 April 2012. The ECtHR, in its decision in the case App. no. 65542/12 *Stichting Mothers of Srebrenica and Others v. the Netherlands*, decision 11 June 2013, unanimously declared the application inadmissible.

³⁰⁴ The District Court of The Hague, judgment of 10 July 2008 (*Mothers of Srebrenica et al. v. State of the Netherlands and United Nations*), LJN number: BD6795, LJN: BD6796 in English. See par. 5.6.

³⁰⁵ *Behrami/Saramati* (2007), *supra* note 135.

³⁰⁶ *Al-Jedda* (2011), *supra* note 195, paras 80, 84.

³⁰⁷ *Milanovic, Al-Skeini and Al-Jedda* (2012), *supra* note 203, at 136-137.

2.3.3.4. Problems with attribution of conduct under Article 7 of DARIO

Attribution of conduct is a very complicated concept already in a general sense. Professor Klabbers discusses the fundamental problem of attribution called ‘paradox of obligation’³⁰⁸, where the problem lies with chains of command which exist in every types of bureaucracies. The superior gives orders to the subordinate, generally with some type of discretion, which then dilutes the order by giving some discretion to the subordinate. This places the eventual responsibility for the action ordered by the superior, on the shoulders of the subordinate and the superior is not considered involved in more then perhaps lack of supervision.

This seems to be reflected in relevant practice regarding international organization in international law, even though it has been submitted under the doctrine of command responsibility that superior officers should be targets of prosecutions rather than their subordinates. Command responsibility or superior responsibility is a doctrine of hierarchical accountability of war crimes. It may be referenced to in government, military law or with regard to corporations and trusts.³⁰⁹

Questions of whether Article 7 of DARIO is generally applicable were also raised by international organizations in their commentaries. For instance the European Commission provided commentary in 2011 and noted that the ILC commentary to Article 7 relates mostly to UN practice and jurisprudence of the ECtHR, questioning whether there is sufficiently identifiable and settled *opinio juris* supporting the codification of the Article as a standard for interpreting the rule of ‘effective control’.³¹⁰ The EC also submitted that article 7 seems to reflect a perception that international organizations tend to escape responsibility for international wrongs.³¹¹

What is also difficult in regards to attribution of control to an international organization is the importance given to the internal rules of international organizations in attribution of conduct. Specifically, with the UN, the internal rules of the organization, which have developed in peacekeeping as standing practice, as part of international law, where the UN itself is not seen responsible for member states’ implementation of SC resolutions or other obligations deriving from UN membership. In *Behrami/Saramati* the ECtHR discussed the internal rules of the UN and practices at length, arriving at a conclusion that it affects attribution, whereas some legal scholars have considered the institutional rules completely separate from rules of responsibility.³¹² However, it seems that strict separation of the two is impossible as has been expressed above in the chapter regarding rules of the organization as *lex specialis*. Further,

³⁰⁸ Klabbers, *International Institutional Law* (2009), see *supra* note 2, at 275. The term ‘paradox of obligation’ is from Michael Harmon, *Responsibility as Paradox: A Critique of Rational Discourse in Government* (Thousand Oaks, CA, 1995).

³⁰⁹ The doctrine of "command responsibility" was established by the Hague Conventions of 1899 and 1907 and was applied for the first time by the German Supreme Court at the Leipzig War Crimes Trials after World War I, in the 1921 trial of Emil Müller. See also e.g. ICTY judgment 10 June 2010 in *Popovic*, Case No. IT-05-88-T, 10 June 2010, for application of the principle; Article 28 of the ICC Statute.

³¹⁰ Responsibility of international organizations, Comments and observations received from international organizations ILC, A/CN.4/637, *supra* note 161, at 22. See Montejo, ‘Effective Control’ under the DARIO, (2013), *supra* note 209, at 400.

³¹¹ Montejo, ‘Effective Control’ under the DARIO (2013), *supra* note 209, at 400. See also A/CN.4/637, *supra* note 161, at 23.

³¹² Milanović, Papić, *As Bad As It Gets* (2009), *supra* note 135, at 281.

during the drafting of the DARIO attention was given to the issue, raised by the European Commission, of whether a ‘special rule of attribution of conduct’ exists for the EC and ‘other potentially similar organizations’, with regard to the attribution of acts of member states implementing binding acts of the relevant organization to that organization.³¹³ Special Rapporteur Giorgio Gaja goes on to say that ‘the outcome of the discussion on the wider question does not settle the issue of the existence of a special rule on attribution concerning a category of international organizations, or even only an individual organization, in their relations to states and other international organizations.’³¹⁴

Article 7 was an issue of debate and concern until the very end of the drafting process of the DARIO. For example the UK, France and Poland expressed concern over the lack of precision provided for applying the ‘effective control’ test and its general applicability to situations other than peacekeeping by the UN.³¹⁵ According to Poland except for extraordinary circumstances of States ordering its organs, placed at the disposal of an international organization, to act contrary to the directives of the latter, responsibility should be borne by the international organization at whose disposal the organ is placed by virtue of the mere fact of the transfer.³¹⁶ Article 7 would be therefore not a general rule, but applied only to exceptional circumstances.³¹⁷

In light of all the criticism and commentaries to Article 7, it can be seen as progressive development of international law by the ILC. Even the commentaries provided by the ILC itself appear to confirm the controversial character of adopting the effective control test to international organizations.³¹⁸ Especially difficult will be to apply the test in non-military contexts. The ILC relied heavily on UN practice to demonstrate the applicability of the effective control test in the realm of international organizations, although the UN itself considered it contrary to its own practice.³¹⁹

³¹³ Seventh report on responsibility of international organizations (2009), *supra* note 273, at 38, para. 122.

³¹⁴ *Ibid.*

³¹⁵ Montejo, ‘Effective Control’ under the DARIO (2013), *supra* note 209 at 401-402.

³¹⁶ Summary record of the 20th meeting, Held at Headquarters, New York, on Wednesday, 26 October 2011, at 3 p.m., Sixth Committee, A/C.6/66/SR. 20, at para. 66.

³¹⁷ Montejo, ‘Effective Control’ under the DARIO (2013), *supra* note 209, at 401.

³¹⁸ *Ibid.* at 404.

³¹⁹ The UN Secretariat stated in its comments that the test of ‘effective control’, within the meaning of article 7, ‘has never been used to determine the division of responsibilities for damage caused in the course of any given operation between the UN and any of its troop-contributing states’, A/CN.4/637/Add.1, *supra* note 187, at 13–14, para. 3.

2.3.4. Ultra vires conduct, inconsistent practice

International organizations are vested with powers that are entrusted with them³²⁰ and in situations where the practice of an international organization develops in a way that is inconsistent with its functions, its constituent instrument, the Special Rapporteur Gaja suggests that this might be solved with a provision on *ultra vires* conduct.³²¹ *Ultra vires* conduct of an international organization could be either conduct beyond the powers conferred on an international organization or conduct exceeding the powers of a specific organ of the organization.³²² An act that is *ultra vires* for an organization is also *ultra vires* for any of its organs.

Article 8 of DARIO expresses the rule regarding excess of authority or contravention of instructions:

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

The Article has to be read in context with general provisions on attribution of the DARIO, especially Article 6.³²³ Article 8 of DARIO follows closely the wording used in Article 7 of ARSIWA. In the commentaries the expression ‘in that capacity’ is key, requiring a close link between the *ultra vires* conduct and the organ’s or agents functions.³²⁴ In the ARSIWA commentary the text ‘indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the state’.³²⁵ The Article 8 makes this clear by referring to ‘acts in an official capacity and within overall functions’ of the international organization.

According to the ICJ in *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*³²⁶ that all acts that exceed the scope of their functions of organs or agents of international organizations, even those that are not the officials of the organizations, may be attributed to the international organizations that they represent.³²⁷

The position taken by the Office of Legal Affairs of the UN in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

‘UN policy in regard to off-duty acts of the members of peacekeeping forces is that the UN has no legal or financial liability for death, injury or damage resulting from such acts. [...] We consider the primary factor in determining an “off-duty” situation to be whether the member of a peacekeeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations [...] [W]ith

³²⁰ *Legality of nuclear weapons* (1996), *supra* note 147, p. 66, at 78 para. 25.

³²¹ Second report on responsibility of international organizations (2004), *supra* note 130, at 13, para. 24.

³²² *Ibid.* at 23, para. 51.

³²³ DARIO commentaries (2011), *supra* note 9, at 94, para. (2).

³²⁴ *Ibid.* at 94, para. 4.

³²⁵ ARSIWA commentaries, *supra* note 8, at 46, para. (8).

³²⁶ *Difference relating to* (1999), *supra* note 214, at 89 para. 66.

³²⁷ Second report on the responsibility of international organizations (2004), *supra* note 130, at 24, para 54.

regard to UN legal and financial liability a member of the Force on a state of alert may none the less assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated “state-of-alert” period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peacekeeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff.’³²⁸

According to the memorandum, a conduct deemed off-duty may not be attributed to the UN and the on-duty conduct would be. I have to concur with Special Rapporteur Giorgio Gaja when he wonders how any *ultra vires* conduct relates to the functions entrusted to the person concerned.³²⁹

The responsibility for *ultra vires* acts is important, because denying attribution of conduct may deprive third parties of all reparation, unless conduct may be attributed to a state or another organization.³³⁰ Even then, dual attribution and joint and several responsibility has to be considered. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid under the rules of the organization.³³¹ This would mean the rights of victims of wrongful acts committed by entities connected to the international organization.

It seems that the determination of *ultra vires* acts as attributable to an international organization will be decided on a case-by-case basis. However, what should remain clear and a stable rule is that an international organization, which the organ is representing, should make every effort in investigating any types of allegations of wrongful conduct and advocate and ensure proper reparations are made to the third parties, be they compensations or prosecutions.

What has been the reality in UN peacekeeping missions sadly is that the UN has washed its hands completely regarding serious allegations of gross human rights violations and crimes by personnel in peacekeeping missions and has not made any efforts to even dismiss the persons, let alone advocate transparent prosecutions or proper reparations for victims by the troop contributing states.

³²⁸ Liability of the United Nations For Claims Involving off-duty Acts of Members of Peacekeeping Forces - Determination of ‘off-duty’ versus ‘on-duty’ Status, *UNJY* (1986), at 300.

³²⁹ Second report on the responsibility of international organizations (2004) *supra* note 130, at 25, para. 55.

³³⁰ Second report on the responsibility of international organizations (2004), *supra* note 130, at 24, para. 53.

³³¹ DARIO commentaries, *supra* note 9, at 94, para. 5.

