

# THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO BEAR INTERNATIONAL RESPONSIBILITY

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## Abstract

*The status of international personality is not exclusively reserved for states. In modern days, the international organizations have legal international personality and also have the capacity to be internationally responsible for their conduct. Some particularities of the legal personality of international organizations are decisive in determining their international responsibility. The study will establish the connection between the foundations of the personality and responsibility of an international organization. It will be also analysed the situation of third parties in establishing the responsibility of an international organization.*

**Keywords:** *Responsibility, International Organization(s), International Legal Personality, International Responsibility, Attributable to.*

## Introduction

The responsibility of international organizations creates specific issues regarding the imputability in international law. The International Law Commission(ILC) had to face complex problems, to which international law does not answer unequivocally, had to base its findings on a fragmented practice and marked by a great pragmatism and on a limited importance of jurisprudence and less conclusive. The complexity of the problem is related to the particularity modes of international organizations activity. Indeed, they often act through the Member States or using their organs. At the same time, Member States exercise strong influence on the operation and decision making within the organization. The imputability study of conducts related to activities of international organizations should take into account the control interrelations and power between the organization and its members. They impact both on the responsibility of international organizations and the responsibility of Member States following facts organization.

The responsibility is the final test of international personality.

The legal personality is translated by the ability to be the holder of rights and obligations and, therefore, have the responsibility in case of obligation's infringement. The identical imputability with the legal international entity which has to answer for a crime committed by a person who does not have the same quality.

Indeed, the ability to commit a wrongful international act belongs by definition only to international law subjects. This is the situation when a conduct can be attributed to an entity, contrary to international law, can be considered a subject of

international law. Similarly, international personality has the effect of making susceptible subject likely to be considered responsible for any internationally breaches attributed to it. By this mean the international imputability organization of the breaches is both a consequence but also an indicator of its international personality.

The legal personality allows to the international organization to activate similar to a self- governing subject.

The international organization became a law subject, able to be entitled, on his right, of their rights and obligations. It can be the beneficial owner of those obligations put on its task under the law of international responsibility if an infringement of its international obligations can be attributable to it.<sup>1</sup>

The responsibility for breaching its obligations allows to third parties to submit their claims directly to the organization. It was seen as representing a certain risk for the third parties. Concrete means of responsibility are less developed in case of international organizations than in the case of states. This acknowledgement powered its argumentation in favour of the Member States' subsidiary responsibility.

International responsibility as an index and consequence of the separate personality of an international organization (1.) may rise special difficulties to people who complain about its activity (2.).

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<sup>1</sup> Pierre Klein, *La responsabilite des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant, Bruxelles, 1998, p.2.

## Content

### 1. Legal personality of international organizations - the foundation of their responsibility

Necessary relationship between responsibility and personality was highlighted many times. The international responsibility of international organizations assumes that they have a legal international personality, that they are international law subjects, different than Member States. The international personality of the organization, so her actual existence in the international order, is essential to its ability to see that those wrongful acts they committed were required to it.

The responsibility of the international organization for those wrongful conducts which are imputed is a “necessary condition”<sup>2</sup> of their legal personality.

The possession of international legal personality just make the distinction between international organization and simple common organs of several states<sup>3</sup>, like the tripartite administration NAURU<sup>4</sup>.

States must be directly responsible for the State’s conduct which wouldn’t be only their instrument without possessing any autonomy to them, without their own will.

To have an international personality, the organization must have a distinct will<sup>5</sup>.

The international organization’s legal personality of international law was recognized by the International Court of Justice (ICJ) in the evaluation notice of April 11<sup>th</sup>, 1949. This legal international personality is distinct from the one that states form and it depends on the will of these states so as shown in the evaluation notice of the Organization in which it finds its foundation, without a required disposition, which would be expressly conferred.<sup>6</sup>

Those kind of explicit assignments are very rare and scarce, organizations must have an independent will, distinct from that of Member States. This criterion is considered as “the foundation stone” of the international personality<sup>7</sup>, “its fundamental criterion”.

