Responsibility of International Organizations – Introducing the ILC's DARIO

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Abstract

The responsibility of international organizations is a field of international law which has gained importance in theory and practice especially within the last decades. As of 2002, also the International Law Commission started attending to the topic. It concluded its work in August 2011 by adopting on second reading a set of 67 *Draft Articles on Responsibility of International Organizations* (DARIO). The purpose of this contribution is to give an introduction and assessment of the content and potential of these articles and to evaluate the critique that has been raised so far. The DARIO are modelled after the Commission's previous and very successful work, the *Articles on State Responsibility* (ASR). Thus, the question can be posed whether the DARIO are likely to follow in the footsteps of its older sibling, the ASR, to become similarly successful.

Keywords

Responsibility of International Organizations; State Responsibility; Draft Articles on Responsibility of International Organizations; International Law Commission

I. Introduction

In August 2011, the ILC adopted the Draft Articles on Responsibility of International Organizations (DARIO).[1] At first sight, the DARIO seem to be the revised, extended version of the Commission's masterpiece, the Articles on State Responsibility (ASR).[2]

The purpose of this article is to present the keystones of the DARIO, to scratch the surface of some of the articles and their Commentary, and finally, to grapple with the main points of criticism that

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1 Report of the ILC, GAOR 66th Sess., Suppl. 10, Doc. A/66/10, 54 et seq.

2 GAOR 56th Sess., Suppl. 10, Doc. A/56/10, 43 et seq.; because of the wide acceptance that the ASR have met and their wide reflection of customary international law, it seems appropriate to no longer speak of Draft Articles on State Responsibility but solely of Articles on State Responsibility.

have been raised so far. As the ASR have become a box office hit and the DARIO look the same, the question can be raised whether the DARIO thus have the same potential. The contribution will proceed as follows: it will start with some background information on the DARIO (II.) and will then describe the scope of the articles (III.), the conditions for responsibility to arise (IV.) and the circumstances precluding wrongfulness (V.). What the consequences of a wrongful act are and how responsibility of an international organization can be invoked will be dealt with in Section VI. In Section VII., the responsibility in cases of connected conduct is outlined. The article will conclude with an analysis of the critique raised so far (VIII.) and some final remarks (IX.).

II. Some Background Information

1. Development of the DARIO

The ILC included the topic "Responsibility of International Organizations" in its program of work only in 2002, although it had already detected the need for a law of responsibility of international organizations many years before.[3] The Special Rapporteur, Giorgio Gaja, drew up eight reports from 2002 to 2011. The Commission adopted the DARIO on first reading in 2009 and then on second reading in 2011. The Commission finished this work expeditiously – in comparison, it took the Commission 45 years (1956 – 2001), more than thirty reports, and the work of five Special Rapporteurs to conclude its work on the analogous topic of State Responsibility.

2. The Reasons behind the DARIO

When thinking about legal responsibility of international organizations one can first wonder why international organizations can be held responsible at all, namely by third, non-member states. The Commission states in article 3 DARIO:

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[3] See A. El-Erian, Special Rapporteur on Relations between States and Intergovernmental Organizations, *First Report on Relations between States and Intergovernmental Organizations, ILCYB* 1963, Vol. II, 184, paras 172 et seq.

"Every internationally wrongful act of an international organization entails the international responsibility of that organization."

Some argue that this reflects a rule of international law, either by stating that it reflects a general principle of law[4] or by finding that this is a rule of international customary law.[5] Others base their reasoning on the international legal personality of international organizations.[6] Behind this legal argumentation one can find a political consideration which is based on the major role that international organizations nowadays play at the global level: because of their major role it would seem intolerable not to hold them responsible when violating international norms.[7]

The Commission bases article 3 DARIO on all of these legal considerations together: it seems to interpret the international responsibility of international organizations as being part of customary international law by relying on two references that can be interpreted as a proof for "practice" on the one hand and *opinio juris* on the other hand.[8] In addi-

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4 M.H. Arsanjani, "Claims Against International Organizations", *Yale Journal of World Public Order* 7 (1981), 131 et seq.

5 E.g. M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, 1995, 8; ILA, Final Report, *Accountability of International Organisations*, Berlin Conference 2004, 26, available at <http://www.ila-hq.org>.

6 E.g. I. Brownlie, *Principles of Public International Law*, 2008, 683 et seq.; K. Ginther, "International Organizations, Responsibility", in: R. Bernhardt, *Encyclopedia of Public International Law II*, 1995, 1336; M. Hartwig, "International Organizations or Institutions, Responsibility and Liability", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2012, Vol. VI, 6 et seq., paras 11 et seq.

7 E.g. Hirsch, see note 5, 8; E. Paasivirta and P.J. Kuijper speak of a public morals argument, id., "Does One Size Fit All?: The European Community and the Responsibility of International Organizations", *NYIL* 36 (2005), 169 et seq. (172 et seq.).

8 The Commission draws upon two references: first, it cites the United Nations Secretary-General who stated, in a report on peacekeeping operations: "the principle of state responsibility-widely accepted to be applicable to international organizations-that damage caused in breach of an international obligation and which is attributable to the state (or to the Organization) entails the international responsibility of the state (or of the Organization) [...]." Second, the Commission refers to the Advisory Opinion of the ICJ on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, 88 et seq., para. 66, in which the Court said: "[...] the Court wishes to point out

tion, according to article 2 lit. (a) DARIO, the responsibility of an international organization is linked to its international legal personality.[9] Thereby the Commission clearly favors understanding the international legal personality of international organizations to be an "objective" personality, which does not need to be recognized by an injured state before considering whether the organization may be held internationally responsible according to the DARIO.[10] This last part of the sentence may at first sight seem to extend the rights of an injured state by according the possibility to refer directly to the injuring international organization. This possibility, however, has its downside as the injured party then has only limited possibility to refer to the Member States directly, because the DARIO do not establish a general concurrent or subsidiary responsibility of Member States.[11]

In the Commentary to article 3, the Commission states: "The general principle, as stated in article 3, applies to whichever entity commits an internationally wrongful act."[12] Thus, the Commission also relies on a general principle of law. It is especially noteworthy that the Commission here speaks of a general principle which applies for "whichever entity." It seems that the Commission here wants to pave the way for more international responsibility regimes.

Whereas the principle that international organizations may be held internationally responsible for their acts is widely accepted today, this may not be the case for all of the provisions contained in the DARIO.

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that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts." See Commentary to article 3, see note 1, paras 1 et seq. with reference to Doc. A/51/389, 4, para. 6.

9 This link has been pointed at by the Commission more strongly in its work on the ASR, see note 2, 4 and 34.

10 Commentary to article 2, see note 1, para. 9; whether international organizations have such an objective international legal personality which does not depend on the recognition of a third party is still a matter of controversy, compare e.g. K. Schmalenbach, "International Organizations or Institutions, General Aspects", in: Max Planck Encyclopedia, see note 6, Vol. VI, 31 et seq.; C. Ryngaert/ H. Buchanan, "Member State Responsibility for the Acts of International Organizations", *Utrecht Law Review* 7 (2011), 131 et seq. (134 et seq.).

11 See Section VII.

12 Commentary to article 3, see note 1, para. 1.

The Commission makes clear in its General Commentary that, because of the absence of relevant practice with regard to some aspects, the DARIO to a certain extent constitute not a codification but rather a progressive development of the law.[13]

3. The Methodological Approach of the Commission

The DARIO will probably seem very familiar to all who have already been concerned with the ASR. This is because the Commission took the ASR as the basis for the DARIO. The DARIO follow the general outline of the ASR and many of the provisions are the same except that it says "international organization" instead of "state".[14] The Commission had already taken the same approach earlier, when it drafted the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations on the basis of the 1969 Vienna Convention on the Law of Treaties.[15] The underlying assumption of the approach taken here is that, as states and international organizations are both subjects of international law, they should in principle be addressees of the same rules when breaching their international obligations.[16]

III. The Scope of the DARIO

According to article 1 the DARIO apply:

> "1. [...] to the international responsibility of an international organization for an internationally wrongful act.
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> 2. [...] to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization."

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13 General Commentary to the DARIO, see note 1, para. 5; regarding the criticism raised thereto see Section VIII.

14 When this contribution refers to the corresponding articles of the ASR, it may not always replicate this exception.

15 Cf. thereto the analysis by C. Brölmann, "International Organizations and Treaties: Contractual Freedom and Institutional Constraint", in: J. Klabbers / Å. Wallendahl, *Research Handbook on the Law of International Organizations*, 2011, 285 et seq. (292 et seq.).