Part III. Content of international responsibility / Internationally wrongful acts / Primary rules

3.1. General

The rules of international responsibility in general, are secondary rules, which continue to apply in an identical fashion across multiple fields of primary rules.³³² Primary rules, the undertakings of international organizations, determine the boundaries of the conduct of international organizations. There is an internationally wrongful act of an international organization when an action or omission constitutes a breach of an international obligation of that international organization.³³³

International organizations are parties to treaties and make agreements with other subjects of international law, and they are bound by those undertakings. Also the rules of the organization, present some boundaries to the conduct of international organization, however, a violation of the rules of the organization entails its responsibility, not for the violation of the ‘rule’, as such, but for the violation of the international law obligation it contains.³³⁴

It is generally accepted that the same principles that make an internationally wrongful act of a state, apply also to international organization.³³⁵ A wrongful act, which results in the responsibility of an international organization, may be a breach of a treaty obligation, breach of customary international law, unilateral promises or general principles of international law. There are debates on whether the responsibility of an international organization can arise from acts where there is no *dolus* or *culpa*, blameworthiness present.³³⁶ Regardless of intent, if another party suffers for the actions of another, the injured party should be compensated.³³⁷

The ICJ held in *WHO v. Egypt*³³⁸ 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.’³³⁹ International organizations are bound by *jus cogens* and secondary rules of international law.³⁴⁰ Obligations that are not *jus cogens* may not be binding on international organizations, unless they are party to the specific treaty or other instrument establishing the obligation. There is still a theoretical gap concerning the legal basis of obligation for international organizations.³⁴¹ Often enough breaches of norms may be a result from pursuing a legitimate purpose of policy, i.e. humanitarian interventions by UN peacekeeping operations. But what are the *jus cogens* norms that bind international organizations.

³³² Unless a *lex specialis* is shown to exist.

³³³ DARIO, article 4, see *supra* note 9, at 81 for commentaries.

³³⁴ Eighth report on responsibility of international organizations (2011), *supra* note 53, at 9, para. 19. See also Comments of the UN Secretariat A/CN.4/637/Add.1, sect. II.B.1, para. 6.

³³⁵ Klabbers, *International Institutional law* (2009), see *supra* note 2, at 283.

³³⁶ *Ibid.* at 284.

³³⁷ *Ibid.*

³³⁸ *WHO v. Egypt* (1980), *supra* note 115, para. 37.

³³⁹ *Ibid.*, para. 37.

³⁴⁰ Klabbers, *International Institutional Law* (2009), see *supra* note 2, at 284.

³⁴¹ *Ibid.*

According to the Article 26 of DARIO violation of peremptory norms of international law cannot be justified by circumstances that preclude wrongs, such as consent or distress. The international community has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.

In relation to state responsibility the ICJ noted in the *Barcelona Traction* case that:

‘an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes.’³⁴²

Peremptory norms are ‘the outlawing of acts of aggression, and of genocide, as also ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.³⁴³ The ICJ has reaffirmed this idea in later cases.³⁴⁴ The consequences of international responsibility are not limited to bilateral situations.

Peremptory norms of international law are binding on international organizations in the same way as they are on states.³⁴⁵ All subjects of international law are bound by *jus cogens*, be they states, international organizations or others.³⁴⁶ In his fifth report to the ILC, the Special Rapporteur Gaja indicated that both international organizations and states can breach obligations *jus cogens*, peremptory norms of general international law, and therefore there is no reason to treat an international organization in a different way.³⁴⁷ However, the application of certain peremptory norms may be problematic.³⁴⁸

Clearly accepted and recognized peremptory norms ‘include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination’³⁴⁹, and added that, clearly, international organizations, like states, may not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm.³⁵⁰

³⁴² *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, at 32, para. 33.*

³⁴³ *Ibid.* para. 34.

³⁴⁴ ARSIWA commentaries, *supra* note XX, at 33, para. (4). See e.g. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at 258, para. 83.*

³⁴⁵ Fourth report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, ILC Fifty-eighth session Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/564, Geneva (2006), at 18, para. 47.

³⁴⁶ Trindade: Some Reflections Responsibility of International Organizations (2013), *supra* note 204, at 7.

³⁴⁷ Fifth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur, ILC Fifty-ninth session, Geneva, 7 May-8 June and 9 July-10 August 2007 A/CN.4/583, Geneva (2007), para. 56.

³⁴⁸ Fourth report on responsibility of international organizations (2006), *supra* note 345, at 18, para. 47. The problems are mainly related to the prohibition to use force.

³⁴⁹ ARSIWA commentaries, *supra* note 8, at 85, para. (5).

³⁵⁰ DARIO commentaries, *supra* note 9, 120–1, paras. (2) and (3).

3.2. International human rights norms

The development of human rights law in the later half of the twentieth century has been the main reason why the role of individuals has risen to a prominent position. Some writers have argued that the primary subject of international law is the individual.³⁵¹ One of the most influential British international lawyers of last century Hersch Lauerpacht has said that: ‘Fundamental human rights are rights superior... [and must lead to the] consequent recognition of the individual human being as a subject of international law’.³⁵² Professor Philip Allott sees the international society arising from the ‘self-creating of all human beings’³⁵³

The universal human rights system that has the greatest variety of participants in ideological, cultural, political and socio-economic terms than any other regional human rights regime is closely linked to the UN.³⁵⁴ The universal human rights system was created by the UN Charter and UN organs authorizing bodies and posts that are concerned with protecting human rights; the SC, GA; the Human Rights council, the Office of the High Commissioner of Human Rights.³⁵⁵ In addition there are working groups and rapporteurs and each human right treaty has their own committee.³⁵⁶

Traditionally, the protection of human rights is the duty of states. Under the States have a legal duty prevent human rights violations and use means at its disposal to carry out investigations for violations in its jurisdiction, to identify and punish the responsible and ensure adequate compensation for the victims.³⁵⁷ Many human rights instruments obligate states to respect and ensure the respect of human rights in specific treaties, such as the Universal Declaration of Human Rights (UNDHR)³⁵⁸ and in the International Covenant on Civil and Political Rights

³⁵¹ McCorquodale, *The Individual in the International Legal System* (2010), at 287.

³⁵² Hersch Lauerpacht, *International law and human rights*, Stevens & Sons, London, 1950, at 72.

³⁵³ Philip Allot, *Reconstituting Humanity –New International law*, 3 *European Journal of International Law* 219 (1992).

³⁵⁴ Henry J. Steiner, *International Protection of Human Rights*, in Malcolm D. Evans (ed.) *International Law*, Third edition (Oxford University Press, 2010), 785-813, at 785-786.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.* The core human rights treaties are Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 (UNTS vol. 993, p. 3.), International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965, Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990.

³⁵⁷ *Velásquez Rodríguez Case*, 4 Inter-American Court of Human Rights, (ser. C), Judgment July 29, 1988, at 174.

³⁵⁸ Article 4 of UDHR, *supra* note 3. While the UDHR was not seen as imposing legal obligations upon states at the time of its adoption in 1948, it is commonly accepted that it now constitutes, at a minimum, ‘significant evidence’ of customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *Ga. J. Int'l & Comp. L.* 287, 317, 322 (1995-96).

(ICCPR).³⁵⁹ Many human rights treaties and declarations have become internalized and constitutionalized and influence how people think about issues.³⁶⁰

This is the standing premise and even in situations large-scale disasters or armed conflicts, the primary responsibility of protecting human rights rests with the host state, regardless of in the presence of international assistance from international organizations or other states.³⁶¹

3.2.1. Responsibility of international organizations for protection of human rights

As mentioned above, human right that are considered peremptory norms, are binding also on international organizations, such as the basic rights of the human person. However, international organizations rarely are parties to human rights treaties. Therefore, the challenge of seeking to show that that international human rights law is applicable to the activities of international organizations is a central. The respect of and responsibility for violations of human rights by international organizations is vital considering the significant influence international organizations have globally to the lives of million of individuals.

The UN, the main focus of this study, has a unique position in the midst of different international organizations: the UN itself is the producer and protector of many of the most fundamental human rights treaties.

Scholars have suggested three alternative ways in reasoning the responsibility of the UN to follow human rights.³⁶² The first argues that UN bodies have sufficient personality to be bound by human rights law and that general principles of international law, including *jus cogens* norms and customary international law, can and do bind them in many circumstances.³⁶³ According to Barrister Mark Pallis, this creates a situation where an organization could be bound by custom formed through a process, which it had not contributed to.³⁶⁴ However, the UN is the protector and creator of the core universal human rights treaties and therefore, one could argue, that the UN has participated in creating the *jus cogens* norms, through its various organs and bodies that have made reports and recommendations over the course of decades. The vocabulary of universal human rights instruments and how the binding norms have come to fruition, started with the UN.

A second approach to applying human rights law to the UN relies on the fact that one of the purposes of the UN is to promote and encourage respect for human rights and for fundamental freedoms. This leads to the idea that ‘the UN is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order,

³⁵⁹ Articles 2, 8, ICCPR, *supra* note 3.

³⁶⁰ Steiner, Protection of Human Rights (2010), *supra* note 354, at 786.

³⁶¹ See e.g. Inter-Agency Standing Committee, Protecting Persons Affected by Natural Disasters, IASC Operational Guidelines on Human Rights and Natural Disasters (Brookings-Bern Project on Internal Displacement, 2006) (hereinafter “IASC Human Rights and Disasters Guidelines”), at 10. Available at: http://www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines_IDP.pdf (25.11.2014).

³⁶² Pallis, UNHCR Accountability Mechanism (2004-2005) *supra* note 16, at 872.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

without any added judicial finesse.³⁶⁵ This argument seems to leave areas of indeterminacy when it comes to defining precise rules and precise legal consequences of particular actions.³⁶⁶ However, the task of the UN in promotion of human rights has evolved from a traditional international organization to having ‘quasi-sovereign’ powers in global governance, especially when equipped with territorial control.³⁶⁷

A third approach considers the ‘quasi-sovereign’, state-like functions exercised by the UN, and leads to the idea that the UN must respect international human rights when it is exercising functions that have been transferred to it by a state.³⁶⁸ This can be seen as a firmer legal basis than the other approaches, although the idea is hampered practically because many of the states where the UN operates are not party to international human rights treaties, or have entered numerous reservations.³⁶⁹ It is also often unclear whether state functions have actually been transferred to the UN. Pallis submits that the UN should be bound just because an obligation theoretically exists on a host state and the UN should be prohibited from offering a lower standard of protection than the state in which it is operating.³⁷⁰

All of the above approaches are valid arguments and are not mutually exclusive and looking at the arguments combined, one can make the assertion that there is sufficient basis in arguing in favour of obliging the UN to follow human rights. Simply because the UN is not a state per se, should not be a hindrance to applying human rights standards to its actions. The UN has developed as an institution protecting and promoting human rights, to one that has been given supranational powers over states and has taken state-like tasks.

The notion of effective control is also used in connection with international human rights law as a threshold for the applicability of human rights instruments.³⁷¹ ‘Effective control’ is used in international law to determine whether a state is an occupying power (and has effective control over the occupied territory), thereby having certain obligations pursuant to the laws of occupation. By analogy, the effective control test could also be applied to situations of international governance, such as was established in Kosovo by the UN under SC resolution 1244 (1999) of 10 June 1999. The effective control over the territory of Kosovo is in the hands of the global administration that was set up in 1999.