International organizations are, like States, legal entities which act by individuals or groups. International organizations are “secondary” international law entities, to the extent that they are, themselves made up of states that are also at the origin

of their creation and execution of the will of organizations. The issue of international responsibility award is made more complex by the double position of the state towards the organization also like a founder and performer.

The legal personality of international organizations, and therefore their ability to answer for their actions in the international law, depends on the states’ will, the primary subjects and entire body of international law. International organizations often remain closely linked to their creators and are very dependent, hence resulting difficulty to divert their will to that of their members and operate attributing their acts.<sup>8</sup> Member States tend to try to guide the organizations’ action those they created in a way according to their interests and it tries “to provide at least partial control”<sup>9</sup>. However, organizations often receive certain autonomy towards their members, due to the dynamics created by the establishment of their own organs. They are often the place of some complex power games and, if their action is submitted to Member States’ will, the opposite is also true: Member States may act under its control or following the instructions of the organization. The creation of an organization has just the effect of restricting action’ states freedom, even if the transfer of competences to the organization is based on a voluntary basis.

International organizations are responsible as law international subjects for those international law breaches that they commit. Their capacity to be responsible for their international law violations, which are attributable to them can be deduced of their capacity as holders of international obligations and therefore of their international legal personality.<sup>10</sup> This principle is summarized by Ian Brownlie which believes that “If an organization has a different legal personality from that of the Member States, and action which left to the states would create responsibility, it is reasonable to be attributed the organization’s responsibility.”<sup>11</sup> If it is the consequence of the international personality of the organization, the responsibility is, also, “often presented as the ultimate test of the effectiveness of the legal personality of a given entity.”<sup>12</sup> Other authors emphasize the logical connection between the legal personality of the organization and its capacity to be internationally responsible. The responsibility of the organization depends on its legal personality and depends on “how

<sup>2</sup> Alain PELLET, Patrick DAILLIER, Mathias FORTEAU, *Droit international public*, 8<sup>eme</sup> edition, L.G.D.J., Paris, 2009, §478.

<sup>3</sup> Philippe SANDS, Pierre KLEIN, *Bowett’s Law of International Institutions*, 6<sup>th</sup> Edition, Sweet and Maxwell, London, 2009, § 15.001.

<sup>4</sup> CIJ, *Certaines terres a phosphates a Nauru (Nauru c. Australie)*, arret du 26 juin 1992 (Exceptions preliminaires), Rec. p. 258, §47.

<sup>5</sup> Rosalyn HIGGINS, “The Legal Consequences for Membre States of the Non Fulfilment by International Obligations of their Obligations towards Third Parties”, *Annuaire de L’institut de Droit International*, vol. 66-I, Pedone, Paris, 1995, p. 254.

<sup>6</sup> Alain PELLET, Patrick DAILLIER, Mathias FORTEAU, *Droit international public*, 8<sup>eme</sup> edition, L.G.D.J., Paris, 2009, §383.

<sup>7</sup> Joe VERHOEVEN, *La reconnaissance internationale dans la pratique contemporaine*, Pedone, Paris, 1975, p. 199.

<sup>8</sup> Manuel PEREZ GONZALES, “*Les organizations internationales et le droit de la responsabilite*”, *Revue generale de droit international public (RGDIP)*, Pedone, Paris, 1988, p. 69.

<sup>9</sup> Pierre-Marie DUPUY, *Droit international public*, 9<sup>eme</sup> ed. Dalloz, Paris, 2008, p.156.

<sup>10</sup> C.F.AMERASINGHE, *Principles of the institutional law of international organizations*, Oxford University Press, 2005, 2<sup>nd</sup> ed., p. 399.

<sup>11</sup> Ian BROWNLIE, *Principles of Public International Law*, 6<sup>th</sup> ed., Oxford University Press, 2006, p.655.