16 To the critique thereon see Section VIII.

Ratione personae, the DARIO contain not only provisions on the responsibility of international organizations according to article 1 (1) DARIO, but to a certain extent also on the responsibility of states according to article 1 (2) DARIO. The latter was left out in the ASR, according to its article 57.

The understanding of "international organization" chosen here by the Commission is wider than, for example, that in the Vienna Conventions.[17]

Article 2 lit. (a) DARIO reads:

"For the purposes of the present draft articles,

(a) 'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."

Thus, an international organization, as understood here, cannot only be established by an international treaty, but also by a resolution adopted by another international organization or by a conference of states.[18] Not only intergovernmental organizations are covered, but also international organizations that have been established with the participation of state organs other than governments or by other entities.[19] Also entities, such as the European Union, that have diverged from being a classical international organization, are included in that notion.[20] As the formulation "treaty or other instrument governed by interna-

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17 See article 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, Doc. A/CONF.67/16; article 2 (1) (n) of the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978; 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, Doc. A/CONF.129/15; this has been criticized by M. Mendelson, "The Definition of 'International Organization' in the International Law Commission's Current Project on the Responsibility of International Organizations", in: M. Ragazzi (ed.), *International Responsibility Today – Essays in Memory of Oscar Schachter*, 2005, 371 et seq.

18 Commentary to article 2, see note 1, para. 5.

19 Commentary to article 2, ibid., para. 3.

20 On the criticism see Section VIII.

tional law" makes clear, organizations which are established through instruments governed by municipal law are not covered.[21]

The DARIO do not apply to the international responsibility of an individual.[22] This follows already from article 1 DARIO and is made clear again in article 66 DARIO.[23]

Ratione materiae, the DARIO are limited in their scope to the consequences of a breach of *international* law. The responsibility of an international organization because of a breach of *municipal* law does not fall within the scope of the DARIO.[24] This is indicated clearly throughout the articles by the requirement of an "internationally" wrongful act. According to article 5 "[t]he characterization of an act of an international organization as internationally wrongful is governed by international law."

IV. The Elements of Responsibility

Article 4 DARIO states that:

> "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
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> (b) constitutes a breach of an international obligation of that organization."

This is exactly the formulation as can be found in article 2 ASR. The Commission states in its Commentary that "article 4 expresses with regard to international organizations a general principle that applies to every internationally wrongful act, whoever its author."[25]

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21 Cf. Commentary to article 2, see note 1, para. 6.

22 For this compare generally A. O'Shea, "Individual Criminal Responsibility", in: Max Planck Encyclopedia, see note 6, Vol. V, 141 et seq.

23 Article 66 DARIO reads: "These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State."

24 Cf. Commentary to article 1, see note 1, para. 3.

25 Commentary to article 4, ibid., para. 1.

1. Attributable Conduct

As article 4 DARIO explicitly states, there must be a conduct which either can be an action or an omission. An omission generally can only be relevant when there is an obligation for the international organization to act.[26] Whether the conduct can be attributed to the organization is addressed in articles 6 to 9 DARIO. This contribution will, in the following, mainly concentrate on article 6 and article 7 DARIO, as they are likely to cause the most difficulties.

a. Conduct of Organs or Agents, Article 6 DARIO

Attributable is, first of all, the conduct of an organ or agent of an international organization in the performance of its functions according to article 6 DARIO. What is meant by "organ" and "agent" can be found in article 2 DARIO. Pursuant to article 2 lit. (c) DARIO:

> "'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization",

no matter if it is explicitly called "organ" or if it gains that status from its functions.[27]

Whereas the attribution of conduct of organs is well familiar from article 4 ASR, the attribution of conduct of agents as provided for in article 6 DARIO is different and thus deserves special attention.

Article 2 lit. (d) DARIO provides for a very wide understanding of the term "agent". According to this provision,

> "'agent of an international organization' means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."

This may be not only natural persons, but also other entities.[28]

The definition contained in article 2 lit. (d) DARIO is based on a passage of the Advisory Opinion of the ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*, where the Court stated:

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26 Cf. Commentary to Chapter III DARIO, ibid., para. 2.

27 Cf. Commentary to article 2, ibid., paras 20 et seq., and Commentary to article 6, ibid., para. 1.

28 Commentary to article 2, ibid., para. 25.

> "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."[29]

Because of the wide definition of "agent", article 6 DARIO is very comprehensive in its scope. This becomes particularly obvious when recalling article 8 ASR. The latter article deals with the attribution of the conduct of a person or group of persons to a state when acting on the instructions, or under the direction or control of that state.[30] For the question, whether the person or group of persons had acted "under the direction or control" of a state, different criteria have been developed by the ICJ in the *Nicaragua*[31] case on the one hand, and by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić*[32] case on the other hand.[33] One cannot find an identically worded provision to article 8 ASR in the DARIO. Instead, the Commission subsumes this situation under article 6 DARIO. By this, the Commission wants the same criteria to be applied with regard to international organizations under article 6 DARIO as the ones developed with regard to states under article 8 ASR. This is made clear by the Commission in the Commentary to article 6 DARIO. Here, the Commission states: "[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2."[34]

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29 ICJ Reports 1949, 174 et seq. (177).

30 Article 8 ASR provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

31 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14 et seq.

32 *Prosecutor v. Duško Tadić*, ICTY, Case IT-94-1-A (1999), *ILM* 38 (1999), 1518 et seq.

33 See e.g. Commentary to article 8 ASR, see note 2, paras 4 et seq.; as to the criticism that has been expressed with regard to article 8 ASR and the attribution of conduct of private persons compare e.g. R. Wolfrum, "State Responsibility for Private Actors: An Old Problem of Renewed Relevance", in: Ragazzi, see note 17, 423 et seq.

34 Commentary to article 6, see note 1, para. 11.

According to article 6 (1) DARIO, the conduct is only attributable if the organ or agent acted "in the performance of functions of that organ or agent ... ". For the determination of the functions, article 6 (2) DARIO refers to the "rules of the organization." The Commission finds though, that "in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization."[35] This clarification is especially relevant with regard to *de facto* organs or agents that can be subsumed under article 6 DARIO when acting under the instructions, the direction or control of an international organization (see above), as they may not be entrusted with functions pursuant to the rules of the organization.[36]

A conduct can also be attributed in case of an *ultra vires* act.[37] According to article 8 DARIO "[t]he 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."

b. Conduct of Organs of a State or Organs or Agents of an International Organization, Article 7 DARIO

The conduct of organs of a state as well as of organs or agents of an international organization that have been placed at the disposal of another international organization can be attributed according to article 7 DARIO, provided that the latter "exercises effective control over that conduct."[38] For this, the Commission states, "'operational' control would seem more significant than 'ultimate' control, since the latter

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35 Ibid., para. 9.

36 Ibid., para. 11.

37 To the wide acceptance of this and its bases see P. Klein, "The Attribution of Acts to International Organizations", in: J. Crawford/ A. Pellet/ S. Olleson, *The Law of International Responsibility*, 2010, 304 et seq.

38 Article 7 reads: "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."

hardly implies a role in the act in question."[39] To determine if an international organization has effective control, the "factual circumstances and particular context" are decisive.[40] The situation that the Commission refers to here explicitly is the one of military contingents that a state places at the disposal of the United Nations for a peacekeeping operation.[41] In the Commentary,[42] the Commission examines *inter alia* the jurisdiction of the European Court of Human Rights, which dealt with this situation in *Behrami and Saramati,*[43] and subsequently in *Kasumaj v. Greece,*[44] *Gajić v. Germany*[45] as well as *Berić and others v. Bosnia and Herzegovina.*[46]. In those decisions, the Court had referred to the work of the Commission and also applied the criterion of "effective control". However, the Court there relied on "ultimate authority and control" rather than on "operational control". In *Al-Jedda v.*

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39 Commentary to article 7, see note 1, para. 10; for more details on the discussion compare the various authors the Commission cites in its footnote 115, 89; compare also N. Tsagourias, "The Responsibility of International Organisations", in: M. Odello / R. Piotrowicz, *International Military Missions and International Law,* 2011, 245 et seq.; K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *EJIL* 19 (2008), 509 et seq.

40 Commentary to article 7, see note 1, para. 4; an extensive evaluation of the responsibility practice of international organizations can be found at K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen*, 2004.

41 Commentary to article 7, see note 1, para. 1.

42 Ibid., paras 10 et seq., compare also the references of the Commission to a long list of literature thereon in footnote 115.

