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International Responsibility of Public International Organizations and Their Member States

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INTERNATIONAL RESPONSIBILITY OF PUBLIC INTERNATIONAL ORGANIZATIONS AND THEIR MEMBER STATES

by

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J.D., Free University of Berlin, 1993

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INTERNATIONAL RESPONSIBILITY OF PUBLIC INTERNATIONAL ORGANIZATIONS AND THEIR MEMBER STATES

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I. Introduction

The title indicates that the thesis will deal mainly with two problems: the responsibility of international organizations for their acts in international law and the responsibility of their member states for these acts.

Part II will explore what kinds of international organizations exist and what requirements must be met by an international organization to be able to act under international law. It will show that an international organization which has the capacity to act under international law is an international person. The meaning, the source, and the scope of this personality will be analyzed.

Part III will investigate the international responsibility of such an international organization. It will explain why an international organization is responsible for its illegal acts. It will also explain what rules of responsibility are applicable and how they are applied to an international organization.

Part IV will answer the question whether and under what circumstances the member states of an international organization are responsible. This section will differentiate between the responsibility of member states for their own conduct and the responsibility for conduct of their organization. It will be revealed also that the responsibility of the member states for the acts of their organization is restricted. Finally it will show how this responsibility is attributed to the member states and how it is shared among them.
II. International Organizations in International Law

A. Types of International Organizations

There are different types of international organizations depending upon the different founding subjects and applicable legal orders. The notion "international" does not indicate that an international organization has the power to act under international law. Therefore not every international organization has the capacity of committing breaches of international law. That is why the different types of international organizations have to be examined in order to determine their capacity in and under international law.

1. Public International Organization

To create a public international organization, several criteria have to be met:

First, the organization must be established by an international agreement which places it under the order of international law. Secondly, the organization must be equipped with

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1 Terminology used by HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW, 8, § 11, (2d ed. 1980) and art.34 (2) of the Statute of the International Court of Justice, June 26, 1945, 59 United States Statutes At Large 1031, 1059 (hereinafter Stat.).

organs capable of expressing the independent will of the organization. Thirdly, the organization must have defined aims. And, in order to reach these aims, it must be established for an appropriate period of time.

a. International Agreement as Founding Instrument

Only an international agreement, an agreement concluded by subjects of international law, can create a public international organization. An agreement by subjects of national law cannot create a public international organization because these subjects do not have such capacity under international law.

Most of the time, such an international agreement is a written treaty, since it provides more security and clarity in regard to the aims and competences of the organization. But it is recognized that a public international organization can also be created by other forms of agreement.

As to the subjects of international law having the capacity to establish such an organization, reference has to be made to states as original subjects of international law. Their power to create a public international organization is unquestioned. However, it is uncertain whether public international organizations also have such power. Although it is recognized that public international organizations can be members of another public international organization, their creating capacity is denied. Taking into account that

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4 SCHERMERS, supra note 1, at 9, § 12 (giving some examples); Barberis, supra note 2, at 217.

5 SCHERMERS, supra note 1, at 9, § 12; Yasseen, supra note 3, at 34.

6 SEIDL-HOHENVELDERN/LOIBL, supra note 2, at 5, Nr 0110; Vignes, in HANDBOOK, supra note 3, at 59. See Henry G. Schermers, International Organizations as Members of Other International Organizations, in FESTSCHRIFT
these organizations can conclude treaties, if their constituting treaties confer them the treaty-making power, with states or other public international organizations, it is contradictory to deny them the power to create another public international organization as long as the so-created organization can support the constitutional aims of the founding organizations. If this requirement is fulfilled, the creating capacity of public international organizations should be recognized.

b. International Law as Legal Order
An organization is a public international organization only if it is governed by international law because only then does it have an international personality distinct from that of its founders. If an organization is governed by national law, it has a national, not an international, personality.

FÜR HERMANN MOSLER 823, 832 (1983) for the membership of the EEC in other international organizations.

7 See SCHERMERS, supra note 1, at 10, § 14; Yasseen, supra note 3, at 34. See also SEIDL-HOHENVELDERS/LOIBL, supra note 2, at 3-5, Nr 0105/0110.


9 Barberis, supra note 2, at 218. Therefore the term "public international organization" is used instead of "international governmental organization".
Therefore, an agreement which forms a public international organization has to make sure that the organization is governed by international law. The creating members determine whether the system of national or international law is decisive for that organization. This is true even if only public international organizations create a public international organization because they can place the created organization under the legal system of one of their member states instead of international law.

c. Aims and Duration

In order to contribute to international cooperation, a public international organization must have clearly defined aims. These aims, as well as the competences to achieve them, have to be laid down in the constituting agreement. But even with a set of clearly defined aims and related competences, an organization is an ephemeral entity, if its constituting agreement does not provide an appropriate period of time to enable the organization to accomplish those aims.

If these requirements are met, a failure to fulfill one of those aims will be inconsequential, since this will be a question of fact but not of law.

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10 Epping, in KNUT IPSEN, VÖLKERRECHT 68 (3d ed. 1990) (hereinafter VÖLKERRECHT); SCHERMERS, supra note 1, at 15, § 22 ; Barberis, supra note 2, at 220.

11 Epping, in VÖLKERRECHT, supra note 10, at 68.

12 SEIDL-HOHENVELDERN/LOIBL, supra note 2, at 4, Nr 0105. See also Roland Vaubel, A Public Choice View of International Organization, in THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS 27, 31 passim (Roland Vaubel/Thomas D. Willet eds., 1991) for an assessment of how the decisionmakers of an organization influence the achievement of these aims.

13 SEIDL-HOHENVELDERN/LOIBL, supra note 2, at 3, Nr 0105.

14 Contra id. at 6, Nr 0112.
d. Own Organs

To complete the task for which it is founded, an organization needs its own organs.\textsuperscript{15} This is an essential condition, because an organization cannot act without its organs. Not only does an organization need organs, but also the organs must be independent from any particular member\textsuperscript{16} to be able to declare their own will.\textsuperscript{17} Otherwise, there would not be a separate legal personality.

2. Private International Organization

A private international organization differs from a public international organization in so far as it is not created by an international agreement,\textsuperscript{18} and it is not governed by international law.\textsuperscript{19} A private international organization is that which is established under the regime of a state's municipal law.\textsuperscript{20} That is why it does not have an

\textsuperscript{15} SCHERMERS, \textit{supra} note 1, at 14, § 21.

\textsuperscript{16} \textit{Id}.

\textsuperscript{17} SEIDL-HOHENVELDERN/LOIBL, \textit{supra} note 2, at 5, Nr 0111. \textit{See also} Barberis, \textit{supra} note 2, at 219.

\textsuperscript{18} SEIDL-HOHENVELDERN/LOIBL, \textit{supra} note 2, at 2, Nr 0103; Epping, \textit{in VÖLKERRECHT} \textit{supra} note 10, at 73.


\textsuperscript{20} This law is private law which explains the notion of private international organization, SCHERMERS, \textit{supra} note 1, at 16, § 23. These organizations are, however, not private in the sense that no governmental organs are engaged, although most of them consist only of private - natural or moral - persons. These
international personality but only a national personality. Without an international personality, it is not a subject of international law and therefore cannot commit breaches of international law. Because of its inability to act illegally under international law, this paper will not examine further private international organization.

3. International Enterprise

There are some confusions about terminology in regard to the international enterprises. An international enterprise can be called international corporation,\textsuperscript{21} international public venture,\textsuperscript{22} public international company,\textsuperscript{23} common inter-state enterprise,\textsuperscript{24} \textit{établissement publique international}\textsuperscript{25} or \textit{entreprise publique international}.\textsuperscript{26}

Despite the differences in terminology there is consensus on its legal classification to some extent. This organization can be - contrary to what was said for a private organizations are called international organizations because they persue international purposes, SEIDL-HOHENVELDERN/LOIBL, \textit{supra} note 2, at 2, Nr 0103. Examples for such organizations are Amnesty International and Greenpeace. \textit{See also} CLIVE ARCHER, \textit{INTERNATIONAL ORGANIZATIONS} 38 \textit{passim} (2d ed.1992) (distinguishing between certain types of private international organizations).


\textsuperscript{23} SCHERMERS, \textit{supra} note 1, at 19, § 26.


\textsuperscript{25} H.T. ADAM, \textit{LES ETABLISSEMENTS PUBLICS INTERNATIONAUX} 11 (1957).

\textsuperscript{26} Barberis, \textit{supra} note 2, at 232.
international organization - created by an international agreement between states,\textsuperscript{27} but it is nevertheless placed under the regime of domestic law.\textsuperscript{28} Even when the agreement provides that the domestic law will apply only residuarily beside the rules of the constituting treaty of the enterprise, the domestic law will still have its effects upon the enterprise.\textsuperscript{29}

There may be other means of distinguishing a public international organization and an international enterprise,\textsuperscript{30} but the fact that national law governs the behaviour of the international enterprise is the most important one.\textsuperscript{31} If such an enterprise is founded by an international agreement, and if the treaty provides for application of international law, it is - though pursuing economical goals - a public international organization.\textsuperscript{32}

\textsuperscript{27} See the authors in footnote 21, 23, 26 and SEIDL-HOHENVELDERN, CORPORATIONS, \textit{supra} note 24, at 112. It is questionable whether public international organizations can also create an international enterprise. But if one accepts that they can create a public international organization, one has also to accept - \textit{a majore ad minus} - that they can create an international enterprise. The Andean Development Corporation is an example for such an enterprise, 8 I.L.M. 940 (1969).

\textsuperscript{28} See authors in note 27.

\textsuperscript{29} F.A.Mann, \textit{supra} note 21, at 147.

\textsuperscript{30} See H.T.ADAM, \textit{supra} note 25, at 11-13.

\textsuperscript{31} SCHERMERS, \textit{supra} note 1, at 20, § 28.

\textsuperscript{32} F.A.Mann, \textit{supra} note 21, at 148. \textit{But see} Barberis, \textit{supra} note 2, at 235 (considering an enterprise which is governed exclusively by its constituting treaty as an international enterprise. However, it is a public international organization because the constituting treaty which is not placed under the regime of one contracting party's domestic law has to be classified as international law, Westland Helicopters Ltd. v. Arab Organization for Industrialization, 23 I.L.M. 1071, 1081-82 (International Chamber of Commerce, Court of Arbitration, 1984), SEIDL-HOHENVELDERN, CORPORATIONS, \textit{supra} note 24, at 114). \textit{See also} Zagaris, \textit{The Rising Utility of the Public International Corporation}, 6 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 43, 45 (1976).
The international enterprise which is discussed in this subsection has no international personality. This follows from the fact that it is not governed by international law.\footnote{Exception has to be made for the type of enterprise which is mentioned in note 32.} The international enterprise is therefore unable to act illegally under international law, and thus, it will not be examined in this paper.

B. Public International Organizations as Subjects of International Law

In Part A it was said that a public international organization (hereinafter international organization) has an international personality. This makes an international organization the subject of international law. It has therefore the capacity of committing breaches of international law. Since this capacity depends upon its personality, the notion of international personality needs to be illuminated.

Not until the advisory opinion of the International Court of Justice (hereinafter ICJ) in "Reparations for Injuries Suffered in the Service of the United Nations"\footnote{Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (April 11).} was the international personality of the international organization generally accepted.\footnote{See Bardo Fassbender, Die Völkerrechtssubjektivität internationaler Organisationen, 37 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES REcht UND VÖLKERREcht (Ö.Z.Ö.R.V.) 17, 18 (1986) for the history of recognizing international organizations as international persons. See generally HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE, INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM 21 passim (2d ed.1984) for the history of public and private international organizations.} The Court stated that "the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality... It must be
acknowledged that its members, by entrusting certain functions to it, have clothed it with
the competence required to enable those functions to be effectively discharged."36
Although the advisory opinion was only concerned with the international personality of
the United Nations (hereinafter UN), it was the starting point of recognizing international
organizations as international persons distinct from their members.37

1. Meaning of International Personality
International personality means to be a subject/person38 of international law by receiving
rights and obligations of the international legal system.39 Thus, the international
personality is a consequence of being part of the international legal community. It is only
a formal description40 which does not say what rights and obligations are conferred to

36 1949 I.C.J. at 179.

37 Eckart Klein, Reparations for Injuries Suffered in the Service of UN (Advisory
Opinion), in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (E.P.I.L.),
DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS AND INTERNATIONAL

38 These notions are synonyms, Hermann Mosler, Réflexions Sur La Personnalité
Juridique En Droit International Public, in MÉLANGES OFFERTS A HENRI ROLIN,
PROBLÈMES DE DROITS DE GENS, 228, 233/234 (1964).

