

ASPECTS REGARDING INTERNATIONAL RESPONSIBILITY BY ANALYSING THE AGENCY RELATIONSHIP BETWEEN THE INTERNATIONAL ORGANIZATION AND THE STATE

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Abstract

The study analyses the consequences for the responsibility of the organization and the relevant state of an agency relationship between an international organization acting as a principal and a state acting as its agent. It is proved that an international organization may be responsible for damage caused by the conduct of the state. We can also sustain that the state itself may bear responsibility for having established or for not having terminated the agency relationship if it commits wrongful conduct on behalf of the international organization.

Keywords: *Responsibility, International Organization(s), Agency Relationship, Wrongful, Conduct.*

Introduction

The concept of an agency relationship is a private law concept but it can be also transposed to international law. Indeed, international practice shows that a state sometimes acts on behalf of another state, with the legal consequence that the conduct performed by the state acting in the name of the other state has the same legal effect for the latter as if it had acted itself.¹ For instance, two states can conclude an agreement whereby one state undertakes to exercise certain sovereign powers on behalf of the other state, including all of its international relations.² Another instance of an agency relationship between two states can be found when a state exercises diplomatic protection in the interest of the citizens of another state in conformity with a mandate conferred upon it by the latter state. With the development of the powers of international organizations, it is also conceivable to see as an agency relationship the situation where an international organization acts on behalf of one or more states in order to implement some of its powers.³ It is today no longer contested that international organizations enjoy their own international legal personality.⁴ Therefore, an agency relationship could be constituted between an international organization and one or more state(s), both being distinct international legal subjects, the state(s) acting as the principal(s) and the international organization acting as the agent.

Conversely, and this is the situation dealt with by this article, an agency relationship can exist between an international organization and one or more states, where the state(s), seen as the agent(s), act(s) on behalf of the international organization, regarded as the principal.

The effects of an agency relationship between an international organization and a state, for the responsibility, under international law, of the parties to the agency relationship, can of course be regulated by an explicit agreement concluded between the relevant international organization and the state. This article will analyse the consequences of an agency relationship between an international organization, as the principal, and a state, as the agent, for the responsibility of the parties toward third parties under general international law. Specific agreements, on the allocation of responsibility between an international organization and a state, that may have been concluded will not be taken into account. This article will argue that, as in domestic private law, the implication of an agency relationship between an international organization and a state, where the organization is the principal, is the responsibility of the principal, the organization, for wrongful acts committed by the agent, the state, within this relationship. Furthermore, this analysis will explain that the state may also be responsible for wrongful acts carried out on behalf of the international organization.

This study demonstrates that the international organization is, logically, responsible for wrongful acts committed by the state or state acting as its

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¹ A.P. Sereni, 'Agency in International Law', 34 *AJIL* (1940) p. 638.

² ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952, *ICJ Reports* (1952) p. 176 at p. 188. The Court emphasised that Morocco, the state on behalf of which international relations should be conducted, remained a sovereign state.

³ D. Sarooshi studied the agency relationship between a state acting as a principal and an international organisation acting as its agent. 'Conferrals by States of Powers on International Organizations: The Case of Agency', 74 *BYIL* (2003) p. 308-332.

⁴ T. Gazzini, 'Personality of international organizations', in J. Klabbers and A. Wallendahl, eds., *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar 2011) p. 33 at p. 33.

agent(s). The article further argues that the state(s) may however also bear responsibility for wrongful conduct that it has committed on behalf of an international organization. In such a situation, the victim would then have the choice between obtaining a remedy from the international organization or from the state(s).

Content

1. The effects for the responsibility of an international organization

1.1. For wrongful acts consistent with the agency relationship

In accordance with Article 7 of the DARIO, if an organ of a state is placed at the disposal of an international organization and if that international organization exercises effective control over the conduct of that organ, this conduct is attributed to the international organization alone.⁵ As shown above, such a situation, where a state places one of its organs at the disposal of an international organization, which exercises effective control over the conduct of that organ, corresponds to an agency relationship between the international organization and the state where the organization acts as the principal and the state as the agent. Therefore, in accordance with Article 7 of the DARIO, there is an exclusive attribution of all acts committed by a state to an international organization, when the acts are performed in conformity with an agency relationship between the international organization acting as the principal and the state acting as the agent. The international organization is the only subject responsible for wrongful acts carried out by the state within the agency relationship. In the absence of any agreement providing otherwise, the state does not assume any responsibility for those wrongful acts. The consequence of an agency relationship between an international organization and a state is that the acts by the state on the basis of the agency relationship engage the sole responsibility of the international organization if they infringe one of its international obligations.