43 ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* Decision (Grand Chamber) of 2 March 2007 on the admissibility of Applications No. 71412/01 and No. 78166/01. Compare thereto C.A. Bell, "Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision", *N.Y.U.J.Int'l L. & Pol.* 42 (2009-2010), 501 et seq.

44 Decision of 5 July 2007 on the Admissibility of Application No. 6974/05.

45 Decision of 28 August 2007 on the Admissibility of Application No. 31446/02.

46 Decision of 16 October 2007 on the Admissibility of Applications Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

United Kingdom[47] on the other hand, the Court considered that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations."[48] In this formulation one may see an approximation of the Commission's and the Court's positions.

2. Breach of an International Obligation

As stated in article 4 lit. (b) DARIO, the action or omission must constitute a breach of an international obligation of the respective organization. According to article 10 (1) DARIO "[t]here is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned."

The obligation that is breached cannot be found in the DARIO itself. The Commission even writes in the General Commentary that "[n]othing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations."[49] Just like the ASR, the DARIO contain only secondary rules, as opposed to primary obligations.[50]

As the formulation "regardless of its origin" makes clear, the primary obligation can be found in any source of international law – e.g. in international treaties, customary international law or it can be established by a general principle.[51]

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47 Judgment (Grand Chamber), 7 July 2011, <http://cimskp.echr.coe.int>, para. 56.

48 Ibid., para. 84.

49 General Commentary to the DARIO, see note 1, para. 3.

50 Criticism on this dichotomy and its inconsistent use has been raised by A. Nollkaemper/ D. Jacobs, "Shared Responsibility in International Law: A Conceptual Framework", *SHARES Research Paper* 03 (2011), ACIL 2011-07, 81 et seq., <www.sharesproject.nl>.

51 These are the sources of international law the Commission names in the Commentary to article 10, see note 1, para. 2, as already in the Commentary to article 12 ASR, see note 2, para. 3; that sources of international law besides the ones contained in the catalogue of Article 38 (1) ICJ Statute

The Commission states in the Commentary to article 10 DARIO that "[a]n international obligation may be owed by an international organization to the international community as a whole, one or several states, whether members or nonmembers, another international organization or other international organizations and any other subject of international law."[52] As a consequence, this can also be an obligation owed to an individual as far as the individual is a subject of international law. In the General Commentary to the ASR, the Commission wrote this more explicitly when stating that "they apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."

The Commission names some examples for international obligations owed to individuals by stating in the Commentary: "[w]ith regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals."[53]

An international obligation may also arise for an international organization towards its members under the rules of the organization according to article 10 (2) DARIO. According to article 2 lit. (b) "'rules of the organization' means, 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." The formulation "towards its members" in article 10 (2) DARIO seems to suggest that only obligations owed to the members but not the ones owed to the personnel or other individuals are included. On the other hand, the Commission states in the Commentary that: "The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organiza-

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should be widely accepted, see R. Wolfrum, "Sources of International Law", in: Max Planck Encyclopedia, see note 6, Vol. IX, 299 et seq.; W. Graf Vitzthum, *Völkerrecht*, 2010, 66 et seq.

52 Commentary to article 10, see note 1, para. 3.

53 Commentary to article 33, ibid., para. 5; for the limited consequences arising for individuals and the impossibility for them to invoke responsibility themselves according to the DARIO see Section VI.

tion."[54] Moreover it states: "Paragraph 2 refers to the international obligations arising 'for an international organization towards its members', because these are the largest category of international obligations flowing from the rules of the organization. This reference is not intended to exclude the possibility that other rules of the organization may form part of international law."[55]

The ILC has referred to the "rules of the organization" before.[56] The definition as contained in article 2 DARIO is mainly based on the definition of the 1986 Vienna Convention.[57] What constitutes an "established practice" of an organization has been discussed since then.[58] The "rules of international organizations", however, have a far greater importance in the DARIO than they had in the Vienna Convention, since, for example, they can be constitutive for the responsibility of an organization, as article 10 (2) DARIO makes clear.

The extent to which rules of international organizations are of an international law character is a matter of controversy.[59] As pointed out

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54 Commentary to article 10, see note 1, para. 4.

55 Ibid., 98, para. 8.

56 See article 5 of the 1969 Vienna Convention on the Law of Treaties; article 3 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations and article 2 of the 1986 Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations. However, only the latter contains a definition.

57 The Commission points this out in the Commentary to article 2, see note 1, para. 16.

58 See further on the issue C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", ACIL Research Paper No. 2011-03 (*SHARES Series*), finalized 26 April 2011, <www.sharesproject.nt>, 19 et seq.; C. Peters, "Subsequent Practice and Established Practice of an International Organization: Two Sides of the Same Coin?", *Goettingen Journal of International Law* 3 (2011), 617 et seq.; that also the case law of the court of an organization should be seen as "established practice" of that organization has been argued e.g. by the European Commission, Doc. A/CN.4/545, 15; see also Paasivirta/ Kuijper, see note 7, 214 et seq.

59 This is also noted by the Commission in Commentary to article 10, see note 1, para. 5; compare ILA, *Committee on Accountability of International Organizations, First Report*, Taipei Conference 1998, 593 et seq.; see also M. Benzing, "International Organizations and Institutions, Secondary Law", in: Max Planck Encyclopedia, see note 6, Vol. VI, 74 et seq.; Ahlborn, see note 58 and id., "UNESCO Approves Palestinian Membership

above, only breaches of international law are covered by the scope of the DARIO. The Commission states that "to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law."[60]

The Commission writes in the Commentary that "paragraph 2 does not attempt to express a clear-cut view on the issue." But by stating that a "breach of an international obligation […] may arise for an international organization […] under the rules of the organization" it clearly rejects the view that the secondary law of an international organization does not form part of international law but supports the opinion that secondary rules of international organizations form, at least to a certain extent, part of the sources of international law today.[61] The Commission, however, acknowledges that organizations that have obtained a high level of integration, such as the European Union, are a special case.[62] This acknowledgment is reflected again in the *lex specialis* rule as contained in article 64 DARIO.[63]

Bid - A Case for US Countermeasures Against the Organization?", who doubts that an international organization can incur international responsibility for a breach of its own rules, <http://www.ejiltalk.org> 2011.

60 Commentary to article 10, see note 1, para. 7.

61 Benzing, see note 59, states in para. 49 that: "It is safe to conclude that legal acts of international organizations and institutions, inasmuch as they are binding, have by now acquired the status of a source of international law."

62 Commentary to article 10, see note 1, para. 5 with reference to the decision of the ECJ in *Costa v. E.N.E.L.*; compare on this issue e.g. A. von Bogdandy/ M. Smrkolj, "European Community and Union Law and International Law", in: Max Planck Encyclopedia, see note 6, Vol. III, 828 et seq., paras 2 et seq.

63 Article 64 reads: "These draft 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 of 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."; see also Section VIII.

3. Further Elements

Further elements to the ones described in article 4 DARIO are not required for international responsibility to arise according to the DARIO. However, further elements can be necessary according to the primary obligation. The primary obligation can require, for example, that there must be fault or that the injured party must have suffered a certain damage.[64]

V. Circumstances Precluding Wrongfulness

Even when the elements of responsibility are met, there may be circumstances that preclude the wrongfulness of the respective conduct.[65] These circumstances are set out in articles 20 to 27 DARIO, which correspond to articles 20 to 27 ASR.[66]

1. Consent, Article 20 DARIO

As one of these circumstances, article 20 DARIO sets out the valid consent of a state or an international organization to the commission of the act in question.[67] As in article 20 ASR, here the consent can also be given expressly or implicitly and it can be given in advance or even at the time the act is occurring. By contrast, a consent given after the conduct has occurred is a form of waiver or acquiescence and thus regulated in article 46 DARIO.[68] A consent given by an international or-

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64 Commentary to article 4, see note 1, para. 3; further elaborated in the Commentary to article 2 ASR, see note 2, paras 3, 9 et seq.

65 One can argue that the conduct is actually "wrongful but excused", see V. Lowe, "Precluding Wrongfulness or Responsibility: A Plea for Excuses", *EJIL* 10 (1999), 405 et seq.; G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Band I/3, 2002, 919.

66 On the criticism of these provisions see also Section VIII.

67 Article 20 reads: "Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent."

68 Article 46 reads: "The responsibility of an international organization may not be invoked if: (a) the injured State or international organization has val-

ganization "does not affect international obligations to the extent that they may also exist towards the members of the consenting organization, unless that organization has been empowered to express consent also on behalf of the members."[69]

2. Self-Defense, Article 21 DARIO

According to article 21 DARIO, "[t]he wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law."