39 Barberis, supra note 2, at 168; Hans Kelsen, Théorie Du Droit International
Public, in 84 R.C.A.D.I. 1, 101 (1953III); Mosler, supra note 38, at 233/234;
Pierre Pescatore, Les Relations Extérieures Des Communautés Européennes, in
103 R.C.A.D.I. 1, 29/30 (1961II).

40 Kelsen, supra note 39, at 101.
the international person. However, this description is useful, because it makes clear that someone has "the capacity to operate upon the international plane".

2. Source of International Personality

The statement of the Court left uncertain whether the international personality of the UN deduces from the rights and obligations laid down in the Charter of the UN, or whether these rights and obligations bestowed upon the UN derive from its international personality. The above definition leads to the conclusion that the international personality derives from the rights and obligations which are imposed upon the international organization and not vice versa.

Following that reasoning, the question remains as to who within the international society imposes the rights and obligations upon the international organization. By bringing the organization into being, the founders confer certain rights and obligations upon it. These rights and obligations are laid down in the treaty which establishes the organization.

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44 Mosler, supra note 38, at 241.

Thus, by attributing rights and obligations to the international organization, the constituting treaty determines the international personality of the international organization.46

Some treaties provide expressly that the international organization has an international personality, e.g., art.6 ECSC- and art.210 EEC-treaty.47 But such declaration does not confer any more rights or obligations to the international organization than those already conferred upon it48. On the contrary, if the treaty declares that the organization has an international personality but fails to attribute rights and obligations to it, such declaration is meaningless and cannot create any international personality.49

Because the rights and obligations conferred upon international organizations vary according to the aims and purposes of these organizations, the extent of international


48 SEIDL-HOHENVELDERN/LOIBL, supra note 2, at 43, Nr 0324.

49 Mosler, supra note 38, at 245/246. But see Mann, supra note 46, at 306.
personalities varies, too.\textsuperscript{50} Some international organizations have, therefore, greater international personalities than others. Even so, "that is not the same thing as saying that it is a state...or that its legal personality and rights and duties are the same as those of a state",\textsuperscript{51} because international organizations are not original subjects of international law\textsuperscript{52} like states.\textsuperscript{53}

3. Scope of International Personality

A treaty which establishes an international organization is binding only for the contracting parties\textsuperscript{54} which are the members of the organization. The treaty is therefore "\textit{res inter alios acta}" for the third parties. This does not mean that the international personality of an international organization is real only for those which have ratified the treaty.\textsuperscript{55} Because of its international personality, an international organization can commit breaches of international law. It can therefore violate the international rights of non-members. If the international organization was not existing as a subject of international law, it could not violate the rights of non-members. However, the

\textsuperscript{50} Dupuy, \textit{supra} note 46, at 530; Mosler, \textit{supra} note 38, at 240.

\textsuperscript{51} 1949 I.C.J. at 179.

\textsuperscript{52} \textit{Contra} Seyerstedt, \textit{supra} note 46, at 61-62. \textit{See} Rama-Montaldo, \textit{supra} note 42, at 147.

\textsuperscript{53} \textit{E.g.} Epping, \textit{in} VÖLKERRECHT, \textit{supra} note 10, at 54.

\textsuperscript{54} Vienna Convention on the Law of Treaties, May 23, 1969, art.34, 1155 U.N.T.S. 331, 341. The rule in art.34 is customary international law and an expression of the principle of consent, \textit{e.g.}, Heintschel v. Heinegg, \textit{in} VÖLKERRECHT, \textit{supra} note 10, at 138. Although art.34 speaks only of states, it is assumed that the customary rule is in force for all subjects of international law.

\textsuperscript{55} \textit{Contra} SEIDL-HOHENVELDERN/LOIBL, \textit{supra} note 2, at 42, Nr 0321; Mann, \textit{supra} note 21, at 152.
international personality of an international organization is not opposable to non-members, since subjects of international law cannot impose any obligation on the third parties by treaties unless the third parties consent to the obligation. If the international personality of an international organization was opposable to non-members, they would have to accept the responsibility of the international organization. Since the international personality of an international organization results from its constituting treaty, the obligation to accept its responsibility is also a consequence of that treaty. Therefore the international personality of an international organization is not opposable to non-members, unless they recognize the international organization as a subject of international law. By recognizing the international organization the non-members declare their consent that the international personality of the organization is opposable to them, and that the organization is responsible for its wrongful acts. That recognition does not mean that the non-members confer the organization a new international personality which is different from that conferred by the members. It means that they take the existing international personality of the organization into account, and that they accept it as a subject of international law. It can, therefore, be said that the non-members rely on the already existing international personality. In this respect, the international personality is objective. Thus, the recognition of an international organization by non-members is only declarative and not constitutive.

56 Supra note 54.

57 Dupuy, supra note 46, at 556; Mosler, supra note 38, at 249; Yasseen, supra note 3, at 47.

58 Dupuy, supra note 46, at 555/556; Fitzmaurice, supra note 46, at 4/5; Mosler, supra note 38, at 249/250; Zemanek, supra note 46, at 357. See Yasseen, supra note 3, at 47.

59 Dupuy, supra note 46, at 556; Zemanek, supra note 46, at 357; Ingolf Pernice, Die Haftung internationaler Organisationen und ihrer Mitarbeiter, 26 ARCHIV
Concerning the international personality of the UN, the ICJ in its aforementioned advisory opinion had another perspective. It stated that "fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely recognised by them alone, together with capacity to bring international claims (against non-members)."^61 This statement may be invoked by the Court to encourage the non-members to join the UN and to strengthen its work. Yet, this passage is inconsistent with the above cited rule of "*res inter alios acta*". Even though the vast majority of the states of the present international community are also members of the UN, this does not create an objective personality which is opposable to non-members.\^62 This is because the international law is still governed by the principle of consent which is inherent in the principle of "*res inter alios acta*".

As long as the international community is a community of equals, the majority cannot impose any obligation upon the minority without its consent. Therefore, despite the opinion of the ICJ, the international personality of an international organization is not opposable to non-members, unless they have recognized the international organization.

\^60 *Contra* Seidl-Hohenveldern/Loibl, *supra* note 2, at 78, Nr 0702.

\^61 1949 I.C.J. at 185.

\^62 *See* Dupuy, *supra* note 46, at 555 (arguing against the element of quantity). *See also* Seidl-Hohenveldern, *Corporations*, *supra* note 24, at 88 (saying that the objective personality of the UN is an exception). *But see* Schermers, *supra* note 1, at 778, § 1391 (differentiating between universal and closed organizations and assuming that the universal organizations have an opposable objective personality). *See also* Michael Bothe, *Die völkerrechtliche Stellung der Europäischen Gemeinschaften im Völkerrecht*, 37 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Z.a.ö.R.V.) 121, 125 (1977) (assuming that an *erga omnes* rule of opposable objective personality may be in development).
III. International Responsibility of Public International Organizations

An international organization commits breaches of international law when it violates the obligations which are imposed upon it by its founding treaty. This capacity of the international organization to act illegally under the international law requires it to be responsible for its wrongful acts, since "responsibility is an indispensable element of any legal system". Otherwise, there would be only moral, but no legal, obligations. The responsibilities of international organizations correspond to their international personalities because the personalities determine the capacity to act upon the international plane. As the personalities vary according to the rights and obligations, the


65 FRIEDRICH BERBER, LEHRBUCH DES VÖLKERRECHTS, III.Band 2 (2d ed. 1977).

The scope of responsibilities of the international organizations also vary. The greater their capacities under international law, the greater their scope of responsibilities. The fact that an international organization is responsible for its breaches of international law does not answer the question which rules of responsibility are applicable to the international organization. This question will be examined in the next section.

A. Rules of Responsibility of Public International Organizations

There are customary rules for responsibility arising out of breaches of international law which have evolved from state practice. Art.38 (1) c ICJ-statute indicates that practice of the states flowing out of a sense of legal obligation is a source of international law.

Yet, before discussing whether these rules are binding upon an international organization, it would be appropriate to look for rules of responsibility which have evolved from the practice of the international organizations. The practice of international organizations


69 Supra note 1, at 1060.

70 The I.L.C. in its commentary on art.13 of its draft on state responsibility says that "the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States." Report of the Commission to the General Assembly, 1975II Y.B.Int’l L. Comm’n 47, 90, DOC.A/10010/REV.1. But see Reuter, supra note 66, at 506 (assuming
can also create international law, since art.38 (1) c of the ICJ-statute speaks in general terms of practice and not of state practice alone.

However, there is not yet sufficient practice of international organizations in this field which meets the requirements in art.38 (1) c ICJ-statute, namely a general, consistent and repeated practice. The only existing rules of responsibility are those of state practice.

B. Rules of State Responsibility

It is assumed that an international organization is bound by customary international law which is developed by state practice because the member states cannot escape their international obligations by creating an international organization which is not bound by these obligations. But this assumption does not take into account that the international organization is an international person distinct from its founding members. This does not explain why the rules of state responsibility should apply to breaches of international obligations committed by the international organization as an independent member of the international society.

that the responsibility of an international organization is governed by rules which are parallel to those governing the responsibility of a state).


72 Meng, supra note 63, at 329.

73 E.g. SHAW, supra note 46, at 63.


75 FELICE MORGENSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS 32 (1986).
It is furthermore assumed that the rules of state responsibility can be applied to an international organization by way of analogy.\textsuperscript{76} Analogy means that a case for which there are no legal rules is treated in the same way as a similar case for which there are legal rules. If this approach was accepted, it would be possible to apply the rules of state responsibility to wrongful acts of the international organization. Yet, this analogy requires that there are no rules of responsibility for the wrongful acts of the organization. It is questionable, however, whether this is true because it is argued that the rules of state responsibility address to all subjects of international law and that the international organization as a subject of international law is also bound by these rules.\textsuperscript{77}

Two objections must be raised against these arguments. First, these rules have evolved from state practice and are binding only upon states and not to all subjects of international law.\textsuperscript{78} Secondly, even if these rules were binding upon all subjects of international law, the international organization could not contribute to the creation of these rules. Therefore, the organization would have had no opportunity to object to the application of these rules to it.\textsuperscript{79} Thus, its situation can be compared to newly


\textsuperscript{77} BERBER, \textit{supra} note 65, at 18; Ewa Butkiewicz, \textit{The Premises of International Responsibility of Inter-Governmental Organizations}, 11 POLISH YEARBOOK OF INTERNATIONAL LAW (P.Y.I.L.) 117, at 117-118 (1981/82).

\textsuperscript{78} Cf. Bleckmann, \textit{supra} note 74, at 110 (saying that the rules of state practice are only destined to states).

\textsuperscript{79} Cf. Asylum (Colombia v. Peru) 1950 I.C.J. 266, 277-278 (November 20) and Fisheries (United Kingdom v. Norway) 1951 I.C.J. 116, 131 (December 18) (stating that a customary rule of international law is inapplicable to a state if it has opposed its application to itself). It is agreed that this protest must be made continuously by the state from the beginning of the practice in order to prevent
independent states. In respect to these states the question has been whether they are bound by the existing customary international law, although they could not have objected its application to them. The answer to this question depends upon the nature of the binding force of customary international law.\(^80\) If the states can avoid the customary international law by persistently objecting to it from the start of the custom,\(^81\) then it must be acknowledged that the binding force of customary international law follows from the express or tacit consent of the states.\(^82\) Therefore, the newly independent states could prevent the application of customary international law to them by making reservations\(^83\) or be bound by it by way of recognition or acceptance.

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\(^80\) See generally Heintschel v. Heinegg, in VÖLKERRECHT, supra note 10, at 197-199 (giving a survey over the different opinions on this problem).

\(^81\) 1951 I.C.J. at 131.

\(^82\) Charney, supra note 79, at 16.

This approach is applicable to the international organization. If the international organization recognizes or accepts the rules of state responsibility as binding for it, there is no need for an analogy to these rules.

1. Recognition of Rules of State Responsibility

a. Explicit Recognition

It is said that the member states which are bound by the rules of customary international law intend their international organization to be also bound.84 But this intent must be found in the constituting treaty because the treaty determines the rights and obligations of the international organization under international law. These treaties must be reviewed to see whether they contain explicit recognition of rules of state responsibility.

The constituting treaties of international organizations which contain provisions regarding the responsibilities of these organizations are the EEC- and the EURATOM -treaties.85 The EEC-art.215 (1) and the EURATOM-art.188 (1) refer to the "contractual liability" of these organizations. But, since this liability "shall be governed by the law applicable to the contract in question", these articles deal only with responsibilities for the wrongful acts in respect to contractual obligations at the national level.