When the DARIO was adopted, there was hardly any practice supporting the rule of its Article

7. However, on the other hand, no state criticised the content of Article 7.⁶ There is also a scholarly consensus that effective operational command or control by an organization exercised over an act leads to the attribution of that act to the organization.⁷ Reference can also be made to the similar principle, which is well established in general international law, that acts of non-state actors are attributable to a state when such actors act under the control of the state.⁸ It seems indeed fair to attribute conduct to that subject of international law that exercises control over that conduct and to engage its responsibility if the conduct is wrongful. Responsibility should be located with the actor who is in a position of control over the wrongful act. Such a regime deters the commission of the wrongful act, and prompts compliance with the law.⁹ Given the absence of state protests, recent court practice, and its appropriateness in the law of responsibility, it is argued that the rule of attribution of Article 7 is an emerging rule of customary international law.

1.2. For wrongful acts contrary to the agency relationship

The DARIO are not explicit concerning the attribution to the international organization or to the state of an act committed by the state contrary to the agency relationship established between the organization, as the principal, and the state, as the agent. Reference can however be made to the rule attributing certain *ultra vires* acts carried out by an organ of an international organization to that organization. The International Court of Justice has admitted attribution to an international organization of an act committed by one of the organization's organs, taken within the functions of the organization, even if the organ exceeded its competence.¹⁰ Furthermore, the Court also stated that: 'it needs hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations'. This implies that acts of United Nations agents that exceed their official competence may be attributable to the organization and may engage its responsibility. This case law was considered by the International Law Commission in its DARIO. In accordance with its Article 8: 'the conduct of an

⁵ Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 6, p.19.

⁶ C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after *Beh-rami*', 45 *Israel L Rev.* (2012) p. 151 at p. 164.

⁷ See, for instance, P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford, A. Pellet and S. Olleson, eds., *The Law of International Responsibility* (Oxford, OUP 2010) p. 297 at p. 300; N. Gal-Or and C. Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN', 13 *German LJ* (2012) p. 511 at p. 529; M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Martinus Nijhoff Publishers 2005) pp. 100-103.

⁸ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, at pp. 47-48-art. 8 and commentary

⁹ C. Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after *Behrami*', 45 *Israel L Rev.* (2012) p. 151 at p. 154.

¹⁰ Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, ICJ Reports(1962), p.151-168.

organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions'.¹¹ This provision thus provides for the attribution of a certain kind of *ultra vires* conduct to an international organization. The conduct can take two different forms: it can either be the conduct of an organ or agent adopting an act that is not within its competence; it can also be the conduct of an organ or an agent acting contrary to the specific instructions given by the international organization. An *ultra vires* act is attributable to an international organization only if its author acted in an official capacity. Furthermore, the act must remain within the functions of that organization.¹²

One reason for the attribution to an international organization of an *ultra vires* act of an organ or agent of that organization, who acted in an official capacity and within the functions of the organization, is the protection of third persons. An international organization can organise itself within the limits of its constitutive treaty: it can create subsidiary organs or recruit agents who will exercise its functions. Therefore, it is sometimes difficult for a third party to realise that an act of an international organization was not carried out by a competent organ or agent.¹³ An act adopted by an organ or agent of an international organization may rightly remain an act of that organization even if it has been adopted contrary to the delimitation of the competence of the relevant organ or agent. Another explanation for the attribution of an *ultra vires* act to an international organization relies on the notions of fairness and effectiveness. The organization that employs the wrong-doer is in the best position, in comparison with other subjects, to control its organs and agents. Those are normally subject to the internal direction of the organization. Therefore, if an organ or agent of an international organization commits an *ultra vires* act when acting in its official capacity and within the functions of the organization, the international organization that did not properly supervise the relevant organ or agent should logically assume responsibility for the act.¹⁴

In accordance with Article 2 of the DARIO, an 'organ' of an international organization is 'any person or entity which has that status in accordance with the rules of the organization' whereas an 'agent' of an international organization means: 'an official or other person or entity, other than an organ of an international organization, who is charged by the

organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.¹⁵ The word 'organ' in Article 2 of the Draft Articles does not refer to the organ of a state placed at the disposal of an international organization. Indeed, the Draft Articles distinguish the attribution of the conduct of organs or agents of an inter-national organization (Art. 6) from the conduct of an organ or organs of a state placed at the disposal of an international organization (Art. 7). The difference between organs or agents of an international organization and organs of a state put at the disposal of an international organization lies in the fact that organs or agents of an international organization are fully seconded to an international organization. This is not the case when organs of a state are placed at the disposal of an international organization.