The Commission had considered whether a distinction should be made between self-defense by states and self-defense by international organizations.[70] In the end, it decided that "[f]or reasons of coherency, the concept of self-defence which has […] been elaborated with regard to States should be used also with regard to international organizations."[71] The conditions that must be met by an international organization in order to be acting in self-defense are a question of primary rules.[72] Only when an international organization complies with those rules, can the wrongfulness of the conduct be precluded. Self-defense is, as is well-known, an exception to the prohibition of the use of force.[73] The ILC also understands self-defense in the context of the DARIO this way.[74] Thus, the wrongfulness of the use of force by an international organization can be precluded when it acts in self-defense, which

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idly waived the claim; (b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim."; compare also Commentary to article 20 ASR, see note 2, para. 3.

69 Commentary to article 20, see note 1, para. 4.

70 Cf. also M.H. Arsanjani, "Claims against International Organizations: Quis custodiet ipsos custodes?", *Yale Journal of World Public Order* 7 (1980-81), 131 et seq. (176); P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, 1998, 421; Schmalenbach, see note 40, 264 et seq.; M.C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, 2004, 17.

71 Commentary to article 21, see note 1, para. 2.

72 Ibid., para. 4.

73 See generally M. Bothe, "Friedenssicherung und Kriegsrecht", in: Vitzthum, see note 51, 655 et seq.

74 Cf. Commentary to article 21, see note 1, para. 1.

may be seen a far-reaching conclusion.[75] In addition, it is noted by the Commission that the understanding of "self-defense" has been widened in practice with regard to UN peace-keeping and peace-enforcement missions to "defense of the mission".[76]

3. Countermeasures, Article 22 and Articles 51 to 57 DARIO

The Commission also decided to include provisions on countermeasures in the DARIO. The inclusion of provisions on countermeasures had already been a matter of controversy with regard to the ASR.[77] Thus one can imagine that the inclusion of countermeasures taken by international organizations, especially against states, would be no less a matter of discussion.[78] According to article 22 DARIO, the wrongfulness of an act of an international organization can be excluded also when this act constitutes a lawful countermeasure.[79] The countermea-

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75 This equalization of international organizations with states has been criticized see Section VIII.

76 Commentary to article 21, see note 1, para. 3; see in greater detail the fourth report of the Special Rapporteur, 2006, Doc. A/CN.4/564, paras 16 et seq.; further examinations on the issue can be found at T. Findlay, *The Use of Force in UN Peace Operations*, 2002; compare also K.E. Cox, "Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force", *Den. J. Int'l Law & Policy* 23 (1999), 239 et seq., and by M. Frulli, "Le operazioni di *peacekeeping* delle Nazioni Unite e l'uso della forza", *Riv. Dir. Int.* 84 (2001), 347 et seq.

77 Cf. J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, 47-49. For a definition of countermeasures with regard to states compare D. Alland, "The Definition of Countermeasures", in: Crawford/ Pellet/ Olleson, see note 37, 1135: "countermeasures are pacific unilateral reactions which are intrinsically unlawful, which are adopted by one or more states against another state, when the former consider that the latter has committed an internationally wrongful act which could justify such a reaction."

78 Harsh criticism came e.g. from J. Alvarez, *Misadventures in Subjecthood*, 2010, <http://www.ejiltalk.org>.

79 Article 22 reads: "1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for

sure taken by the international organization is a reaction to the wrongful conduct of another international organization or a state and a remedy of the former against the wrongful act of the latter. Like the ASR, the DARIO or their Commentary also do not provide for a definition of countermeasures.[80] As an example of measures that have been called countermeasures in practice so far, the Commission names the "suspension of concessions or other obligations."[81]

Two situations need to be distinguished here: first, where a countermeasure is taken against another international organization. Second, where a countermeasure is taken against a state. The first situation, where an international organization takes countermeasures against another international organization, and its conditions, is dealt with in articles 51 to 57 DARIO. The situation that an international organization takes countermeasures against a state that has committed a wrongful act against the international organization, is not dealt with in articles 51 to 57 DARIO. Article 22 (1) DARIO refers to "the substantive and procedural conditions required by international law" instead. The Commission suggests applying the conditions set out for countermeasures taken by a state against another state in articles 49 to 54 ASR by analogy here.[82] When an international organization intends to take countermeasures against its members, it must additionally fulfill the requirements set out in article 22 (2) and (3) DARIO. The exercise of countermeasures by an international organization against its members may namely be prohibited by the rules of the organization.[83]

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countermeasures taken against another international organization. 2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless: (a) the conditions referred to in paragraph 1 are met; (b) the countermeasures are not inconsistent with the rules of the organization; and (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation. 3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules."

80 Cf. therefore e.g. Alland, see note 77.

81 Commentary to article 51, see note 1, para. 4.

82 Commentary to article 22, ibid., para. 2.

83 Cf. also Ahlborn, see note 59.

4. *Force Majeure*, Article 23 DARIO

Significantly less controversial has been the case of *force majeure*. This is hardly surprising, given that the concept of *force majeure* is a widely accepted concept applicable not only to states but also to other subjects of law.[84] According to article 23 (1) DARIO the wrongfulness of an act of an international organization is precluded "if the act is due to *force majeure,* that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation."

Whereas the Special Rapporteur had still recommended in his fourth report[85] to include financial distress as a case of *force majeur*e, the Commentary to the DARIO does not mention financial distress at all. The reason for this can be found in the statement of the Chairman of the Drafting Committee of 8 June 2006: "The Committee was of the view that there may be various reasons for financial distress of an international organization, such as poor management, non-payment of dues by member States, unanticipated expenses, etc., most of which could not be considered cases of force majeure. Financial distress of an international organization could amount to force majeure only in exceptional circumstances. […] It was further agreed, that, while there may be circumstances that financial distress of an international organization may satisfy the requirement of force majeure, it was not prudent to use it as a prime example of a case of force majeure even in the commentary, since it might be misleading."[86]

5. Distress, Article 24 DARIO

When "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care" the wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded according to article 24 DARIO.

As an example of distress, the Commission refers to the Commentary on the corresponding article 24 ASR which names "aircraft and

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84 Cf. for the concept in general S. Hentrei/ X. Soley, "Force Majeure", in: Max Planck Encyclopedia, see note 6, Vol. IV, 151 et seq.

85 Doc. A/CN.4/564, para. 31.

86 Available at <http://www.un.org/law/ilc/>, see 5 et seq. of the statement.

ships entering State territory under stress of weather or following mechanical or navigational failure"[87] as the most common cases of distress and states also that "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases."[88] These examples show, despite this last cited sentence, that the field of application of cases of distress is very limited. In addition, the Commission decided to include a limitation *ratione personae*: the act must be committed for "saving the author's life or the lives of other persons entrusted to the author's care."

The Commission has discussed whether this requirement was too narrow as there may be situations where an international organization would intervene to prevent loss of life of individuals with whom it had no special relationship. The considerations of the Drafting Committee were very extensive here and even touched upon the issues of the Responsibility to Protect and humanitarian intervention. In the end it decided not to extent the scope of distress further as laid down in the ASR.[89]

6. Necessity, Article 25 DARIO

According to the Special Rapporteur, "[n]ecessity is probably the most controversial circumstance precluding wrongfulness. It has almost always been considered only in relation to States."[90] Nevertheless, "[t]he general view was that international organizations should be able to invoke necessity. But it was the general view that such a right should be circumscribed carefully."[91]

Article 25 DARIO, at first sight, looks basically the same as article 25 ASR, but there is one significant difference: whereas article 25 ASR refers to "an essential interest of the State or of the international com-

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87 Commentary to article 24 ASR, see note 2, para. 3.

88 Ibid., para. 4.

89 Statement of the Chairman of the Drafting Committee of 8 June 2006, see note 86, 6 et seq.

90 Fourth Report of the Special Rapporteur, Doc. A/CN.4/564, para. 35; compare especially the discussion in the Sixth Committee of the UN General Assembly of 5 November 2004, Doc. A/CN.6/59/SR.22.

91 This was the general view of the ILC, see Statement of the Chairman of the Drafting Committee of 8 June 2006, see note 86, 8.

munity as a whole"[92], an international organization can only invoke necessity "to safeguard […] an essential interest of its member States or of the international community as a whole."[93] In addition, an international organization can only invoke necessity for an essential interest "when the organization has, in accordance with international law, the function to protect the interest in question" according to article 25 (1) lit. (a) DARIO.[94] Thus, an international organization cannot invoke necessity, according to article 25 DARIO, only for the protection of its own interests.[95]

The example for a case of necessity given in the Commentary reflects how remote the Commission has finally become from its initial considerations.[96] The Commission names access to the electronic ac-

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92 Commentary to article 25 ASR, see note 2, para. 2.