³⁶⁵ Frederic Megret, Florian Hoffman, The UN as a Human Rights Violator?: Some Reflections on the UN Changing Human Rights Responsibilities, 25 *Human Rights Quarterly* (2003), 314-342, at 317-318.

³⁶⁶ Pallis, UNHCR Accountability Mechanism (2004-2005) *supra* note 16, at 873.

³⁶⁷ Megret Hoffman, The UN as a Human Rights Violator (2003, *supra* note 365, at 315-316.

³⁶⁸ Pallis, UNHCR Accountability Mechanism (2004-2005) *supra* note 16, at 873-874.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ Human Rights Committee, General Comment no. 31: Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), 10:

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a state party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the state party. This principle also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a state party assigned to an international peace-keeping or peace-enforcement operation.

Paul C. Szasz has written on the topic of UN special regime and how it has made legislation under its jurisdiction.³⁷² According to Szasz, the UN has gone beyond relying on its immunity, but exercised ‘in legislation, establishing a particular tort regime’ under its jurisdiction on the territory of the UN headquarters.³⁷³ This puts a new perspective on the development of the UN as an international organization even further towards states, as exercising control over a territory. If an international organization exercises jurisdiction over a territory, it should be seen as exercising governmental authority, which is essential in determining the responsibility to respect and ensure fundamental human rights.

In the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter UN Victims resolution)³⁷⁴, the responsibility of non-state actors was addressed insofar as they exercise effective control over a certain territory and the people in the territory.³⁷⁵ The victim-oriented perspective, allows victims to seek remedy and reparation on the basis of human solidarity and legal liability, beyond state responsibility.³⁷⁶ It is submitted that although international organizations rarely exercise control over a territory, the principles of ARSIWA should be applied to international organizations, as far as possible.³⁷⁷

In addition, one must also notice that there are various soft law instruments in the global level, such as resolutions, guidelines, recommendations, that despite their lack of legal authority evidence moral authority of international consensus on the matter and propositions of best practice.³⁷⁸

According to J.D. Jennifer Murray, the UN has the moral duty under the UN Charter to hold itself and its agents to international human rights standards in accordance with its functions and purposes as an organization. The UN has a purpose ‘to maintain international peace and security ... in conformity with the principles of justice and international law’³⁷⁹ Therefore actions of the UN during peace operations should conform to international standards.³⁸⁰ The UN Charter imposes upon the UN the duty to promote ‘universal respect for . . . human rights and fundamental freedoms.’³⁸¹

According to Murray not holding the UN to the same standards it is charged with implementing and enforcing, compromises the legitimacy and effectiveness of peace operations, leading ultimately to the corrosion of its moral force. The failure of UN peacekeepers to comply with international law undermines the support to the mission in the host state and might endanger

³⁷² Paul C. Szasz, *The United Nations Legislates* (1987), *supra* note 134, 739-744.

³⁷³ *Ibid.* at 744.

³⁷⁴ Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

³⁷⁵ Theo van Boven, *The United Nations Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And Serious Violations Of International Humanitarian Law*, United Nations Audiovisual Library of International Law, 2010, available at: http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (26.4.2015), at 3, para. (e) non-state actors.

³⁷⁶ *Ibid.*

³⁷⁷ DARIO commentaries, *supra* note 9, at 83-84, para (6).

³⁷⁸ Law and legal issues, IFRC, 2007, *supra* note 103, at 34.

³⁷⁹ Article 1 of the UN Charter, *supra* note 3.

³⁸⁰ Murray, *Who will police the peace builders?* (2002-2003), *supra* note 290, at 519.

³⁸¹ Article 55(c) of the UN Charter, *supra* note 3.

its success. To the local population the difference between the UN and the troop-contributing state is invisible and the agreements over responsibilities between them is insignificant. The only thing they know is that an international organization that has come to uphold and build peace act in a very hypocritical way, when faced with their responsibilities.³⁸²

The ECtHR said in *Al-Jedda* that Article 24(2) of the UN Charter required the UNSC to act in accordance with the purposes and principles of the UN, one of which was the promotion of international human rights.³⁸³ The ECtHR, determined that, in the event of any ambiguity in the wording of a UNSC Resolution, the interpretation that was most in harmony with the requirements of the ECHR and which avoided any conflict of international obligations would prevail.³⁸⁴ The UNSC would have to use clear and explicit language in the respective resolution itself, if it intended states to take measures that would conflict with a state's international human rights obligations.³⁸⁵ According to Professor Marko Milanovic, the *Al-Jedda* case is an important development, where the ECtHR has made a clear statement rule for interpreting SC resolutions that can go a long way in providing a meaningful human rights check on the UN SC.³⁸⁶ In *Al-Jedda* the applicant urged the ECtHR to rely on the ECJ's decision in *Kadi*, and say that UN SC resolutions could not affect human rights protections under the ECHR it to declare that the ECHR is independent of the UN Charter and general international law, requiring it to fragment the international legal order to the benefit of human rights.³⁸⁷ In *Kadi* the ECJ held that guarantees of fundamental rights under EU law could not be displaced by SC resolutions.³⁸⁸

UN has declared human rights as 'fundamental' to the organization.³⁸⁹ In 1948 the General Assembly drafted and adopted the Universal Declaration of Human Rights³⁹⁰ and the UN has adopted international human rights treaties and created the position in protection of fundamental human rights. The UN is involved in continuous discussion on how to reform the human rights treaty system and mechanisms.³⁹¹

The UN has shown concern over the enforcement and compliance of international law, and in many contexts has made disconcerted statements and pleas to uphold the rule of law. As to its own forces, the Secretary-General's Bulletin on Observance by UN Forces of International Humanitarian Law³⁹² Section 3 requires that in the SOFAs³⁹³ the UN 'undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel,' that this obligation is to apply

³⁸² Murray, Who will police the peace builders? (2002-2003), *supra* note 290, at 519-520.

³⁸³ *Al-Jedda*, *supra* note 195, para. 101.

³⁸⁴ *Al-Jedda*, *supra* note 195, para.102.

³⁸⁵ Erika deWet, From Kadi to Nada (2013), *supra* note 194, at 801.

³⁸⁶ Marko Milanovic, Al-Skeini and Al-Jedda (2012), *supra* note 203, at 137.

³⁸⁷ *Ibid.* at 136.

³⁸⁸ *KadiI, KadiII*, *supra* note 192.

³⁸⁹ Preamble of the UN Charter: 'We the peoples of the United Nations [are] determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.'

³⁹⁰ UDHR, *supra* note 3.

³⁹¹ The GA adopted the World Summit Outcome, resolution 60/1 of 16 September 2005 calling for strengthening of the UN's human rights mechanisms.

³⁹² Observance by UN Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (6 August 1999), Sec. 4, reproduced in 38 ILM 1656 (1999).

³⁹³ Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries, UN Doc. A/45/594 (9 October 1990).

even in the absence of a SOFAs, and that the UN will ensure that the members of the force are fully acquainted with these principles and rules; the agreements with troop-contributing states provides that the participants in peacekeeping operations ‘shall observe and respect the principles and spirit’ of these instruments.³⁹⁴ Consequently, full and ready compliance with demands made by the ICC appears to be completely consistent with the general posture of the UN.³⁹⁵

One cannot forget that the UN has been fundamental in the establishment of international tribunals, the ICTY, ICTR and SCSL³⁹⁶ or the East Timor Panels with Exclusive Jurisdiction over Serious Criminal Offences,³⁹⁷ and the establishment of extraordinary chambers in courts of Cambodia.³⁹⁸

The reality of the UN’s own compliance with fundamental human rights norms is in contradiction to its principles. There is consistent evidence that forces acting under UN peacekeeping operations have been involved with human trafficking and the UN has stood idle. Human trafficking violates fundamental human rights and is prohibited under international law.³⁹⁹ Trafficking acts with slavery or slavery like practices may constitute crimes against humanity under the statutes of the ICC, the ICTY and the ICTR.⁴⁰⁰ The prohibition of slavery is a well-established rule of customary international law that attained the status of a peremptory norm.⁴⁰¹ It has been argued that international *opinio juris* of the term, as evidenced by treaty law and UN resolutions, has evolved to include trafficking for sexual exploitation.⁴⁰²

There are numerous reports about abuses sexual exploitation from also from the Democratic Republic of the Congo (DRC) by MONUC peacekeepers, and in most cases the investigations into the offences were not conducted respectfully in regards to the victims.⁴⁰³ According to reports, girls as young as ten years old, were raped and sexually abused by peacekeepers.⁴⁰⁴

The UN missions in Bosnia and Herzegovina (UNMIBH) and in Kosovo (UNMIK) adopted a ‘zero tolerance’ policy for staff members involved in trafficking or prostitution. According to the missions, this means that allegations of misconduct are investigated and disciplinary action is taken for those found guilty. There have not been any prosecutions only a few of the alleged perpetrators were sent home.⁴⁰⁵ A report prepared by UN independent experts on women, armed conflict, and peace building found UN policies to be ‘extremely ambiguous in regulating interaction between UN peacekeeping personnel and the local female population.’⁴⁰⁶ The

³⁹⁴ The Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations (UN Doc. A/46/185 (23 May 1991)), Article X(28).

³⁹⁵ Paul C. Szasz & Thordis Ingadottir, *The UN and the ICC: The Immunity of the UN and Its Officials*, 14 *Leiden Journal of International Law*, 867–885 (2001), at 875.

³⁹⁶ SC Res. 1315 (August 2000) (on the situation in Sierra Leone).

³⁹⁷ UN Transitional Administration in East Timor (‘UNTAET’) Reg. No. 2000/15 (6 June 2000).

³⁹⁸ UN Press Release SG/SM/7481 (6 July 2000).

³⁹⁹ Murray, *Who will police the peace builders?* (2002-2003), *supra* note 290, at 494.

⁴⁰⁰ *Ibid.* at 497.

⁴⁰¹ *Ibid.* 499-500.

⁴⁰² *Ibid.*

⁴⁰³ See further e.g. Susan A. Notar, *Peacekeepers as Perpetrators* (2006), *supra* note 231, 413-429.

⁴⁰⁴ *Ibid.* at 417.

⁴⁰⁵ Rehn, *Sirleaf, Women, war and peace* (2002), *supra* note 19, at 73.