<sup>12</sup> Pierre Klein, *La responsabilite des organizations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant, Bruxelles, 1998, p.5.

the organization is conceived<sup>13</sup> either as an independent subject or even beneficiary of autonomy to Member States, either as a simple instrument for them. This can be deducted from the Founding States' will organization's own organs to assign a specific mission, in short to translate "the organization's character placed in some ways in front of his members."<sup>14</sup>

The legal personality of international organizations is functional, it is according to the specialized principle and it is limited by the Founding Treaty. International organizations' responsibility occurs for all documents are held liable in all cases where responsibility for conduct can be assigned, as either enter or not within its powers.<sup>15</sup>

International organizations form an united whole, and for assigning responsibilities, we cannot make any difference between the most integrated organs of the organization – as secretary office and organs composed of states' representatives. Finn Seyersted wrote about United Nations (UN) that, resulting from distinct legal personality of organizations, Member States, in this position as members of the internal organ, cannot be declared responsible for the acts of the organization.

Indeed, "it requires a clear delegation setting of power, that Carta doesn't provide", this would lead to the transformation of organizations in a kind of federation, which was not desirable.<sup>16</sup> Member States act as organs of the Organization and not directly as isolated states. In case that an organization has international personality, which means a distinct will of their members, the action of the last one in the decision-making organs of the organization is without influence on imputability of conduct to the organization. Their collective act is, in this hypothesis, considered as an act of the organization, and will be also bear the responsibility.

The vote doesn't create obligations to the state when is deciding in an international organization, so this isn't a unilateral act of the state. One state isn't responsible for the wrongful conduct of an organization which was accomplished by applying a decision taken by vote, only when the vote can be assimilated with aid or assistance in committing the illegal act, which implies that the act wouldn't have been adopted without vote rule. Basically the organization is the only one responsible for its wrongful acts that committed, the responsibility of Member States of the decision-making organ that have adopted the act that led to the violation of any of its

obligations to the international organization cannot be engaged. The vote doesn't express an unilateral manifestation of the will. Indeed, the state is not tied by his affirmative vote, but by the decision according to the procedure provided by the Founding Treaty of the organization's member which it is. The obligation results from the power of the adopted act and not from the expression of the will of the state.

The international organization must be sufficiently independent to possess freestanding personality in front of founding states and quite coherent to set "a center of imputation" of international legal relations who are outstanding.

Creating an international law subject hasn't the objective to create a unique actor who has the function to centralize the action of various states in a particular field. This will be the organization's action, founded in its name, and not in that of an individual state, which means that international responsibility that could result from this action will be that of the organization. After Charles Visscher, "legal personality condition is one of concentration: concentration of wills oriented to follow the statutory goals, concentration of responsibilities by charging exclusive legal entity of the civil consequences of collective decisions made in the usual way", or after Evelyne Lagrange, "the legal personality gives to the organized community its legal unit."<sup>17</sup> The State's creation of an international organisation has the purpose to create a new person which will bear the responsibility of the action that fallow to be committed. The organization is acting on its own behalf and not as representative of its members.<sup>18</sup> Acting as international law subject, the organization is entitled to rights and indebted to obligations, and - in case of violating thereof - it will be the only responsible.

This conclusion led to great difficulties, related mostly to the rarity of cases in which a third party injured can turn against an organization in front of international jurisdictions. There have been imagined yet detours that led to greater confusion in this area.

## 2. Third parties' situation against specific risk of international organizations

International organizations are responsible for the facts that are attributable to them. Although, certain ways of adjusting disagreements especially judicial, which can be used against states are ineffective in terms of international organizations.

<sup>13</sup> Manuel PEREZ GONZALES, "Les organisations internationales et le droit de la responsabilité", *Revue générale de droit international public* (RGDIP), Pedone, Paris, 1988, p. 66.

<sup>14</sup> CIJ, *Reparations de dommages subis au service des Nations Unies*, Avis consultatif du 11 avril 1949, Rec. p.174.

<sup>15</sup> Manuel PEREZ GONZALES, "Les organisations internationales et le droit de la responsabilité", *Revue générale de droit international public*(RGDIP), Pedone, Paris, 1988, p. 68.

<sup>16</sup> Finn SEYERSTED, *Common Law of International Organizations*, Martinus Nijhoff Publisher, Leiden, 2008, p.90.