93 Article 25 reads: "1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act: (a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole when the organization has, in accordance with international law, the function to protect the interest in question; and (b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the organization has contributed to the situation of necessity."

94 It is very interesting to see the development of this article. The Special Rapporteur had suggested in his fourth report (2006) only that there must be "an essential interest that the organization has the function to protect." In its report of 2006 (Doc. A/61/10), the Commission suggested that there must be "an essential interest of the international community as a whole" and "the organization [must have], in accordance with international law, the function to protect that interest."

95 Cf. the criticism on the previous version of article 25, A. Reinisch, "Editorial: How Necessary is Necessity for International Organizations?", *International Organizations Law Review* 3 (2006), 177 et seq.

96 Here the Committee also touched upon issues of humanitarian intervention e.g. as already in the context of distress, see above. Compare therefore also the literature on necessity in the context of state responsibility and human rights protection as a case of necessity: C. Ryngaert, "State Responsibility, Necessity and Human Rights", *NYIL* 41 (2010), 79 et seq.

count of an employee who was on leave as a case of urgency as the only example for necessity in the Commentary to article 25 DARIO.[97]

VI. Consequences of an Internationally Wrongful Act and Invocation of Responsibility

1. Consequences

Again when it comes to the legal consequences arising from an internationally wrongful act, articles 28 et seq. DARIO mirror articles 28 et seq. ASR. As in the case of state responsibility, an international organization may also have the continued duty to perform the obligation breached (article 29 DARIO), to cease the act if it is continuing (article 30 lit. (a) DARIO), and under certain circumstances to offer appropriate assurances and guarantees of non-repetition (article 30 lit. (b) DARIO).[98] Finally it has the duty to make reparation for the injury caused according to article 31, articles 34 et seq. DARIO. Reparation may be owed in the form of restitution, compensation and satisfaction, article 34 DARIO.[99] To a certain extent these consequences may also arise when circumstances precluding wrongfulness have been invoked according to article 27 DARIO.[100]

As articles 28 et seq. DARIO to the widest extent correspond to articles 28 et seq. ASR, in the following this contribution will concentrate

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97 Commentary to article 25, see note 1, para. 2.

98 Article 29 reads: "The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached."; article 30 DARIO reads: "The international organization responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

99 Article 34 reads: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter."

100 Article 27 reads: "The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question."

on the aspects that differ or may cause special problems with regard to international organizations.

According to article 31 (1) DARIO "[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act." An international organization may, however, face difficulties in having the necessary means for making the required reparation, especially compensation.[101] When an international organization is financially not able to fulfill its obligation to pay compensation, the question can be raised whether an injured party can have recourse to the Member States. The existence of such a subsidiary obligation of Member States to pay for the debts of an international organization has been rejected by the Commission.[102] To ensure that the injured parties do not remain empty-handed, the Commission included article 40 (1) DARIO, according to which "the responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations" arising as a consequence of an internationally wrongful act. In addition, according to article 40 (2) DARIO, "[t]he members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfill its obligations" arising as a consequence of an internationally wrongful act.[103]

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101 Cf. also Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 10 February 2011, on Legal Responsibility of International Organizations in International Law, <http://www.chathamhouse.org>, 10.

102 Commentary to article 40, see note 1, para. 2 with reference to comments of states and international organizations; in favor of such a subsidiary obligation on the other hand e.g. W. Meng, "Internationale Organisationen im völkerrechtlichen Deliktsrecht", *ZaöRV* 45 (1985), 325 et seq. (338); I. Seidl-Hohenveldern, "Responsibility of Member States of an International Organization for Acts of that Organization", in: id., *Collected Essays on International Investments and on International Organizations*, 1998, 63 et seq.

103 This provision had been a matter of controversy. In an earlier draft it created a primary obligation for the Member States directly. It read: "The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter." See Titles and Texts of Draft Articles 31 to 45 [44] adopted by the Drafting Committee on 18, 19, 20 and 25

Despite its initial intention[104] not to do so, the Commission in article 40 (1) DARIO clearly lays down a primary obligation for international organizations. By its own definition, "primary rules of international law [are those rules], which establish obligations for international organizations, and secondary rules [are those rules], which consider the existence of a breach of an international obligation and its consequences for the responsible international organization."[105] The duty contained in article 40 (1) DARIO however, certainly does not describe the conditions for such a breach. In addition, article 40 (1) DARIO does not contain a rule on the consequences of the breach as it addresses another level than the obligations elsewhere contained in articles 28 et seq. DARIO. This already becomes apparent when looking at the relationship of the parties involved in the rest of the provisions on consequences according to articles 28 et seq. The parties concerned in article 40 (1) DARIO are the international organizations and its Member States, whereas apart from that the secondary rules address the relationship between the wrongfully acting international organization and the injured party.[106]

Finally, a crucial provision, when it comes to the consequences of the breach, is article 33 DARIO. According to article 33 (1) "[t]he obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach." The Commission thus decided in favor of a traditional approach as already taken analogously in article 33 ASR. It reflects a traditional view of the international legal system as a system focused on states, equating now to a certain extent international organizations, but not individuals or other entities.[107]

July 2007, Doc. A/CN.4/L720 as well as the statement of the Chairman of the Drafting Committee of 31 July 2007.

104 Cf. General Commentary to the DARIO, see note 1, para. 3.

105 Ibid.

106 On the distinction between primary and secondary rules see above; on the difficulties to consequently abide by this dichotomy compare Nollkaemper/ Jacobs, see note 50, 81 et seq.

107 Cf. for the analogous situation of State Responsibility also E. Brown Weiss, "Invoking State Responsibility in the Twenty-First Century", *AJIL* 96 (2002), 798 et seq.

The Commission concedes that international obligations exist towards individuals and can be breached by states and international organizations according to the ASR and the DARIO.[108] However, the consequences of these breaches with regard to individuals are not covered by the ASR or the DARIO.[109] According to article 33 (2) of the DARIO it "is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization." This provision refers to the consequences of breaches that may arise *vis-à-vis* individuals directly, e.g. according to human rights treaties.

2. Invocation of Responsibility

The DARIO also contain provisions regarding the invocation of responsibility in articles 43 et seq. According thereto, the responsibility of an international organization can be invoked by an injured state or an injured international organization (article 43)[110] and under certain circumstances also by a non-injured state or international organization (article 48).[111] There is no possibility for individuals or entities other

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108 See Section IV. 2.

109 Commentary to article 33, see note 1, para. 5; this is criticized by A. von Bogdandy/ M. Steinbrück Platise, "DARIO and Human Rights Protection: Leaving the Individual in the Cold", *International Organizations Law Review* (forthcoming).

110 Article 43 reads: "A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to: (a) that State or the former international organization individually; (b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation: (i) specially affects that State or that international organization; or (ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation."

111 Article 48 reads: "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

than states or international organizations to invoke responsibility directly according to the DARIO.[112] When there is no special rule entitling the individual to invoke responsibility itself (compare article 50 DARIO), the person will need to rely on diplomatic protection.[113] The rules on diplomatic protection have been elaborated by the Commission in the Draft Articles on Diplomatic Protection of 2006.[114] The Commission originally treated questions of diplomatic protection as part of the study on state responsibility.[115] Because of the limitation of the possibility to invoke responsibility, both topics remain closely connected. Article 45 (1) DARIO therefore refers to a rule that is central when exercising diplomatic protection, the rule of nationality of claims.[116]

Article 45 (2) DARIO makes clear that the local remedies rule can be applicable also with regard to claims against international organizations by states or other international organizations. According thereto, when an effective remedy within an international organization is avail-

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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."

112 Cf. for the criticism von Bogdandy/ Steinbrück Platise, see note 109; this has also been criticized by Brown Weiss with regard to state responsibility, see note 107, 815; compare also the réplique of J. Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", *AJIL* 96 (2002), 874 et seq. (886 et seq.).

