

Responsibility of a Member State of an International Organization: Where Will It End?

Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations

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Abstract

The paper addresses the issue of possible responsibility of a member state for acts of an international organization of which it is a member. This particular issue forms part of the on-going work of the International Law Commission of establishing rules for the responsibility of international organizations. The particular challenge is posed by possible “responsibility gaps”, i.e. situations where a state might avoid compliance with its own obligations by prompting the organization of which it is a member to act instead. The paper compares the ILC approach, approaching the issue by way of trying to establish general rules of responsibility (“secondary rules”) and the practice of the EU, which has addressed the issue by tailor-made solutions in the context of specific treaties (“primary rules”). The latter approach is more flexible as it allows individual solutions pertinent to particular circumstances and treaty regimes so as to ensure that either the organization itself or its member state is responsible, depending whichever is genuinely responsible. The paper concludes that the ILC work is progressing in the right direction as it narrows down the possibilities where a member state can be held responsible to cover only situations bordering abuse, rather than more open-ended standards for individual member state responsibility, which can open the door for unpredictable results.

Keywords

responsibility of international organizations and their member states; International Law Commission; EU practice

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I. Introduction

The ILC draft articles on the responsibility of international organizations aim to define, not only the responsibility of the organization itself, but also, in certain cases, the responsibility of a Member State for the acts of the organization.¹ An interesting example is Article 60 of the ILC draft, which provides for the responsibility of a Member State which seeks to avoid compliance with its obligations by taking advantage of the fact that the international organization has competence and prompts it to act instead. The ILC is clearly inspired by the motive to close possible ‘responsibility gaps’ in the imperfect system of international law. International organizations have taken important tasks, but they have not, unlike their Member States, become formal participants in most international treaties, which impose substantive obligations on the Parties, especially in the area of human rights. This can be problematic from the viewpoint of injured parties, especially individuals, who may be affected by decisions of international organizations, but are unable to challenge such decisions in a way normally available in the case of State decisions.

This paper will comment on the progress of the ILC work, especially in the light of the EU experience. The EU experience highlights the issues at stake and this has also been in the mind of the ILC, as its commentary demonstrates. The EU is an organization which often acts on the international plane, in lieu of its members (or together with them), and it does so frequently, in areas of traditional State action. This has shaped treaty practice and it raises new issues in the international law of responsibility.² Similar issues arise increasingly also with respect to other international organizations, especially when taking decisions affecting individuals. The same basic question, whether responsibility should be allocated to the organization or its Member States, can arise for instance in the context of UN peace keeping operations.

It is argued that the imposition of responsibility on the Member States of an organization, rather than the organization itself, goes against a historical

¹) Text of the Draft Articles adopted on first reading, *ILC Report: 61st session*, UN Doc. A/64/10, 2009, p. 23.

²) See generally, e.g., J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer, 2001); also E. Paasivirta and P. J. Kuijper, “Does One Size Fit All?”, 36 *Netherlands Yearbook of International Law* (2005), pp. 169–226.

trend. The historical trend, highlighted by the case of a regional integration organization like the EU, is to transfer power to the organization and then to ensure that the one who has power remains responsible for wrongful use of that power. ‘Power breeds responsibility’ should be the maxim that inspires the direction of legal policy. This points *inter alia* towards developing internal legal remedies within the organizations or permitting them to participate in relevant international treaties more widely than at present. However, international organizations constitute a very diverse field, involving different practical needs, which is a major challenge for any kind of harmonized regulation. If one chooses to establish Member State responsibility for certain cases, it is important to know how far it should go, and for what type of reasons it is necessary to allocate the responsibility to the Member States, rather than to the organization itself. Otherwise, international cooperation could be adversely affected and undermine the future development of such cooperation. If an individual Member State in any event remains responsible for the acts of the organization it would be a strong disincentive for trusting common tasks for international organizations. It could also deter the organizations from developing means to address the wrongs resulting from their own acts. Keeping in mind the diversity of international organizations, harmonized rules of a general nature can unravel tailor-made solutions for individual situations or ignore other ways of addressing the issues involved. The tendency of this paper is to invite discussion on whether it is really necessary to have special provision to establish the responsibility of a Member State of an organization and in any event argue in favour of limiting the scope of such responsibility.

