The Legal Framework For The Responsibility Of International Organizations

by

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I. Introduction

When states cooperate in order to form an international organization, they authorize it to have the power to perform certain functions with legal consequences. While performing these functions, an international organization may incur responsibilities to third parties. These third parties may be states, other organizations, individuals or legal persons. All the different possibilities regarding the status of the third party cause situations that differ greatly from each other. The main rule is that international organizations are responsible for the consequences of the acts performed by them.[1]

The capacity of international organizations to be held responsible under international law corresponds to their respective capacities to operate under international law. The responsibility of international organizations varies according to the scope of their legal personality. The responsibility will depend on their legal status *vis-à-vis* both member and non-member states, and will differ from organization to organization.[2]

With the increasing number of international organizations executing tasks with highly injurious potential, the responsibilities need to be defined clearly. The efforts to provide international organizations with the status of international legal subjects with a responsibility of their own have proved only partially successful. The law on the responsibility of international organizations is unclear.[3]

The two principal aims of the law of international responsibility in both domestic common law and civil law systems are: i) to prevent or minimize breaches of obligations prescribed by law; and ii) to provide remedies for those subjects whose legal rights have been infringed due to such violations. A general examination of the evolution of the law in both international and national systems in recent decades shows a change of perspective. There used to be a tendency to stress the limitations of the obligations of the potential wrongdoer, but the emphasis has shifted and now tends to be on the rights of the injured parties.[4]

[1] Amerasinghe, C. F.: Principles of the Institutional Law of International Organizations, Cambridge University Press, United Kingdom 2005, p. 408.

[2] Ginther, Konrad: International organizations, Responsibility, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Volume II, North-Holland 1991, p. 1336.

[3] Ginther (1991) p. 1339.

[4] Hirsch, Moshe: The Responsibility of International Organizations Toward Third Parties: Some Basic Principles, Martinus Nijhoff Publishers, Dordrecht 1995, p. 8.

Recently, international organizations in general and the United Nations (UN) in particular, have been placed under greater scrutiny.[5] It is also noteworthy that the obligations of international organizations towards their member states have recently received some attention especially with regard to international financial institutions, such as the International Monetary Fund and the World Bank.[6]

In academia, this shift towards a more critical approach is reflected in the decision of the International Law Association (ILA) to create an international research committee on the 'Accountability of International Organizations'.[7]

The current possibilities to bring international organizations to account for their actions are limited when compared to existing possibilities with respect to states. In the absence of effective legal remedies against international organizations directly, attempts to file claims against member states continue. The view of many international law experts is that member states of an international organization do not incur legal responsibility for the acts of the organization by virtue of their membership in it. However, some writers accept that member state responsibility might be in order, if effective remedies against international organizations are lacking.[8]

Two basic questions are raised. Whether and under what conditions are international organizations obliged to comply with obligations under international law? What are the legal consequences of non-compliance, in particular regarding the responsibility of international organizations for damage caused in violation of the above-mentioned obligations? In theory, four alternatives can be offered as answers to these questions. The answers have also partly been followed in practice: i) Only the member states are held responsible, be it jointly, or severally and jointly; ii) the organization and the member states are held severally and jointly responsible;

[5] Wilde, Ralph: Enhancing accountability at the international level: the tension between international organization and member state responsibility and the underlying issues at stake, 12 ILSA Journal of International & Comparative Law, 395 – 415, Spring 2008, p. 399 and International Law Association, Final Report of the Committee on the Accountability of International Organizations (2004) and Resolution No. 1/(2004) both available at http://www.ila-hq.org/en/committees/index.cfm/cid/9 (last visited on 11 March 2010).

[6] Darrow, Mac: Between light and shadow: The World Bank, the International Monetary and International Human Rights Law, Hart Publishing, Oxford/Oregon 2003, p. 132 An interesting curiosity about the World Bank is that it has established an Inspection Panel. The purpose of the Panel is to make sure that the Bank is acting in compliance with its own operational policies, i.e. not with obligations arising from general international law. The Inspectional Panel is an internal organ of the World Bank and can only recommend an investigation on other measures. For more on the topic, please see Shihata, Ibrahim F.I.: The World Bank Inspection Panel: In Practice, Oxford University Press, 2000, p. 56 and Roos, Stefanie-Ricarda: The World Bank Inspection Panel, Max Planck United Nations Law Yearbook 5, pp. 479-521, 2001, p. 482.

[7] Wilde (2008) p. 399 and International Law Association, Final Report of the Committee on the Accountability of International Organizations (2004) and Resolution No. 1/(2004) both available at http://www.ila-hq.org/en/committees/index.cfm/cid/9 (last visited on 11 March 2010).

[8] Wilde (2008) pp. 400-401.

iii) the organization is held primarily responsible and the member states only secondarily responsible; or iv) the international organization is held exclusively responsible.[9]

The aim of this article is to examine the responsibility of international organizations, from a procedural perspective as a contextual perspective. It touches upon the question of member state responsibility and the phenomenon of 'piercing the corporate veil'.[10] Four concrete steps of improvement, which could be taken in order to improve the situation regarding international responsibility and to increase accountability, are proposed.

II. The Legal Foundation for International Organizations

2.1 Constituent Documents

The basis of the legal order of an international organization is its constituent document. The constituent document, the constituent treaty, represents the top of the hierarchy of legal rules of the international organization.[11] The constituent treaty differs from international treaties in general. For example, the purpose of constituent treaties is to create a new subject of law, which possesses certain autonomy. The constituent treaty forms the backbone of the international organization and aids in the process of identifying and organizing the competences of the organization.[12]

The constituent treaty determines the legal nature of the instruments of an international organization, and the ways those instruments are created. However, the constituent treaty may be too vague or even if it is clear (as the Treaty of Rome), cases, where the instrument does not fit into the scope of the treaty may be presented in practice.[13]

Often the objectives of normative texts are to authorize various bodies, especially international organizations, to contribute to the preservation of a harmonious international order. In this regard, the texts must offer clarity in defining the specific duties and jurisdiction of these bodies in order to avoid any straying from the true objectives of the organization. Straying from the

[9] Ginther (1991) p. 1336.

[10] While referring to international organizations, the 'corporate veil' means the same type of limited responsibility of the member states, as exists for the share holders of a limited liability company. 'Piercing the veil' -situation thus refers to a situation, where member state responsibility is invoked.

[11] Schermers, Henry G. & Blokker, Niels M.: International Institutional Law, Kluwer Law International, the Netherlands 1995, p. 1195, para. 1899.

[12] Diez de Velasco Vallejo, Manuel: Les organisations internationales, Economica, Paris 2002, p. 107.

[13] Klabbers, Jan: An Introduction to International Institutional Law, Cambridge University Press, United Kingdom 2005, p.197.

objectives can result in violations of law and cause harm to third parties.[14] Unsuccessfully directed involvement by international organizations may blur the distinction between their positive value and unreasonable, regulatory involvement that has a negative effect on the international order. That is why the roles of international organizations must be clear. That is also why the normative texts providing the justification and authority for these roles must be as clear as possible. The texts that international organizations themselves produce and apply in the execution of their responsibilities, must also be drafted and interpreted with extreme care, taking into consideration the juridical instruments on which the work relies. These texts provide legitimacy for the acts of the organization.[15] The general starting point, when examining issues of responsibility of international organizations is the text of the constituent treaty in each case.[16]

International organizations can be regarded as subjects of international law. Three indicators can be used to define an international subject. The first indicator is whether the subject in question has the right to enter into international agreements. The second is whether it has the right to send and receive delegations, and the third is whether it can file and receive international claims. However, even though an organization would not fulfil one of these requirements, it could still be regarded as an organization, and the list is not a comprehensive description of subjects of international law.[17]

To be able to attain the aims presented in the constituent documents, international organizations need the attribution of competences, a legal personality, organs and financial and personnel resources.[18] In order to operate in the guidelines provided to the international organization, it also needs the capacity to create legal instruments.[19]

[14] Araujo, Robert John (2005): Objective Meaning of Constituent Instruments and Responsibility of International Organization. In Maurizio Ragazzi (ed.), International Responsibility Today, pp. 343 – 353, Koninklijke Brill NV, the Netherlands 2005, p. 346.

[15] Araujo (2005) p. 347.

[16] Brownlie, Ian: The Responsibility of States for the Acts of International Organizations. In Maurizio Ragazzi (ed.), International Responsibility Today, pp. 355 – 362, Koninklijke Brill NV, the Netherlands 2005, p. 359.

[17] Klabbers (2005) p. 44.

[18] Colliard, Claude-Albert – Dubouis, Louis: Institutions Internationales, Dalloz, Paris 1995, p. 172.

[19] Klabbers (2005) p. 197. Note that the generic term 'instruments' includes but is not limited to international agreements. It covers also other legal documents, such as rules and decisions, which can also be seen as rather generic categories. The core of the matter is that any problem can be solved provided that the right tools exist, and by the term 'instruments', it is meant to express that international organizations need the capacity to create these tools.