113 Article 50 reads: "This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization."

114 Draft Articles on Diplomatic Protection, ILC Report of the 58th Sess., 2006, Doc. A/61/10, 13 et seq.

115 Cf. General Commentary to the Draft Articles on Diplomatic Protection, ibid., 22.

116 Article 45 reads: "1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims. 2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted."

able, an injured state or international organization may not invoke the responsibility before exhausting this remedy.[117]

VII. Responsibility in Cases of Connected Conduct of States and International Organizations

Articles 16 et seq. ASR contain rules on the responsibility of a state when it acts in connection with another state. Articles 14 et seq. DARIO as well as articles 58 et seq. DARIO complement these provisions. They are patterned after articles 16 et seq. ASR as the Commission tried to set up a coherent system of rules when a state acts in connection with the conduct of a state (articles 16 et seq. ASR) or an international organization (articles 58 et seq. DARIO) and *vice versa* when an international organization acts in connection with the act of a state or another international organization (articles 14 et seq. DARIO). Because of the corresponding content of articles 14 et seq. DARIO and articles 58 et seq. DARIO, they shall be dealt with here subsequently, despite their systematic position in the DARIO.

1. Responsibility of an International Organization in Connection with the Act of a State or another International Organization, Articles 14 et seq. DARIO

Under certain conditions, an international organization may be responsible for an act of a state or another international organization. Articles 14 et seq. DARIO set out these conditions.

a. Aid or Assistance, Article 14 DARIO

First, article 14 DARIO addresses the situation where an international organization "aids or assists a State or another international organiza-

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117 The Commission notes in the Commentary to article 45, see note 1, para. 7: "Although the term 'local remedies' may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2"; for an overview of the remedies available, which are still in an embryonic stage, compare e.g. Schmalenbach, see note 10.

tion in the commission of an internationally wrongful act."[118] Article 14 DARIO corresponds to article 16 ASR. The Commission writes in the Commentary: "The international responsibility that an entity may incur under international law for aiding or assisting another entity in the commission of an internationally wrongful act does not appear to depend on the nature and character of the entities concerned."[119] Thereby the Commission formulates another general rule applicable to all entities.

According to article 14 DARIO, the aiding or assisting international organization is responsible, given that it knew of the circumstances (lit. (a)) and that the act would be internationally wrongful when committed by the organization itself (lit. (b)). As the formulation "in the commission of an internationally wrongful act" suggests, the internationally wrongful conduct must actually be committed by the aided or assisted state. The wording of the precondition set out in article 14 lit. (a) DARIO is in fact misleading as according thereto, the mere "knowledge" would be sufficient. The Commission, however, states, with reference to the Commentary on article 16 ASR, that the international organization needs to "intend" to facilitate the occurrence of the wrongful conduct by the aid or assistance given. In addition, the Commission requires in the Commentary that the "aid or assistance should contribute 'significantly' to the commission of the act."[120]

b. Direction and Control, Article 15 DARIO

Second, corresponding to article 17 ASR, an international organization can be responsible when it directs and controls a state or another international organization in the commission of an internationally wrongful

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118 Article 14 reads: "An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization."

119 Commentary to article 14, see note 1, para. 1.

120 A critical assessment of the article, especially when the aid or assistance exclusively consists of financial support can be found at A. Reinisch, "Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts", *International Organizations Law Review* 7 (2010), 63-77.

act, according to article 15 DARIO.[121] As in article 17 ASR, a narrow understanding of "direction" and "control" underlies article 15 DARIO: "[T]he term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern", and "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."[122] Again, the organization must be aware of the circumstances (lit. (a)) and the act would need to be internationally wrongful when committed by that organization itself (lit. (b)).[123] Also here, mere knowledge would not be enough, instead there must be an intention by the international organization and the internationally wrongful conduct must actually be committed.[124] To detect the intention of the international organization should, however, not be too difficult in such a case of direction and control.

c. Coercion, Article 16 DARIO

Third, article 16 DARIO deals with the situation when an international organization coerces a state or another international organization to commit an internationally wrongful act.[125] By referring to the Commentary of article 18 ASR, the Commission makes clear, that "coercion" here needs to be understood just as narrowly as in article 18 ASR: "Coercion for the purpose of article 18 has the same essential character as force majeure under article 23. Nothing less than conduct which forces the will of the coerced state will suffice, giving it no effective

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121 Article 15 reads: "An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization."

122 Commentary to article 15, see note 1, para. 4, with reference to the Commentary on article 17 ASR, see note 2, 43, para. 7.

123 For a further assessment compare Reinisch, see note 120.

124 Cf. Commentary to article 15 DARIO, see note 1, para. 6.

125 Article 16 reads: "An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and (b) the coercing international organization does so with knowledge of the circumstances of the act."

choice but to comply with the wishes of the coercing State."[126] Unlike the previous articles, article 16 DARIO does not require the act to be wrongful if committed by the coercing organization. Instead the act needs to be wrongful for the coerced entity, (compare article 16 lit. (a) DARIO).

d. Circumvention, Article 17 DARIO

Finally, the most interesting provision here is the one that cannot be found correspondingly in the ASR, which is article 17 DARIO.[127] This provision takes into account that an international organization may circumvent its international obligations both through its decisions and authorizations. Article 17 DARIO describes two situations: first, when an international organization adopts a decision binding its Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization. The responsibility of the international organization is already triggered by the adoption of the binding decision – the bound Member State or international organization does not need to already have implemented the decision and thus have committed the act.

The second situation occurs when an international organization authorizes its Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.[128] Unlike the case before, the act which is authorized

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126 Commentary to article 16, see note 1, para. 4, with reference to the Commentary to article 18 ASR, see note 2, para. 2.

127 Article 17 reads: "1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization. 2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization. 3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed."

128 For a critical examination of the inclusion of this situation in the DARIO, compare N. Blokker, "Abuse of the Members: Questions concerning the Draft Article 16 of the Draft Articles on Responsibility of International

needs to be actually committed. Moreover, it needs to be committed "because of that authorization", according to article 17 (2) DARIO.

In both cases the international organization circumvents one of its international obligations. "The term 'circumvention' implies an intention on the part of the international organization to take advantage of the separate legal personality of its members […]."[129] The less discretion the international organization gives in its decision to the addressees, the more obvious may be the organization's intention to circumvent its obligation.

In its previous version of article 17 DARIO, the Commission had also referred to a third situation. It found, that "an international organization incurs international responsibility if it […] recommends that a member State or international organization commit such an [internationally wrongful] act."[130] In his eighth report, the Special Rapporteur explained the reasons for the inclusion of "recommendations" by stating: "[t]he idea that an international organization may be responsible when it recommends a certain action to a member is based on the assumption that members are unlikely to ignore recommendations systematically. At least some of the members may be prompted to follow the recommendation."[131] In the present articles, this was dropped. Various international organizations as well as states had criticized the inclusion of responsibility because of non-binding recommendations in the DARIO, pointing to the considerable extension of responsibility that would result thereof.[132] An argument against the inclusion of recommendations in article 17 DARIO is that, as a Member State is not obliged to implement a recommendation, the implementation is based on its own decision (at least from a formal legal perspective), which

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Organizations", *International Organizations Law Review* 7 (2010), 35 et seq. (46).

129 Commentary to article 17, see note 1, para. 4.

130 The current article 17 was article 16 back then, Report of the ILC, GAOR 64th Sess., Suppl. No. 10, Doc. A/64/10, 24.

131 Eighth Report on Responsibility of International Organizations, Doc. A/CN.4/640, para. 56, 20.

132 See the comments of inter alia the IMF (Doc. A/CN.4/637), of the European Commission or the International Labour Organization (both Doc. A/CN.4/637, Section II.B.12) or of the Nordic Countries (Doc. A/C.6/64/SR.15, para. 28).

outweighs the initial conduct (the recommendation) of the international organization.[133]

2. Responsibility of a State in Connection with the Conduct of an International Organization

Articles 58 et seq. DARIO contain rules on the responsibility of a state in connection with the conduct of an international organization. According to article 57 ASR, this had been left out in the ASR.[134] Articles 58 et seq. DARIO are patterned after articles 16 et seq. ASR, like articles 14 et seq. DARIO.

As can be inferred from the articles 58 et seq. DARIO, the mere membership in an international organization is not sufficient to trigger responsibility. In the Commentary, the Commission explicitly states that "[…] membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act."[135] Instead, there must be a certain conduct, be it aid or assistance (article 58 DARIO), direction and control (article 59 DARIO), coercion (article 60 DARIO), the circumvention of international obligations (article 61 DARIO), the acceptance of responsibility or a certain causation of reliance of the injured party (article 62 DARIO).

The question whether a state should be responsible for the wrongdoing of an international organization, solely because of its membership, has been a matter of controversy for a long time, especially since the collapse of the International Tin Council in 1985.[136] The ILC aligns with the Institute of International Law, which stated in its resolution of 1995 that: "[s]ave as specified in article 5, there is no general rule of international law whereby States members are, due solely to their mem-

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133 Cf. also the statement of the ILO, ibid., which speaks of a broken chain of causation; Blokker, see note 128, 43 et seq.