<sup>17</sup> Evelyne LAGRANGE, *La représentation institutionnelle dans l'ordre international*, Kluwer Law International, La Haye, Londres, New York, 2002, p.8.

<sup>18</sup> Evelyne LAGRANGE, *La représentation institutionnelle dans l'ordre international*, Kluwer Law International, La Haye, Londres, New York, 2002, p.45.

In some instances, third parties have been affected by the inherent difficulties in applying the responsibility of international organizations. Many detours of this difficulty were imagined, most often being the evocation of the international personality absence, of a specific organization to approach the direct responsibility of Member States.

Multilateral treaties for the protection of human rights, without exception - are not opened only to the states adhesion, although they are often the work of international organizations.<sup>19</sup>

The difficulty was showed especially in front of the European Convention of Human Rights.

This state of fact, although leading to an issue of responsiveness, may have an incidence on the imputability issue of the litigious act itself, or at least of the responsibility for this act, and with the desire of ensuring the effectiveness of the European system of human rights protection could push to the temptation to modify certain points of States' law responsibility and international organizations. As an author presented it, "in front of the international inability in which could be an individual faced with the situation of asking directly concerned in front of an international surveillance in Strasbourg, it is tempted to try to make a state which would be part of the Convention to bear responsibility violation"<sup>20</sup>.

The Union's accession to the European Convention of Human Rights will adjust the acts of the latter issue, the issue can still be about the conduct of other organizations. It should be emphasized that such an assumption of temptations was issued especially by the doctrine, European Court of Human Rights remain roved on this subject.

The will to avoid that states pass by their obligations, taking refuge behind international independent personality of an international organization, the inability to bring an organization before the ICJ and fears of the organization's insolvency were an argument presented in favor of subsidiary responsibility of the Member States of the Organization for wrongful acts committed by it.

The related issues of distinct legal personality of the former European Communities were the subject of a rich jurisprudence of the European Convention of Human Rights organs.

Complaints about the attributable conduct of the European Union were directed against it or against all Member States.

These complaints brought against Community acts were declared inadmissible based on the competence's absence *ratione personae* of Court when they aimed specifically European Communities. Instead of this, the Court did not directly answer the question about a possible collective responsibility of all Member States when the petition was directed against them.

The first of these cases is that one of Confederation française démocratique de travail (CFDF) petition directed against the European Community and alternative against "the community of their Member States" and "their states individually."<sup>21</sup>

The union complained that it was not appointed by the Council of the European Communities as a representative organization called to establish candidates' lists for the ECSC Consultative Committee, although it, given its importance, was the second among the five organizations recognized as representative in France.

European Commission of Human Rights declared the request, because it is directed against the European communities which have their own legal personality<sup>22</sup>, as inadmissible *ratione personae*, which are not party to the Convention<sup>23</sup>, and thus benefit of "total immunity"<sup>24</sup> of it. She concludes about "the corporate member states", a notion that has not been defined by the applicant, but the Commission has treated it as part of the European Community Council. After this decides regarding the request as inadmissible *ratione personae* on France, it still not accepting the right of individual appeal, the Commission estimated that the responsibility of other states cannot be considered for attended the Council decisions of the European Community, and in failing states, in circumstances of the case, their "jurisdiction", according to article 1 of the Convention<sup>25</sup>. The Commission did not recognize any collective responsibility or secondary of European Community Member States, based on the autonomy of members of their communities. She doesn't agree to recognize a "community of Member States" that would exist outside the organization's institutions. This recognized the possibility that Member States, taken collectively, to respond for their international

<sup>19</sup> Robert KOLB, Gabriele PORRETTO, Sylvain VITE, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales – Forces de paix et administrations civiles transitoires*, Bruylant, Bruxelles, 2005, p.239.

<sup>20</sup> Pierre APRAXINE, "Violation de droits de l'homme par une organisation internationale et responsabilité des Etats au regard de la Convention européenne", *Revue trimestrielle des droits de l'homme (RTHD)*, Bruylant, Bruxelles, 1995, p.16.