2.2 International Legal Personality

The notion of 'legal personality' is originally a concept of private law. It was designed to enable a group of persons to function as an autonomous entity in pursuit of a certain goal. The legal personality of these entities is derived from the individuals who form the entity. Therefore, the theoretical distinction sometimes made between original and derivative legal persons was born.[20]

The international legal personality of an international organization means that it possesses rights, duties, powers and liabilities distinct from its members or its creators on the international plane and in international law. The question what these powers are, is a harder one to answer, as the international legal personality is rarely explicitly mentioned in the constituting acts of organizations.[21]

Unlike most domestic legal orders, international law does not have a code or a statute, which contains the requirements for obtaining legal personality or capacities that result from it.[22]

The international personality of international organizations has evolved, and it can be said that they have a legal personality that is distinct from their member states. The organizations not only have the capability to possess rights or obligations in international relations, but also when they operate in the territory of a state.[23] The fact that little doctrinal work on the subject of the legal personality of international organizations has appeared after the beginning of the 1970s, may be seen as evidence of the fact that the international system has evolved to a point where the legal personality of international organizations as such is no longer an issue.[24]

2.3 Domestic Legal Personality

Every domestic legal system is free to develop its own requirements for a legal personality to exist. This does not mean that these various differing requirements would be unrelated. Many constituent treaties of international organizations also have provisions regarding their legal

[20] Muller, A.S.: International Organizations and their Host States, Aspects of their Legal Relationship, Kluwer Law International, the Netherlands 1995, p. 72.

[21] Amerasinghe, C.F.: Local Remedies in International Law, Cambridge University Press, United Kingdom 2004, p. 78,

[22] Muller (1995) p. 72.

[23] Diez de Velasco Vallejo (2006) p. 14. The Articles of the constituting acts of certain international organizations defining the international legal personality: European Community (EC) art. 281; European Coal and Steel Community (ECSC) art. 6; United Nations Educational, Scientific and Cultural Organization (UNESCO) art. XII; World Meteorological Organization (WMO) art 27; International Maritime Organization (IMO) art. 49; Organization of American States (OAS) art. 139. Articles defining the domestic legal personality: UN art. 104; EC art. 282 Indian Ocean Commission (IOC) art. 3.2.

[24] Muller (1995) p. 73.

personality under the domestic law of their member states. These provisions, naturally, can only affect the organization's position within its member states – states that are not members define the legal status of the organization in accordance with their national law. This often depends on the government's opinion regarding the organization's status in general – whether it has recognized the organization or not. The domestic legal personality of an organization may extend to its various organs, and even its subsidiary bodies.[25]

The acquisition of legal personality under international law does not depend on the inclusion of a specific provision in the constituent instrument. However, all the better if such a provision can be found, as, for example Article 104 of the United Nations Charter, which reads as follows:

> *"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."*

The purpose of this type of provision in the constituent instrument or the headquarters agreement is to impose on the member states or the host state an obligation to recognize the legal personality of the organization under national law. [26]

In addition to the constituent treaty, a particularly important source for answers regarding the domestic legal personality of an international organization is the Headquarters Agreement, concluded between the organization and the host state. This agreement determines the immunities and privileges of the organization and creates a particular legal status that derogates from the automatic application of national law.[27] On the international level there are two ways to lay down the parameters for the national legal personality of international organizations. Firstly, there are those provisions that state that the organization: shall enjoy in the territory of its member states 'the legal capacity necessary to exercise its functions'. This is a functional description of the concept. The second way explicitly indicates what capacities the national legal personality includes. According to one 'model description', the international organization shall have the capacity to: i) contract; ii) to acquire and dispose of immovable and movable property; and iii) to institute legal proceedings. There is no substantial difference between the two above-mentioned ways of determining domestic legal personality, although both organizations and states tend to prefer one of the two.[28]

[25] Klabbers (2005) pp. 49-52.

[26] See Official Records of the General Assembly Fifty-eight Session, Supplement No. 10(A/58/10) (2003) pp. 29 – 54, Report of the International Law Commission (ILC), 55th session (5 May – 6 June and 7 July – 8 August 2003) p. 41.

[27] Colliard – Dubouis (1995) p. 174.

[28] Muller (1995) pp. 89-90. Muller presents as an example the fact that financial institutions seem to have a preference for the model description.

2.4 Attributed, Implied and Inherent Powers

In order to be able to operate, international organizations need legal competence, i.e. legal powers. The possible origins of this competence or these powers are not as clear as their necessity. The debate between attributed, implied and inherent powers is interesting, and as it is necessary to know what exactly the existing powers are for us to be able to define an act beyond these powers, the three possibilities of origin are shortly presented below.

Attributed powers basically mean that international organizations are only authorized to do things they are empowered to do. The principle of attribution faces at least two problems. Firstly, the whole idea of creating international organizations loses ground, if these organizations are nothing more than spokespersons of their member states. The second problem relates to the fundamental idea of an international organization. As they are considered dynamic and living creatures that are in constant development, their founding members can hardly envisage their future completely. This creates a major practical problem, if attributed powers are considered the only powers an organization can have.[29]

The doctrine of implied powers was first developed in order to solve the division of power between central government and local authorities in the context of federal states. There are two ways in which implied powers can be considered to exist. The first way supposes that implied powers flow from a rule of interpretation that treaty rules must be interpreted so as to guarantee their fullest effect. The second version suggests that a power is implied in the functions and objectives of the organization. The latter version has been criticised, but is often thought to have prevailed.[30]

As both of the above-mentioned doctrines have their problems, a third one has been presented. According to the third alternative, established organizations would possess inherent powers to perform all those acts, which they need to perform in order to reach their goals, simply because they are inherent in being an organization.[31]

Usually, when important powers, as in the above-mentioned situations, have been attributed to international organizations, parliamentary and judicial organs have also been established. These structures are needed to provide necessary checks and balances.[32]

[29] Klabbers (2005) pp. 63-67.

[30] Klabbers (2005) pp. 67-73.

[31] Klabbers (2005) p. 75.

[32] Schermers – Blokker (1995) p. 1193 para. 1897.

III. Governing Laws and Supervisory Mechanisms

3.1 The Governing Law

The law governing the relations between international organizations and states is generally international law. Therefore, in states' relations with organizations as members the constituent instrument would basically be applicable as an international treaty, subject to international law. There may also be relationships between states and organizations which involve separate agreements governed by international law. Examples of these agreements would be headquarter agreements and peacekeeping agreements.[33]

However, there may be direct relations between international organizations and states, which are governed by national or by international law. As an example, the supply of gas or electricity by a state to an international organization will generally be governed by the national law of that state. Responsibility of states to international organizations may in the appropriate situation and circumstances, for example, if armed forces or police damage the property of an organization, be governed by international law. The converse situation regarding the responsibility of an organization to a state, may also be governed by international law, for example, when an official of an organization in the performance of his duties damages state property. The ownership of immovable property and the rights and duties relating to it, are generally governed by the national law of the state, where the property is located (*lex situs*). Therefore, the UN, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), for example, have registered the ownership of the buildings they own in the USA in the appropriate registry. It is understood that the consequences of ownership in terms of rights, derive from the national law concerned.[34]

It must be stated that international organizations also have diverse relations with entities other than states, such as natural persons and corporations, and these relations are governed by either national or international law. There is a wide range of choices regarding the law of contracts or agreements, and if no expressed choice is made, principles of private international law apply to determining the proper law applicable to the contract.[35]

The mechanisms of bringing international organizations to account for their actions are limited when compared to such mechanisms existing with respect to states.[36] A major issue is the question whether and to what extent the application of systems of public order can be evaded by the claim that it was not the member states, but the organization that was involved in the activities concerned. One such case, *Serbia and Montenegro v. Belgium* concerned the legality of

[33] Amerasinghe (2005) p. 387.

[34] Amerasinghe (2005) p. 387.

[35] Amerasinghe (2005) p. 388.

[36] Wilde (2008) p. 400.

use of force. In 2004 three of the respondent states contended at the preliminary objections phase at the International Court of Justice (ICJ) that because the North Atlantic Treaty Organization (NATO) possesses legal personality, it is the organization and not the individual member states that should bear the responsibility.[37]

Concerning member state responsibility, in the case of *Waite and Kennedy v. Germany* in 1999, the Grand Chamber of the European Court of Human Rights (ECrtHR), in an Article 6 case, observed that:

> "The Court is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial...."[38]

While the case concerned human rights, the principle applied would seem to be a general one. A state cannot escape responsibility by creating an international organization. It is also clear that responsibility for violations of the European Convention on Human Rights (ECHR) is itself a form of state responsibility.[39]

The decisions of deliberative, legislative or executive organs of organizations may need to be interpreted and legally examined either by the organs themselves, by other organs or by international or national tribunals. As an example, the decisions of the General Assembly or the Security Council of the UN relating to peace-keeping may fall into this category. In 1982 a resolution of the General Assembly relating to the UN Council for Namibia was brought before an organ of the UN for interpretation. The Legal Counsel of the UN gave an opinion in which he advised that because the resolution conferred a representative function on the Council, it had the power to conclude contracts on behalf of Namibia. His opinion was followed.[40]

[37] *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (2004), Judgment of the International Court of Justice, 15 December 2004. Commented by Brownlie (2005), see the preliminary objections of France, Italy and Portugal, available at www.icj-cij.org applications submitted in 1999 (last visited 14 March 2010).