134 Nevertheless, Member States may be responsible, next to the situations described in the DARIO, according to the ASR. Compare Commentary to article 62, see note 1, para. 1.

135 Commentary to article 62, see note 1, para. 2.

136 Cf. on this the analysis made by the Special Rapporteur in his Fourth Report, Doc. A/CN.4/564/Add.2, with references to a large list of literature in footnotes 160 et seq.

bership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[137]

a. Aid or Assistance, Article 58 DARIO

Article 58 DARIO describes the reversed situation of article 14 DARIO.[138] Whereas in article 14 DARIO an international organization aids or assists a state (or another international organization) in the commission of a wrongful act, in article 58 DARIO a state aids or assists an international organization in the commission of a wrongful act. A state can thus not only be responsible when assisting or aiding another state (article 16 ASR), but also when assisting or aiding an international organization in the commission of a wrongful act (article 58 DARIO). Unfortunately, the Commission does not refer explicitly to the requirements, as stated above, that the relevant state organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct, that the internationally wrongful conduct is actually committed by the aided or assisted international organization and also that the aid or assistance contributed "significantly" to the commission of the act.[139] However, as the Commission makes clear that article 58

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137 Article 6 (a) *Annuaire de l'Institut de Droit International*, Vol. 66-II (1996), 445; the ILA obviously was of the same view in its Berlin Report of 2004, see note 5, when it stated: "The question of concurrent or residual liability of Member states for non-fulfilment by IO-s of their obligations towards third parties has already been fully covered in the 1995 Resolution of the Institut de Droit International: 'The Legal Consequences for Member states of the Non-Fulfilment by International Organisations of their Obligations toward Third Parties'. The Committee did not therefore feel it necessary to go further into the matter.", compare on the other hand A. Stumer, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections", *Harv. Int'l L. J.*, 48 (2007), 553 et seq.

138 Article 58 reads: "1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article."

139 Commentary to article 16 ASR, see note 2, para. 5; the Special Rapporteur had pointed out that there should be some clarification in the Commentary,

DARIO is to be seen as the equivalent to article 14 DARIO and article 16 ASR, one can suppose that the Commission wanted these requirements to be applied here as well.[140]

On the other hand, article 58 (2) DARIO contains a provision that cannot be found in these two other articles. According to article 58 (2) DARIO, "[a]n act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article." Unfortunately, the Commission remains very unclear as to what exactly this means. To specify this provision, the Commission only states in the commentary abstractly that "[t]he factual context such as the size of membership and the nature of the involvement will probably be decisive."[141] The Special Rapporteur pointed out that "for the purpose of assessing whether aid or assistance occurs, much depends on the content of the obligation breached and on the circumstances."[142]

To understand article 58 (2) DARIO better, it is helpful to look into the eighth report of the Special Rapporteur.[143] Until then, no such provision had been included in article 58 DARIO, but only in the Commentary, which stated that "the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization."[144] This formulation, that was in fact a lot more narrow than the one now contained in article 58 (2) DARIO, has already been challenged.[145]

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but apparently this was not effectuated by the Commission, see Seventh Report of the Special Rapporteur, 2009, Doc. A/CN./610, para. 75.

140 Commentary to article 58, see note 1, para. 3: "The present article uses the same wording as article 16 on the Responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State."

141 Commentary to article 58, see note 1, para. 4.

142 Seventh Report of the Special Rapporteur, 2009, see note 139, para. 75.

143 Eighth Report of the Special Rapporteur, 2011, Doc. A/CN.4/640, para. 103.

144 Commentary to article 57, para. 2, Report of the ILC on the work of its 61st Sess., Doc. A/64/10.

145 J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *ILR* 129 (2007), 91 et seq. (97 et seq.); C. Ryngaert/ H. Buchanan, "Member State Responsibility

One main difficulty in a situation of aid and assistance by a state here is how to delineate when the conduct of the state needs to be seen as part of its function as a state on the one hand and when the conduct of the state needs to be seen as an action in its function as a member of an international organization on the other hand.

In most international organizations members of policy-making organs are representatives from governments. To see every action of that representative as the action of the state would of course completely undermine the separate legal personality of an international organization. On the other hand, one should not forget that the rules of an international organization cannot be applied to the detriment of a third party, as they are *res inter alios acta* to them. The extensiveness of the wording of this provision is especially problematic with regard to third parties. This needs to be kept in mind when interpreting article 58 (2) DARIO. The Commission states in the Commentary that "while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members."[146]

b. Direction and Control, Article 59 DARIO

Also with regard to "direction and control", the Commission creates a coherent system for the situation where a state directs and controls another state or an international organization as well as the reversed situation, when an international organization directs and controls another international organization or a state, according to article 59, 15 DARIO and article 17 ASR.[147] For all three articles the same requirements apply. Article 59 (2) DARIO contains a provision parallel to the one in article

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for the Acts of International Organizations", *Utrecht Law Review* 7 (2011), 131 et seq. (143); both refer to P. Klein, *La Responsabilité des Organizations Internationales Dans les Ordres Juridiques Internes et en Droit des Gens*, 1998, 469 et seq.

146 Commentary to article 5, see note 1, para. 3.

147 Article 59 reads: "1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State. 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article."

58 (2) DARIO and thus, raises similar problems. The Commission states: "As in the case of aid or assistance, which is considered in article 58 and the related commentary, a distinction has to be made between participation by a member State in the decision making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been discussed in the commentary on the previous article."[148]

c. Coercion, Article 60 DARIO

A similar triplet can be found in the case of coercion, according to article 16, 60 DARIO and article 18 ASR.[149] The conditions applicable according to the three articles are essentially the same.[150] Article 60 DARIO contains no provisions like articles 58 (2) and 59 (2) DARIO "because it seems highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization."[151]

d. Circumvention of International Obligations, Article 61 DARIO

Article 61 DARIO can be seen in connection with article 17 DARIO.[152] Whereas article 17 DARIO addresses the situation that an international organization circumvents its international obligation by, in a certain

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148 Commentary to article 58, see note 1, para. 2.

149 Article 60 reads: "A State which coerces an international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and (b) the coercing State does so with knowledge of the circumstances of the act."

150 See above.

151 Commentary to article 60, see note 1, para. 3.

152 Article 61 reads: "1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization."

way, using a Member State or another international organization, article 61 DARIO addresses the reversed situation of a state taking advantage of an international organization of which it is a member.

As in article 17 DARIO, "circumvention" implies also in article 61 DARIO the existence of an intention to avoid compliance.[153] In addition, three conditions need to be met in order for responsibility to arise for a Member State under article 61: first, the international organization needs to have competence in relation to the subject matter of an international obligation of the state. Second, the Member State needs to have caused the organization to commit an act. The Commission speaks of the necessity of "a significant link between the conduct of the circumventing member State and that of the international organization."[154] Third, the act in question needs to constitute a breach of an international obligation if committed by the state.

e. Acceptance or Causation of Reliance, Article 62 DARIO

The last two cases of responsibility of states mentioned in the DARIO are those of acceptance of responsibility in article 62 (1) lit. (a), and of causation of reliance according to article 62 (1) lit. (b) DARIO.[155]

As provided for in article 62 (1) lit. (a) DARIO, a Member State is also responsible for an internationally wrongful act when it accepts responsibility for it towards the third party, expressly or implicitly, before or after the responsibility arises for the international organization.[156]

In addition, the Member State is responsible when its conduct has led the third party to rely on its responsibility, according to article 62 (1) lit. (b) DARIO. The Commission here lays down a provision which

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153 Commentary to article 61, see note 1, para. 2; Commentary to article 17, see note 1, para. 4. The Commission thus decided in favor of a subjective concept – other than in the preliminary version of article 61 DARIO where an objective approach had been pursued. Compare on this E. Paasivirta, "Responsibility of a Member State of an International Organization: Where Will It End?", *International Organizations Law Review* 7 (2010), 49 et seq. (58 et seq.).

154 Commentary to article 61, see note 1, para. 7.

155 Article 62 reads: "1. A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility. 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary."