<sup>21</sup> Commission européenne des droits de l'homme, *Confédération française démocratique du travail c. Communautés européennes, subsidiairement la collectivité de leurs Etats membres et leurs Etats membres pris individuellement*, dec. Du 10 juillet 1978, Req. No 8030/77.

<sup>22</sup> Commission européenne des droits de l'homme, *Confédération française démocratique du travail c. Communautés européennes, subsidiairement la collectivité de leurs Etats membres et leurs Etats membres pris individuellement*, dec. Du 10 juillet 1978, Req. No 8030/77 §2.

<sup>23</sup> Commission européenne des droits de l'homme, *Confédération française démocratique du travail c. Communautés européennes, subsidiairement la collectivité de leurs Etats membres et leurs Etats membres pris individuellement*, dec. Du 10 juillet 1978, Req. No 8030/77 §3.

<sup>24</sup> Frederic KRENC, "La décision *Senator Lines* ou l'ajournement d'une question délicate", *Revue trimestrielle des droits de l'homme (RTHD)*, Bruylant, Bruxelles, 2005, p. 124.

<sup>25</sup> Frederic KRENC, "La décision *Senator Lines* ou l'ajournement d'une question délicate", *Revue trimestrielle des droits de l'homme (RTHD)*, Bruylant, Bruxelles, 2005, p. 124, §7.

organization's performed acts whose members are, would mean to deny international distinct legal personality of European Commission. The responsibility of a "Member States' collectivity" of the European Community, different and parallel to the last one, would emptied the substance of organization's autonomy.

Another request directed also against "European Community, subsidiary, against the community of Member States and their Member States individually" for the European community organs' acts, was tried and declared inadmissible, as being directed against them. The Commission then examines the problem, namely "whether the act in question, committed by an organ of the European Community may engage the responsibility of each of the 12 Member States of the European Community on the Convention's ground." The Commission did not decide on this point and declare the request as inadmissible because there weren't used all of the Communities appealing means. Other applications directed against the European Community or against institutions were systematically declared inadmissible *ratione personae*. This solution was recently confirmed by the European Court of Human Rights, which estimated that "although the holder of sovereign powers transferred in this way, the international organization in question can not, as long as it is not part of the Convention, to see her responsibility held for procedures carried in front of her organs or decisions given by them."<sup>26</sup>

In front of the inability to attract an organization directly before the European Court of Human Rights, were submitted requests against the completeness of their Member States, putting in question the responsibility of Member States for its organization's acts. If any real form of secondary responsibility was denied by the Court, states may be responsible for not taking the necessary measures accomplished during the transfer of powers to the benefit of the organization.

Not having the means to put into practice, the organization's, requests were directed against the North Atlantic Treaty Organization (NATO) member states which are parties to the European Convention on

Human Rights. However, the European Court of Human Rights did not decide on the question of responsibility for acts committed by NATO member states during military operations against the Federal Republic of Yugoslavia.

Despite these procedural issues, and whatever advantages to the third party get in touch with an organization, no rule which imposes responsibility subsidiary of the members of an organization have appeared in international law.

### Conclusions

The problem of imputability of an international organization or its Member States of their wrongful conduct, translate all its complexity between these different subjects. However, a guiding thread running throughout this study: responsibility depends on the mean margin of the international law subject, the capacity to adopt an autonomous conduct. One subject under the will of other could not be the holder of responsibility. The Member States, in principle, are not responsible for the imputable international organizations violations, except where they do not exercise control of it, situation in which it cannot be considered as an entire law subject due to the inexistence of a distinct will from that of the states. This lack of autonomy may be general, and in this case the organization does not possess international personality, she is just a normal organ or Member appears only in special case, situation in which the organization is subject to control or coercion of one or more states. In parallel, a State is not responsible for committed acts after the application of the international organization's decision unless it in this case have no margin maneuver.

However, relations between international organizations and their members are generally complex activities of international organizations or States within their adherence to an international organization is likely to give rise to responsibility all actors, depending on the method and the actual degree of control over committing the wrongful act.

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<sup>26</sup> CourEDH, GC, arret du 30 juin 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi c. Irlande*, §152.

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