[38] See as recent authority, *Aït-Mouhoub v. France (Case No 103/1997/887/1099) (28 October 1998, unreported) (p. 52) referring to Airey v. Ireland (1979) 2 EHRR 305 at 314-315) Waite and Kennedy v. Germany* (Application no. 26083/94), 118 International Law Reports (ILR) (2001), 121, at 135 (p. 67).

[39] Brownlie (2005) p. 361.

[40] Amerasinghe (2005) pp. 61 and the opinion of the Legal Counsel of the UN of 14 April 1982: United Nations Juridical Yearbook (UNJY) (1982) pp. 164-165.

3.2 Supervisory Mechanisms

3.2.1 The International Court of Justice

The ICJ is the principal judicial organ of the UN. It is one of the six major organs of the organization and the successor to the Permanent Court of International Justice (PCIJ) established by the League of Nations (LN). The Statute of the Court is an integral part of the UN Charter, and as a government ratifies the Charter, the ratification includes automatically the acceptance of the Statute. However, the compulsory jurisdiction of the Court further requires an acceptance by the state[41].

In addition to hearing contentious cases, the ICJ is authorized to issue advisory opinions on legal questions. The UN Charter provides that the UN General Assembly and the Security Council may request such opinions and that the General Assembly may authorize other organs and the specialized agencies to request opinions on legal questions within the scope of their activities. The Economic and Social Council (ECOSOC), the Trusteeship Council, and all the specialized agencies except the Universal Postal Union have been granted general authority of this kind.[42]

The ICJ hears cases that are referred to it by the contending parties. The Court may, however, determine that the case, because of its nature, is not subject to judicial determination or that the parties have no legal right to submit the case to the ICJ. Only states are entitled to bring cases before the ICJ.[43]

No state is required to submit any case (filed, for example, by another state) for hearing and decision. This lack of compulsory jurisdiction is a major deficiency of the international legal system as contrasted with national legal systems.[44] The freedom to choose whether or not the states will submit any particular case for judicial determination is a feature of sovereignty that states refuse to surrender to international authority. After agreeing to submit a case to the Court, the state is bound by the principles of international law to accept and carry out the decision, although there is no satisfactory means for enforcement of decisions, and refusal to comply has occurred on more than one occasion.[45]

Article 36 of the Statute of the ICJ includes a partial attempt to overcome the lack of compulsory jurisdiction. The Article 36 section 2 provides that any party to the Statute may

[41] Unlike the League arrangement in which the PCIJ and its membership were independent of the League, Bennett, LeRoy A.: International organizations, Principles and Issues, Prentice-Hall Inc., New Jersey 1995, p. 75.

[42] Bennett (1995), p. 76.

[43] Bennett (1995) p. 76 and The Statute of the International Court of Justice, see for example www.icj-cij.org (last visited 14 March 2010).

[44] Bennett (1995) p. 76.

[45] Bennett (1995) p. 187.

declare, that it recognizes as compulsory, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: i) the interpretation of a treaty; ii) any question of international law; iii) the existence of any fact which, if established, would constitute a breach of an international obligation; and iv) the nature or extent of the reparation to be made for the breach of an international obligation. Article 36 section 2 was an attempt to build a bridge between the principle of sovereignty and that of compulsory jurisdiction. The intention was to open an area in which a degree of international order could be established through the judicial process.[46]

This 'optional clause' described above has not resulted in the submission of a wide range of disputes over legal questions to the Court for settlement. Several states have attached reservations to their acceptance of the compulsory jurisdiction of the Court. The broadest of these reservations was made by the United States (US) in the Connally Amendment, which specified that the jurisdiction of the Court would not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the US *as determined by the United States of America"*. Not only did this reservation practically nullify the compulsory jurisdiction clause by allowing the US to decide unilaterally that any case it wished not to submit was 'essentially' one of domestic jurisdiction, but it also allowed, under the legal principle of reciprocity, any other party to a case involving the US to invoke the same privilege. The jurisdiction of the Court in contentious matters is by no means limited to the 'optional clause' of its Statute and the voluntary submission of cases by parties to disputes. Hundreds of bilateral and multilateral treaties contain clauses agreeing that the parties will submit disputes arising under the terms of each treaty to the ICJ. The most recent cases submitted to the Court have in fact been based on such treaty agreements.[47]

The reformation of the role of the ICJ could serve to facilitate the enforcement of international responsibility. In order to achieve this improvement, the international organizations would need to be allowed to become parties to cases before the Court. The ILA Committee acquired detailed proposals regarding the issue, drawn up by one of its Co-Rapporteurs. The views of the members differed on the substantive merits of these proposals; some members were strongly in favour, as others doubted whether these proposals would prove to be practicable, or even desirable.[48]

[46] Bennett (1995) p. 187. As an example, Russia has not declared that it recognizes *ipso facto* the Courts jurisdiction in accordance with Article 36(2). Thus relating to the crisis in Georgia in August 2008, Georgia had to file a case against Russia on the basis of Article 36(1), which states that the Court has jurisdiction (regardless of a specific declaration by a UN member state) in all matters specially provided for in the Charter of the UN or in treaties and conventions in force. Georgia filed an application to the Court claiming that Russia had violated the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Please see *Georgia v. Russian Federation,* Press Release on 12 August 2008 (2008/23), www.icj-cij.org (last visited on 14 March 2010).

[47] Bennett (1995) pp. 187-188.

[48] International Law Association Final Report, Berlin Conference, Committee on Accountability of International Organizations, 2004, p. 49.

Due to their permanent cooperation with international organizations through membership links or otherwise, states have a greater risk than non-state operators of finding themselves opposed to an international organization in a dispute or a difference, but cannot bring a claim against an international organization before the ICJ as a result of the wording of Article 34(1) of the Court's Statute. A judicial remedy from the International Court of Justice for the tortuous and/or organizational responsibility of an international organization might be obtained in either a direct or an indirect way – by allowing more flexibility regarding Advisory Opinions or by clearly amending Article 34(1) to read as follows:

> *"States and International Organizations, duly authorized by their constituent instrument, may be parties in cases before the Court."*[49]

3.2.2 Internal Remedies and National Courts

Exhaustion of local or internal remedies regarding the relationship between states and international organizations (or between international organizations themselves) and in regard to the employment relationship between international organizations and their staff can be discussed. Since international organizations are a comparatively recent phenomenon, the rule of local remedies, which has a much longer history than the life of international organizations, cannot be regarded as intrinsic to the law of international organizations. If the rule is to be applicable in any way in this area, it will be by analogy or on the basis that in specific situations it may be appropriate to apply the rule itself or a similar rule in a different form. What must be discussed then is how far the law of international organizations, in terms of its policies and objectives, requires that the rule of local or internal remedies or an analogous rule be applied to certain situations which arise in the functioning of such organizations. The position is somewhat complicated, because there seem to be no judicial decisions or agreed or accepted practice in the area of the relations between organizations and states. In the area of employment relations, on the other hand, the situation is different, as the relevant basic premises are distinct.[50]

In the case of the relationship between states and international organizations, it is only since the international legal personality of such organizations was formally recognized in the *Reparation for Injuries Case*[51] that the question was seriously asked whether it was proper that the rule of local or internal remedies be applied in that area. The question may be asked both

[49] ILA Final Report (2004) pp. 51-52.

[50] Amerasinghe (2004) p. 366. For an interesting case regarding an employment relationship please see *Boivin c. la France et la Belgique et 32 autres Etats membres du Conseil de l'Europe,* (Application No. 73250/01, decision only available in French) ECrtHR, 9 September 2008.

[51] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of the International Court of Justice, 11 April 1949.

where the international organization is a claimant on behalf of an individual against a state and where a state claims on behalf of a national or individual against an international organization. A third situation which has involved the exhaustion of internal remedies is where a staff member brings a claim against an organization under the internal law of the organization in regard to his employment relationship. This situation concerns a relationship which is entirely internal to the organization.[52]

Regarding the implementation of responsibility of international organizations, jurisdictional immunity remains a decisive barrier to remedial action for non-state claimants. This could be corrected by the availability of adequate alternative remedial protection mechanisms within international organizations.[53]

Since the *Reparation for Injuries* case, it has been established that international organizations such as the UN have the capacity at international law to bring claims, particularly against states in situations in which a right relating to a staff member and vested in the organization has been violated. This followed the recognition of the international personality of the UN in the same case. After the decision in this case, it was suggested that the rule of local remedies should be applied, apparently without qualification, to claims on behalf of staff members, because it would save the UN much trouble and give to the respondent state an opportunity to repair through its own means the injury caused by it.[54]

In the proceedings before the ICJ in the *Reparation for Injuries* case, the counsel for the Secretary General of the UN stated that, in the context of claims by the UN against states for injuries to its officials, there was 'room for consideration' whether the rule of local remedies was applicable. However, in the memorandum of the Secretary General to the General Assembly, explaining what procedures should be taken pursuant to the case, no mention was made of the rule. Consequently, no reference is made to the rule in the resolution of the General Assembly dealing with the matter. However, it has been submitted subsequently that, where a staff member of the organization has been threatened with a private nuisance, he or she should first have recourse to local remedies, no waiver of immunity being necessary because the acts are of a private character over which local courts would have jurisdiction in any case. It has also been suggested in this connection that after exhausting remedies a staff member of an international organization should be able to seek the protection of the organization which he serves rather

[52] Amerasinghe (2004) p. 367.