⁴⁰⁶ *Ibid.* at 70.

independent experts deemed the UN Code of Conduct to be nothing more than ‘a skeletal outline of basic human rights’ that ‘trivializes violations against women.’⁴⁰⁷

3.2.2. The Rise of victims’ rights

The historic evolution of human rights as an integral part of international law by endorsement and ratification of numerous human rights treaties calls for effective remedies for violations of human rights. Many human rights treaties make reference to circumstances, which are essential in humanitarian assistance, such as the right to life, health and livelihood and freedom from discrimination.⁴⁰⁸ Often the fundamental human rights of individuals in humanitarian crisis are dependent on the actions of international organizations and global governance in general. The host states are often crippled by the humanitarian crisis and unable to provide protection to the people in its jurisdiction. The people in affected areas of humanitarian crisis are left without effective recourse to demand the protection of their fundamental rights, when the state unable to provide those rights. The international humanitarian assistance that has come there to help them is considered to have no obligation to fulfil its promises. The rights of the victims of said violations would be then to address their state not those who were actually responsible for the violations. Victims of human rights violations by international organizations cannot be said to have an access to effective legal remedies.

The right to effective remedies has been so widely acknowledged that it may be regarded as forming part of customary international law.⁴⁰⁹ Traditionally, civil and political rights, such as access to effective legal remedies have emphasized the rights of the accused, such as the presumption of innocence and right to a fair trial.⁴¹⁰ The legalistic frameworks of legal remedies are usually focused on the nature of conflict or the context rather than dependent on the victims’ suffering.⁴¹¹ International human rights have developed towards the recognition of the rights of victims⁴¹² of gross violations of human rights and international crimes. The rise of victims’ rights has been a development of a new criminological theory, restorative justice, which emphasizes the rights of victims in a legal process.

The UN GA has adopted two resolutions dealing with the rights of victims: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the

⁴⁰⁷ *Ibid.* at 72.

⁴⁰⁸ Article 9, para. 5 of ICCPR, *supra* note 3.

⁴⁰⁹ Boven: UN basic Principles on guidelines on the right to a remedy and reparation for victims (2010), *supra* note 375, at 2.

⁴¹⁰ See e.g. Article 2 para. 3 and 14, para. 2 of the ICCPR, *supra* note 3.

⁴¹¹ M. Cherif Bassiouni, International Recognition of Victims’ Rights, 6 *Human Rights Law Review* (2006), 203-279, at 204.

⁴¹² Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Victim includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. UN Victims resolution, *supra* note 374, at 5, section V, para. 8.

2006 UN Resolution on Victims. The 2006 Basic Principles and Guidelines are said to be a triumph for victims' rights.⁴¹³

Provisions providing a right to a remedy for victims of violations of international human rights law can be found in numerous international human rights instruments, in particular Article 8 of the UDHR, Articles 2 and 14 of the ICCPR, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Torture Convention, and Article 39 of the Convention on the Rights of the Child. In relation to international humanitarian law, Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and Articles 68 and 75 of the ICC Statute.⁴¹⁴

The ICC Statute is significant in the development of victims' rights. 'For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.'⁴¹⁵ Article 68(1) of the ICC Statute provides that the ICC shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The ICC has a Victims and Witnesses Unit within the Registry, pursuant to Article 43(6), to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the ICC and others who are at risk on account of testimony.⁴¹⁶

3.2.3. Victims' rights to reparation

The legal consequences of a breach of an international obligation are reparations. In the *Factory at Chorzów* case the ICJ ruled that: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'⁴¹⁷ Reparations in an adequate form may mean any number of actions, for instance monetary compensation or possibly prosecution of perpetrators. Reparation may apply also to moral damages.⁴¹⁸

The existence of an obligation to make reparation has often been acknowledged by international organizations.⁴¹⁹ A particularly clear example may be found in a report by the UN SG on the administrative and budgetary aspects of the financing of UN peacekeeping operations: 'The applicability of international humanitarian law to UN forces when they are

⁴¹³ Bassiouni, *International Recognition of Victims' Rights* (2006), at 279.

⁴¹⁴ Regional conventions also include provisions concerning a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴¹⁵ www.icc-icp.int (English) > Structure of the court > Victims (18.10.2014).

⁴¹⁶ http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx (18.10.2014).

⁴¹⁷ *Factory at Chorzów*, 1927, *supra* note 20, at 21.

⁴¹⁸ Fifth report on responsibility of international organizations (2007), *supra* note 347, at 9 para. 26.

⁴¹⁹ The UN settled claims arising from the UN Operation in the Congo, *supra* notes 243, 245.

engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of UN forces.⁴²⁰

The UN Victims resolution provides detailed descriptions of standards that should be followed and according to the resolution ensuring victims' rights means the duty to take appropriate legislative and administrative and other appropriate measures to prevent violations, the duty to investigate, effectively, the duty to submit to prosecution the person allegedly responsible irrespective of who may ultimately be the bearer of responsibility for the violation and, the duty to punish the responsible persons and provide effective remedies to victims, including reparations.⁴²¹ Moreover, in accordance with international law there is a duty to cooperate and assist international judicial organs competent in the investigation and prosecution of these violations.⁴²²

Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and care should be taken to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.⁴²³

It is submitted that there is a gap between international human rights law and international criminal law.⁴²⁴ The parallel nature of these two bodies of law limits the reach of international criminal law to punish fundamental human rights violations and they remain without effective enforcement.⁴²⁵ The concept of victims' redress needs to be developed in a more comprehensive way.⁴²⁶ The rise of victims' rights has called for re-conceptualizing legal distinctions and technicalities of various classifications of crimes against victims.⁴²⁷

As discussed above, the UN has taken responsibility for damages in private claims and paid damages. The UN Legal Counsel has also said that it would cease participation in cooperation with armed forces where there is suspicion violation of human rights or international humanitarian law. However, the UN does not seem to set the same standard to its own personnel or to forces acting under UN missions. On the contrary, according to reports, UN has made significant efforts to hinder investigations and has weak practices in relation to

⁴²⁰ SG's report of the financing of UN peacekeeping operations, September 20, 1996, A/51/389, *supra* note 241, para. 16.

⁴²¹ Reparations are e.g. 'Restitution' restoring the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property; 'Compensation' should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services; 'Rehabilitation' should include medical and psychological care as well as legal and social services, UN Victims resolution, *supra* note 374, Article IX, paras 15-23.

⁴²² UN Victims resolution, *supra* note 374, Article II, para. 3 and Article III, para. 4.

⁴²³ *Ibid.* Article VI, para. 10, at 6.

⁴²⁴ Bassiouni, International Recognition of Victims' Rights (2006), *supra* note 411, at 205.

⁴²⁵ *Ibid.* Exceptions are the ECtHR and the Inter-American Court of Human Rights.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.* at 204.

protecting victims and providing them with access to justice; in reporting abuse as well as participating in the process.

3.2.4. The UN practice on treatment of victims

The UN SC has called for responsibility of peacekeepers involved in crimes:

“Expresses its serious concern at allegations that some UN personnel may have been involved in sexual abuse of women and children in camps for refugees and internally displaced people in the region, supports the SG’s policy of zero tolerance for such abuse, looks forward to the SG’s report on the outcome of the investigation into these allegations, and requests him to make recommendations on how to prevent any such crimes in future, while calling on states concerned to take the necessary measures to bring to justice their own nationals responsible for such crimes⁴²⁸

In issuing the Bulletin on Observance by UN Forces of International Humanitarian law,⁴²⁹ the SG took a step towards holding peacekeeping personnel accountable under international law. However, the full impact of this Bulletin is limited by the fact that, while it must be advocated through the SG’s Special Representative to all staff in the peacekeeping operation, enforcement is left up to troop-contributing states.⁴³⁰ According to the independent experts Rehn and Sirleaf, the troop-contributing states are neglecting to prosecute their soldiers.⁴³¹ When violations occur, the personnel are rarely even sent home for fear of adverse political consequences and because missions are typically understaffed. The UN Head of Mission does not have any authority to discipline troops or punish misconduct, but only general responsibility for conduct, which includes setting standards, training troops and investigating.⁴³² Prosecutions that are carried out by the home country are generally not made public because they take place in military courts, which are closed procedures. As a result, much of the information on crimes committed by peacekeepers must be drawn from press accounts and reports of human rights organizations or generalized from the few countries that have dealt with the actions of their peacekeepers.⁴³³

The UN’s Office of Internal Oversight Service (OIOS)⁴³⁴ conducted an investigation in 2004-2005 regarding the abuses of the MONUC peacekeepers in the Congo.⁴³⁵ The OIOS apparently set a high evidentiary threshold, which is questionable due to the fact that the victims in the

⁴²⁸ S/RES/1400 (2002).

⁴²⁹ ST/SGB/1999/13, 6 August 1999.

⁴³⁰ Rehn, Sirleaf, *Women, war and peace* (2002), supra note 19, at 72.

⁴³¹ *Ibid.*

⁴³² *Ibid.*

⁴³³ See e.g. Nita Bhalla: “UN must review policy on peacekeepers who abuse –Amnesty”, <http://www.trust.org/item/?map=un-must-review-policy-on-peacekeepers-who-abuse-amnesty> (16.5.2014).

⁴³⁴ OIOS is the central UN mechanism covering the entire organization was established in 1994 to ‘enhance oversight functions, in particular with regard to evaluation, audit, investigation and compliance’ in order to achieve accountability. GA Resolution 48/218B, 11.9, UN Doc. A/RES/48/218 (Dec. 23, 1993).

⁴³⁵ See The Report of the SG on the Activities of the OIOS: Investigation by the OIOS into Allegations of Sexual Exploitation and Abuse in the UN Organization Mission in the Democratic Republic of the Congo, U.N. Doc. A/59/661 (Jan. 5, 2005).

investigation were minors and the MONUC itself was receiving the complaints from the victims rather than an impartial third party, which creates an uneven balance of power between the alleged perpetrators and victims.⁴³⁶ Many peacekeepers were repatriated before the investigation was concluded.⁴³⁷ The investigation also lacked of transparency and the sexual abuse continued during the investigation. Further, the troop-contributing contingents reportedly actually disturbed the investigations and did not provide information to the OIOS.⁴³⁸ The report lead to a resolution by the SC to ensure the SG's zero tolerance policy to on sexual abuse, and investigate and penalize those found to be responsible⁴³⁹.

In Bosnia, despite professed commitment to prosecution of peacekeepers, the officers of the International Police Task Force (IPTF) have enjoyed complete impunity.⁴⁴⁰ States retain jurisdiction over their peacekeepers under immunity provisions, but no state has invoked criminal jurisdiction for human trafficking violations in Bosnia.⁴⁴¹ Moreover, UN officials have often been dismissive of allegations of peacekeeper involvement in trafficking and the requirement that governments inform the UN of criminal prosecutions has little meaning.⁴⁴² No member of UNMIBH has ever been criminally prosecuted for trafficking-related offenses, which 'indicates that there is an obvious lack of political will to hold them accountable.'⁴⁴³

In relation to the UNHCR, Mark Pallis writes that the OIOS should have the capacity to institute investigations into the UNHCR on its own initiative when the UNHCR is unwilling or unable to act, and request information and allow participation of refugees, in order to carry out its oversight functions effectively.⁴⁴⁴ Apparently investigations have delivered positive outcomes.⁴⁴⁵ However, with regards to victims in individual case, the OIOS is not the appropriate body to provide remedies, and direct complaints mechanism should not be substituted by OIOS investigations.⁴⁴⁶

The combination of legal, political and moral arguments of the imperative to uphold human rights law, all work together to create a framework of rules by which the UN may reasonably be expected to follow. There have been positive developments, but not enough, much more is needed to make the academic progress a reality to victims on the ground and for the international legal system is far from being victim-oriented.⁴⁴⁷By honouring of victims, the international community expresses solidarity and reaffirms the principles of accountability, justice and the rule of law.⁴⁴⁸

⁴³⁶ Notar, *Peacekeepers as Perpetrators* (2006), *supra* note 231, at 418.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ SC Res. 1592 (2005) (on Democratic Republic of the Congo).