The EEC-art.215 (2) and the EURATOM-art.188 (2) refer to the "non-contractual liability" of these organizations. However, these provisions state that the liability shall be determined "in accordance with the general principles common to the laws of the

84 Bleckmann, supra note 74, at 117.


86 EEC-treaty, supra note 47, at 86; EURATOM-treaty, supra note 85, at 227. A similar provision can be found in art.40 ECSC-treaty, supra note 47, at 171.
member states". Thus, it must be concluded that these provisions do not recognize the rules of state responsibility.

Although no other treaties are found to recognize explicitly the rules of state responsibility, it is submitted that an international organization would be bound by these rules if its constituting treaty contains such a recognition.

b. Implicit Recognition

Even if no explicit recognition of the rules of state responsibility is found in the treaty, recognition of these rules may be implied. There are several treaties of economic international organizations which contain provisions that limit the responsibilities of their member states for obligations of the international organizations to the extent of their unpaid subscriptions. Such limitation of the member states' responsibilities can only imply *argumentum e contrario* - that the international organizations are responsible for obligations which exceed these subscriptions. But the validity of such implied recognition of responsibility is restricted because the context, object and purpose of these provisions reveal that only contractual, not non-contractual, obligations of the international organizations are intended. However, the implied recognition of the responsibilities of international organizations for contractual obligations must be interpreted as a recognition of the rules of state responsibility, for there are no other

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88 These are the tools to be used to interprete treaties according to art.31 of the Vienna Convention on the Law of Treaties, supra note 54, at 340, which reflects customary international law, IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 19 (2d ed.1984).
applicable rules. Recognition of responsibility as such is unnecessary due to the fact that responsibility arises already from a breach of international law.

2. Acceptance of Rules of State Responsibility

a. Explicit Acceptance

The ICJ had stated that "(i)t is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations....An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." Following that reasoning, then, it is possible for an international organization to declare its acceptance of the rules of state responsibility by way of an unilateral act.

The UN has expressly accepted its responsibility for breaches of international law, with regard to its peace-keeping activities in the Congo. Contrary to the recognition of responsibility included in the constituting treaty, an express acceptance of responsibility can have two meanings. First, it can mean that there was indeed a breach of international obligation. Secondly, it can mean that the rules of state responsibility are accepted. Whereas the first meaning was clearly within the declaration of the UN made by the

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Secretary-General, the second meaning has not been as clearly accepted. Although the UN accepted its responsibility for the wrongful acts of its agents,91 hence the rule that acts of "lent" organs are imputable,92 the agreements concerning the compensation of damages caused by these acts were only lump-sum agreements.93 The principle of "restitutio in integrum"94 was therefore not accepted.

b. Implicit Acceptance

Even if an international organization does not recognize the rules of state responsibility in its founding treaty, and even if it does not accept them by way of a declaration, it is nevertheless bound by these rules by taking part in the international relations without declaring reservations.95 Since there is only one set of customary international law which has evolved from state practice, the participation in international relations without declaring reservations implies that these rules are accepted. Since the rules of state

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91 Although the acts had been committed by military forces of the member states, these acts were considered to be sole acts of the UN because the forces were placed under the control of the UN, Roberto Ago, Third Report on State Responsibility, 1971 II/1 Y.B.Int'l L.Comm'n 199, 272-274, U.N.Doc.A/CN.4/246 AND ADD.1-3. But see Paul de Visscher, Observations Sur Le Fondement Et La Mise En Oeuvre Du Principe De La Responsabilité De L'Organisation Des Nations Unies, 40 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 165, 169 (1963).

92 Art.9 of the I.L.C. draft on State responsibility, supra note 68, at 31.

93 See Ago, supra note 91. See also de Visscher, supra note 91, at 172 (saying that this reparation "forfaitaire" was due to factual difficulties in ascertaining what really happened).

94 See The Factory at Chorzow (Germany v. Polish Republic) 1928 P.C.I.J.(ser.A) No.17, 2, 47 (September 13). See generally Ago, supra note 91, at 206 for a survey of possible legal consequences arising out of breaches of international law.

95 See MORGENSTERN, supra note 75, at 32. Cf. BERBER, supra note 71, at 54; VERDROSS, supra note 64, at 142 (saying that newly independent states are bound by customary international law if they do not declare reservations).
responsibility are part of customary international law, the international organization also accepts them by participating in international relations.

C. Application of Rules of State Responsibility to Public International Organizations

In applying the customary international law to the international organizations, notice needs to be paid to the differences between the states and the international organizations. The rules of customary international law can only be applied to the international organizations as long as they fit the nature of those organizations. The following section will examine how far the rules of state responsibility are applicable to international organizations.

1. Acts of Organs as Source of Imputability

Art. 13 of the I.L.C. draft on state responsibility specifically refers to "(t)he conduct of an organ of an international organization acting in that capacity." The commentary of the I.L.C. reveals that "it would be a mistake to seek in this draft a solution to the problem of attribution to an international organization of the conduct of organs of that organization acting on its behalf...." The commentary then points to the cases in international practice "in which the act of one of its organs has been attributed to an international organization as a source of international responsibility of the organization." The special rapporteur for the I.L.C. draft on state responsibility also

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96 Bleckmann, supra note 74, at 120. See HANS-JÜRGEN MÜLLER, GRUNDSÄTZE DER VÖLKERRECHTLICHEN VERANTWORTLICHKEIT INTERNATIONALER ORGANISATIONEN 87 (1977).

97 I.L.C. draft, supra note 68, at 31.

98 I.L.C. commentary on art. 13, supra note 70, at 90.

99 Id. at 87.
submits that "(w)here persons who are organs of ... an international organization commit, in that capacity, ... acts injurious to a third State, the first obvious conclusion is that those acts involve the responsibility of the ... organization of which the persons in question are organs."100 Hence, art.5 of the I.L.C. draft on state responsibility may serve as a starting point. Art.5 states that the "conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question."101

Art.5 refers to the internal law of the state to qualify a person or a group of persons as organs of that state. In the case of an international organization, reference must be made to the founding treaty of that organization as its internal law to qualify a person or a group of persons as organs of the international organization.102 These organs act on behalf of the international organization. It seems thus appropriate to consider the acts of these organs as acts of the organization,103 provided that "the organ of the international organization concerned acted in the capacity of an organ of the organization in the exercise of functions of the organization."104 In attributing the acts of organs to an organization, attention needs to be paid, however, to certain differences in the structure of state organs and organs of the international organization. The international


103 Pernice, supra note 59, at 416. See Amador, supra note 75, at 190.

104 I.L.C. commentary on art.13, supra note 70, at 90.
organization has generally different kinds of organs with different compositions. 105 Whereas some organs of the international organization are composed of independent civil servants, 106 others are composed of the state representatives. 107 Furthermore, the organs of states or other international organizations may be placed at the disposal of an international organization, and there may be circumstances where the organs of an international organization act outside their competences (ultra-vires acts). The impact of these circumstances on attributing the acts of these organs to an organization will be clarified next.

a. Organs Composed of Civil Servants

On the one hand, an international organization has administrative organs 108 which are composed of independent international civil servants. If these organs act in accordance with their competences provided in the founding treaty, their acts are imputable to that international organization but to no other subject because of the independent nature of these organs. 109

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105 See SCHERMERS, supra note 1, at 143, § 219.

106 See id. at 286-293, § 475-487.

107 See id. at 114-133, § 180-209.

108 See Seidl-Hohenveldern, in HANDBOOK, supra note 3, at 95-100. See generally A. LEROY BENNETT, INTERNATIONAL ORGANIZATIONS, PRINCIPLES AND ISSUES 385 passim (4th ed.1988) for the administration of international organizations, especially the UN.

The Secretary-General of the UN is an example for such an organ.

109 Butkiewicz, supra note 77, at 129-130; Pernice, supra note 59, at 416.
b. Organs Composed of State Representatives

On the other hand, an international organization has plenary and non-plenary organs which are composed of state representatives. It may be asked whether the decisions of these organs are imputable to the organization or to the member states or to both. There are two reasons why the decisions of these organs are only imputable to the international organization.

First, the fact that these organs are composed of states representatives does not make them organs of every single member state. They are created by the founding treaty as organs of the organization regardless of their composition. They are independent from the individual member state, but are not independent from the member states as a group. This is because the member states created or joined the organization to be able to act collectively as a group. They chose to cooperate through the organization which represents the amalgamation of the member states. It is thus the only entity to which decisions of these organs are imputable. Secondly, on the sociological side, the will of the organization is a result of dialogues among the state representatives. Therefore, the result will always be different from the will of an individual member state. There has to be a compromise between the state representatives. Although they

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110 See Seidl-Hohnveldern, in HANDBOOK, supra note 3, at 81-95. The General Assembly (hereinafter GA) of the UN is an example for a plenary organ, whereas the Security Council (hereinafter SC) of the UN is an example of a non-plenary organ.


112 Butkiewicz, supra note 77, at 126; Dupuy, supra note 46, at 543-544.

113 Butkiewicz, supra note 77, at 126; Dupuy, supra note 46, at 544.

114 Seidl-Hohnveldern, in HANDBOOK, supra note 3, at 89.
are mainly concerned with the interests of their states,\textsuperscript{115} the state representatives must also take into account the interests of other member states. This compromise may reflect different points of view, but it will not be the same as the individual will of a member state. This is not only true for organizations whose constitutions allow majority decisions, but also for organizations whose constitutions provide for unanimous decisions because even then it is unlikely that every will of the individual member states is identical.

There is one exception to this result, however. Because of their status as state representatives, these representatives function not only as organs of the organization but also as organs of their respective states. If they act as organs of their states, their acts are imputable only to their states.\textsuperscript{116} Unless the state representatives declare that they act in their role as state organs, their acts are imputable only to the international organization.\textsuperscript{117}

c. Organs Placed at the Disposal of the Public International Organizations

Art.9 of the I.L.C. draft on state responsibility states that the "conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if


\textsuperscript{116} \textit{SEIDL-HOHENVELDERN/LOIBL, supra} note 2, at 131, Nr 1112. \textit{But see MUNCH, supra} note 63, at 264 (arguing that the acts of state representatives are also imputable to the international organization if they act as organs of their state and as organs of the international organization. This reasoning must be rejected because the representatives can only act either as organs of their states or as organs of the international organization).

that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.\textsuperscript{118}

Art.9 sets forth three conditions\textsuperscript{119} of imputing the acts of the organ upon the state at whose disposal it has been placed (beneficiary state): first, the organ must have the legal status as an organ of the state or international organization which lent it to the beneficiary state;\textsuperscript{120} second, the organ must have acted as if it was an organ of the beneficiary state;\textsuperscript{121} and third, the organ must have acted under the instructions of the beneficiary state, i.e., the beneficiary state must exercise exclusive control over the "lent" organ.\textsuperscript{122}

The states or international organizations may place an organ at the disposal of an international organization instead of a state.\textsuperscript{123} The acts of this organ are imputable only to the beneficiary organization, if the above mentioned conditions are fulfilled.\textsuperscript{124} The most decisive criterion in this respect is that of control.\textsuperscript{125} The acts of the "lent" organ can only be considered as acts of the beneficiary organization if that organization controlled the lent organ without any interference from the state or international organization.


\textsuperscript{119} I.L.C. commentary on art.9, supra note 118, at 286.

\textsuperscript{120} Id. at 286.

\textsuperscript{121} Id. at 288.

\textsuperscript{122} Id. at 287.

\textsuperscript{123} The military forces of the UN member states are state organs which are placed at the disposal of the UN for peace-keeping operations, see Ago, supra note 91, at 272-273.

\textsuperscript{124} Id.

\textsuperscript{125} See Eagleton, supra note 66, at 386.
organization which have lent it. Otherwise, the acts of the "lent" organ will be considered as acts of the lending state or international organization.

d. Organs Acting Ultra-Vires

Art. 10 of the I.L.C. draft on state responsibility states that "(t)he conduct of an organ of a State .. shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity." Art. 10 shows that there is only one type of ultra-vires acts of state organs, which is when they exceed their competences or contravene the instructions given to them.

In the case of an international organization we have to differentiate between two types of ultra-vires acts. The first type is when the acts exceed the competences of the organs given by the constituting treaty but remain within the scope of competences of the international organization. These internal ultra-vires acts are similar to those envisaged by art. 10 of the I.L.C. draft. The second type occurs when the acts of the

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126 Butkiewicz, supra note 77, at 124 and at 134; Jean-Pierre Ritter, La Protection A L'Egard D'Une Organisation Internationale, 8 A.F.D.I. 427, 444 (1962). See Amrallah, supra note 90, at 73-74; de Visscher, supra note 90, at 55-56 for the UN. See also Perez Gonzalez, supra note 102, at 84.