The following comments are aimed at the progressing ILC work on the scope of Member State responsibility for the acts of an international organization. The paper will first address the draft Article 28, which was adopted in the 2007 ILC Report, followed by some critical comments, and turn thereafter to the new draft Article 60 included in the 2009 ILC Report. On the whole, the ILC approach seems to be shifting from objective standards towards subjective standards, where the intent of a Member State of an organization plays a greater role in determining whether it should be responsible for the acts of the organization. This paper does not deal with all issues of Member State responsibility, covered in ILC draft Articles 57 (aid and assistance), 58 (direction and control) and 59 (coercion). The latter provisions are a mirror image of draft Articles 13–15 providing for the

responsibility of the organization itself and involve more factual and less institutional assessment than Article 60.

2. Objective Standard for Member State Responsibility: ‘Circumvention of Obligations’

2.1. Article 28 of the 2007 ILC Report

The 2007 ILC Report provided for Member State responsibility in the special case of ‘provision of competence’ to an organization. Article 28 of the ILC Draft articles on the Responsibility of International Organizations stated as follows:

International responsibility in case of provision of competence to an international organization:

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

A provision such as Article 28 is aimed at a situation where a Member State’s substantive obligations differ from those of the organization itself. That could constitute a potential responsibility gap. However, a discrepancy between the substantive obligations of a Member State and the organization is a given fact in most practical situations. Since important international obligations stem from treaties, and treaties have been only exceptionally open to international organizations, and sometimes under restricted conditions, it follows that the organization has different substantial obligations than its Member States. Any international organization starts from a ‘clean slate’, it has no history, whereas its Member States carry a whole history of treaty relations with them when joining the organization. The situation may change over time if the organization becomes gradually a contracting party to the same treaties to which its Member States are parties thus reducing potential responsibility gaps over time. That has been the direction of development

in the case of an integration organization like the EU, but the situations differ depending on the organization, its nature and functions.

Article 28 used the concept of “circumvention” as a criterion for triggering Member State responsibility. However, that concept may give rise to different interpretations. One view would be that it requires a particular intent, some deliberate effort by a Member State to by-pass its obligations. That approach will be explored later. Another view would be that the notion of circumvention does not require such intent, but establishes an objective standard. In that case, it would establish Member State responsibility for a broad class of situations. Indeed, if the meaning of circumvention boils down to the difference of obligations between a Member State and the organization itself, it could establish Member State responsibility potentially for all acts of the organization where such difference of obligations exists. In this case, the difficulty would be that the scope becomes too broad. It seems troublesome that Member States should as a rule bear responsibility for the acts of the organization on the ground that they have in the past transferred competence to the organization, especially if such transfer of competence originates in a distant past. The practical implications of such transfer of competence can be fully visible only years after, and they can be difficult to anticipate. In the case of the EU, the Member States that have transferred competence to the organization in the 1958 Rome Treaty could be held responsible, for instance, as result of the way in which the European Commission has handled a competition case 50 years later, because it could turn out to be in contravention of say Article 6 of the European Convention of Human Rights.³ As a result, there would need to be compelling reasons before making Member State responsibility a general rule.

How far should Member State responsibility then go? Not far, since the laying down of generic rules of responsibility can produce unpredictable results, especially if the transfer of competence from a Member State to the organization has taken place in a distant past. Such rules can hamper international cooperation in the framework of international organizations. If the accepted proposition is that the one who exercises power should in principle be responsible, and if it is the organization that does so, a Member State should not easily be held responsible, or be so only in exceptional

³) See Paasivirta and Kuijper, *supra* note 2, p. 193.

circumstances. That is a fundamental legal policy question. Would such Member State responsibility be dictated by a high level of public concern?

One should take a brief look at the concerns that were behind Article 28 and then take a step back in order to review how these type of situations are being addressed through ‘normal’ treaty processes, involving interpretations and tailor-made solutions for issues arising from disparate treaty obligations between an international organization and its members.

2.2. Human Rights and ‘Public Morals’ as Motivating Factors behind Member State Responsibility

The ILC Draft articles are intended to codify the rules of responsibility of international organizations generally and basically for all situations. However, as regards Member State responsibility the ILC commentary and the Report by Professor Gaja⁴ draw their examples from areas with strong “public morals” connections, in particular the area of human rights. Indeed, human rights and disarmament are probably the most critical areas in this context, resulting from the fact that international organizations have not been Contracting Parties to such treaties, and given the moral weight and cross-cutting nature of human rights issues.

When the Special Rapporteur takes the example of nuclear weapons –the possibility that a State may acquire WMDs and make use of an international organization in order to avoid the State’s obligations under the NPT –he indeed takes us to a world of evil and seeks for moral condemnation: yes, the state should remain responsible in that situation, too. The message of the human rights examples points in the same direction: fundamental notions of public morals should not be swept away by choosing a ‘wicked format’, a legally separate entity or organization, which is not formally bound by the obligations of the State concerned.