⁴⁴⁰ Murray, *Who will police the peace builders?* (2002-2003), *supra* note 290, at 509.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

⁴⁴⁴ Pallis, *UNHCR Accountability Mechanism* (2004-2005), *supra* note 16, at 892.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Bassiouni, *International Recognition of Victims' Rights* (2006), *supra* note 411 279.

⁴⁴⁸ *Ibid.*

Part IV Executing the responsibility of international organizations

4. Privileges and Immunities

4.1. General

Even though immunity does not mean impunity, it often seems to lead to that regarding the responsibility of international organizations. This next chapter will look at immunities of international organizations, especially those of the UN, which often prevents investigation, prosecution or consequences for wrongful acts. The impossibility to take legal actions against international organizations and their personnel is seemingly in conflict with the fundamental human right of access to effective legal remedies. In the end of the chapter there is discussion on the conditions of waiver of immunity and of the absoluteness of the immunities of the UN in relation to international crimes and serious breaches and also whether in the age of international tribunals, the absolute immunities are anymore justified.

Under traditions over thousands of years representatives of states have enjoyed certain privileges and immunities, namely heads of state, state officials, diplomatic representatives and consuls. Most of the principles are codified in Vienna Convention on Diplomatic Relations (hereinafter VCDR).⁴⁴⁹ Immunities have developed to ensure smooth conduct of international relations and international cooperation and promote mutual respect among states of their sovereignty and the right to protect their representatives abroad from possible abuses of the power and authority of the territorial state.⁴⁵⁰

Immunities can be categorized in two different types of protections. Some officials enjoy broad immunity because of their status or office (*immunity ratione personae*), the immunity of others relates only to the acts that are performed in their official capacity, functional immunity (*immunity ratione materiae*).⁴⁵¹ Personal immunities are conferred to those who are entrusted to represent the state at the international level.⁴⁵² Personal immunities are given to senior officials, especially heads of state, heads of government, and foreign ministers.⁴⁵³ They also apply to diplomats and other officials on special mission in foreign states.⁴⁵⁴ State officials that are not entitled to immunity *ratione personae* are immune from states jurisdiction in relation

⁴⁴⁹ VCLT, *supra* note 109.

⁴⁵⁰ Paola Gaeta, Does President Al Bashir Enjoy Immunity from Arrest?, 7 *Journal of International Criminal Justice* (2009), 315-332, at 320.

⁴⁵¹ Dapo Akande, International Law Immunities and the International Criminal Court, 98 *the American Journal of International Law*, No. 3 (July, 2004), 407-433, at 409.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.* at 410.

⁴⁵⁴ Possibly under customary international law as well as treaty law, the person of any official sent abroad on a special mission, be they any type of governmental official, by a state is inviolable, and they may not be arrested or detained. See Articles 29, 31, 23 Vienna Convention on Diplomatic Relations (VCDR), Vienna, 18 April 1961, Entry into force: 24 April 1964, UNTS vol. 500, 95, UN Convention on Special Missions, December 8, 1969, UNTS vol. 1400, 231.

to acts performed in their official capacity.⁴⁵⁵ Immunity *ratione materiae* may be invoked by former officials, in relation to the performance of duties while they were in office.⁴⁵⁶

Incumbent heads of state enjoy personal immunities in the widest extent and, when facing charges for international crimes, they are entitled to immunity from arrest and from criminal prosecution in the territory of foreign states under customary international law. State practice and the practice of the ICJ, specifically in the *Arrest Warrant*⁴⁵⁷ case⁴⁵⁸ support this rule. The *Arrest warrant* case handled an arrest warrant that was issued and circulated internationally by Belgium against the incumbent Minister of Foreign Affairs of the Congo, alleging grave breaches of the Geneva conventions of 1949, the Additional Protocols and crimes against humanity. The ICJ held that immunities cover not only the performance of official duties but also private acts.⁴⁵⁹ However, immunities that are attached to a particular office or status are valid only as long as the official holds that position.⁴⁶⁰

Immunities and privileges of international organizations are based on necessity of international organizations to be able to fulfil their functions. The absence of immunity is considered to endanger the fulfilment of the mission of the international organization.⁴⁶¹ In case the receiving states define private acts widely it might influence the success of the mission.⁴⁶² However, the legal personality of an international organization does not imply that an organization is entitled to enjoy privileges and immunities from non-member states under international law.⁴⁶³

There is no general treaty or binding document that governs diplomatic relations of international organizations and its staff or those representing states to those organizations.⁴⁶⁴ The Vienna Convention on the Representatives of States in Their Relations with International Organizations of a Universal Character from 1975 is not in force and it has been criticised for focusing on the sending states rights at the expense of the host state.⁴⁶⁵ Law relating to privileges and immunities of international organizations consists of a myriad of treaties and other legal instruments and also domestic legislation. Usually each organization has its own treaty on privileges and immunities. In addition to the UN and EU treaties, international organizations sometimes use the 1961 Vienna Convention on Diplomatic Relations.⁴⁶⁶

⁴⁵⁵ Akande, International Law Immunities and the ICC, *supra* note 451, at 412.

⁴⁵⁶ Akande, International Law Immunities and the ICC, *supra* note 451, at 412. See also VCDR, *supra* note 454, Article 39(2) in relation to former diplomats.

⁴⁵⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports* 2002, p. 3.

⁴⁵⁸ Gaeta, Does Al Bashir Enjoy Immunity from Arrest? (2009), *supra* note 451, at 317. See esp. footnote 6.

⁴⁵⁹ *Arrest Warrant*, case, *supra* note 457, para. 54.

⁴⁶⁰ Akande, International Law Immunities and the ICC, *supra* note 451, at 410.

⁴⁶¹ Niels Blokker, Henry Schermers, Mission impossible? On the Immunities of Staff Members of International Organizations on Mission, in *Liber Amicorum of Ignaz Seidl-Hohenveldern* (Published by Kluwer Law International, The Hague, The Netherlands, 1998), at 45.

⁴⁶² *Ibid.* at 45.

⁴⁶³ See e.g. August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000), at 152-157.

⁴⁶⁴ Klabbers, *International Institutional Law* (2009), *supra* note 2, at 139.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Blokker, Schermers, Mission Impossible? *supra* note, 461.

It has been submitted that there is a rule of customary international law, according to which there is an obligation to grant privileges and immunities.⁴⁶⁷ However, there may be such a rule of customary international law, but as an unspecified rule it is not very useful to invoke that rule without any precision of its scope.⁴⁶⁸ The rationale behind the customary rule is, that when the immunities and privileges are awarded to official duties, all the duties of an organization would be covered by the immunities and privileges. The assumption that an organization would not act *ultra vires* makes the rule of customary international law on privileges and immunities unconvincing.⁴⁶⁹ In any case customary international law does not grant immunity from jurisdiction to acts performed in a personal capacity.⁴⁷⁰

4.2. The Immunity of the UN: Functional necessity or absolute immunity?

Privileges and immunities of international organizations are based on the theory of functional necessity; immunities are necessary in order for the international organizations to fulfil their purpose.⁴⁷¹ Functional necessity means that international law grants substantive rights and obligations to international organizations conditionally, as opposed to states that have rights and obligations simply by their statehood, and are immune from suit for governmental activities, (*acta jure imperii*). The doctrine of implied powers, the principle of speciality means that international organizations and their organs can exercise functions that they were empowered to perform.⁴⁷²

Immunity of international organizations is granted *ratione materiae* and not *ratione personae*.⁴⁷³ To warrant immunity for private acts is considered to impede the course of justice under the laws of the host state. It is considered unacceptable to extend immunities to all sorts of private acts.⁴⁷⁴ There are exceptions though and e.g. heads of secretariat of missions are usually endowed with the same immunities as diplomats.⁴⁷⁵ However, immunity for non-official acts of international staff members is usually not granted to majority of civil servants. Functional immunity might sometimes expand to acts that are generally not considered official including acts such as walking the streets of the host nation, entering the country etc.⁴⁷⁶ Separating private acts from official functions is not clear and neither are rules regarding different groups of persons and the immunities are under constant and increasing debate.

The principle of 'functional' immunity was established in the founding document of the UN. The UN enjoys immunities based on Article 105 of the UN Charter.⁴⁷⁷ However, a treaty can

⁴⁶⁷ Maastricht District Court in *Eckhardt v. Eurocontrol* (No.2) decision of 12 January 1984: Eurocontrol 'is entitled to immunity from jurisdiction on the grounds of customary international law to the extent that is necessary for the operation of its public service.' in ILR 331 at 338.

⁴⁶⁸ Klabbers, *International Institutional Law* (2009), see *supra* note 2, at 149.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Blokker, Schermers, *Mission impossible?*, *supra* note 461, at 42.

⁴⁷¹ Klabbers, *International Institutional Law* (2009), *supra* note 2, at 132.

⁴⁷² *Ibid.* at 56.

⁴⁷³ With the exception of the highest officials. Blokker, Schermers, *Mission impossible?*, *supra* note 461, at 46.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.* at 45.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Article 105 of the UN Charter:

bind only the parties to it, so the provisions bind only UN members. The ICJ determined in the *Reparation for Injuries* case⁴⁷⁸ that the UN has objective legal personality, opposable also vis-à-vis non-member states, and presumably this holding also applies to the necessary immunities of the organization, and that these immunities must be respected not only by members but also non-members of the UN.⁴⁷⁹

In order to make more specific provisions on the immunities of the UN, the UNGA adopted the Convention on the Privileges and Immunities of the UN (CPIUN) in 1946 and the Convention on the Privileges and Immunities of the Specialized Agencies (CPIUNSA) in 1947. Though not all members of the UN are parties to the said conventions, the provisions are recognized as an authoritative interpretation of Article 105(1) as to what privileges and immunities the UN requires in order to be able to fulfil its purposes.⁴⁸⁰

The UN is said to enjoy functional immunity, however, it is often quoted as ‘absolute’, based on the wording used in Article II(2) of the CPIUN, which states that the UN shall enjoy immunity from ‘every form of legal process’. The ‘absolute’ immunity from suit of the UN is respected in most countries, though some national courts have tried to limit the UN’s scope of immunity along the initially envisaged ‘functional’ immunity.⁴⁸¹ Absolute immunity is not equated to the doctrine of absolute state immunity recognizing nothing but *acta iure imperii*, not only due to the dispute settlement clause of Article VIII, section 29 of the CPIUN.⁴⁸² The clause can be regarded as an acknowledgment of the right of access to court as contained in all major human rights instruments.⁴⁸³ The District Court of The Hague held in *Mothers of Srebrenica* case⁴⁸⁴ that ‘absolute immunity of the UN is the norm and is respected.’⁴⁸⁵ The Hague Court first established that the UN had invoked its immunity within the functional framework of a UN peacekeeping mission.⁴⁸⁶ According to Guido den Dekker, The Hague Court ‘correctly expressed that the UN enjoys absolute *functional* immunity.’⁴⁸⁷ However, the UN defines the limitations of its functions itself and does not subject its immunity under

‘1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.’