The rule of attribution in Article 8 of the DARIO can however be transposed to the attribution of some conduct of an organ of a state placed at the disposal of an international organization in accordance with Article 7 of the Draft Articles. A wrongful act adopted by an organ of a state placed at the disposal of an international organization is attributable to the organization, even if the act did not comply with the instructions given by the organization to the organ when two requirements are fulfilled. First, the act must relate to the functions of the organization. Second, the conduct of the state's organ must have been under the effective control of the international organization when it committed the act. Indeed, even if placed under the effective control of an international organization, the organ of a state may not have understood the instructions given by the organization and may have committed an act contrary to them. In other words, if the rule of attribution of Article 8 is applied to an agency relationship between an international organization acting as a principal and a state acting as an agent, it appears that an international organization is responsible for the wrongful conduct of a state that is its agent, even if this conduct is contrary to the instructions given by that organization, if it was committed within the agency relationship established between the relevant organization and the state. The reason for attributing responsibility to the international organization for acts of an organ of a state contrary to the instructions given by the organization, but still attached to the functions to be fulfilled by the state on behalf of the organization, lies in the effective control exercised by the organization over the state's organ.

¹¹ Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 26.

¹² Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 26.

¹³ A. Tzanakopoulos, *Disobeying the Security Council* (Oxford, OUP 2011), p. 32.

¹⁴ M. Hirsch, *The Responsibility of International Organizations Toward Third Parties* (Dordrecht, Martinus Nijhoff Publishers 1995) p. 77.

¹⁵ Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 6.

In conclusion, the implication of an agency relationship between an international organization, acting as the principal, and a state, acting as the agent, for the responsibility of these two subjects of international law is that wrongful acts committed by the state within the agency relationship engage the responsibility of the organization if they are consistent with the agency relationship and sometimes even if they are contrary to the terms of the agency relationship. Are there any consequences of the agency relationship for the responsibility of the state? Does the international organization assume exclusive responsibility? Or is there a dual responsibility of the international organization and the state for wrongful acts committed by the state?

2. The consequences for the responsibility of the state in case of any international obligation of the international organization is violated

Article 58 of the DARIO provides for the responsibility of a state that aids an international organization in the commission of a wrongful act when the state does so with knowledge of the circumstances of the wrongful act and when the act would be considered wrongful under international law if committed by the state itself.¹⁶

The responsibility of the state acting as an accomplice is a different responsibility than that of the international organization because the former derives from the violation of another obligation, namely not to assist an international organization in the commission of a wrongful act. At the same time, the responsibility of the state is in another sense also derived, because it depends on the commission of a wrongful act by another international subject, the international organization. Article 58 is similar to Article 16 of the DARS.¹⁷ The latter provision embodies a norm of customary international law.¹⁸ State practice is too limited to confirm that Article 58 also includes a similar norm of customary international law. However, it is generally accepted that the principles of the law of the international responsibility of states can apply by analogy to the international responsibility of international organizations.¹⁹ It is therefore reasonable to argue that the provisions of Article 58, which are similar to those of Article 16 of the DARS, are at least, a progressive development of the law.

What then counts as aid triggering responsibility for the supporting state? The International Law Commission does not provide an answer to this question in its commentary on Article 58. The commentary on Article 16 of the DARS can help to interpret the similar provision contained in Article 58 of the DARIO. For the International Law Commission, no particular kind or level of assistance is required, as long as the aid or assistance materially facilitates or contributes significantly to the performance of the wrongful act.²⁰ Therefore, Article 58 of the DARIO can be applied in a situation where a state places one of its organs at the disposal of an international organization knowing that the organization will then commit a wrongful act. The rule of Article 58 is to be implemented in the case where a state agrees to an agency relationship between an international organization, acting as the principal, and itself, acting as the agent, and where the state knows that the purpose of the agency relationship is the adoption of a wrongful act by the organization. Furthermore, in accordance with the requirements for the application of Article 58, the wrongful act should also be wrongful for the state if it were attributed to it. In other words, the state should also be bound by the obligation that the organization is violating. Indeed, it would be problematic to hold a state responsible for having aided an international organization in the commission of an act that would not be wrongful if made by the state.²¹ If the state acting as an agent does not know that the act is wrongful for the international organization, its responsibility is not engaged. If the conduct would not be wrongful if committed by the state on its own behalf, the responsibility of the state is not engaged either. In both situations, the international organization is solely responsible for the damage.