127 I.L.C. draft, supra note 68, at 31.


129 See authors in note 128. See infra notes 135 and 136 for examples of such ultra-vires acts.

130 Terminology used by Lauterpacht, supra note 128, at 111.
organs exceed the competences of the international organization itself.131 These acts are not within the scope of powers conferred to the international organization in its constituting treaty. These external ultra-vires acts are not envisaged by art.10 of the I.L.C. draft, since states do not derive their competences from a treaty but already possess all the possible competences in international law.

Ultra-vires acts are either void ab initio or voidable,132 but in both cases they may have harmful effects on other parties,133 regardless of whether they are members or not.134 Therefore, these acts have to be attributed to someone who will be responsible.

(1) Internal Ultra-Vires Acts

There are basically two kinds of internal ultra-vires acts of organs of an international organization. The first kind are acts of organs in a field that is conferred to other organs

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131 See authors in note 128. In its advisory opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (April 11), the Court was asked whether the UN can bring a claim of reparation against a state. This question concerned the competence of the UN as an organization. The Court held that the UN has the capacity to claim reparation from a member state, id. at 184, as well as from a non-member state, id. at 185.


133 See Jennings, supra note 132, at 66; Perez Gonzalez, supra note 102, at 78-79.

134 The membership may have an influence on the question of which legal effect should be attached to an ultra-vires act, see Lauterpacht, supra note 41, at 411.
of the international organization. The second kind are acts of organs which are not in conformity with the procedural or substantive rules of the organ concerned. Both kinds of internal ultra-vires acts can be compared to those envisaged by art.10 of the I.L.C. draft. Art.10 also differentiates between two kinds of ultra-vires acts. The first is that of an organ exceeding its competences. In this respect, art.10 refers "to the case of an organ which acts in the performance of duties other than those which are entrusted to it." This case is similar to the first kind of internal ultra-vires acts of an international organization. The second is that of an organ contravening the given instructions. Here, art.10 refers "to the case of an organ which, while acting in the performance of the functions which it was empowered to carry out, acts in a manner

135 See Felice Morgenstern, *Legality in International Organizations*, 48 Brit. Y.B. Int’l L. 241, 246-249 (1976-77). In its advisory opinion on Certain Expenses of the United Nations, 1962 I.C.J. 151 (July 20), the Court was asked whether certain expenditures for peace-keeping operations which were authorized by the GA constituted expenses within the meaning of art.17(2) UN-Charter, supra note 2, at 1040. The underlying question was whether the GA, not only the SC, can authorize peace-keeping operations. This last question concerned the competence of the GA as an organ of the UN, and it was answered affirmatively by the Court, id. at 162 passim.

136 Id. at 251-253 on acts contrary to procedural rules. In its advisory opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (June 8), the Court was asked whether the Maritime Safety Committee had been elected in accordance with art.28(a) of the IMCO Constitution. Art.28(a) provided *inter alia* that no less than eight members of the Committee shall be the largest ship owning nations. Although Liberia and Panama were included among the eight largest ship owning nations based on registered tonnage, they had not been elected by the IMCO Assembly into the Committee. Thus, the question was whether the IMCO Assembly had acted in conformity with the constitution of the IMCO. After an interpretation of the notion "eight largest ship owning nations", the Court declared the non-election of Liberia and Panama to be unconstitutional, id. at 171.

inconsistent with the instructions, whether general or specific, which had been given to it.\textsuperscript{138} This case is similar to the second kind of internal ultra-vires acts of an international organization, assuming that the procedural and material rules of an organ are treated as instructions given to it by the founding treaty. These ultra-vires acts are imputable to the international organization,\textsuperscript{139} as are ultra-vires acts of the state organs to the state according to the rule laid down in art.10 of the I.L.C. draft.

(2) External Ultra-Vires Acts

These acts are not similar to those covered by art.10 because of the unlimited powers of states in international law. These acts are distinguishable from the internal ultra-vires acts because they are not within the scope of competences of the international organization. It can be argued that they are not attributable to the international organization because they are outside the competences of the organization. However, this argument has to be rejected. As in the case of internal ultra-vires acts, there is no other subject of international law to which these acts could be attributed, since the international organization is distinct from its members.\textsuperscript{140}

\textsuperscript{138} \textit{Id.}.

\textsuperscript{139} \textit{But see} Butkiewicz, \textit{supra} note 77, at 137-139 (differentiating between the ultra-vires acts of organs composed of civil servants and of organs composed of state representatives, and submitting that only the ultra-vires acts of organs composed of civil servants are attributable to the organization, \textit{id.}).

\textsuperscript{140} \textit{See also} Ignaz Seidl-Hohenveldern, \textit{The Legal Personality of International and Supranational Organizations}, 21 R.E.D.I. 35, 44 (1965) (arguing that this result is based on the estoppel- respectively the \textit{bona-fides} principle).
Because of the implied powers\textsuperscript{141} of an international organization, only the acts which are manifestly outside the competence of the organization are ultra-vires.\textsuperscript{142} It can then be argued that because of the obvious illegality, the acts concerned should not be attributed to the organization. In regard to this objection it is worthwhile mentioning that the special rapporteur had proposed an exception to the rule laid down in art.10 for conduct of an organ if "the organ's lack of competence was manifest."\textsuperscript{143} This proposed exception was rejected by the I.L.C., which observed that "the fact of knowing that the organ .. is exceeding its competence ... will not enable the victim of such conduct to escape its harmful consequences."\textsuperscript{144} This reasoning must be applied, \textit{mutatis mutandis}, to manifest external ultra-vires acts of an international organization.

\section*{2. Exhaustion of Local Remedies}
Art.22 of the I.L.C. draft states that there is a breach of an "international obligation concerning the treatment to be accorded to aliens ... only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{143} Ago, \textit{supra} note 100, at 95.
\item \textsuperscript{144} I.L.C. commentary on art.10, \textit{supra} note 137, at 69.
\item \textsuperscript{145} I.L.C. draft, \textit{supra} note 68, at 32.
\end{itemize}
The rationale for this principle is that the wrongful act is not completed until the local remedies are unsuccessfully exhausted. The state which acted contrary to the international obligation concerning the treatment of aliens shall have the opportunity to rectify the created situation by subsequent conduct.

Likewise, the responsibility of an international organization for breaches of international obligations concerning the treatment of aliens is not completed until the aliens concerned have unsuccessfully exhausted the local remedies of the international organization. An opportunity should also be given to the international organization to rectify a situation which is contrary to a specified result required by an international obligation.

In case of an international organization one major difference has to be taken into account. The principle of exhaustion of local remedies is most often defined with respect to situations arising within a state's territory. Since the international organization does not have a territory of its own, the breach of an international obligation concerning the treatment of aliens by the international organization can only occur within the territory of a member or non-member state. It is therefore doubtful whether this principle can be applied to the international organization. The same doubt exists with respect to states. The question has been whether the principle concerned can be applicable to them if the initial act of a state occurred outside the state's territory. The special rapporteur answered the question affirmatively by reasoning that "the only valid criterion for


148 Amrallah, *supra* note 90, at 76 for the UN.


150 See I.L.C. commentary on art.13, *supra* note 70, at 87.
determining ... whether the principle of exhaustion of local remedies should or should not apply is the existence or absence of adequate and effective remedies...."151 The I.L.C. agreed with this position by saying that in a situation where effective local remedies exist "there seems in principle to be no reason why the state should be prevented from discharging its obligation ... solely on the ground that the initial conduct was adopted outside its frontiers."152

According to this reasoning the principle of exhaustion of local remedies is applicable to the international organization if it has effective local remedies.153 A remedy is effective if it "offer(s) a real prospect of still achieving the result originally aimed at by the international obligation or, where appropriate, an equivalent result."154 The remedy can be "judicial or administrative, ordinary or extraordinary."155

In the case of the international organization, therefore, two situations have to be differentiated. First is the breach of an international obligation concerning the treatment of nationals of member and non-member states (who are aliens for the organization) outside the internal order of the organization. Second is the breach of such an international obligation within the internal order of the organization.

151 Ago, supra note 146, at 38.

152 I.L.C. commentary on art.22, supra note 147, at 44.


154 Ago, supra note 146, at 41.

155 Id.
a. Treatment of Nationals Outside the Internal Orders of Public International Organizations

(1) Treatment of Nationals of Member States

As a general rule an international organization acts within the territory of a state with the consent of the latter. In this circumstance there is often an agreement concluded between the state and the international organization which provides inter alia that the state will be responsible for the wrongful acts of the international organization within the territory of the state. There is no need in such instance for the exhaustion of local remedies of the international organization.

Sometimes the agreement between the state and the international organization provides that a remedy will be created to review the wrongful acts of the international organization. As the obligation concerning the treatment of aliens is an obligation towards the state and not the aliens, the state is free to modify this obligation by creating a remedy that is not already existent. Then, the nationals of the state concerned have to exhaust the so-created remedy before their state can exercise diplomatic protection.

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156 I.L.C. commentary on art.13, supra note 70, at 87.

157 The technical assistance agreements of the UN contain such provisions, id. at 89; Zacklin, supra note 66, at 95.

158 Amrallah, supra note 90, at 75-76; de Visscher, supra note 90, at 59 for peace keeping activities of the UN. See also GRENVILLE, CLARK/SOHN, LOUIS B., WORLD PEACE THROUGH WORLD LAW 331 (2d ed.1960) for actions of the UN according to Chapter VII.

159 Ago, supra note 146, at 31.

160 Amrallah, supra note 90, at 76; de Visscher, supra note 90, at 59.
Yet, there may be wrongful acts of an international organization within a state’s territory without the consent of the state\textsuperscript{161} or without any agreement between them. If the international organization has effective local remedies, the nationals of the member state are obliged to exhaust these remedies. Only if the specified result required by the international obligation - or an equivalent result - is not achieved, can their state claim the breach of international obligation against the international organization.

The nationals face the problem, however, that the judicial and administrative bodies of international organizations are less developed than those of the states.\textsuperscript{162} They may not have local remedies. It has been argued, nonetheless, that the principle of exhaustion of local remedies is applicable, if the international organization subjects itself to a remedy that will be created for the dispute in question or to a remedy that will be available outside its internal order.\textsuperscript{163} If this argument were accepted, nationals would have to negotiate with the international organization which remedy to use or to create. Taking into account the unequal bargaining power of the parties, this procedure might produce undue advantages for the international organization. The so-created or agreed remedies are not effective, if the requirement of an effective remedy is understood in the sense that it has to be effectively usable.\textsuperscript{164} It must therefore be recognized that in cases where no remedy was available within the internal order of the international organization, the principle of exhaustion of local remedies does not apply.\textsuperscript{165} The state of the nationals

\textsuperscript{161} This may be the case for actions of the UN pursuant to Chapter VII, see I.L.C. commentary on art.13, \textit{supra} note 70, at 87.

\textsuperscript{162} Ritter, \textit{supra} note 126, at 454.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} Ago, \textit{supra} note 146, at 39.

\textsuperscript{165} See Eagleton, \textit{supra} note 66, at 352 and at 412; Perez Gonzalez, \textit{supra} note 102, at 96.
concerned can then immediately exercise diplomatic protection against the international organization.

(2) Treatment of Nationals of Non-Member States Which Recognize the Public International Organization

Nationals of non-member states which have recognized the international organization\(^{166}\) have to exhaust the effective local remedies of that international organization in case of a breach of an international obligation concerning the treatment of aliens.\(^ {167}\) If the exhaustion of local remedies does not create a situation in conformity with that international obligation, or if there are no effective local remedies available within the internal order of the international organization, the non-member state can exercise diplomatic protection against the international organization.

(3) Treatment of Nationals of Non-Member States Which do not Recognize the Public International Organization

Nationals of non-member states which have not recognized the international organization have also to exhaust the effective local remedies of that organization\(^ {168}\) because the breach of international obligation is not completed until the local remedies are

\(^{166}\) If the organization acts with the state’s consent on its territory, this permission constitutes implicit recognition. In cases where there is an agreement between the organization and the state, this agreement also constitutes implicit recognition, \textit{SEIDL-HOHENVELDERN, CORPORATIONS, supra note 24, at 91.}

\(^{167}\) The principle also applies if there is an agreement that provides for the creation of such remedies. The principle does not apply, however, if there is an agreement that provides for the exclusive responsibility of the non-member state.

\(^{168}\) The situation where an agreement provides for the exclusive responsibility of the non-member state or for the creation of local remedies has to be excluded because such an agreement constitutes an implicit recognition of the organization.
unsuccessfully exhausted.\textsuperscript{169} The fact that their state does not recognize the organization as a subject of international law does not exempt them from that requirement. However, the non-recognition of the international organization as an international person unfolds its effects where the exhaustion of local remedies does not bring about the result required by the international obligation, or where there were no effective local remedies available within the internal order of the international organization. In that case the state can "ignore" the international organization\textsuperscript{170} and does not have to exercise diplomatic protection against the organization. Instead, the diplomatic protection has to be against the member states.\textsuperscript{171}

b. Treatment of Nationals Within the Internal Orders of Public International Organizations

There are rules which govern the relationship between an international organization and nationals of member and non-member states who work for the organization (civil servants).\textsuperscript{172} Since these rules are enacted on the basis of the founding treaty of the international organization,\textsuperscript{173} they are international in character.\textsuperscript{174} The obligations of the organization pursuant to these rules are therefore international obligations.\textsuperscript{175} But

\textsuperscript{169} \textit{Supra} note 146.