⁴⁷⁸ *Reparation for Injuries* (1949), *supra* note 79.

⁴⁷⁹ Szasz, Ingadottir, *The UN and the ICC* (2001), *supra* note 395, at 869.

⁴⁸⁰ *Ibid.*

⁴⁸¹ Introductory note to the CPIUN and CPISA by August Reinisch, <http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html> (20.4.2015).

⁴⁸² See Article VIII(29) of the CPIUN: “The United Nations shall make provisions for appropriate modes of settlement of (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”

⁴⁸³ Introductory note to the CPIUN and CPISA by August Reinisch, <http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html> (20.4.2015).

⁴⁸⁴ *Mothers of Srebrenica et al. v. Netherlands and UN*, *The District Court of The Hague*, Case no. 295247, LJN: BD6796, judgment of 10 July 2008.

⁴⁸⁵ *Ibid.* para. 5.13.

⁴⁸⁶ *Ibid.* 5.11- 5.12 and 5.14.

⁴⁸⁷ Guido Den Dekker, *Immunity of the UN before the Dutch courts*, *The District Court of The Hague*, judgment of 10 July 2008 (*Mothers of Srebrenica et al. v. State of the Netherlands and UN*), Hague Justice Portal, 28 Jul 2008, available at <http://www.haguejusticeportal.net/index.php?id=9569> (20.4.2015).

independent review and has never waived its immunity. The practical difference between absolute immunity and 'limited' functional immunity is therefore unclear and the core of debate over functional immunities.

Regarding different officials performing the functions of the UN, the basis and contents of their immunities are variable. The CPIUN contains privileges and immunities for three categories of persons crucial for the work of the Organization: 1) representatives of Member States; 2) UN officials; and 3) experts on missions for the UN. UN officials, i.e. permanently employed staff members, enjoy 'functional' immunity.⁴⁸⁸ The CPIUN stresses that '[p]rivileges and immunities are granted to officials in the interests of the UN and not for the personal benefit of the individuals themselves'.⁴⁸⁹ As opposed to UN officials, experts on missions for the UN, like members of the UN peacekeeping operations, serve under a temporary and specific mandate. They also enjoy certain functionally limited privileges and immunities.⁴⁹⁰ They are only immune from legal process to the extent necessary to perform their duties. However, the immunities awarded to officials of the UN apply even after they have left office.⁴⁹¹

The UN peacekeeping forces are not directly referred to in the CPIUN. It is possible to consider that they are covered by CPIUN Article VI as 'experts on mission'. However, in fact, this appears never yet to have been used.⁴⁹² The exact contents of the privileges and immunities of members of UN forces are unclear.⁴⁹³ One possibility is instead, that force members are afforded immunity from at least the criminal jurisdiction of the host state of the force by means of Status of Forces Agreements (hereinafter SOFA)⁴⁹⁴ concluded with the UN and any criminal jurisdiction is to be exercised by the troop contributing state.⁴⁹⁵ The SG's Bulletin about the application of the Humanitarian Rules of Warfare to UN Forces provides specifically that accusations of war crimes are to be tried by the troop supplying state.⁴⁹⁶ However, should the situation arise that the immunity of a member of a UN force has to be asserted in a situation not covered by any of these agreements (for example, vis-à-vis a transit state, or the national state of the soldier), then the UN would rely directly on Article 105(2) of the UN Charter, which so far has rarely if ever occurred.⁴⁹⁷ The conclusion that is compelling is that the term 'officials' in the UN Charter is broader than that in the CPIUN and encompasses all persons

⁴⁸⁸ Article V, Section 18 (a) of the CPIUN: immunity 'from legal process in respect of words spoken or written and all acts performed by them in their official capacity'. Only the Secretary-General, Under-Secretaries-General and Assistant Secretaries-General enjoy full diplomatic privileges and immunities.

⁴⁸⁹ Article V, section 20 of the CPIUN.

⁴⁹⁰ Article VI of the CPIUN.

⁴⁹¹ This is explicitly stated in respect of experts in CPIUN, Sec. 22(b), but implicitly applies also to officials since the immunity is related solely to the fact that at the time the words in question were uttered or the acts performed the person was acting in an official capacity, and not to the person's status at the time the immunity is asserted.

⁴⁹² Szasz, Ingadottir, *The UN and the ICC* (2001), *supra* note 395, at 872.

⁴⁹³ *Ibid.*

⁴⁹⁴ Upon a new peace operation, the UN generally negotiates a more comprehensive agreement on privileges and immunities directly with each host state, a Status of Forces Agreement (SOFA). It contains provisions relating to the exercise of criminal and civil jurisdiction over foreign personnel. Instead of subjecting UN personnel to the jurisdiction of the host state, most SOFAs provide that peacekeeper-contributing states should exercise jurisdiction over their nationals with respect to crimes committed by them while serving as members of UN missions. See further, Murray, *Who will police the peace-builders*, *supra* note XX, at 509.

⁴⁹⁵ *Ibid.* See Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries, UN Doc. A/45/594 (9 October 1990).

⁴⁹⁶ Observance by UN Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (6 August 1999), Sec. 4, reproduced in 38 ILM 1656 (1999).

⁴⁹⁷ Szasz, Ingadottir, *The UN and the ICC* (2001), *supra* note 395, at 872.

who perform functions for the UN, including members of the Secretariat, certain other appointees of the GA, experts on mission, and possibly also members of UN forces.⁴⁹⁸

Military personnel of states, on a UN peacekeeping mission, are usually granted immunity from the host state jurisdiction and the troop contributing state retains exclusive jurisdiction on criminal prosecution and certain civil matters. The content of the immunities vary based on Status of Forces Agreements (SOFA). For civilian personnel (UN staff, experts on mission), the jurisdiction of the host state and third state is applicable.

Based on functionality of the immunities, peacekeepers should not be able to assert immunity when they commit serious violations of human rights; as such acts clearly fall outside the scope of their official duties.⁴⁹⁹ For instance in Bosnia, the functional limitations on peacekeeper immunity has been completely ignored. The IPTF officers were completely shielded from criminal liability by a web of privileges and immunities afforded to them under international law and operation-specific stationing agreements, as well as the unwillingness of their home countries to prosecute their officers who were alleged to have committed acts human trafficking, among other acts, resulting in violations of fundamental human rights.⁵⁰⁰ According to Frederick Rawski 'Recent [ICJ] jurisprudence indicates that there has not yet developed a customary international law, exception' to jurisdictional immunity even in cases of gross human rights violations if an alternative forum for prosecution exists or may exist in the future'.⁵⁰¹

Professor Klabbers has argued that functional immunities are biased in favour of international organizations, based on the benevolence assumption of the actions of international organizations.⁵⁰² This is an especially fitting description regarding international humanitarian organizations, such as the UN. Professor Klabbers put it well saying that 'It is one thing to say that organizations shall be immune from suit to the extent necessary to their functioning, but why should third parties who have seen a deal go sour, be victimized by the necessities of the organization?'⁵⁰³ Klabbers writes that there is a flaw in the theory of 'functional necessity', where the functional needs of an organization are put before those of others. He goes on to say that the idea of functional necessity requires justification, while there has so far not been convincing arguments.⁵⁰⁴ Also, although the theory is helpful in determining the scope of the immunities and privileges, the question of what is necessary in terms of the functions of an organization remains unanswered and is a relative question.

One could also go further to question the necessities of extent of functional immunities. Although there is limited information about the actual extent to which international humanitarian operations have resulted in legal claims, some surveys have been conducted. According to a survey conducted under the Disaster Law Programme of the International Federation of Red Cross and Red Crescent Societies (IFRC), claims and liability concerns are

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Murray, Who will police the peace builders (2002-2003), *supra* note 290, at 507.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Frederick Rawski, To Waive or not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations, 18 *Connecticut Journal of International Law* 103, at 113-114 (2002).

⁵⁰² Klabbers, *International institutional law* (2009), *supra* note 2, at 33.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.* at 136.

not creating important disruptions in international relief and recovery activities.⁵⁰⁵ Although, one could argue that activities of the UN and especially involving military operations, are more prone to liability claims, the survey could provide some perspective on the necessity of such strict interpretations of the UN over its immunity. The survey included intergovernmental organizations but also many NGOs that do not enjoy any immunity and are completely subjected to host state judicial processes. According to the survey, only 32 % of humanitarian organizations reported to having had claims filed against them, most of them being contractual issues. Respondents to the IFRC survey also reported that neither claims nor fears of liability were a hindrance their operations.⁵⁰⁶ Only 3 % of international humanitarian organizations reported substantial impediments from the potential of criminal investigation or arrest.⁵⁰⁷

4.3. Waiver of immunity

According to the ICJ, pursuant to Article 105 of the UN Charter, states have an obligation to provide their national courts with information on the position of the UN regarding its immunity in a given case, and must ensure that the national court deals with the question of UN immunity expeditiously and as a preliminary matter.⁵⁰⁸

According to the CPIUN and the CPIUNSA the UN has ‘the right and duty’ to waive immunity if the immunity would impede the course of justice and are against the interests of the UN and can be done without prejudice to UN interests.⁵⁰⁹ The immunities are submitted to be not for the personal benefit of the individuals themselves, but for the interests of the UN.⁵¹⁰ Article 5 of the VCLT requires parties to treaties to perform their treaty obligations in good faith and it is extended to a constituent instrument of an international organization and member have a duty to act as good members.⁵¹¹ Would it not then be natural to expect the same from the UN, to waive immunity when it is required? States respect the immunity of the UN, but the UN should hold its end of the agreement and respect the jurisdiction of states and their responsibility of protecting human rights by waivering immunity.

⁵⁰⁵ Law and legal issues, IFRC, 2007, *supra* note 103, at 144.

⁵⁰⁶ *Ibid.* Only 4 % of all respondents and 7 % of NGOs stated that the potential of civil liability had substantially impeded their operations. 15 % of all respondents and 32 % of international humanitarian organizations (including some UN agencies) acknowledged that claims had been brought against them.