[53] Gaillard, Emmanuel – Pingel-Lenuzza, Isabelle: International Organizations and Immunity from Jurisdiction: to Restrict or to Bypass, International & Comparative Law Quarterly (ICLQ) Vol. 51 No. 1 (January 2002), pp. 1-15. Cambridge University Press, p.2.

[54] Amerasinghe (2004) p. 367

than that of his national state, because of the primary allegiance which he owes to the organization.[55]

There are several problems connected with the view that the rule of local remedies applies to claims by international organizations on behalf of their staff members. First, it must be recognized that in the *Reparation for Injuries* case what the ICJ acknowledged was that as a result of the fact that international organizations such as the UN may carry international responsibility; such organizations had the right to bring claims on behalf of their staff members for injuries suffered in the performance of their official functions.[56]

The Court made a clear distinction between a staff member acting in his official capacity and the treatment of such a staff member in his personal capacity.[57] It would seem that where a staff member is injured while performing his official duties, the organization would have the exclusive right of protection. Then again, where the injury takes place when he or she is in his private capacity or in his or her private life, his or her national state would have the right of protection. Some may believe that it is undesirable that a staff member should have to rely on his or her national state for protection in his private life. However, if he or she is to be able to maintain his or her independence in the performance of his official duties, the better view, in the light of the *Reparations for Injuries* case, seems to be that the organization has the right of protection only where the staff member is acting in an official capacity.[58]

The opposite situation, where the international organization is the respondent in a case involving the protection of a national, raises different problems. The question is whether, where the international organization does provide internal means of settling disputes between such persons and itself, they have an obligation to exhaust such remedies before their national states may exercise diplomatic protection.[59]

Immunity of the UN, for example, often sets a barrier for the use of national courts. As an example, a national court in the Netherlands declared on 10 July 2008 it had no competence to hear an action instituted against the UN. The judgment was delivered in the incidental proceedings in the civil case brought by the Association 'Mothers of Srebrenica' and ten individual plaintiffs against the State of the Netherlands and the UN. The basis of the claim was that the Association considered the UN and the Netherlands to be responsible for the murder of 8.000-10.000 citizens of Bosnia-Herzegovina in 1995. The Association represented the interests of the victims' relatives. Central to the issue of whether a Dutch court had

[55] Amerasinghe (2004) p. 368.

[56] Amerasinghe (2004) p. 368.

[57] Amerasinghe (2004) p. 369.

[58] Amerasinghe (2004) p. 369.

[59] Amerasinghe (2004) p. 371.

jurisdiction in this case, was the question whether the case offered grounds or reasons to make an exception to the immunity enjoyed by the UN under international law, in accordance with Article 105 of the UN Charter and Article II, paragraph 2 of the Convention on the Privileges and Immunities of the United Nations (the Privileges Convention). The court concluded that in international law practice absolute immunity of the UN is the standard and is respected, and that the interpretation of Article 105 of the UN Charter offers no basis for restriction of the immunity of the UN.[60]

3.2.3 Arbitral Tribunals

The Final report of the ILA in 2004 stated that when concluding agreements with states or non-state entities, international organizations should continue adding a clause providing for compulsory referral to arbitration of any dispute that the parties have been unable to settle through other means. The Report further stated that international organizations should faithfully comply with their undertakings to resort to arbitration procedures.[61]

When inserting an arbitration clause into treaties concluded between them, states, international organizations and non-state entities should consider the compulsory arbitration provided for in such clauses to be governed by the 1996 Optional Rules for Arbitration involving International Organizations, drawn up by the Permanent Court of Arbitration.[62]

There have been rare cases where international organizations have been reluctant to cooperate with the establishment of an arbitral tribunal. By agreeing to an arbitration clause the international organization waives its right to invoke its immunity before the arbitral tribunal, and this waiver has to be understood as including any means that a party, having accepted the principle of recourse to arbitration, may attempt to invoke in order to hinder the arbitral process.[63]

3.3 Case Law

3.3.1 Reparation for Injuries – A Landmark Case

Case law on international responsibility of or to international organizations is scarce. However, established practice since the creation of the LN, which no longer exists, and particularly after

[60] Please see *Association of Mothers of Srebrenica et. al v. the State of The Netherlands and The United Nations* (case number 295247), District Court in the Hague, the Netherlands, 10 July 2008, http://www.haguejusticeportal.net/eCache/DEF/7/766.html (last visited 23 May 2010).

[61] ILA Final Report (2004) p. 49.

[62] ILA Final Report (2004) p. 49.

[63] Gaillard – Pingel-Lenuzza (2002) p. 13.

WW II has rested on certain assumptions. The principal international judicial precedent relating to the subject of international responsibility is the *Reparation for Injuries Case*[64], brought before the ICJ.[65]

The advisory opinion of the Court was a landmark in establishing the international personality of the UN with attendant rights in international law. The ICJ ruled that the member states in setting up the UN intended to confer upon it the capacity to operate on the international plane and to exercise rights and duties necessary to carry out its functions. Its privileges are not necessarily identical with those of a state, but the organization must be deemed to have such powers, even if not expressly stated in the Charter that are essential to the performance of its duties. This idea is a principle of implied powers that opens the door to a generous interpretation of the prerogatives of international organizations. In reconciling the UN's right to claim damages with the state interest involved, the Court advised that neither party has priority and that any conflict of interest might be resolved by accommodation.[66]

The Advisory opinion of the ICJ on the *Reparation for injuries* case marks the beginning of the judicial recognition that the UN has powers other than those expressly conferred by the member states in the constituent treaty.[67]

3.3.2 Westland Helicopters Ltd.

Westland Helicopters Ltd. v. Arab Organization for Industrialization arbitration by the International Chamber of Commerce (ICC) in 1984 and the subsequent appeals in Swiss courts are some of the most important cases regarding the responsibility of international organizations with relation to member state responsibility.[68]

> The organization in question here was the Arab Organization for Industrialization (AOI), which was founded by a treaty concluded between the United Arab Emirates, Saudi Arabia, Qatar and the Arab Republic of Egypt.[69]On 27 February 1978, Westland Helicopters Ltd. (Westland), a company subject to English law, and the AOI concluded a contract called the Shareholder Agreement, as an aim to create a joint stock company.

[64] ICJ Reports (1949) p. 174.

[65] Amerasinghe (2005) pp. 384-385.

[66] Bennett (1995) p. 201.

[67] Martin Martinez, Magdalena M.: National Sovereignty and International Organizations, Kluwer Law International, the Netherlands 1996, p. 82.

[68] *Westland Helicopters v. Arab Organization for Industrialization and Others (International Chamber of Commerce, Arbitral Tribunal, Case no 3879)),* 80 International Law Reports (1989), (hereinafter *Westland* case, ICC (1984) and the subsequent cases in Geneva Court of Justice (Switzerland), 23 October 1987 and Federal Supreme Court, Switzerland, 19 July 1988. See also International Legal Materials (ILM) 23 (1984) p. 1071.

[69] *Westland* case, ICC (1984) pp. 596-603 and Hirsch (1995) p. 107.

> The AOI was to have 70 % of the shares and Westland 30 %. The purpose of the company, The Arab British Helicopter Company (ABH) was to function as the legal base for the creation of a business to manufacture, overhaul, carry out quality control on and sell the Lynx helicopters developed by Westland. Arab Emirates, Saudi Arabia and Qatar declared in May 1979 that they wished to liquidate the AOI, a liquidation committee would be set up, and that all investments in the armaments business in question would be discontinued. Egypt held that the AOI was still in existence as a legal person. [70]In June 1980, an arbitration request was filed by Westland against the AOI, the four member states and the ABH. Westland claimed that the organization and its members were bound to pay under a joint and several liability the sum of 126.000.000 pounds sterling to the claimant. In October 1980, an Arbitral Tribunal of the ICC was constituted.[71]

In the proceedings the question of member state responsibility arose and the Arbitral Tribunal concluded that in the absence of any specific provisions the member states were liable for the debts of the organization.[72] The ruling was, however, overturned by the subsequent appeals in Swiss courts, which found that the Arbitral Tribunal did not have jurisdiction over Egypt in the absence of an arbitration agreement signed by Egypt.[73] In addition to this, the Court of Justice of Geneva did not agree with the observation of the Arbitral Tribunal regarding the status of the AOI, and it stated that the AOI was "legally and financially, an organization independent of the founding states". [74]After the Court of Justice of Geneva, the case went to the Federal Supreme Court of Switzerland. The Federal Court upheld the decision of the Geneva Court and approved its principal reasoning. In the reasoning of the Federal Court, it placed great significance on the constituent instruments of the AOI.[75]

In an analysis performed by Hirsch, two main points arise regarding both sets of proceedings. In the arbitral award, the two main conclusions were that i) the doctrine of limited responsibility was rejected by the Arbitral Tribunal and that ii) the reasoning inclines to impose a secondary responsibility on the member states of international organizations. In the Swiss Courts, the two main principles were that i) the responsibility should be determined almost exclusively in accordance with the constituent instruments and that ii) when the constituent instrument shows that the organization is a legal entity separate from its member states, this separation will exempt the members from responsibility towards third parties.[76]

[70] *Westland* case, ICC (1984) pp. 596-603. The details more thoroughly discussed by Hirsch, pp. 107-112.