\textsuperscript{170} \textit{See supra} text accompanying note 56.

\textsuperscript{171} \textit{See infra} text accompanying note 287 for the question whether the diplomatic protection has to be exercised against all member states collectively.

\textsuperscript{172} \textit{E.g.} SCHERMERS, \textit{supra} note 1, at 293, § 488.

\textsuperscript{173} SEIDL-HOHENVELDERN/LOIBL, \textit{supra} note 2, at 123, Nr 1042.

\textsuperscript{174} \textit{Id.} at 203-204, Nr 1503.

\textsuperscript{175} \textit{See} Amador, \textit{supra} note 76, at 189.
these obligations do not exist towards the states whose nationality the civil servants have (contrary to those obligations concerning the treatment of aliens), but towards the civil servants.\textsuperscript{176} Hence, when these obligations are violated, the states of the civil servants cannot exercise diplomatic protection on their behalf.\textsuperscript{177} The requirement of exhausting the local remedies of the international organization is then unnecessary. The civil servants can only get protection against such violations by using the administrative or judicial machinery which is available for them within the internal order of the international organization.\textsuperscript{178}

3. Circumstances Precluding Wrongfulness

The articles 29 - 34 of the I.L.C. draft on state responsibility deal with circumstances precluding wrongfulness. Only article 34 which deals with self-defense is not applicable to an international organization, since it does not have a territory that could be the aim of an armed attack.\textsuperscript{179}

\textsuperscript{176} Clive Parry, \textit{Some Considerations upon the Protection of Individuals in International Law}, in 90 R.C.A.D. 1. 653, 716 (1956II); Ritter, \textit{supra} note 126, at 452.

\textsuperscript{177} This is also a consequence of the privileges and immunities of the civil servants towards their own states. \textit{But see} Ritter, \textit{supra} note 126, at 452-453.

\textsuperscript{178} \textit{See} Effect of Awards of Compensation made by the United Nations Administrative Tribunal 1954 I.C.J. 47 (July 13); SCHERMERS, \textit{supra} note 1, at 296, § 491; SEIDL-HOHENVELDERN/LOIBL, \textit{supra} note 2, at 179, Nr.1351. For the exhaustion of internal remedies of an international organization by civil servants see A.A. Cancado Trindade, \textit{Exhaustion of Local Remedies and the Law of International Organizations}, 57 R.D.I. 81, 86 (1979). If the organization disregards the decision of its competent review body, the member states are entitled to intervene, Ritter, \textit{supra} note 126, at 452-453. \textit{But see} Parry, \textit{supra} note 176, at 720-721.

\textsuperscript{179} Art. 51 of the UN-Charter, \textit{supra} note 2, at 1044-45, to which article 34 of the I.L.C. draft refers, makes an armed attack an essential condition for self-defense by a state.
4. Consequences of a Wrongful Act

The consequence of a wrongful act in international law is the obligation on the part of the subject who committed the wrong to make reparation or satisfaction.\textsuperscript{180}

Reparation is due for a material damage. It means to "re-establish the situation which would, in all probability, have existed if that act had not been committed."\textsuperscript{181} If such a restitution in kind is not possible, the wrongdoer has to pay compensation.\textsuperscript{182}

Satisfaction is due for an immaterial damage. It means normally that the wrongdoer admits his illegal behaviour and makes a formal excuse. Both reparation and satisfaction are consequences which can be performed by an international organization as well. They attach therefore to its breaches of international law.

\textsuperscript{180} E.g. Shaw, supra note 46, at 496; Ipsen, \textit{in Völkerrecht}, supra note 10, at 528. \textit{See also} Ago, supra note 91, at 206-208 for other concepts of legal consequences arising out of a wrongful act in international law.

\textsuperscript{181} The Factory at Chorzow (Germany v. Polish Republic) 1928 P.C.I.J. (ser.A) No.17, 2, 47 (September 13).

\textsuperscript{182} Id. Sometimes monetary compensation is also due for an immaterial damage, see S.S."I'm Alone" (United States of America v. Canada), III R.I.A.A. (Willis van Devanter/Lyman P.Duff) 1609, 1618 (1935).
IV. International Responsibility of Member States for Wrongful Acts of Their Public
International Organizations

A. Concurrent Responsibility

A member state of an international organization may contribute to the wrongful act of the organization by its own illegal conduct. If this illegal conduct is associated with the wrongful act of the international organization, there is a concurrent responsibility of the international organization and the member state. The responsibility of the member state is not one for the wrongful act of the international organization, but one for its own illegal conduct.\(^{183}\)

There is no direct responsibility of the member states for the wrongful acts of the international organization, because the international organization is an international person distinct from its members.\(^{184}\)

\(^{183}\) Ritter, supra note 126, at 444-445; Seidl-Hohenveldern, supra note 117, at 416. See also MÜNCH, supra note 63, at 264 (assuming a responsibility of the member states for conduct within their international organization). But see Reuter, supra note 66, at 505 (using the term concurrent responsibility for an indirect responsibility of the member states for the wrongful acts of their international organization).

\(^{184}\) See supra text accompanying note 37. But see Meng, supra note 63, at 342 (arguing that the member states are directly responsible for the ultra-vires acts of their international organization).
1. Responsibility for Active Conduct

A member state incurs direct responsibility if it "associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act." 185

This kind of direct responsibility for an active conduct can occur in association with an organization's wrongful act within and outside a member state's territory.

2. Responsibility for Omission

A member state incurs direct responsibility if it endorses the wrongful act of an international organization, or if it does not take all the appropriate measures to prevent the wrongful act of an international organization. 186 Such direct responsibility for omission can only occur in association with an organization's act within the territory of a member state, since outside its territory a state has no capacity to prevent illegal conducts of other subjects of international law.

185 I.L.C. commentary on art.13, supra note 70, at 91. This would be the case, for example, if the UN established peace-keeping forces in a state without its consent and if one of the UN member states agreed to send forces for that purpose.

186 Ago, supra note 100, at 127; I.L.C.-commentary on art.13, supra note 70, at 91; Pernice, supra note 59, at 416; Seidl-Hohenveldern, supra note 117, at 416. Following the example in note 185, this would be the case if an UN member state does not prevent the UN peace-keeping forces from making use of its infra structure for their operations.
3. Responsibility for Conduct in Association with Binding Decisions of Public International Organizations

The decisions of an international organization may be binding for the member states.187 A member state may therefore have an obligation to support or not to prevent the actions of the international organization. This obligation may conflict with the member state's obligation not to commit breaches of international law, if the organization's decision involves an internationally wrongful act. If the member state acts in accordance with the organization's decision despite its wrongfulness, the state is responsible for its conduct because the obligation to obey the decisions of the international organization does not exempt the member state from its responsibility for breaches of international law.188

B. Indirect Responsibility

1. Indirect Responsibility Towards Non-Members Which do not Recognize the Public International Organization 189

An international organization may violate international rights of a non-member. Since an international organization is an international person distinct from its members, it is responsible for its wrongful acts against a non-member. The non-member concerned can therefore demand reparation or satisfaction from the international organization which

187 See for example art.25 of the UN-Charter, supra note 2, at 1041. See also EVAN LUARD, INTERNATIONAL AGENCIES: THE EMERGING FRAMEWORK OF INTERDEPENDENCE 288 passim (1977) for techniques of international organizations to secure compliance with their decisions.

188 F. Münch, supra note 153, at 322.

189 In the following, reference in this paragraph to a non-member will mean a non-member which does not recognize the international organization.
committed the wrongful act. This demand, however, will constitute an implicit recognition of the organization as a subject of international law. However, a non-member is not obliged to address its claims directly to the international organization unless its bilateral treaty rights have been violated because a treaty between the non-member and the international organization implies recognition of the organization as an international person. But if the wrongful act was not a breach of bilateral treaty, the non-member can address its claims directly to the member states of the organization. This is a consequence of the non-recognition of the international organization. This lack of recognition does not mean that the organization does not exist as an international person for the non-member, since an international organization cannot logically violate the international rights of a non-member if it does not exist for

190 Contra Ritter, supra note 126, at 440. See supra text accompanying note 180 for legal consequences of an internationally wrongful act.

191 See MÜNCH, supra note 63, at 256 (assuming that it would theoretically possible to make such a demand with a reservation of non-recognition).

192 SEIDL-HOHENVELDERN, CORPORATIONS, supra note 24, at 91.

193 Matthias Herdegen, Bemerkungen zur Zwangsgliquidation und zum Haftungsdurchgriff bei internationalen Organisationen, 47 Z.a.o.R.V. 537, 548 (1987); Meng, supra note 63, at 327; F. MÜNCH, supra note 153, at 322; MÜNCH, supra note 63, at 256; Ignaz Seidl-Hohenveldern, Die völkerrechtliche Haftung für Handlungen internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten, 11 Ö.Z.Ö.R.V. 497, 502-503 (1961). See Ginther, supra note 67, at 164. See also Ritter, supra note 126, at 436-439 (differentiating between public and private acts, and assuming that only the former give rise to a responsibility of the member states). Contra Gerhard Hoffmann, Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden, 41 NEUE JURISTISCHE WOCHENSCHRIFT (N.J.W.) 585, 586 (1988); Pernice, supra note 59, at 416. See infra text accompanying notes 286-289 for the question whether the non-member has to address its claims against all member states collectively.

194 See supra text accompanying note 55. Contra Meng, supra note 63, at 327.
the latter.\textsuperscript{195} The non-recognition only means that the international personality of the
organization is not opposable to the non-member for purposes of responsibility.\textsuperscript{196} It
can therefore "ignore" the international organization by lifting its corporate veil and hold
the member states responsible.\textsuperscript{197}

Although the non-member can address its claims directly to the member states, it is not
a case of direct responsibility on the part of the member states. It is a case of indirect
responsibility\textsuperscript{198} because the member states are made responsible for the wrongful acts
of their organization which is a distinct international person.\textsuperscript{199} The indirect
responsibility of the member states towards a non-member constitutes an exception to the
general rule that the acts of an international organization are only imputable to the
organization.\textsuperscript{200}

\textsuperscript{195} It can be argued that the member states have violated the rights of the non-
member by acting collectively. But it would then not be possible for the non-
member to make the international organization responsible for the wrongful act.

\textsuperscript{196} See supra text accompanying note 56.

\textsuperscript{197} If the recognition by a nonmember was constitutive for the international
personality of an international organization, there would be no corporate veil to
lift, Meng, supra note 63, at 327.

\textsuperscript{198} MÜNCH, supra note 63, at 268; Seidl-Hohenveldern, supra note 193, at 503 n.32.

\textsuperscript{199} If the recognition by a non-member was constitutive, there would be a direct
responsibility of the member states because the international organization would
not exist for the nonmember. It would have to be assumed, then, that the member
states are made responsible for their acts, see supra note 195.

\textsuperscript{200} See supra text accompanying notes 97-144.
2. Indirect Responsibility Towards Non-Members Which Recognize the Public International Organization

If an international organization violates the international rights of a non-member, it is responsible for this wrongful act because of its independent international personality. Yet, a non-member cannot address its claims arising out of breaches of international obligations by the international organization directly to the member states of the organization whereas a non-member which does not recognize the international organization can do so except for breaches of bilateral treaty. This follows from the fact that the non-member has recognized the international organization as a subject of international law distinct from its members. The organization's personality is therefore opposable to the non-member. Nonetheless the question appears to be whether the responsibility of an international organization rests solely on that organization or whether the member states bear an indirect responsibility if the organization cannot or is not willing to fulfill its primary responsibility.

Several arguments have been made in support of an indirect responsibility of the member states for internationally wrongful acts of their organizations, at least in certain circumstances. First, it is assumed that the relationship between an international organization and its member states is similar to that between a federal state and its members. Because of this similarity it is said that the member states of an

201 In the following, reference in this paragraph to a non-member will mean a non-member which recognizes the international organization.

202 Hoffmann, supra note 193, at 586; Meng, supra note 63, at 342; MÜLLER, supra note 97, at 88; MÜNCH, supra note 63, at 268; SEIDL-HOHENVELDERN, CORPORATIONS, supra note 24, at 91.