Can Article 58 of the DARIO also be applied to the situation where a state *becomes* aware that an international organization is committing a wrongful act through an organ of the state that has been at the disposal of the organization for a certain time? In other words, can Article 58 be implemented not only at the beginning but also in the course of an agency relationship between the international organization, being the principal, and the state, being the agent? An agency relationship between an international organization and a state is based on the consent of both parties. The counterpart of consent to the

¹⁶ Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011, p. 90.

¹⁷ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, p. 65.

¹⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, *ICJ Reports* (2007) p. 43 at p. 217, para. 420. See also G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009) p. 1 at p. 7-10; H.P. Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge 2012) p. 191.

¹⁹ P. Klein, 'The Attribution of Acts to International Organizations', in J. Crawford, A. Pellet and S. Olleson, eds., *The Law of International Responsibility* (Oxford, OUP 2010) p. 297.

²⁰ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 66, para. 5.

²¹ H.P. Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge 2012) p. 250.

agency relationship is the possibility, for both parties, of terminating the agency relationship, temporarily or permanently.²² If the agency relationship is based on a treaty, the termination of the treaty should comply with the provisions of the treaty. If the treaty establishing the agency relationship does not contain any provision regarding its termination – which is the most usual situation – the treaty should be revocable at the discretion of the parties in conformity with Article 56 of the 1986 Vienna Convention on the Law of Treaties. The argument runs that a treaty establishing an agency relationship between an international organization and a state is a consent-based agreement and should be revocable at any time if it does not contain any provision regarding termination.²³ The concerned state is then free to withdraw from the treaty setting out an agency relationship between it and an international organization. If the agency relationship is not based on a treaty but is an implicit *ad hoc* agency relationship, to be deduced from the effective control exercised by an international organization on the organ of a state placed at its disposal, the state should also be able to withdraw from the agency relationship. Indeed, it is the case that the relevant state is not completely seconded to the organization and should be able to take back effective control over its organ placed at the disposal of the international organization. In conclusion, a state is able to withdraw from an agency relationship between an international organization that is the principal and itself as the agent. Hence, a state should be considered as helping an international organization in the commission of a wrongful act if it does not withdraw from an agency relationship between the international organization as the principal and itself as the agent, and if the known purpose of the agency relationship is the commission of a wrongful act.

The interpretation of Article 58 of the DARIO offered here can be supported by the rule of Article 61 of the Draft Articles according to which a state member of an international organization incurs international responsibility if it circumvents an obligation 'by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation'. Under Article 61, a state should bear responsibility if it places one of its organs at the disposal of an international organization so that the organization can commit an act that would be wrongful if attributed to the state.²⁴ The scope of Article 58 is however broader than the scope of Article 61. Contrary to Article 61, Article 58 can apply to the situation when the state does not

intend to help an international organization in the commission of a wrongful act when it places one of its organs at the disposal of the organization, but it appears, in the course of the organization's activities, that the organization is using this organ to commit a wrongful act.

In practice, it is unlikely that a state will place one of its organs at the disposal of an international organization with the acknowledged purpose that it will commit wrongful acts under international law on behalf of that organization. It seems more likely that the state will learn about such acts in the course of the agency relationship.

However, the state will not be responsible for damage caused by isolated or minor violations of international law by one of its organs placed at the disposal of an international organization. Indeed, since the international organization, and not the state, exercises control over the conduct of the 'lent' organ of the state, the state cannot strictly supervise all the activities of that organ.

The state is responsible only 'to the extent that its own conduct has caused or contributed to the internationally wrongful act'.²⁵ In an agency relationship between an international organization and a state, where the organization is the principal and the state the agent, the international organization can proceed only with the intervention of the state that acts on its behalf. The degree of participation of a state in the fulfilment of wrongful conduct in an agency relationship between that state and an international organization, where the state acts as an agent, is as important as that of the international organization commissioning this wrongful conduct. Therefore, the extent of the responsibility of the state for damage caused by wrongful conduct within the agency relationship is analogous to the extent of the responsibility of the international organization under two conditions. The state is responsible if it carried out a wrongful act on behalf of the organization when it knew or ought to have known that the act was wrongful for that organization and when the act would be wrongful if attributed to the state. This is not a case of joint responsibility. The international organization and the relevant state are held responsible for different acts: the international organization for the original wrongful conduct committed on its behalf by the state in an agency relationship; and the state for having established the agency relationship or for not terminating the agency relationship when it knew or ought to have known about the wrongful conduct, when this conduct would also be wrongful for the state if it were attributed to it. A demand for compensation may

²² D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford, OUP 2005) p. 41-42.