⁵⁰⁷ *Ibid.* 19 % of international humanitarian organizations reported that a staff member or volunteer had at one point been criminally investigated or jailed in the course of an international disaster relief operation.

⁵⁰⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Rep. 1999, 62, paras 62-63.

⁵⁰⁹ Article 20 of the CPIUN: officials: ‘The SG shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN.’ Article 23 of the CPIUN: experts on mission: ‘The SG shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the UN.’ Article VI §22 of the CPIUNSA Specialized Agencies ‘shall have the right and duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice to the interests of the Specialized Agency.’

⁵¹⁰ *Ibid.*

⁵¹¹ Blokker and Schermers, *Mission impossible?*, see *supra* note 461, at 51.

Whether the functional immunities apply, that is to say that the words and or actions are related to the persons' official capacity is to be decided by the SG.⁵¹² The state that wishes to challenge the immunities and the position of the SG⁵¹³ can be challenged judicially through requesting a binding advisory opinion from the ICJ.⁵¹⁴ Politically the GA or a competent Council may challenge the SG decision.⁵¹⁵ This has never been done. Obviously, there is no motivation of any of these entities that are entitled to challenge the immunity to do so. On the contrary, it would be political suicide. The real motivation to challenge the immunity should come from an independent party that has nothing to gain or lose for challenging the immunity. An international tribunal might provide the answer.

The UN has always invoked its immunity in any international legal proceedings within the functional framework mentioned (Article 105(1) of the UN Charter as detailed in Article II(2) of the Convention on the Privileges and Immunities of the United Nations (the Convention), using Articles 31 and 32 of the Vienna Convention on the Law of Treaties) and that no exceptions have ever been made in practice.

4.4. International crimes and the rise of international tribunals

There is a rule that removes immunity *ratione materiae* concerning international crimes. According to an established rule, the official position of individuals does not exempt them from individual responsibility for acts that are crimes under international law.⁵¹⁶ There are a number of cases where a foreign national court has prosecuted persons entitled to immunity for committing an international crime. It has been argued that acts that amount to international crimes cannot be seen as official acts, even while officials in question possesses immunity *ratione materiae*.⁵¹⁷ It is submitted that international crimes are *jus cogens* norms, peremptory norms that cannot be violated and enjoy a higher status than immunity rules.⁵¹⁸

International criminal law has developed to allow domestic courts to prosecute crimes that have universal jurisdiction. For instance The Torture Convention⁵¹⁹ defines the offense of torture to acts that have been committed specifically in the exercise of official capacity and allows universal jurisdiction and upholding immunity *ratione materiae* would be inconsistent with the provisions of the Torture Convention.⁵²⁰ Immunity *ratione materiae* must be regarded as

⁵¹² The ICJ held that any finding by the SG concerning immunity "creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts," *Difference relating to the Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, ICJ Reports 1999, p. 62, at 87, para. 61.*

⁵¹³ The immunity of the SG can be waived by the SC only, CPIUN § 20.

⁵¹⁴ See Article VIII(30) of CPIUN.

⁵¹⁵ Szasz, Ingadottir, *The UN and the ICC (2001)*, *supra* note 395, at 873.

⁵¹⁶ Akande, *International Law Immunities and the ICC (2004)*, *supra* note 451, at 415. Provisions stating that official capacity does not amount to a substantive defence are included in the statutes of several international criminal tribunals, e.g. ICC Statute, Art. 27(1).

⁵¹⁷ *Ibid.* at 414.

⁵¹⁸ *Ibid.*

⁵¹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, UNTS vol. 1465, p. 85.

⁵²⁰ Akande, *International Law Immunities and the ICC (2004)*, *supra* note 451, at 514.

having been displaced by the rule according universal jurisdiction for acts of torture.⁵²¹ In addition, genocide, crimes against humanity, grave breaches of the Geneva Conventions and other war crimes related to armed conflict that are under the jurisdiction of the ICC, are often committed in an official capacity of a government and therefore, immunity *ratione materiae* is inconsistent with these provisions.⁵²² However, the ICJ⁵²³ and ECtHR⁵²⁴ and many national courts have rejected the view that violation of *jus cogens* norms would be superior to immunity rules.⁵²⁵ In the *Mothers of Srebrenica et. al.*⁵²⁶ case the District Court of the Hague arrived at the conclusion that there is currently no ground for an exception to the rule of immunity within the framework of enforcement through civil law of the standards of *jus cogens*, like the prohibitions on genocide and torture. This means there is no ground for prioritizing conflicting standards of international law or weighing of interests.⁵²⁷ Article 6 of the ECHR (or Article 14 of the ICCPR) does not give a right to bring the UN before a domestic court on the single basis of the right of access to a court as guaranteed by it.⁵²⁸ It has been submitted that Article 103 of the UN Charter does not always and right away bring relief in the event of conflicting obligations of a peremptory nature or conflicting human rights obligations of an international customary law nature.⁵²⁹ The ICJ however, has been more strict with its interpretations.⁵³⁰

The creation of international tribunals for the prosecution of international crimes has ceased the exclusive jurisdiction of states. According to Paola Gaeta, although allowing jurisdiction to international tribunals is against the rationale of personal immunities, their jurisdiction ‘cannot be conceived as an expression of the sovereign authority of a state upon that of another state, nor can their judicial activity be considered as a form of ‘unduly’ interfering with the sovereign prerogatives of another state’, because they act on behalf of the international community as a whole.⁵³¹

In order for international tribunals to have jurisdiction, the instruments creating those tribunals have to expressly or implicitly remove the relevant immunity, and that the state of the official concerned is bound by the instrument removing immunity.⁵³² Some scholars have suggested that courts established under SC resolutions, such as the ICTY, are universal and therefore need not be accepted by a state in order for it to prosecute officials who otherwise enjoy immunities. In the *Taylor* case⁵³³, the SCSL relied upon its international nature and insisted that the rules of international law on personal and state immunity have no bearing whatsoever in respect to the exercise of jurisdiction by international criminal courts.⁵³⁴ It noted that rules of state

⁵²¹ *Ibid.* at 415.

⁵²² *Ibid.*

⁵²³ *Arrest Warrant*, *supra* note 457, para. 58.

⁵²⁴ 2001 Al-Adsani v. United Kingdom, Application no. 35763/97, judgment 21 November, para. 61.

⁵²⁵ Akande 414.

⁵²⁶ *Mothers of Srebrenica* (2008),

⁵²⁷ *Mothers of Srebrenica* (2008), paras 5.20-5.21.

⁵²⁸ *Mothers of Srebrenica* (2008), paras 5.22, 5.25.

⁵²⁹ *Kadi I, Kadi II*, *supra* note 192.

⁵³⁰ See e.g. *Nicaragua Case (1984)*, para. 107; See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Provisional Measures, Order of 14 April 1992*, *I.C.J. Reports 1992*, p. 114.

⁵³¹ Paola Gaeta, *Does President Al Bashir Enjoy Immunity* (2009), *supra* note 450, at 320-321.

⁵³² Dapo Akande, *International Law Immunities and the ICC* (2004), at 418. States that are not parties to treaties establishing a collective or international tribunal, still enjoy the immunities *ratione materiae* and may not be prosecuted in a court which jurisdiction it has not been accepted

⁵³³ *Decision on Immunity from Jurisdiction, Taylor (SCSL-2003-01-I)*, Appeals Chamber, 31 May 2004.

⁵³⁴ *Ibid.*, para. 52.

immunities aim at protecting the sovereign equality of states and have therefore no bearing on the functioning of international criminal courts, which exercise their mandate on behalf of the international community.⁵³⁵ In addition, no has claimed that the ICTY violated the immunities of the incumbent president of the FRY Slobodan Milosevic, when it issued an arrest warrant against him.⁵³⁶

In the *Arrest Warrant* case the ICJ stated that personal immunities constitute a bar only to the exercise of criminal jurisdiction by national courts and that this is not the case with international criminal courts. The ICJ referred specifically to a number of international courts and tribunals such as the ICTY, the ICTR and the ICC. With regard to the ICC, the ICJ referred to Article 27(2) of the ICC Statute, which provides that ‘immunities...which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.⁵³⁷

Article 27(2) of the ICC Statute contains an explicit denial of international and national law immunities. It provides: ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’ Article 27(2) conclusively establishes that state officials are subject to prosecution by the ICC and that provision constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis the ICC.⁵³⁸ The Article 27 could open the avenue to criminal prosecution of UN peacekeepers.⁵³⁹

International law has developed in the recent decades more and more towards accountability and abolishing impunity. Although the functional immunity of the UN is a problem, essentially the problem comes down to lack of jurisdiction.⁵⁴⁰ The jurisdiction of international tribunals is usually referencing only states and not international organizations.⁵⁴¹ The ICC is not in a position to assert any jurisdiction over the UN, and cannot grant it immunity. However, the UN has an agreement with the ICC and The ICC as an international, independent tribunal, could be the answer. The Statute offers ample safeguards against politically motivated prosecutions and is relevant only when national authorities fail to act.⁵⁴² In the Negotiated Relationship Agreement between the ICC and the UN, the UN has promised to cooperate with and assist the work of the Court. Specifically, Article 19 of the Agreement states that:

“... the Court exercises its jurisdiction over a natural person who is alleged to be criminally responsible for a crime or crimes within the jurisdiction of the Court and who, pursuant to the provisions of the Charter of the United Nations, the Convention on the Privileges and

⁵³⁵ *Ibid.*, para. 51: ‘A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community. Another reason is as put by Professor Orentlicher in her amicus brief that ‘states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.’”

⁵³⁶ Paola Gaeta, Does President Al Bashir Enjoy Immunity (2009), *supra* note 450, at 316.

⁵³⁷ *Arrest Warrant* case, para. 61. See further, *ibid.* at 319.

⁵³⁸ Akande, International Law Immunities and the ICC (2004), at 420.

⁵³⁹ Murray, Who will police the peace-builders? (2002-2003), *supra* note 290, at 513. However, states that are not parties to the ICC Statute may not be willing to cooperate with the ICC.

⁵⁴⁰ The UN is a separate legal person, the immunity of its officials and experts is a right belonging to the organization and not to the member states.

⁵⁴¹ Crawford, Olleson, The Nature and forms of international responsibility (2010), *supra* note 38, at 443.

⁵⁴² Sirleaf, Rehn, *Women, war and peace* (2002) *supra* note 19, at 73.

Immunities of the United Nations or other agreements concluded by the Organization, enjoys privileges and immunities in connection with his or her work for the Organization, the United Nations undertakes to cooperate with the Court in such a case or cases and, if necessary, will waive the privileges and immunities of the person or persons concerned in accordance with the provisions of the relevant instruments.”⁵⁴³

Presumably in most instances any accusations of crimes within the jurisdiction of the ICC would not relate in any way to official functions of the UN or its officials, and thus the question of immunities should not arise.⁵⁴⁴ The SG would merely indicate that the acts in question are not covered by any UN immunities, and thus there is no obstacle to the ICC exercising its jurisdiction.⁵⁴⁵ If immunities were an issue,⁵⁴⁶ the UN would either waive any such immunity or to deprive the person of the status on which such immunity is based.