203 See supra text accompanying notes 192-197.

204 Lauterpacht, supra note 41, at 412.

205 MÜNCH, supra note 63, at 269-270.
organization should bear indirect responsibility for the wrongful acts of the organization as the federal state is responsible for the internationally wrongful acts of its members.\textsuperscript{206} However, this comparison speaks for a sole responsibility of an international organization, since it is the federation which "absorbs" the responsibility of its members.

Secondly, it is argued that member states are indirectly responsible for the internationally wrongful acts as far as they control the international organization.\textsuperscript{207} This argument does not justify indirect responsibility of the member states, either.\textsuperscript{208} If the member states control the international organization, there is no reason why acts of the organization should be imputable to the organization and not to the member states. The theory that an international organization is controlled by its member states destroys \textit{de facto} the independent personality of the international organization. It is also a fiction

\begin{flushright}
\textsuperscript{206} \textit{Id.}
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\textsuperscript{208} Pernice, \textit{supra} note 59, at 420.
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because control can only be exercised by one entity\textsuperscript{209} but not by several entities with conflicting interests.\textsuperscript{210}

Thirdly and linked to the first argument, it is submitted that the relationship between an international organization and its member states is similar to that between a domestic corporation and its members.\textsuperscript{211} Because of this similarity, it is said to be possible to transfer the rules which have been developed by the ICJ in the \textit{Barcelona Traction} case\textsuperscript{212} to the international organization.\textsuperscript{213} Thereby the member states are said to be responsible for the debts of the international organization if it is terminated\textsuperscript{214} either by dissolution or otherwise.

However, the comparison between a domestic corporation and an international organization has to be rejected. Unlike a domestic corporation an international

\textsuperscript{209} Not surprisingly, the control theory is based upon a comparison between a state enterprise and an international organization. The control which is exercised by a state in a state enterprise allows lifting of the enterprise’s corporate veil, Herdegen, supra note 193, at 552. See generally Karl-Heinz Böckstiegel, \textit{Der Durchgriff auf den Staat bei Verträgen im internationalen Wirtschaftsverkehr}, in \textit{Festschrift für Ignaz Seidl-Hohenfeldern} 17 (1988); Mark M. Christopher, Note, \textit{Piercing the Corporate Veil Between Foreign Governments and State Enterprises: A Comparison of Judicial Resolutions in Great Britain and the United States}, 25 V.I.I.L. 451 (1984-85) for the question when the corporate veil of a state enterprise can be lifted.

\textsuperscript{210} \textit{See} Amerasinghe, \textit{supra} note 87, at 278.


\textsuperscript{212} Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) Second Phase, 1970 I.C.J. 3 (February 5).

\textsuperscript{213} Seidl-Hohenfeldern, \textit{supra} note 211, at 887.

\textsuperscript{214} \textit{Id.}
organization serves public purposes,\textsuperscript{215} and this excludes the applicability of the rules for domestic corporations.\textsuperscript{216} Related to this analogy to domestic law is the argument that international law does not contain express rules on the limited liability of an international organization as municipal laws on domestic corporations.\textsuperscript{217} From the lack of such rules it is concluded that the limited liability of an international organization is not possible in international law.\textsuperscript{218} This approach overlooks the basic principle in international law that everything is allowed as long as it is not prohibited by a specific rule.\textsuperscript{219}

Finally, the indirect responsibility of the member states is upheld under the assumption that there is a general principle of law that no subject can escape its responsibility towards third parties by creating another subject.\textsuperscript{220} Yet, it is doubtful whether such a

\textsuperscript{215} Meng, \textit{supra} note 63, at 331.

\textsuperscript{216} \textit{See} Henry G. Schermers, \textit{Liability of International Organizations}, 1 \textit{Leiden Journal of International Law} (L.J.I.L.) 3, 6 (1988) for more criteria of differentiation between international organizations and domestic corporations.

\textsuperscript{217} H.T.Adam, \textit{Les Organismes Internationaux Spécialisés} 130 (1965); Meng, \textit{supra} note 63, at 331 and 336; Schermers, \textit{supra} note 216, at 9; Shihata, \textit{supra} note 22, at 125.

\textsuperscript{218} Meng, \textit{supra} note 63, at 336; Schermers, \textit{supra} note 216, at 9. \textit{But see} Shihata, \textit{supra} note 22, at 125 (saying that the absence of a rule of limited liability does not imply that there is a rule of unlimited liability).

\textsuperscript{219} S.S. Lotus (France v. Turkey), 1927 \textit{P.C.I.J.} (ser.A) No.10, 2, 18-19 (September 7). Pernice, \textit{supra} note 59, at 419.

\textsuperscript{220} Meng, \textit{supra} note 63, at 331-333. \textit{See} Westland Helicopters Ltd. v. Arab Organization for Industrialization, 23 I.L.M. 1071, at 1084 (International Chamber of Commerce, Court of Arbitration, 1984) (saying that there is a general principle of law that members of an organization are indirectly responsible for the obligations of that organization unless "they had excluded their liability in a manner which could not escape third parties' notice ...."). \textit{See also} Seidl-Hohenveldern, \textit{supra} note 193, at 506 (saying that the corporate veil of an international organization may be lifted in cases which are analogous to those in
general principle of law can be found in different municipal laws. Nevertheless this argument has to be taken into consideration insofar as it implies that the member states enabled the international organization to commit breaches of international law by creating it. If they had not created the organization, it would not have an opportunity to commit an illegal conduct. Because of this creating act the indirect responsibility of the member states for the internationally wrongful acts of their international organization cannot totally be excluded. This does not mean that the member states incur an

municipal law where lifting of the corporate veil of a domestic corporation is justified).

221 Amerasinghe, supra note 88, at 274-275; Herdegen, supra note 193, at 551-552, and supra note 207, at 142. See Pernice, supra note 59, at 418 (saying that the principle of creditor protection is -if anything- only applicable to economic organizations).

222 See Meng, supra note 63, at 338-339.

223 Contra Pernice, supra note 59, at 419; Ritter, supra note 123, at 436. See Amerasinghe, supra note 87, at 275-277, and Philippe Cahier, The Strengths and Weaknesses of International Arbitration Involving a State as a Party, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 241, 244 (Julian DM Lew ed., 1987) (arguing that an indirect responsibility of the member states of an international organization must be explicitly provided by the founding treaty).

unlimited indirect responsibility. This would be a denial of the independent legal personality of the international organization. The indirect responsibility of the member states must therefore be an exception.

a. Indirect Responsibility for Ultra-Vires Acts

Ultra-vires acts may not only be breaches of an international organization’s internal law, but may also constitute wrongful acts towards non-members. It can be argued in such an instance that the member states bear an indirect responsibility for these acts, since they run afoul the constituting treaty of the organization which was set up by the member states. Thus, the indirect responsibility of the member states may arise from the fact that the international organization did not act within the limits imposed by them. However, it is questionable whether a non-member whose rights have been violated can invoke indirect responsibility of the member states based on this fact. A differentiation between the internal and the external ultra-vires acts seems necessary for resolving the issue.


224 Herdegen, supra note 193, at 553-554, and supra note 207, at 142; Münch, supra note 63, at 268; Seidl-Hohenvelde, supra note 2, at 80, Nr 0709. Contra Meng, supra note 63, at 340. See Müller, supra note 97, at 88.


226 Hoffmann, supra note 193, at 586.

227 But see Meng, supra note 63, at 342 (arguing that the responsibility of the member states for the ultra-vires acts is a direct responsibility based upon their control over the international organization).
(1) Internal Ultra-Vires Acts

The internal ultra-vires acts are those which are contrary to the internal separation of powers between the organs or to the procedural and substantive rules of the organs of an international organization.\(^{228}\) But they are nonetheless within the organization's scope of competences. A non-member's expectation that the international organization will obey its internal law does not need to be protected because the organization's nonconformity with its internal rules is an exclusively internal matter of the organization.\(^{229}\) Moreover, this nonconformity does not aggravate the wrongfulness of the act. For the non-member, it makes no difference whether the act was in conformity with the organization's internal law or not. There is therefore no indirect responsibility of the member states for the internal ultra-vires acts of their organization.

(2) External Ultra-Vires Acts

The external ultra-vires acts are those which are outside the international organization's scope of competences.\(^{230}\) As in the case of internal ultra-vires acts, the nonconformity of the external ultra-vires acts with the organization's constituting treaty does not add anything to its wrongfulness. But contrary to the internal ultra-vires acts, this nonconformity is not an exclusively internal matter of the international organization. It concerns the external sphere of the organization, since these acts exceed the competences which relate to the organization's external activities. Hence, the belief of a non-member

\(^{228}\) See supra text accompanying notes 135-139.

\(^{229}\) Art. 46 of the Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations, supra note 8, at 570, excludes in principle an organization's recourse in its internal law. Since an organization cannot invoke its internal law towards other parties, it must be concluded- argumentum e contrario - that other parties cannot invoke the internal law of an international organization either.

\(^{230}\) See supra text accompanying note 140.
that the international organization will not go beyond its external competences demands more attention. Under normal circumstances, the international organization would not be able to perform such an act in its external relations. Thus, it is reasonable to protect a non-member in its belief that it will not be violated by the external ultra-vires acts of the organization by stipulating an indirect responsibility of the member states. The member states will incur this indirect responsibility if the international organization is unable or unwilling to undertake its responsibility for wrongful acts.

However, there is one difficulty with this point of view. This difficulty stems from the implied powers of an international organization. These are "those powers which, though not expressly provided in the charter, are conferred upon (the international organization) by necessary implication as being essential to the performance of its duties." These powers may lead to the conclusion that the acts which seem at first sight to be external ultra-vires acts are still within the organization’s scope of competences because they are essential to the performance of its duties. Nevertheless, these implied powers do not expand an organization’s external competences unlimitedly. These powers must be necessary to achieve the aims of the international organization, and if they are not necessary, the acts are ultra-vires, and the member states are indirectly responsible for them.

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232 Seidl-Hohenvedern, supra note 140, at 40.

233 Id.
b. Indirect Responsibility for Ultra-Hazardous Activities

(1) Conventional Rules on Indirect Responsibility for Ultra-Hazardous Activities

Art.22 (3) of the Convention on the International Liability for Damage Caused by Space Objects\(^234\) (hereinafter Liability Convention) provides that an international organization and its member states which are parties to the Liability Convention are jointly and severally liable for damages caused by outer space activities of that organization. Before this joint and several liability can be established, two conditions must be met according to art.22 (1): the international organization must have declared its acceptance of the rights and obligations of the Liability Convention, and a majority of the international organization’s member states must be parties to the Liability Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (hereinafter Outer Space Treaty)\(^235\).

By establishing that the international organization and their member states are jointly and severally liable, the Liability Convention provides that the member states are indirectly responsible for the acts of the organization. Yet, only those member states which are parties to the Liability Convention incur this indirect responsibility. This is an exception to the afore mentioned submission that in a case of indirect responsibility all member states are indirectly responsible.\(^236\) This exception can be explained by referring to the customary rule of international law that a treaty cannot impose any obligation upon third

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\(^236\) See *supra* text accompanying notes 222-226.
parties unless they have consented to that obligation.\textsuperscript{237} The declaration of acceptance by the international organization required by art.22 (1) cannot be construed as binding for its member states\textsuperscript{238} because of its independent international personality. Therefore, the Liability Convention could only stipulate an indirect responsibility of those member states which are parties to it.

The reason for an indirect responsibility of those member states which are parties to the Liability Convention is supposedly that the outer space activities involve an increased danger of harm.\textsuperscript{239} For the same reason, art.2 of the Liability Convention\textsuperscript{240} has established an absolute liability for the damages caused on the surface of the earth or to aircraft in flight. That means that the parties to the Liability Convention are liable for any act which causes the kind of damage prescribed by art.2. The concept of this absolute liability is an exception to the rules of state responsibility, since it does not require that the act which leads to liability is in breach of an international obligation.\textsuperscript{241}

\textsuperscript{237} See supra note 54.


\textsuperscript{239} Id.

\textsuperscript{240} Supra note 234, at 189.

It only requires that the act causes damage. Yet, the absolute liability envisaged by the Liability Convention is limited, since art. provides for a liability based on fault for damages done elsewhere than on the surface of the earth or to aircraft in flight. The indirect responsibility of the member states is a secondary responsibility because according to art. (a) a claim for compensation shall be first presented to the international organization. Pursuant to art. (b) a non-member state may invoke the member states’ responsibility only if the international organization does not fulfill its obligation within six months.


243 *Supra* note 234, at 190.