[71] *Westland* case, ICC (1984) pp. 604-605 and Hirsch p. 108.

[72] *Westland* case, ICC (1984) pp. 600, 613.

[73] *Westland* case, ICC (1984) p. 641.

[74] *Westland* case, ICC (1984) pp. 641-646 and Hirsch (1995) p. 110.

[75] *Westland Helicopters v. Arab Organization for Industrialization and Others* (Federal Supreme Court, Switzerland (1980) 80 ILR, p. 652.

[76] Hirsch (1995) pp. 111-112.

3.3.3 The International Tin Council

Another strong example of relevant case law in the field is the International Tin Council litigation in the 1980s.[77]

The ITC was an international organization established by a treaty (the Sixth International Tin Agreement) concluded in 1982 between 23 parties, including the UK and the EEC. The agreement stated that the ITC has a legal personality and that the executive chairman of the ITC is responsible for the administration and operation of the agreement in accordance with the decisions made by the ITC.[78]

> The purpose of the ITC was to regulate the international tin market, to adjust and balance world production and consumption of tin, and to maintain market prices stable by buying and selling tin on the international markets. Due to an unexpected overproduction of tin and financial mistakes, the ITC collapsed in 1985 and left behind numerous unpaid obligations. The creditors resorted to litigation mostly in English courts by bringing, inter alia, the claim that there was a subsidiary or complementary liability of member states.[79]

The main question was, whether the ITC was itself alone responsible for the contracts it made or whether the member states were additionally or alone responsible, either as 'partners' or as principals of an agent.[80] The constitutive treaty of the ITC did not provide for any responsibility of the member states, nor was there a clause excluding the responsibility of the member states. The courts examined whether there was a general rule of international law which provided for a secondary responsibility of member states in this case. After thorough and elaborate Court proceedings, where the judges reviewed the existing international case law and the writings of leading international law jurists, both the Court of Appeals and the House of Lords concluded that there was no such rule and dismissed the claims.[81] The Court of Appeals held that "nothing is shown of any practice of states as to the acknowledgement or acceptance of direct liability by any states by reason of the absence of an exclusion clause".[82] Cases were also brought before the Court of Justice of the European Communities, but were withdrawn before the judgment was rendered. The first question for the Court to decide would have been the question of admissibility.[83]

[77] *Maclaine Watson & Co Ltd. v. International Tin Council,* High Court, Chancery Division, United Kingdom 13 May 1987 (No. 2) and 9 July 1987, and Court of Appeal, United Kingdom, 27 April 1988.

[78] Amerasinghe (2005) p. 410.

[79] Seidl-Hohenveldern, Ignaz: Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the Englich Court of Appeals, 32 German Yearbook of International Law, pp. 43-54, 1989, p. 44.

[80] Lewis, Charles J.: State and Diplomatic Immunity, Lloyd's of London Press Ltd. 1990, p. 173..

[81] Hirsch (1995) pp. 115-121.

[82] *Maclaine Watson & Co Ltd. v. International Tin Council* (No. 2), 80 ILR. pp. 110, 174.

[83] Hirsch (1995) p. 121.

After the collapse of the ITC the operation of a commodity agreement was added as a new testing ground for the responsibility of international organizations. In the debate on the responsibility of international organizations, the view that international organizations are endowed with an international legal personality, and with a responsibility for wrongful acts towards third parties irrespective of their prior recognition, started gaining ground.[84]

3.3.4 Behrami and Behrami v. France and Saramati v. France, Germany and Norway

A rather recent and interesting case on the topic was the *Behrami and Saramati* case in the ECrtHR in 2007. Based on the doctrine of attributability, and a movement from 'effective control' towards 'ultimate control', the ECrtHR found in the case of *Behrami and Saramati*, that the UN was itself responsible for the actions of UNMIK and KFOR in Kosovo, and not individual states carrying out the operations, and thus the ECHR could not be applied and the case was inadmissible in the ECrtHR.[85]

The Court stated that UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the Security Council. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.[86] This attribution concerning UNMIK is clear, if we consider, for example the Draft Articles of the ILC on the Responsibility of International Organizations. These articles have not, however, been agreed upon by states and therefore are not, as such, binding codification. UNMIK is a subsidiary organ of the Security Council, and thus its conduct has to be considered as an act of the UN under international law. The Court considered the attribution to be possible also with regard to KFOR, as a single chain of command ran from the Security Council through NATO down to KFOR and the individual national contingents making up the operation[87] Therefore, the ECrtHR concluded that the applicants' complaints must be declared incompatible *ratione personae* with the provision of the ECHR.[88]

[84] Ginther (1991) p. 1339.

[85] *Behrami and Behrami v. France and Saramati v. France Germany and Norway* (hereinafter *Behrami and Saramati*), Grand Chamber of the ECrtHR, 2 May 2007, paras. 151-153.

[86] *Behrami and Saramati* (2007) para. 151.

[87] Sari, Aurel: Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases. in 8 Human Rights Law Review, pp. 151-170, Oxford University Press 2008, pp. 163-165 and UN Document A/62/10 (2007) Art. 4 p. 187. The ECrtHR has also faced criticism regarding the UN's unified command and control on KFOR, whether such effective control actually existed. Sari suggests, that the conduct of KFOR should have been attributed either to the states contributing personnel to the operation or to NATO, or possibly to both.

[88] *Behrami and Saramati* (2007) para. 152.

On admissibility grounds, the Court removed the Saramati application against Germany from the docket and declared inadmissible the application of Behrami and Behrami as well as the remainder of the Saramati application against France and Norway.[89]

The reasoning of the Court has been criticized for a number of reasons, even though even the critics admit that the applicants' complaints should have been held inadmissible in any event.[90] The most fundamental of these reasons is the ECrtHR's identification of the legal issues raised by the complaints. The ECrtHR correctly underlined that one of the legal issues raised by the case concerned the Court's competence to review the conduct of national contributions to KFOR and UNMIK. However, this did not entitle it to disregard whether the applicants came within the jurisdiction of the respondent states as Article 1 of the ECHR presupposes. Instead of addressing the issue of a jurisdictional link between the applicants and the respondent states, the Court decided to investigate primarily, whether KFOR and UNMIK operated in the framework of Chapter VII of the Charter, and secondly, whether their acts and omissions could be attributed to the UN in accordance with the rules of international law governing the responsibility of international organizations.[91]

The above-mentioned critique recognizes the fact that the attributability in this case of the relevant acts and omissions to the UN demonstrates that the UN could in principle incur responsibility for the internationally wrongful conduct of KFOR and UNMIK. However, this responsibility of the UN does not exclude the possibility that the same conduct may also be attributable to the respondent states and may engage their international responsibility.[92]

The ECrtHR has used the *Behrami and Saramati* cases as precedents regarding similar admissibility issues. This is troubling in light of the enhancement of international responsibility in general, and in taking into consideration the shortcomings of the Court in the reasoning of the case.[93]

[89] *Behrami and Saramati* (2007) para. 153.

[90] Sari (2008) p. 166.

[91] Sari (2008) p. 158.

[92] Sari (2008) p. 159.

[93] The *Behrami and Saramati* case has already been used as reference for example in the case of *Beric and Others v. Bosnia and Herzegovina* case in the ECrtHR, Fourth Section, on 16 October 2007, where the Court declared the applications inadmissible. Another decision of the ECrtHR regarding inadmissibility was given in the case of *Boivin c. la France et la Belgique, et 32 autres Etats membres du Conseil de l'Europe* (Decision only available in French) on 9 September 2008. The Court distinguished the case from the cases *Beer and Reagan*, *Waite and Kennedy vs. Germany*, (application No. 28934/95, ECrtHR, 18 February, 1999) and *Bosphorus* (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, ECrtHR, Fourth Section 13 September 2001 and Grand Chamber 30 June 2005), and made a comparison to the situation in the *Behrami and Saramati* case to find the case inadmissible. The *Behrami and Saramati* case has also been used as reference on the national level, in the case of *Al-Jedda v. Secretary of State for Defence* in the UK House of Lords (UKHL) on 12 December 2007. However, reference was not made to find the case inadmissible. In the *Al-Jedda* case, the UKHL rejected the argument that the ECrtHR used in the *Behrami and Saramati* case by distinguishing the facts of the *Al-Jedda* case from those of the *Behrami and Saramati* case and it found the case admissible.