⁵⁴³ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, Entry into Force: 04.10.2004.

⁵⁴⁴ Szasz, Ingadottir, *The UN and the ICC* (2001), *supra* note 395, at 880-881.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ Only if the official happened to be in a category of those enjoying quasi-diplomatic immunity Article 19 of CPIUN or immunity from arrest, article 22(a) of CPIUN on experts on mission.

Part VI Conclusions

5. Main findings of the study and recommendations for research

In recent decades international organizations have evolved into powerful entities that challenge the hegemony of states in the international arena. The international community has started to see that even international humanitarian organizations make mistakes and abuse the powers it has been given. The DARIO are an attempt of resolving the lacuna of accountability that exists, but the effects the DARIO may have in carrying out the responsibility of international organizations, remains to be seen.

The progressive draft by the ILC was opportune, but a lot remains to be desired for its contents. At the core of the criticism are not just the provisions on attribution of conduct and *lex specialis* of the DARIO, but also the principles how international organizations are approached as subjects of international law.

The legal personality of international organizations is defined from the standpoint of states. States are seen as the supreme holders of powers, legal subjects *sui generis* that are above other subjects of international law. International organizations were originally created as tools for states in order to reach common goals, but they have developed as institutions and the UN for instance, possesses supranational powers. International organizations today exercise governmental functions, which are usually performed only by states, such as legislative and judicial functions, even territorial control. The exercise of state-like functions should be followed with state-like obligations. The form and shape of the legal person should not be the decisive factor in deciding the duties of international subjects, but their functions and practices in reality.

The definition of international organizations comes from the standpoint of states and it also affects the definition of the rules of the organization. Although the ILC adopted a very specific definition of the rules of the organization, it does not resolve the inconsistencies that result from the dual nature of the rules of the organization as part of international law and as internal rules for the purposes of specifying hierarchies and competences within the international organization. Regarding the ARSIWA, the role of internal laws of the state, are very clear, with international organizations, the separation of purely institutional internal rules and genuine *lex specialis*, is not.

I concur with Professor Brölmann, who submitted that the formal legal landscape, of dividing law as either municipal or international, needs to be reconstructed. The role of the rules of the organization is dual, partly closed, partly open, partly institutional partly international law, which allows loopholes by way of invoking *lex specialis*. General international law may not automatically have normative force within the legal order of the international organization.⁵⁴⁷ To summarize the problem of *lex specialis*: there seems to be no general rule of responsibility that can override institutional law of international organizations.⁵⁴⁸

⁵⁴⁷ Brölmann, the Institutional veil of international law (2007), *supra* note 89, at 254.

⁵⁴⁸ *Ibid.*

On the other hand, *lex specialis* has an unclear relationship to other maxims of interpretation and resolving norm conflicts, e.g. the principle *lex posterior derogat legi priori*.⁵⁴⁹ One interpretation gives priority to the rule that is later in time, over the special rule⁵⁵⁰ This could give way to interpret *lex specialis* in the light of the *lex posterior* developments of international law. International law has increasingly changed towards ending impunity, and grown more and more towards protecting third parties and victims. One could argue that invoking a *lex specialis*, such as an agreement between the UN and member states, that limits liability, is no longer be justified in the current legal atmosphere.

The rules of the organization apply in the attribution of conduct to an international organization. Regarding attribution of conduct, the problematic provision is Article 7 of DARIO. The conduct of an organ or agent that is placed at the disposal of an international organization is said to be attributable to the organization, if the international organization had effective control over the conduct.

In UN peacekeeping there usually often is an agreement between the troop-contributing state and the UN, where the state retains control over disciplinary and criminal matters. According to the model contribution agreement relating to military contingents placed at the disposal of the UN in peace operations, the UN is liable towards third parties, but it has a right of recovery from the contributing state under circumstances such as ‘loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the government’.⁵⁵¹ The agreement governs the relations between the parties to the contract may not deprive a third party of any right that the party may have towards the state or organization which is responsible under general international law.⁵⁵² The UN may not make agreements where the rights of the third party are limited. According to the UN Secretariat UN peacekeeping operations are subject to the executive direction and control of the SG, or under the overall direction of the SC or the GA, and that an act of a UN peacekeeping force would always be attributable to the UN.

The UN has assumed responsibility in private law claims many times and it invokes its right to seek recovery from the contributing member state. The UN has not taken the same attitude in criminal matters or human rights violations. Even though the UN does not have jurisdictional authority on the troop-contributing states, it could provide proper reparations to victims and claim recovery from the member state that is unwilling to carry out their responsibility. The UN has actually been unwilling to demand any assurances or place consequences for member states that have been uncooperative with OIOS investigations or neglected to prosecute offenders.

According to Article 7 of the DARIO, agreements of responsibility may not affect the general rules of attribution and despite agreements, conduct of an organ or agent placed at the disposal of an international organization, is attributed to the entity that had ‘effective control’ over the conduct. The effective control test was modelled from the ARSIWA and along the lines of the *Nicaragua* case⁵⁵³. During the drafting of the DARIO, the ‘overall control’ test or ‘ultimate

⁵⁴⁹ Later law overrides prior law.

⁵⁵⁰ See paragraph 3 of article 30 of the 1969 Vienna convention on the law of treaties, *ibid. supra* note XX.

⁵⁵¹ Article 9 of the UN Model Contribution Agreement (A/50/995, annex; A/51/967, annex).

⁵⁵² DARIO commentaries, see *supra* note 9, at 87, para. 3.

⁵⁵³ *Nicaragua* case, *supra* note 85.

control' test were considered, but the ILC ended up rejecting it, due to the extensive criticism the *Behrami/Saramati* judgment of the ECtHR received. As was submitted by the ILC, it did not have a lot of jurisprudence regarding the responsibility of international organizations at its disposal, so seems it had to make decision of rejecting the jurisprudence of the 'overall' or 'ultimate control' based on limited practice, basically based on just the *Behrami/Saramati* decision. However, the unsuccessful decision of the ECtHR should not have persuaded the ILC to reject the 'overall control' test. The 'overall control' was used in the *Tadic* case and according to Professor Cassese, is more reflective state practice than the effective control test. Moreover, the 'effective control' test requires a high evidentiary threshold, which will prove problematic to fulfil.

Article 7 of DARIO also permits dual attribution and the same conduct may be attributed to more than one entity. In the Srebrenica trials in the Netherlands, dual attribution was taken into consideration and in *Nuhanovic*, it was held that it was possible that both the Netherlands and the UN had effective control over the same wrongful conduct. However, the dual attribution could not be confirmed due to the fact that UN invokes its immunity in every instance and has never subjected itself to any investigation or judicial review

Universal human rights are the common heritage of all democratic nations today. The ideals of democracy and the respect for the rule of law, call for accountability in every form of government. Traditionally, states are the primary bearers of responsibility in following international human rights norms, but the evolution of international organizations alongside states and beyond them as governmental powers, makes them responsible.

In humanitarian crisis, the affected state is still considered accountable in providing human rights protections to its people. However, the host states are usually burdened by the crisis and often are unable to provide even the basic needs, let alone equipped to conduct investigations and prosecute crimes committed by relief or aid personnel within their jurisdiction. The international organizations that arrive in the affected state are often there armed with mandates for the protection human rights. International organizations should therefore at least comply with the standards it sets. Furthermore, the UN, has been mandated to exercise governmental powers, including control over territories, such as the interim administration that was created in Kosovo. It is not justifiable that the global administrators have no accountability for their actions.

International operations are also often run with a sense of urgency and on an ad hoc. Humanitarian crisis are sudden and require speedy actions, but international humanitarian organizations, such as the UN have operated in similar circumstances for decades, so the lack of accountability mechanisms for personnel are not justified. The basic necessities of life should obviously be priorities, but there is no legal hierarchy between human rights.⁵⁵⁴ UN needs to see the reality on the ground and not having proper accountability mechanisms in place is not acceptable. A proper, independent system needs to be placed to gain oversight over international organizations.

In recent decades human rights and international criminal law has brought the role of victims to the forefront. The ICC Statute is significant in the development of victims' rights and it is historically the first time victims have the possibility to present their views and observations

⁵⁵⁴ *Ibid.* at 907.

before the ICC. The UN Victims resolution of 2006 allows victims to seek remedy and reparation on the basis of human solidarity and legal liability, beyond state responsibility. The resolution addresses also non-state actors that could be applied to international organizations.

While it is recognized that high officials and representatives are in political positions that could make them vulnerable to politically motivated prosecutions, the interpretation of functional immunities should not lead to impunity. International organizations interpret their immunities strictly and on their own accord. It seems that the immunities of the UN have formed to be more absolute than the immunities of heads of states. The UN has never waived immunity, even though it has the obligation to do so under the CPIUN.

International tribunals could provide an impartial and independent review over the conduct of international organizations, and the UN should be open to that. After all, although international tribunals are independent, they have been created by or under the protection of the UN. Also, good defences against accusations of UN personnel having committed crimes may exist, however, these would have to be established at a trial before a court and for this purpose a waiver of immunity is necessary.⁵⁵⁵

Article 5 of the VCLT requires parties to treaties to perform their treaty obligations in good faith and it is extended to a constituent instrument of an international organization and member have a duty to act as good members.⁵⁵⁶ States respect the immunities of the UN, but the UN should hold its end of the agreement and respect the jurisdiction of states and their responsibility of protecting human rights and waive immunity.

The current legal atmosphere where international organizations exercise increasingly more state-like functions, but enjoy unlimited and absolute immunities, is hard to justify in time where and the calls for accountability of states and end to impunity have increased. Especially in international administration, where the use of force is allowed and international organizations and other entities who enact those powers are the true government, which decide upon the rights of the individuals, the lack of judicial remedies for victims and accountability of international organizations is difficult to justify in terms of rule of law.⁵⁵⁷ Unlimited privileges and immunities in circumstances of international administration are 'incompatible with recognised international human rights standards'.⁵⁵⁸ For decades, the UN has tried to review its policies and implement 'zero-tolerance' policies on abuses by peacekeepers, but little has changed. It is high time for the UN to take its own advice and allow transparent, independent review over its conduct.

⁵⁵⁵ Szasz, Ingadottir, *The UN and the ICC* (2001), *supra* note 395, at 881.

⁵⁵⁶ Blokker, Schermers, *Mission Impossible?* *supra* note, 461, at 51.

⁵⁵⁷ Klabbers, *International Institutional Law* (2009), *supra* note 2, at 151.

⁵⁵⁸ See Ombudsperson in Kosovo, Special Report No.1, 26 April 2001, para. 28: 'The Ombudsperson is, therefore, of the opinion that UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) is incompatible with recognized international human rights standards.'