244 Art.22 (3) covers only damages done to states, not to other subjects of international law. That is why this part of the thesis refers only to non-member states instead of non-members. The solution of the secondary indirect responsibility of those member states which are parties to the Liability Convention does not apply to non-member states which do not recognize the international organization, I.H. Diederiks-Verschoor, *Pro and Contra of International Governmental Organizations in Space Law*, in *Proceedings of the Seventeenth Colloquium on the Law of Outer Space* 186, 188 (1975) (hereinafter *Proceedings*); Christian Paternam, *Interpretation of some Articles of the Convention on International Liability for Damage Caused by Space Objects*, in *Proceedings* 118, 120 (1973); Silvia Maureen Williams, *Remarks on some Aspects of Space Liability*, in *Proceedings* 274, 277 (1972). Their participation in a multilateral treaty does not imply recognition of the organization’s international personality contrary to a bilateral treaty between them. Non-member states which do not recognize the international organization can therefore present their claims directly to the member states. But contrary to what was said above, *supra* text accompanying note 193, they cannot present their claims to all member states. They can present their claim only to those member states which are parties to the Liability Convention, Paternam, at 121, because member states which have not ratified the Liability Convention are not bound by the principle of absolute liability. Hence, these member states do not bear an indirect responsibility. It can be argued that this result might be an incentive for member states of an international organization which has declared its acceptance of the rights and obligations of the Liability Convention not to ratify this Convention and thereby avoid indirect responsibility. But it should be recalled that an
A similar provision can be found in the Outer Space Treaty. Its art.6 provides that the "responsibility for compliance with this treaty shall be borne both by the international organization and by the states parties to the treaty participating in such organization." By providing that the member states of an international organization are responsible for the organization's compliance with the Outer Space Treaty, it establishes an indirect responsibility of the member states. As in the Liability Convention, only those member states parties to the Outer Space Treaty bear an indirect responsibility. This limitation of indirect responsibility to certain member states is based on the same reason as in the Liability Convention.

Art.6 does not say, however, whether a claim for compensation has to be first presented to the international organization or whether a non-member state can choose to present its claim first to the member states. The provision can possibly be interpreted in both ways.246 Yet, following the general submission that an international organization is primarily responsible towards a non-member,247 the non-member state has to present its claim first to the international organization. Only if the organization does not fulfill its obligation is a non-member state entitled to address its claim to the member states. The indirect responsibility of those member states parties to the Outer Space Treaty is therefore a secondary one.248 It is assumed that the indirect responsibility of those international organization is only able to adhere to this Convention if a majority of its member states has ratified it.

245 Supra note 235, at 209.


247 See supra text accompanying note 202.

248 A non-member state which does not recognize the international organization can present its claim directly to the member states, Williams, supra note 244, at 274. However, only those member states which are parties to the Outer Space Treaty
member states is established because of the increased risk of damage involved in outer space activities.

Art. 7\textsuperscript{249} of the Outer Space Treaty provides that parties to the Treaty are "liable for damage to another state party to the treaty or to its natural or juridicial persons," thereby establishing an absolute liability,\textsuperscript{250} since it does not limit the liability to fault but embraces every damage. The reason why the Outer Space Treaty is not as specific as the Liability Convention is about the liability of an international organization and its member states is probably that there have been already discussions within the legal Sub-Committee of the UN- Committee on the peaceful use of outer space about the drafting of the Liability Convention.\textsuperscript{251}

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies\textsuperscript{252} (hereinafter Agreement) does not contain a provision dealing with an indirect responsibility of the member states. Art.16 in combination with art.14\textsuperscript{253} of the Agreement establishes only a responsibility of the international organization itself. An bear an indirect responsibility, since the other member states are not bound by its concept of absolute liability. \textit{See infra} note 250 for the concept of absolute liability.

\textsuperscript{249} Supra note 235, at 209. Since art.7 covers only damages done to states, this part of the thesis refers only to non-member states instead of non-members.


\textsuperscript{251} See Gerald F. FitzGerald, \textit{The Participation of International Organizations in the Proposed International Agreement on Liability for Damage Caused by Objects Launched into Outer Space}, 3 C.Y.I.L. 265 (1965) for the drafting history of art.22 of the Liability Convention.

\textsuperscript{252} December 18, 1979, 18 I.L.M. 1434 (1979).

\textsuperscript{253} Id. at 1439-1440
explanation for that omission can be found in art. 14 (2) which says that the "detailed arrangements concerning liability for damage caused on the moon.... may become necessary as a result of more extensive activities on the moon." Thus, a detailed provision on liability was considered unnecessary because of the limited activities on the moon. Moreover, since the moon and other celestial bodies do not belong to any one country, the activities on these celestial bodies cannot cause damage to any country. The Agreement is therefore no evidence for a tendency towards sole liability of international organizations in the sphere of outer space activities.  

(2) Customary Rules on Indirect Responsibility for Ultra-Hazardous Activities
The Outer Space Treaty and the Liability Convention provide for an indirect responsibility of those member states which have adhered to them for the outer space activities of their international organizations. The justification for such an indirect responsibility lies in the greater risk of damage of such activities compared to normal activities. A transfer of this concept of indirect responsibility to other ultra-hazardous activities of international organizations presupposes that there is an absolute liability in international law for damages arising out of ultra-hazardous activities. However, it is doubtful whether there is a customary rule or a general principle of international law which prescribes an absolute liability for ultra-hazardous activities.  

254 But see Pernice, supra note 59, at 422.

such a rule or a principle, the idea of indirect responsibility of the member states of an international organization which engages in such activities could be applied to those ultra-hazardous activities as well.

3. Indirect Responsibility Towards Other Member States

The member states of an international organization have two different kinds of relations with that organization: internal and external relations. If the international organization violates the rights of a member state, the external relation between the organization and the member state is involved. In such a case, the member state is in the same position as a non-member which has recognized the international organization. Therefore the same solution which applies to such a non-member has to be applied here. This means that the international organization is primarily responsible for its wrongful act towards a member state. The other member states incur an indirect responsibility only

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258 MUNCH, *supra* note 63, at 270. The membership of a state within an international organization is only of importance within the internal order of that organization, id. at 270-271.

in case of an external ultra-vires act or an ultra-hazardous activity for which international law has established an absolute liability.\textsuperscript{260}

However, since the constituting treaty of an international organization is \textit{lex specialis} for the member states,\textsuperscript{261} it can provide for another solution with respect to the question of indirect responsibility. The founding treaty can establish an unlimited indirect responsibility of the member states or a limited responsibility of the international organization for its breaches of international law towards its member states. There are a number of treaties of financial international organizations which contain non-liability clauses.\textsuperscript{262} These clauses exclude the liability of member states for obligations of their organizations beyond the extent of their unpaid subscriptions,\textsuperscript{263} thereby restricting the

\textsuperscript{260} \textit{But see} Adrian Bückling, \textit{Die völkerrechtliche Haftung für Schäden, die durch Weltraumgegenstände verursacht werden}, 21 \textit{ZEITSCHRIFT FÜR LUFTRECHT UND WELTRAUMRECHTSFRAGEN} 213, 219 (1972) (saying that art.22 (3) of the Liability Convention does not cover damages done by an international organization to its member states. However, there is nothing in the Convention which excludes such damages from its scope).

\textsuperscript{261} Ritter, \textit{supra} note 126, at 433. \textit{See} Herdegen, \textit{supra} note 193, at 549.

\textsuperscript{262} \textit{See} Amerasinghe, \textit{supra} note 87, at 271-274 n. 42-54 for references.

\textsuperscript{263} The payments of the member states for their uncalled subscriptions is not an indirect responsibility, since these payments are made towards the international organization and not towards the creditor of the organization, Münch, \textit{supra} note 63, at 263-64. In the case of Eurochemic, an international enterprise which was dissolved, the member states made payments for the contractual obligations of Eurochemic to Belgium, the successor of the enterprise, as part of the winding up process, but not to the creditors of the enterprise, Seidl-Hohenveldern, \textit{supra} note 223, at 51-52. The fact that the payments went beyond the subscribed shares of the member states, id., can be explained on the ground that the Statute of Eurochemic did not contain any non-liability clause, Amerasinghe, \textit{supra} note 87, at 271.
indirect responsibility of the member states towards another member state. However, the impact of these non-liability clauses is limited even with regard to the member states, since the interpretation pursuant to art.31 of the Vienna Convention on the Law of Treaties, which reflects customary international law, shows that these clauses are only destined to contractual, but not to non-contractual, obligations of an international organization. Yet, these clauses restrict the indirect responsibility of other member states with respect to the contractual obligations of an international organization towards a member state.

4. Division of Indirect Responsibility Among Member States

a. Attribution of Indirect Responsibility to Member States

(1) Wrongful Acts Towards Non-Members

Two situations have to be differentiated depending on where the act which gives rise to the indirect responsibility of the member states has occurred. First, if the act occurred in the territory of a non-member state, the indirect responsibility has to be attributed to all member states collectively because there is no link to a particular member state which

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264 These clauses have no effect on non-members which do not recognize the international organization. These clauses are also without effect on non-members which recognize the international organization. The recognition does not mean that the non-members consent to the limitation of the indirect responsibility of the member states which is a question of the internal law of the organization. If the member states want to exclude their indirect responsibility towards these non-members, they have to conclude a treaty with these non-members on that issue, Meng, supra note 63, at 340. Contra Amerasinghe, supra note 87, at 272-73. See Hoffmann, supra note 193, at 587 (saying that the non-liability clauses have an effect for contracts between a non-member state and an international organization).

265 Supra note 54, at 340.

266 The following remarks are valid for all non-members - whether they recognized the international organization or not.
would allow attribution of indirect responsibility to this particular state.\textsuperscript{267} Second, if
the act occurred in the territory of a member state, it can be argued that the indirect
responsibility should be attributed to this particular state because of the territorial link
between the act and the state.\textsuperscript{268}

The fact that some headquarter agreements provide that the seatstate of the international
organization does not incur any additional responsibility for the acts of the organization
other than that which follows from its membership\textsuperscript{269} seems to support this argument.
Such a provision, which is only binding for the member states,\textsuperscript{270} would be unnecessary
if the territorial link was considered to be irrelevant by the member states. However, the
attribution of the indirect responsibility to the member state where the act occurred
conflicts with art.13 of the I.L.C. draft on state responsibility, which states that "(t)he
conduct of an organ of an international organization ... shall not be considered as an act
of a State ... by reason only of the fact that such conduct has taken place in the territory
of that State ...."\textsuperscript{271} Yet, it has to be admitted that the practice which has been taken

\textsuperscript{267} MÜNCH, \textit{supra} note 63, at 267.

\textsuperscript{268} \textit{Id.} at 266. See L.F.E. Goldie, \textit{Liability for Damage and the Progressive
Development of International Law}, 14 I.C.L.Q. 1189, 1253 (1965) and SEIDL-
HOHENVELDERN/LOIBL, \textit{supra} note 2, at 80, Nr 0707 with respect to a non-
member state which does not recognize the international organization. See also
F.Münch, \textit{supra} note 153, at 322 (assuming an indirect responsibility of such a
state for non-treaty breaches with respect to every non-member state - regardless
of recognition) and Ritter, \textit{supra} note 126, at 438 (assuming an indirect
responsibility of such a state for public acts with respect to a non-member state
which does not recognize the international organization).

\textsuperscript{269} See Seidl-Hohenveldern, \textit{supra} note 117, at 418 for a headquarter agreement of
the Republic of Austria. Such a provision is useful for the seatstate because it is
most likely that the acts of the international organization occur on its territory.

\textsuperscript{270} \textit{Id.}

\textsuperscript{271} \textit{Supra} note 68, at 31.
into account by the I.L.C. to draft art.13 consists only of cases between an international organization and its member states or non-member states which recognize the international organization. Nonetheless it is submitted that the reasoning behind art.13 applies also to a non-member which does not recognize the organization. The mere fact that the act which gives rise to the indirect responsibility of the member states occurred in the territory of a member state is not sufficient to single out this particular state. The territorial link between this particular state and the act concerned is only arbitrarily. There is no more causal relationship between the act and the particular state than between the act and the other member states. Therefore, even if the act is committed in the territory of a member state, the indirect responsibility has to be attributed to all member states collectively.

The attribution of the indirect responsibility to all member states collectively may be challenged for acts which have been decided by a majority. It can be said that only those member states which have voted in favor of the act should be indirectly responsible. This is contrary to the general rule that the acts of an international organization are only imputable to the organization. However, since the indirect responsibility of the member states is an exception to that general rule, it can be further argued that the indirect responsibility of only those member states which voted for the act also follows from that exception. Still, the assumption has no validity, since an opposing member state has agreed to the possibility of majority decisions within the organization. Since the state knew that its vote could be overruled, it cannot escape the indirect responsibility

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272 See the I.L.C. commentary on art.13, supra note 70, at 87 passim.

273 Cf. MÜNCH, supra note 63, at 267 (assuming a collective responsibility of all member states, but submitting that the member state on whose territory the act was committed bears a primary responsibility, whereas the other member states bear a secondary responsibility).