156 Cf. Commentary to article 62, see note 1, para. 6.

protects the good faith of third parties. Unfortunately, the Commission does not set up the further requirements to determine what constitutes sufficient causation of reliance. If understood widely, this provision could be applied in a way that would undermine the aforementioned decision against a general responsibility of Member States for the acts of an international organization. As stated above, "membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act."[157]

It will thus be necessary here to draw a line between conduct that solely reflects the exercise of membership on the one hand and the causation of reliance for third parties on the other hand. For this differentiation it will also be necessary to have in mind that Member States will intervene more in the decision-making process of an international organization when they know that they will probably be held responsible for the acts of the international organization.[158] When interpreting article 62 (1) lit. (b) DARIO one can also take into account the basic considerations that underlie article 58 (2) DARIO.[159]

VIII. Critique

The Commission has faced some critique for the DARIO. In the following, the main points of criticism shall be dealt with.

1. Comparing Apples and Oranges I: States vs. International Organizations

One of the main points of criticism raised has been that the ILC does not recognize sufficiently the differences between states and international organizations in the DARIO.[160] Some even found that the

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157 Id., see note 1, para. 2.

158 See Fourth Report of the Special Rapporteur 2006, Doc. A/CN.4/564/Add.2, para. 94 with further references.

159 The Special Rapporteur mentions in his Fourth Report (see above, para. 93) the relevance of voting behavior of a state for its responsibility. Similar considerations can be made in a situation according to article 58 DARIO.

160 E.g. J. Wouters/ J. Odermatt, "Are All International Organizations Created Equal? Reflections on the ILC's Draft Articles of Responsibility of Inter-

DARIO have turned out to be only a "find and replace" exercise of the ILC - wherever the word "state" originally appeared it was replaced by the word "international organization."[161]

By equating international organizations to a large extent with states, the ILC has indeed been very progressive at least in some parts, e.g. when it comes to circumstances precluding wrongfulness.[162] However, probably no one would doubt that international organizations have become very powerful actors at the international level. Where functions have been conferred on them, they may act as independent subjects of international law in place of states. When they do so – carrying out tasks that have so far been fulfilled by states – it seems logical to hold them responsible equally for their conduct. It does not seem plausible that a completely different legal regime dealing with the legal consequences of breaches of international law by them should be established.[163]

On the contrary, this would lead to a large fragmentation of international law in that field. In addition, different legal regimes applicable for states on the one hand, and international organizations on the other, could create incentives for states to circumvent international responsibility by using the international legal personality of international organizations when their responsibility regime is shaped more leniently than that of states. *Vice versa*, the importance of international organizations could decrease, when their international responsibility is more encompassing than that of other subjects of international law, especially states.

2. Comparing Apples and Oranges II: The Variety of International Organizations

A second point that has been criticized is that the DARIO do not differentiate between the different kinds of international organizations,

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national Organizations", *Global Governance Opinions* March 2012, <www.globalgovernancestudies.eu>.

161 J.E. Alvarez, speech before the Canadian Council on International Law, 27 October 2006, <http://www.asil.org>.

162 See Section V.

163 See also Blokker, see note 128, 36.

namely with regard to regional economic integration organizations.[164] Often mentioned here are the problems of attribution that arise e.g. when acts of the EU are implemented by its Member States or in the case of mixed agreements of the EU and its Member States with third states.[165]

The implementation of the law of the EU is primarily carried out by the authorities of its Member States. When the EU is bound by an international obligation but the breach is actually committed through the conduct of Member States, the question is whether this conduct is attributable to the EU. As a reaction to the critique on the insufficient differentiation, the Commission has included a far-reaching *lex specialis* provision in article 64 DARIO. According thereto the DARIO "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 of 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." In the Commentary, the Commission explicitly refers to the problem of attribution in case of implementation as just described and sees this as a situation where special rules apply. With that provision, the Commission opens up the DARIO for a far-reaching differentiation between the various international organizations.

With regard to mixed agreements, whose characteristic is that the EU, its Member States and third states are parties to, it is a matter of controversy who is responsible for what obligation contained in the agreement.[166] The Commission addresses this problem in the Commen-

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164 See Paasivirta/ Kuijper, see note 7, 206; especially the European Commission pointed out that the special characteristics of the European Community (now European Union) need to be addressed, Doc. A/C.6/58/SR.14, paras 13 et seq.; Doc. A/CN.4/545, 5; confirmed again in 2011, Doc. A/C.6/66/SR.18, paras 38 et seq.

165 Cf. S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment", in: Ragazzi, see note 17, 405 et seq. (408 et seq.); Paasivirta/ Kuijper, see note 7, 184 et seq.

166 For further details compare M. Möldner, "European Community and Union, Mixed Agreements", in: Max Planck Encyclopedia, see note 6, Vol. III, 854 et seq., paras 32 et seq.

tary to article 48 DARIO.[167] It decides in favor of a joint responsibility of the EU and its Member States when the agreement does not provide for the apportionment of the responsibility between the EU and its Member States,[168] which probably reflects the prevailing view on the issue.[169]

3. Putting the Cart before the Horse – The Lack of Primary Rules

Third, it has been criticized that the secondary rules of the DARIO have been framed before even the primary rules have been clearly established.[170] It is certainly true that many primary rules are still controversial, e.g. when it comes to human rights obligations of international organizations. It would probably have been easier to establish the secondary obligations if the primary ones were already further developed. Examples of this again are circumstances precluding wrongfulness, e.g. self-defense, which are closely intertwined with questions of primary norms.[171] Nevertheless, certain primary rules already undoubtedly exist, others are emerging.[172] They would be toothless if they did not lead to any consequences. Considered from the perspective of the injured party, it is clearly favorable when generally applicable secondary rules exist.

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167 Article 48 reads: "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."

168 Commentary to article 48, see note 1, para. 1.

169 Cf. Möldner, see note 166, paras 32 et seq.

170 Alvarez, see not 161, 12.

171 See Section V.

172 E.g. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005, 400 et seq.

4. The DARIO as a Dry Run – The Lack of Practice

Fourth, it has been said that, whereas the ASR were based on the practice of states, the necessary practice is missing with regard to the DARIO.[173] The ILC confirms this by stating in the General Commentary to the DARIO that "[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter."[174] However, this does not necessarily need to be seen as a negative aspect. The ILC has the mandate for both the codification and the progressive development of international law according to article 13 (1) lit. (a) UN Charter and article 1 (1) ILC Statute.[175] A predominance of progressive development by the Commission can also be seen positively as the mere codification may bear a risk of writing down only the past and thus impeding further developments of the rules.[176] Here, the progressive development of the rules seems to lead to an improvement of the position of injured parties, and to enhanced accountability of the injuring parties, which should be welcomed. Given the current, deficient situation of possibilities of legal redress, we probably could have waited for more than 45 years (which were needed for the work on the ASR to be concluded) if we had waited for an extensive practice to emerge. Such an extension of the working period of the ILC would then, without doubt, have led to further criticism.

IX. Final Remarks

Even though there may be some vagueness with regard to particular articles, the general approach of the Commission, to create a coherent system of responsibility for states and international organizations, should be supported. Responsibility as established here can serve as an

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173 J.E. Alvarez, "Memo to the State Department Advisory Committee: ILC's Draft Articles on the Responsibility of International Organizations", Meeting of June 21, 2010, <http://www.law.nyu.edu>.

174 General Commentary to the DARIO, see note 1, para. 5.

175 Article 1 (1) ILC Statute reads: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

176 Sir A. Watts, "Codification and Progressive Development of International Law", in: Max Planck Encyclopedia, see note 6, Vol. II, 282 et seq., para. 19.

important aspect of enhanced accountability of international organizations. Throughout the articles, the Commission repeatedly referred to general principles underlying the DARIO that would also be applicable to other subjects of international law committing an internationally wrongful act. This may open the door for the establishment of further, equally structured international responsibility regimes in the future. A drawback of the approach taken by the Commission is that it did not go further when it came to the rights of individuals. These were already limited in the ASR and are now equally limited in the DARIO, as the consequences of breaches with regard to individuals are not covered by the DARIO and individuals cannot invoke responsibility on their own.

The Commission has not only substantially but also procedurally pursued the same approach with the DARIO as with regard to the ASR, by recommending to the General Assembly to take note of the DARIO in a resolution, to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. This approach has proved very successful with regard to the ASR. They have become widely accepted in practice and in academia. The regime of state responsibility is of course older than that of responsibility of international organizations, and courts as well as the Commission have grappled with the former for a long period of time and thus have had time to develop it. The DARIO on the other hand are young, and still rather in their teenage stage of development. They can be given more time now to evolve in practice. As DARIO's older, adult sibling, the ASR has turned out so well, it can at least be hoped for the younger brother to turn out equally well - and thus become the Super-DARIO. What should, however, be developed now, out of its rather embryonic stage, are the remedies available to claim the responsibility of an international organization.