²³ D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford, OUP 2005) p. 42.

²⁴ Draft Articles on the Responsibility of International Organizations, with Commentaries, p. 93.

²⁵ Commentary of the International Law Commission on Art. 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, p. 66.

therefore be made either to the international organization or to the state. If several states jointly perpetrate a wrongful act by acting as agents of an international organization – for instance, when they contribute together to a peace-keeping operation – they are jointly responsible for having set up the agency relationship or for not withdrawing from the agency relationship, provided that they were aware or ought to have been aware of the wrongfulness of the act and that the act would also be wrongful if imputable to the states. In that case, the victim can ask either the international organization or each of the joint perpetrator states for full reparation for the injury. In any case, the victim should not obtain compensation which is greater than the injury sustained.²⁶

It has been demonstrated that a state has a narrow obligation of *due diligence* to ensure that the disposal of one of its organs to an international organization does not allow the international organization to commit wrongful acts. This obligation can be deduced from Article 58 of the DARIO.

3. Conclusions

Ad hoc agency relationships between an international organization acting as a principal, and a state or states acting as its agent(s), are the most usual agency relationships between an international organization and states. More often such agency relationships are implicit and can be deduced from the exercise of effective control by an international organization over the conduct of an organ of a state placed at the disposal of the international organization with the purpose of carrying out functions of that organization.

The International Law Commission only refers implicitly to the existence of an implicit *ad hoc* agency relationship between an international organization acting as a principal and a state acting as an agent, in Article 7 of the DARIO on the attribution of conduct to an international organization by an organ of a state placed at its disposal and under its effective control. The International Law Commission should have referred explicitly to the possibility of such an *ad hoc* implicit agency relationship and, more generally, to all the possible forms of an agency relationship between an international organization acting as a principal and one or more states acting as its agent(s). Indeed, if the International Law Commission had expressly taken into account the entire range of possibilities of an agency relationship between an international

organization and a state, being a member or not of that organization, where the organization is the principal and the state its agent, it would have emphasised the possible dual responsibility of the international organization and of the state when the state commits a wrongful act on behalf of the organization. When an international organization is the principal in an agency relationship between it and a state, it is logically responsible for wrongful acts committed by the state acting on its behalf. This can be deduced from the DARIO. However, the International Law Commission did not expressly analyse the possible responsibility of the state acting as an agent in an agency relationship between it and an international organization. The state may also bear responsibility when it fulfils wrongful acts on behalf of an international organization. A state is free to establish an agency relationship with an international organization and is consequently also free to withdraw from an agency relationship once it is established. Therefore it is here argued that when a state commits a wrongful act on behalf of an international organization within an agency relationship between the organization and the state, the state bears responsibility for having established the agency relationship or for not terminating the agency relationship if it was obviously aware or ought to have been aware of the wrongfulness of the act for the organization and if the act were wrongful for the state itself if attributed to it. A narrow obligation of due diligence by states to ensure that the placing of one of their organs at the disposal of an international organization is not used for wrongful ends should develop in the future.

The above rule on the responsibility of the state is of particular practical importance. Indeed it is the case that when both an international organization and a state are responsible when a wrongful act is committed by the state within an agency relationship, more avenues of redress would be open. The victim will have a choice between suing the international organization or the state. In such a situation, the victim will have a better chance of receiving reparation for damage. Indeed, it is often easier to sue a state than an international organization given the lack of jurisdiction over international organizations. Furthermore, states generally have better finances than international organizations and are in a better position to award financial reparation. To emphasise the agency relationship between an international organization being the principal and a state being its agent leads to the perception of the possible responsibility of the state for damage caused by a wrongful act committed within the relationship and therefore to another and more effective means for the victim to obtain a remedy.

²⁶ Art. 47 (I) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries., p. 124. See also *Case Concerning Oil-Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, *ICJ Reports* (2003) p. 161, Separate Opinion of Judge Simma, paras. 75-78.

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