274 See supra text accompanying notes 97-144.
as a member of that organization.\textsuperscript{275} Thus, even in the case of majority decisions all member states are held indirectly responsible.

\textbf{(2) Wrongful Acts Towards Member States}

Here again we are faced with two different situations depending on the location of the act which gives rise to the indirect responsibility of the member states. First, if the act occurred in the territory of the claimant member state or a non-member state, the indirect responsibility has to be attributed to all other member states collectively, since there is no link to a particular member state which would justify attribution of indirect responsibility to this particular state. Second, if the act occurred in the territory of one of the other member states, the indirect responsibility has to be also attributed to all member states collectively except for the claimant member state because the territorial link between the act and the particular member state is of no importance.\textsuperscript{276}

\textbf{b. Share of Responsibility}

Although the indirect responsibility is attributed to all member states collectively, the question remains whether a claimant subject has to receive reparation from all member states collectively, or whether it can receive reparation from one member state.\textsuperscript{277} The

\textsuperscript{275} Seidl-Hohenveldern, \textit{supra} note 193, at 503. See F. Münch, \textit{supra} note 153, at 322.

\textsuperscript{276} See \textit{supra} text accompanying notes 272-273. Those member states which voted against the act are also indirectly responsible because of their consent to majority decisions, see \textit{supra} text accompanying note 275.

\textsuperscript{277} See Wilhelm A. Kewenig, \textit{Der Internationale Zinnrat - Ein Lehrstück des Wirtschaftsvölkerrechts}, 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 781, 786 (1990). The same question arises with respect to the exercise of diplomatic protection by a non-member state which does not recognize the international organization, see \textit{supra} note 171.
former presupposes that the member states are only partly liable, whereas the latter presupposes that the member states are jointly and severally liable.

Art.22 (3) of the Liability Convention\textsuperscript{278} provides that the "organisation and those of its members which are States Parties to this convention shall be jointly and severally liable." Yet, it is doubtful whether this means a joint and several liability of the member states. The wording of art.22 (3) permits the assumption that the organization on one side and the member states \textit{en bloc} on the other side are jointly and severally liable.\textsuperscript{279} This interpretation is supported by the context of the convention.\textsuperscript{280} Art.5 (1)\textsuperscript{281} establishes a joint and several liability of two or more launching states. Persuant to art.5 (2)\textsuperscript{282} the state which has paid compensation has a claim of indemnification against the other launching state(s). Such a provision is missing in art.22 (3). Even if art.22 (3) was interpreted in such a way as to make the member states of an international organization, which are parties to the Liability Convention, jointly and severally liable, this principle would only attach to this Convention.

To apply this principle also in other cases which are not related to the Liability Convention, it would have to be shown that the principle of joint and several liability is either a customary rule of international law or a general principle of law. There is no

\textsuperscript{278} Supra note 234.

\textsuperscript{279} Patermann, supra note 244, at 121-22. See Foster, supra note 234, at 182 and Galicki, supra note 246, at 207. But see FitzGerald, supra note 251, at 247-75 (citing suggestions in the legal Sub-Committee that prepared the Liability Convention for a joint and several liability of the member states of an international organization). See also Goldie, supra note 268, at 1253 (suggesting a joint and several liability of states that engage in space activities through international organizations).

\textsuperscript{280} Patermann, supra note 244, at 121-122.

\textsuperscript{281} Supra note 234, at 190.

\textsuperscript{282} Id..
sufficient practice which would allow the assertion that the principle is a customary
erule.\textsuperscript{283} However, there is support for the submission that the principle of joint and
several liability is a general principle of law.\textsuperscript{284} The principle of joint and several
liability is established in the common and civil law systems for torts that are committed
by several parties.\textsuperscript{285} Other law systems have also embraced this principle.\textsuperscript{286} It is
therefore assumed that the principle of joint and several liability is a principle of
international law. Thus, the member states of an international organization are jointly and
severally liable for acts of their organization which entail their indirect responsibility.
Accordingly, a claimant subject can present its total claim for reparation to one member
state.\textsuperscript{287}

Once the member state has satisfied the claim of the claimant subject, it has a claim of
indemnification towards the other member states.\textsuperscript{288} This claim of indemnification has
to be satisfied by each member state according to the percentage of its amount of

\textsuperscript{283} John E. Noyes/ Brian D. Smith, \textit{State Responsibility and the Principle of Joint
and Several Liability}, 13 \textit{THE YALE JOURNAL OF INTERNATIONAL LAW} 225, 242
\textit{passim}, 250 (1988). \textit{But see} Meng, \textit{supra} note 63, at 342; MÜNCH, \textit{supra} note
63, at 267 and Ritter, \textit{supra} note 126, at 436 (assuming a joint and several
liability of the member states of an international organization). \textit{See also} Paul de
Visscher, \textit{La Protection Diplomatiques Des Personnes Morales}, in 102
R.C.A.D.I. 480, 487-88 (1961I) (assuming that the member states of the EEC
can act \textit{ut singuli} towards a non-member state which does not recognize the EEC
to protect its interests. That means - \textit{argumentum e contrario} - that such a non-
member state can invoke its claim against one member state).

\textsuperscript{284} Noyes/ Smith, \textit{supra} note 283, at 249 \textit{passim}.

\textsuperscript{285} \textit{Id.} at 251.

\textsuperscript{286} \textit{Id.} at 252-53.

\textsuperscript{287} The same principle applies to the exercise of diplomatic protection by a non-
member state which does not recognize the international organization.

\textsuperscript{288} MÜNCH, \textit{supra} note 63, at 268; F. Münch, \textit{supra} note 153, at 323.
financial contribution to the international organization or its subscribed shares of the international organization.
V. Summary of Conclusions

An international organization comes into being by an international agreement concluded by subjects of international law, i.e., states or other international organizations. This international organization is called a public international organization instead of international governmental organization, since it is assumed that not only states but also international organizations can create such an international organization. The founding agreement must make the international legal system available for the organization, it must provide for the aims and related competences of the organization, and it must equip the organization with its own organs. If these requirements are fulfilled, the international organization is distinct from its founders.

By receiving international rights and obligations, an international organization becomes an international person. The source of this international personality is the agreement by which the organization is established. The international personality of an organization is thereby restricted to the rights and obligations which are imposed by the founding treaty. This makes an international organization different from a state whose international personality is independent from any international treaty and whose rights under international law are unlimited.

289 Supra text accompanying notes 3-9.

290 Supra text accompanying notes 10-17.

291 Supra text accompanying note 46.
Once an international organization has been established, it exists as an international person for all subjects of international law, whether they recognize the organization or not.\textsuperscript{292}

The international personality is, however, not opposable to subjects which do not recognize the organization because of the principle "res inter alios acta".\textsuperscript{293} Otherwise, these subjects would be obliged to accept the responsibility of the organization for its wrongful acts. This would be contrary to the afore mentioned principle. If the organization is recognized by other subjects, its international personality is opposable to these subjects. The recognition by other subjects of international law does not confer a new personality to the organization. Thus, its personality is objective and a recognition of its personality is declarative.\textsuperscript{294}

Since an international organization has rights and obligations under international law, it is able to act under international law. Therefore it can violate the rights of other subjects of international law because the capacity to act entails the capacity to act illegally. When acting illegally under international law, an international organization is responsible for its breaches of international law.\textsuperscript{295} However, there are no rules of international responsibility developed by the practice of international organizations which govern the international responsibility of these organizations. There are only rules of state responsibility developed by state practice.\textsuperscript{296} These rules are not \textit{per se} binding for an

\textsuperscript{292} Supra text accompanying notes 54-55.

\textsuperscript{293} Supra text accompanying notes 56-57.

\textsuperscript{294} Supra text accompanying notes 58-60.

\textsuperscript{295} Supra text accompanying notes 63-67.

\textsuperscript{296} Supra text accompanying notes 70-73.
international organization. But they are binding for the organization, if the organization recognizes or accepts them, or if it participates in the international relations without declaring reservations. However, in applying these rules to the organization due respect needs to be paid to its structure.

An international organization is responsible for the acts of its organs, whether these organs are composed of civil servants or of state representatives. It is also responsible for the acts of the organs which have been placed at its disposal from states or other international organizations. Finally, the ultra-vires acts of its organs, whether internal or external, are imputable to the organization. The responsibility for all these acts is a consequence of the independent international personality of an international organization.

If an international organization breaches international obligations concerning the treatment to be accorded to aliens, those individuals have to exhaust the local remedies of the organization, provided that there are such remedies available and that they are effective. If the exhaustion of these remedies does not lead to a situation required by the international obligation, or if there are no effective remedies available within the internal order of the organization, the states of the individuals concerned, which are members of the organization or which recognize the organization, can exercise diplomatic

297 Supra text accompanying notes 74-79.

298 Supra text accompanying notes 84-95.

299 Supra text accompanying notes 96-117.

300 Supra text accompanying notes 118-126.

301 Supra text accompanying notes 127-144.

302 Supra text accompanying notes 148-169.
protection against the organization.\textsuperscript{303} But, those states which do not recognize the organization can exercise diplomatic protection directly against the member states of the organization as a consequence of their non-recognition.\textsuperscript{304}

If a member state acts in association with an organization, it is responsible for its own conduct.\textsuperscript{305} This type of responsibility is called concurrent responsibility. There is no direct responsibility of the member states for acts of an organization, since the international organization is a subject of international law distinct from its members. However, the member states incur an indirect responsibility in certain circumstances. They incur an indirect responsibility for all kinds of acts towards subjects which do not recognize the organization.\textsuperscript{306} The practical consequences of this unlimited responsibility towards subjects which do not recognize the international organization are restricted, since all the major international organizations are recognized by the majority of the subjects which form the international community.

The member states of an organization incur only a limited indirect responsibility towards subjects which recognize the organization.\textsuperscript{307} This indirect responsibility is limited to the external ultra-vires acts of their organization\textsuperscript{308} and to its ultra-hazardous activities for which international law has established an absolute liability.\textsuperscript{309} The practical consequences of this limited responsibility towards subjects which recognize the

\textsuperscript{303} \textit{Supra} text accompanying notes 161-167.

\textsuperscript{304} \textit{Supra} text accompanying notes 170-171.

\textsuperscript{305} \textit{Supra} text accompanying notes 185-188.

\textsuperscript{306} \textit{Supra} text accompanying notes 192-200.

\textsuperscript{307} \textit{Supra} text accompanying notes 222-226.

\textsuperscript{308} \textit{Supra} text accompanying notes 230-233.

\textsuperscript{309} \textit{Supra} text accompanying notes 234-257.
international organization are equally restricted. First, external ultra-vires acts are unlikely to occur because of the implied powers of an international organization.\textsuperscript{310} Second, the areas in which conventional and customary international law have established an absolute liability are limited.\textsuperscript{311} The same indirect responsibility of the member states applies to the wrongful acts of the organization towards other member states.\textsuperscript{312} However, the constituting treaty of an international organization can provide for a limited responsibility of the organization with respect to wrongful acts against its member states.\textsuperscript{313} The indirect responsibility is attributed to all member states (except in a case in which a member state has been violated), regardless of whether the act which entails the indirect responsibility was committed within a member state or a non-member state.\textsuperscript{314} The indirect responsibility is also attributed to those member states which voted against the wrongful act.\textsuperscript{315} The member states are jointly and severally liable.\textsuperscript{316} A claimant subject can thus present its claim to one member state and collect the whole reparation from this state. This member state in turn has a claim of indemnification against the other member states.

\textsuperscript{310} \textit{Supra} text accompanying notes 232-233.

\textsuperscript{311} \textit{Supra} text accompanying notes 234-254 for conventional liability and notes 255-257 for customary liability.

\textsuperscript{312} \textit{Supra} text accompanying notes 258-260.

\textsuperscript{313} \textit{Supra} text accompanying notes 261-265.

\textsuperscript{314} \textit{Supra} text accompanying notes 267-276.

\textsuperscript{315} \textit{Supra} text accompanying notes 274-275.

\textsuperscript{316} \textit{Supra} text accompanying notes 284-287.
In order to clarify the legal situation with regard to the international responsibility of international organizations and their member states, it is proposed that the GA authorizes the ILC to draft a treaty which establishes the legal principles found in this thesis. This treaty could be the counterpart to the future treaty on state responsibility which is currently drafted by the ILC. The treaty on the international responsibility of international organizations should be open for signatures by states and international organizations.\textsuperscript{317}

\textsuperscript{317} The same approach has been taken for the law of treaties. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, \textit{supra} note 8, established the law of treaties between international organizations and other international organizations or states, closely tracking the provisions of the Vienna Convention on the Law of Treaties, \textit{supra} note 54. The former Convention is open for signatures by states and international organizations according to its art.82, \textit{supra} note 8, at 587-588.
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