3.3.5 Bankovi and Others v. Belgium and 16 Other Contracting States

Another interesting case that relates to the ECHR is the *Bankovi and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (hereinafter the *Bankovi and Others* case) of 2001, where the ECrtHR also held the application inadmissible. Vlastimir and Borka Bankovi and four other applicants had filed a complaint against 17 member states of the NATO for the deaths and injuries of their close family members that occurred due to the NATO missile attack against the RTS television and radio station facilities in Belgrade on 23 April 1999.[94]

The case was also used as reference later on in the *Behrami and Saramati* case. To summarize shortly the contents of the *Bankovi and Others* case, the ECrtHR found that it had no jurisdiction over the NATO attacks on FRY. It reasoned its conclusion on the grounds that Article 1 of the ECHR limits the competence of the ECrtHR to the cases concerning the duty of the High Contracting Parties to secure the rights and freedoms defined in the ECHR to everyone within their jurisdiction. The ECrtHR concluded that the application of the ECHR cannot be extended to the aerial bombing of a non-member state's territory, since it falls beyond the jurisdiction of the bombing state.[95]

The *Bankovi and Others* case was in all its simplicity about the conduct of military forces of NATO states that were under the full control and jurisdiction of the respondent states. It should be clear, under international law, that this is enough to hold a state responsible. The ECrtHR's reasoning is not clear enough to explain why general principles should not apply to the ECHR.[96]

IV. Responsibility of International Organizations

4.1 Elements of Responsibility

4.1.1 The Conventional Position in International Law

In Article 3 of the ILC Draft Articles on the responsibility of international organizations, it is stated that every internationally wrongful act of an international organization is within the

[94] *Bankovi and Others v. Belgium and 16 Other Contracting States (NATO member states) (Bankovi and Others)*, Grand Chamber, 12 December 2001 paras. 9-11.

[95] Altiparmak, Kerem: Bankovi: An Obstacle to the Application of the European Convention on Human Rights in Iraq. Journal of Conflict & Security Law 9, pp. 213-251, Oxford University Press 2004, p. 221 and the *Bankovi and Others* case (2001).

[96] Altiparmak (2004) p. 226 and the *Bankovi and Others* case (2001).

responsibility of the international organization. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission is i) attributable to the international organization under international law and it ii) constitutes a breach of an international obligation of that international organization. Damage is not included in the elements, as it is not included in the ILC Articles on State responsibility.[97]

Once the existence of international personality of international organizations is recognized, it is natural that, organizations can demand responsibility of other international subjects because they have rights at international law. Similarly they can also be held responsible to other international subjects because they have obligations at international law. States have international responsibility in general because their duties flow from the control they have over territory, airspace, persons etc. or from their relations with other international subjects. In comparison, international organizations have a limited amount of control. However, they have a certain amount of control over persons, and they enter into treaties, agreements and other relations with other international persons which could give rise to international obligations. These obligations could generate responsibility in the appropriate circumstances.[98]

The conventional approach to the law of international organizations disregards the tension between international organization and individual state responsibility. The conventional approach conceives responsibility for the acts of the organization exclusively in terms of the organization itself, not also in light of responsibility for the individual member states. A reflection of the idea of the separate distinct legal personality, which international organizations enjoy, is that the distinct legal person is responsible for the acts of the organization. If states perform acts as part of the structure of the international organization or act on behalf of the organization and in the organization's name, these acts are as a matter of law acts of the organization and not the state.[99]

The current state of the law concerning the responsibility of international organizations leaves a number of problems unsolved. Among them is the question of 'piercing the corporate veil', the distribution of responsibility between the organization and its member states. This question is of paramount importance. The ILC Draft Articles on the responsibility of international organizations have tried to answer this question in Art. 29, which states that a state member of an international organization is responsible for an internationally wrongful act of that organization, if it has accepted responsibility of that act or it has led the injured party to rely on its responsibility. This responsibility is presumed to be subsidiary and exist without prejudice to other possible situations regulated in the Articles, where the responsibility may exist due to

[97] UN Document A/62/10, Report of the International Law Commission, 59th session (7 May – 5 June and 9 July – 10 August 2007, Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 pp. 178 – 220, 1 September 2007, Article 3, p. 185.

[98] Amerasinghe (2005) p. 399.

[99] Wilde (2008) pp. 401-402.

other reasons than simply due to the membership of the organization and acceptance of responsibility.[100]

Another special legal problem as regards the implementation procedure concerns the question of whether international organizations are entitled to, and whether they should, set up remedial procedures which have to be exhausted before a third party is allowed to bring a claim against the organization under international law. Does the law of state responsibility concerning the prior exhaustion of local remedies apply here *mutatis mutandis*? What is the law to be applied for assessing damages?[101]

Regardless of the remaining unclarities, two starting point principles could be presented: i) international organizations are responsible for the consequences of all unlawful acts attributed to them under international law, whether the acts are committed within their competence or not; ii) Where the incompetence of the organization to carry out the relevant act was manifest, and as a consequence the injured party was able to avoid the harmful results, the organization will not be held responsible toward this party.[102]

4.1.2 The Obligations of International Organizations

Article 9 of the ILC Draft Articles on the responsibility of international organizations states that an act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.[103]

Summarizing the above-mentioned, international organizations are responsible for breach of international agreements. When for example the IBRD and the International Development Association (IDA) enter into loan and credit agreements with states, which are international agreements governed by international law, the failure on the part of the IBRD or the IDA respectively to carry out its obligations under such agreements would trigger their international responsibility. There are various other examples of agreements that could generate international responsibility in case the organizations failed to carry out their obligations under them.[104] For example, in the *World Health Organization (WHO) Agreement* case[105], the question brought before the ICJ was, whether the WHO had violated its obligations under an agreement with Egypt,

[100] UN Document A/62/10 (2007) Article 29, p. 194.

[101] Ginther (1991) pp. 1338 – 1339.

[102] Hirsch (1995) p. 16.

[103] UN Document A/62/10 (2007) Articles 8-9, p. 187.

[104] Amerasinghe (2005) p. 400.

[105] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980) Advisory Opinion of the International Court of Justice, 20 December 1980, ICJ Reports (1980) p. 67.

there being no question that the WHO could have been responsible to Egypt for the breach of its obligations under the agreement.[106]

As with regards to the responsibility of organizations under customary international law, possibly on the analogy of the law governing relations between states, international organizations can also have international obligations towards other international legal persons arising from the particular circumstances in which they are placed or from particular relationships. In the *WHO Agreement* case the ICJ specifically referred to the existence of obligations at customary international law for international organizations.[107] There are situations in which international organizations would be responsible under customary international law for the acts of their servants or agents, when they are acting in the performance of their functions, or of persons or groups acting under the control of the organizations, such as armed forces in the case of the UN. There have been claims arising from the United Nations Operation in the Congo (UNOC) in the 1960s, brought against the UN by states relating to injury to their nationals, which were based on violations of international law and which were settled by negotiations between the UN and the states concerned.[108]

The content of the obligations of international organizations could easily be identified in the case of constitutive instruments, other treaties or agreements, depending on the interpretation and application of such instruments. Regarding customary international law, as in the case of obligations owed to organizations, the obligations will be based on fault, risk or absolute liability, as the case may be, depending on the obligation and the content of the applicable customary international law.[109]

4.1.3 Limits of Organizational Competence and the Scope of Control

The recognition of the importance of international organizations in the international society should not blur the recognition of their limitations stemming from the nature of the relationship between the organizations and their members. The organizations are basically instruments for international cooperation and their operations are to a large extent prescribed by the governments of the member states.[110]

One example regarding problems that can be generated by international organizations is the World Trade Organization (WTO). In the opinion of some commentators, this organization has had a tendency to stray from its constitutional aims and exercise influence in areas that

[106] Amerasinghe (2005) p. 400.

[107] ICJ Reports (1980) p. 90.

[108] Amerasinghe (2005) p. 400.

[109] Amerasinghe (2005) pp. 400-401.

[110] Hirsch (1995) pp. 4-5.

seem outside the limits of its competence (*ultra vires*). This phenomenon has been described in legal literature as 'linkage'. This *ultra vires* activity means that an expansionist-oriented organization has infiltrated an area that does not appear to be within the scope of its competence. Another organization that has undergone recent criticism, in this respect, is the IMF.[111]

International organizations have generally been found to be at fault in connection with damage resulting from conduct of their servants, agents, persons or groups under their control, such as armed forces. There may be delicate issues concerning who is responsible in some cases where persons are under the control of more than one international person, such as where armed forces belonging to a state participate in an operation sponsored by the UN or pursuant to a decision of the UN. However, in such cases the issue is one of attribution of responsibility on the basis of control. There is no reason why analogies should not be borrowed from the principle of imputability applied in the customary law of state responsibility, particularly, for injuries for aliens. Similarly, in the area of the general responsibility of international organizations for acts of servants or agents, analogies from the law of state responsibility may be relevant in appropriate situations in determining imputability. The subject of imputability, where acts of organs, servants, agents or independent contractors are concerned, will depend on whether the organ or individual concerned was acting within the scope of 'apparent authority'. This is particularly so in the case of acts performed outside the actual authority granted. Thus, though the act may in fact be done without authority, it may engage the responsibility of the organization, because it is within the scope of apparent authority.[112]

Questions of responsibility have arisen particularly in the case of armed forces engaged in UN 'controlled' operations. In such cases the UN has generally accepted responsibility for any illegal acts which may have been committed by armed forces (belonging to member states) acting under the UN aegis. The UN has acknowledged responsibility for activities carried out by both the United Nations Energy Force (UNEF) and the UNOC, for instance.[113]

The main issues that arise in these cases again are i) whether there has been an unlawful act or omission; and ii) whether such act is imputable to the organization. Regarding the first issue, the UN has refused to bear responsibility for damages caused by its lawful military operations or arising from military necessity – these acts are not unlawful. On the other hand, the UN has accepted liability for all damage not justified by military necessity (e.g. as a result of destruction without necessity, murder, imprisonment, arbitrary expulsion and such acts). [114]

[111] Araujo (2005) p. 346.

[112] Amerasinghe (2005) p. 401.

[113] Amerasinghe (2005) pp. 401-402.

[114] Amerasinghe (2005) p. 402.

4.1.4 The Element of Attribution

As international organizations are subjects of international law and capable of possessing rights and being subject to obligations under international law, the question is, whether and under which conditions internationally wrongful acts can be attributed to an international organization *per se* as to trigger its responsibility.[115]

The ILC Draft Articles on the responsibility of international organizations also touch the subject of attribution in Articles 4-7. According to Article 4, the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law, no matter what position the organ or agent holds in respect of the organization. Article 5 states that the conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct. Article 6 states that the organization cannot avoid responsibility even in a situation, where the conduct exceeds the authority of that organ or agent or contravenes instructions. According to Article 7, even if the conduct is not attributable to an international organization, the organization may acknowledge and adopt the conduct in question as its own.[116]

4.2 Recent Developments

4.2.1 Two Key Policy Issues

As stated above, there are two key policy issues regarding the relationship between the responsibility of international organizations and the responsibility of member states. The first key issue concerns the efficiency and independence of international organizations in their functions. The second relates to the applicability of the responsibility principle.[117]

The *Institut de Droit international* states a principle regarding the first issue: "support for the credibility and independent functioning of international organizations and for the establishment of new international organizations".[118] Member state responsibility in a traditional sense is seen as undermining this principle. The potential problem caused by enforcing member state responsibility for the acts of international organizations is the paralysis within existing organizations, with consensus required for every decision. States might also be

[115] Ginther (1991) p. 1336.

[116] UN Document A/62/10 (2007) Articles 4-7, pp. 186-187.

[117] Wilde (2008) pp. 404-405.

[118] *Institut de Droit international*, Resolution II, The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties, Session of Lisbon, Annuaire de l'Institut de Droit international, Vol. 66-II 1995, Art. 8.

reluctant to create and support new international organizations in the future out of a fear of running the risk of responsibility for future acts they may not be able to control. Such responsibility necessarily contradicts the nature of those international organizations conceived in a manner whereby all member states are not necessarily able to control all the acts and functions of the organization, for example when decisions are taken by the UN Security Council.[119]

According to the responsibility principle, third parties should be protected against undue exposure to loss and damage that they have not themselves caused, in relationships with international organizations. The focus is thus on those affected by the actions of international organizations, who should be provided with legal redress, when such actions lead them to suffer harm or some other loss. This victim-orientated approach leads to the related violator-orientated approach of avoiding impunity, which argues that a state cannot escape its liability under international law by entrusting to another legal person the fulfilment of its international obligations.[120]

This dual principle, that third parties affected by the acts of international organizations should be given redress, and that states should not be able to evade legal responsibility by transferring competences to international organizations – would clearly be supported if member states were made legally responsible for the acts of organizations of which they are a member.[121]

During its Session of Lisbon in 1995, based on the work of the Rapporteur of the Fifth Commission, *Institut de Droit international* adopted a resolution on 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties'. In its decision the *Institut* took into consideration the tensions between the importance of the independent responsibility of international organizations on the one hand, and the need to protect third parties dealing with such international organizations, on the other hand. It also recognized the diversity of international organizations, and the fact that it may not be possible to accomplish a solution which could suit all organizations.[122]

The traditional position which excludes member state responsibility promotes the first policy objective of ensuring the effective functioning of international organizations. Therefore the *Institut de Droit international* resolved that

> "important considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and

[119] Wilde (2008) p. 404-405.

[120] Wilde (2008) p. 405.

[121] Wilde (2008) p. 406.

[122] Resolution of the *Institut de Droit international* (1995) p. 1.

> comprehensive rule of liability of member States to third parties for the obligations of international organizations."[123]

However, those supporting this position do not do so by disregarding the responsibility principle: they do not reason that the effective functioning trumps the need to ensure accountability. They rather seek to promote accountability through alternative means: better safeguards for third parties operating in relation to international organizations directly. The *Institut* further concludes that

> "Important considerations of policy entitle third parties to know, so that they may freely choose their course of action, whether, in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the organization alone or also of the members jointly or subsidiarily. Accordingly, an international organization should specify the position regarding liability 1) in its Rules and contracts; 2) in communications made to the third party prior to the event or transaction leading to liability; or 3) in response to any specific request by any third party for information on the matter."[124]

When transactions are freely entered into, adequate remedies for third parties would not necessarily be required, the key requirement being transparency as to the nature of remedies. This way, an informed decision can be made. For transactions that are imposed, adequate remedies are arguably necessary. In the case of a failure to protect, being 'on notice' of a lack of responsibility is beside the point; the idea here is that there should be a responsibility to take effective action.[125]

The underlying rationale for the lack of member state responsibility in relation to the acts of international organizations has to be understood, then, in terms of a separate area of international law. This area concerns the responsibility of international organizations and the provision of remedies against these actors directly. When the two are taken together, both policy objectives seem to be supported: the functioning of international organizations is not compromised, nor is securing responsibility and redress.[126]

4.2.2 Problems with the Current Situation

As far as the law is concerned, it is relatively unclear whether and to what extent international organizations are subject to national and international law. No standing international court or tribunal has jurisdiction to hear complaints brought directly against international organizations,

[123] Resolution of the *Institut de Droit international* (1995) Art. 8.

[124] Resolution of the *Institut de Droit international* (1995) Art. 9. Commented by Wilde (2008) p. 407.

[125] Wilde (2008) p. 408 and Report of the High-Level Panel, pp. 199-203. See also ICISS Report, at pp. 69-75.

[126] Wilde (2008) p. 408.

and due to privileges and immunities such complaints are usually barred on the domestic level. Even if it was clear that international organizations were capable of being legally responsible for their acts by virtue of their possession of international legal personality, uncertainties would remain.[127]

As an example presented by Wilde, individuals complaining of a breach of their civil and political rights by a member state of the Council of Europe would be able to invoke the state's obligations under the ECHR (provided the alleged breach took place within the state's 'jurisdiction' for the purposes of the Convention). If they were denied an effective legal remedy against that state in domestic courts, they would then be entitled to bring a case to the ECrtHR.[128] Such individuals complaining of a breach of their civil and political rights by the UN – as for example in Kosovo, where the UN is the governmental authority – such a breach is not regulated by the ECHR, domestic remedies are largely absent because of the enjoyment of legal immunities by the UN and its officials, and there is no standing before the ECrtHR to bring cases directly against the UN as opposed to an ECHR contracting state. An Ombudsman can hear complaints against the UN but its decisions are purely recommendatory and it has no enforcement powers.[129] This is also close to what happened in the *Behrami and Saramati* case presented above, where the ECrtHR declared the case inadmissible.

Therefore, in general, there is a legal bar against remedies against the member states of international organizations flowing from the lack of responsibility on the part of member states. This legal bar is matched by the lack of remedies available against such organizations as a matter of fact. Although states act through international organizations in a broad range of functions, the remedies obtainable against them or the organizations involved for breaches of international law are severely limited.[130]

[127] Wilde (2008) pp. 408 – 409.

[128] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Art. 34, (4 November, 1950), 213 United Nations Treaty Series (UNTS). 222: "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention of the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".

[129] Wilde (2008) pp. 409 – 410. The Ombudsman was established by the Special Representative of the Secretary General in Kosovo in June 2000. See Ombudsperson Institution in Kosovo, UNMIK Regulation 2000/38, 30 June, 2000, as amended by UNMIK Regulation 2003/8 15 April, 2003.

[130] Wilde (2008) p. 410.

4.2.3 The Work of the International Law Commission

In 2000, the ILC decided to include the responsibility of international organizations in its long-term programme of work.[131] In December of the following year 2001, the General Assembly of the UN requested the ILC to commence its work on the topic.[132]

Two developments in the background initiated the process of the work of the ILC on the subject. Firstly, the ILC examines at regular intervals the full range of issues related to international law in order to identify matters that would be appropriate for codification. When the ILC began selecting possible topics during its session in 1998, it was in the final phase of elaborating Draft Articles on the International Responsibility of States for Wrongful Acts. It was a success after forty years of work, and it encouraged the ILC to extend its discussion of responsibility to international organizations.[133]

Secondly, the ILC had earlier worked on international organizations. Its previous work resulted in 1975 in the adoption of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Another convention that related to international organizations and developed out of the ILC's work was the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations. Discussions regarding other subjects relating to international organizations were also held. The existence of international organizations and their growing importance has been and still is urging the ILC to take a closer look at legal questions relating to them.[134]

At its fifty-fourth session, the ILC decided, at its 2717th meeting held on 8 May, 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur on the topic. The Working Group considered the following issues in its works: a) the scope of the subject, including the concepts of responsibility and international organizations; b) relations between the subject of responsibility of international organizations and the Articles on State Responsibility; c) questions of attribution, d) questions of responsibility of member states for conduct that is attributed to an international organization; e) other questions concerning when responsibility arises for an international organization; f)

[131] Un Document A/55/10(SUPP), Reports of the International Law Commission, 52nd session (1 May – 9 June and 10 July – 18 August 2000), Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10, pp. 726 – 728 and 729 (1), 1 January 2000 p. 292.

[132] UN Document A/60/10(SUPP), Reports of the International Law Commission, 57th session (2 May – 3 June and 11 July – 5 August 2005), Official Records of the General Assembly, Sixtieth Session, Supplement No. 10, pp.73 – 105, 23 September 2005, p. 73.

[133] Holder, William E.: Can International Organizations Be Controlled? Accountability and Responsibility, 97 American Society of International Law Proceedings, pp. 231 – 240, 2003, p. 237

[134] Holder (2003) p. 237.

questions on the content and implementation of international responsibility; g) settlement of disputes; and h) the question of what practice is to be taken into consideration.[135]

The Working Group recommended that the UN Secretariat approach international organizations and collect relevant materials, especially on questions of attribution and the responsibility of member states for conduct that is attributed to an international organization.[136] The ILC adopted the report of the Working Group.[137]

The ILC has so far adopted 66 Draft Articles.[138] Many of the Articles have been the object of comments after their provisional adoption, especially in the debates held in the Sixth Committee of the UN on the report of the ILC and in written statements made by states and international organizations. Certain Articles have been examined in judicial practice.[139] However, the Draft Articles have not yet been extensively tried in international legal proceedings or much in legal literature either, and their impact on the current situation is still somewhat uncertain.

4.2.4 The Work of the International Law Association

The International Law Association established a committee on the Accountability of International Organizations in May 1996, and its mandate was: "to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international Organizations to their members and to third parties, and of members and third parties to such Organizations. In particular, the Committee may consider such issues as: a) the relations between member states, third parties and international Organizations; b) redress by and against international Organizations, including access to the International Court of Justice and other courts and tribunals, and related issues of procedure; c) the relations between different forms of accountability of international Organizations (legal, political, administrative, financial) and d) the dissolution of international Organizations and related questions of succession."[140]

[135] UN Document A/60/10(SUPP) (2005) p. 73.

[136] UN Document A/57/10(SUPP), Report of the International Law Commission, 54th session (29 April – 7 June and 22 July – 16 August 2002), Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 pp. 10 (b), 18, 461 – 488, 517 and 519, 20 September 2002, pp. 465-488.

[137] UN Document A/60/10(SUPP) (2005) pp. 73-74. See also UN Document A/57/10(SUPP) (2002) para. 464.

[138] See http://www.un.org/law/ilc/ (last visited 11. March 2010).

[139] Articles 3 and 5 were considered by the ECrtHR in recent decisions, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway,* decision of 2 May 2007, pp. 29-33 and 121, and then in *Beric and others v. Bosnia and Herzegovina,* decision of 16 October 2007, pp. 8,9, and 28.

[140] The Final report of the ILA Committee (2004) p. 4.

The First Report of the Committee was presented to the 68th Conference of the ILA at Taipei, 1998, and it laid down the legal framework for accountability of international organizations. The Second Report was presented to the 69th Conference at London, 2000, and it comprised a discussion of relevant general principles, to which was annexed a Co-Rapporteurs' draft of recommended rules and practices (RRP). The Third Report, presented at the 70th Conference at New Delhi, 2002, contained a consolidated, revised and enlarged versions of RRPs, and the Final Report, further categorizing the RRPs was presented to the 71st Conference at Berlin, 2004.[141]

In its Final Report, the Committee had decided not to discuss the concurrent or residual responsibility of member states for non-fulfilment by International Organizations of their obligations toward third parties. The Committee considered the question fully covered in the 1995 Resolution of the *Institut de Droit international*: 'The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties'.[142]

Those who endorse the general view of a lack of member state responsibility in a broader context have focused their attention on seeking to improve mechanisms for securing the responsibility of international organizations. The Final Report, for example, concluded that this regime should be enhanced.[143]

V. Conclusion

No such situation should arise, where an international organization would not be accountable to some authority for an illegal act attributable to that organization.[144] A precondition for the responsibility of international organizations is a separate legal personality of these organizations, but this does not determine whether member states have a concurrent or residual responsibility or not.[145]

[141] The Final Report of the ILA Committee (2004) pp. 4-7.

[142] International Law Association: Third Report Consolidated, Revised and Enlarged version of Recommended Rules and Practices ('RRP's'), New Delhi Conference, Committee on Accountability of International Organizations, 2002 p. 18. Finally the Committee considered the question fully covered in the 1995 Resolution of the *Institut de Droit international*. Final Report of the ILA Committee (2004) p. 26. The Resolution of the *Institut de Droit* which the Committee considered to be exhausting is discussed under the following title.

[143] Wilde (2008) p. 410 and ILA Final Report (2004).

[144] ILA Final Report (2004) p. 26.

[145] Higgins, Rosalyn: The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations towards Third Parties, Annuaire de l'Institut de Droit international, vol. 66-I, 1995, p. 254.

These are interesting times when it comes to the development of international responsibility. With the adoption of the ILC Articles on the responsibility of international organizations, the increasing legal practice and the hopefully successful UN reform, the time is now to focus on the issue of the relation between the responsibility of international organizations and the responsibility of their members. Should the corporate veil of an international organization be pierced and the member state responsibility invoked? If yes, how do we still need to develop the current legal framework in order to establish this member state responsibility? If not, how do we look after the interests of third parties? How do we make sure that the international organizations can be held accountable for their actions?

In Europe, the times are also interesting due to the ratification of the Lisbon Treaty[146]. The Treaty defines the legal personality of the European Union, making it a stronger actor in its own right, within the international community and, for example, opens the possibility for the European Union to accede to the ECHR. It is evident from the cases presented above that case law does not deliver a unified stance on the question of member state responsibility under international law. Therefore, the existing legal practice has not created a customary norm regarding member state responsibility in international law.[147]

Current legal practice has even produced detrimental precedents, as can be seen in the *Behrami and Saramati* case in the ECrtHR, when it comes to the protection of human rights and the endorsement of international responsibility. If a principle of international responsibility is not clear to the courts, as was obvious in the *Bankovi and Others* case (where full control and jurisdiction of the respondent states did not result in state responsibility), further academic debate is definitely needed.

Taking into consideration the efforts of non-state actors such as the ILC, ILA and the *Institut de Droit international,* the problem is not necessarily so much the lack of academic efforts regarding questions of substance, but the lack of consistent jurisprudence, caused to a large extent by the procedural difficulties surrounding these cases. The aforementioned efforts, especially the ILC Draft Articles, should be accepted by states as binding international law. By adopting clear procedural rules and more easily subjecting international organizations to claims, the substantive guidelines on international responsibility can develop into practice.

A great step forward could be attained by amending the role of the ICJ. The ILA Committee would not include its conclusions regarding the amendment of the ICJ Statute in the main body of its Final Report, as it is a topic that divides academics and consequently, on which consensus is difficult to reach. Nevertheless, further academic discussions are encouraged in

[146] For more information on the Lisbon Treaty, please see http://europa.eu/lisbon_treaty (last visited 14 March 2010).

[147] Hirsch (1995) p. 124.

order to make the topic of the ICJ Statute and the general question of procedural barriers to finding international organizations responsible easier to approach.

In conclusion, there remain four points of consideration for the future development of international responsibility. By taking on these four challenges, the harm from the remaining unclarities could be brought down to a minimum. The interests of third parties would be better protected and unwanted surprises regarding responsibility issues for member states, and also international organizations themselves, could be avoided.

1. **Removing procedural obstacles:** The Statute of the ICJ should be amended to *accept international organizations as parties* in cases before the Court. This would not open the Court to individuals, but it would enable the Court to hear cases, where the injured third party and claimant or the respondent is an international organization. This would be a great step forward in the field of international responsibility.

2. **Improving existing structures**: If and when jurisdictional immunity continues to form a barrier to remedial action for non-state claimants, adequate *alternative remedial protection mechanisms* within international organizations should be encouraged and developed.

3. **Increasing transparency and good faith**: An international organization should *specify the* position regarding responsibility in its *rules*. Organizations should also be encouraged to provide parties with the necessary *information as to the allocation of responsibility* between the organization and its member states. This information should be given prior to the conclusion of the agreement concerned, or at the start of the operational activity envisaged by the organization and its member states.

4. **Referring disputes to arbitration**: If possible, when concluding agreements with states or non-state entities, international organizations should add a clause providing for *compulsory referral to arbitration* of any dispute that the parties have been unable to settle through other means.