Given the moral weight of human rights obligations, it is, of course, not surprising that the ECHR has not been ready to declare States “complete absolution” from responsibility for a whole “field of activity” covered by their transfer of competence to international organizations, even though

⁴) G. Gaja, Special Rapporteur, *Fourth Report on Responsibility of International Organizations*, UN Doc. A/CN/564/Add.1.

its practice has not gone as far as establishing Member State responsibility in such situations.⁵

The Special Rapporteur does not seem to argue in this context by way of peremptory rules of international law (*jus cogens*), perhaps at least partly for the reason that that would cover only a limited number of rules. So while the moral motivation is there, it is not wholly persuasive for establishing Member State responsibility in the broad manner as envisaged by the ILC. One should therefore take a closer look at how these kinds of issues have been addressed in practice.

2.3. *How do 'Normal' Treaty Processes Address the Issue of Different Obligations of an International Organization and its Member States?*

An ILC project, which is specifically committed to codifying general rules of responsibility, is perhaps inevitably inclined to stretch the ambit of responsibility beyond what practical necessity dictates. It may therefore be useful to recall the “normal” treaty processes that are being used for dealing with the issue of different international obligations of the organization itself and its members. For that purpose it suffices to recall the following examples drawn from EU experience, related to diverse legal contexts but all of them stemming from the fact that the Member States have different obligations than the organization itself.

(a) *Interpretation and application of treaties* were, of course, the means applied by the ECHR in the cases mentioned in the ILC commentary. In *Waite and Kennedy v. Germany*, the end result of the judgment was that the ECHR did not consider that a violation had taken place. In this case, involving the immunity of the European Space Agency in relation to claims concerning employment, the Court concluded that the applicants’ right to a court under the Convention had not been violated as there was alternative legal process available to them.⁶ Similarly, in the *Bosphorus v. Ireland* case, involving the implementation of an EC Regulation giving effect to UN Sanctions, the Court applied the criterion of “equivalence” of human rights guarantees in the EC legal system compared to those under the Convention, and concluded that Ireland did not incur responsibility.⁷

⁵) See *infra* notes 7–8 and accompanying text.

⁶) Judgement, 18 February 1999, application no. 26083/94.

⁷) Judgement, 30 June 2005, application no. 45036/98, para. 154.

As mentioned above, the ECHR has not been prepared to declare that a transfer of competence to an international organization grants “complete absolution” from responsibility for a whole “field of activity” covered by such competence. However, the message is clearly that a Member State of an organization does not incur responsibility easily in individual cases, in particular in situations where a clear effort has been made to make available alternative means within the international organization concerned to satisfy Convention requirements. In such circumstances, the interest of pursuing “international cooperation” sets limits to holding individual States responsible for the acts of the organization of which they are members.

(b) *Succession (implicit) to treaty obligations* previously held by the EU Member States is the approach that was in the past applied to GATT obligations, when the organization itself was not a formal Contracting Party to the GATT Agreement. This approach was approved by the European Court of Justice in the *International Fruit Company case*,⁸ inter alia for the reason that the EC role was recognized in practice by other GATT Contracting Parties. This GATT-process was perhaps quite unique to the EC, and possibly also to the GATT regime,⁹ but it signals the importance of tailor-made solutions, which involve both third parties and Member States of the organization. This process later paved the way for the formal EC membership in the WTO.

(c) The EU practice of *conclusion of mixed agreements*, with participation both of the organization and its Member States, has been a dominant way for the organization to enter into new international agreements aside its Member States. Again, it is one example of tailor-made solutions, where the interests of the Member States and third parties have to be taken into account. Mixed agreements permit internal coordination between the Member States and the organization in respect of their respective responsibilities. In practice, when multilateral treaties are negotiated by the EU, careful attention is paid to how competences are coordinated concerning a particular treaty. Increasingly, this results in a declaration of competences by the organization with regard to different parts of a treaty. This is in each case prepared and

⁸) Joined Cases 21–24/1972 [1972] ECR 1219.

⁹) Succession has not been approved in other contexts, for instance relating to the MARPOL 73/78 Convention, see Case C-308/06 Intertanko, ECJ, Judgment, 3 June 2008, para. 48.

coordinated within the organization and it ultimately serves third party interests in ensuring proper responsibility in a transparent manner.

(d) *Accession to existing treaty obligations*, as envisaged in the Lisbon Treaty. Article 6(2) of the amended EU Treaty provides:

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the treaties.

A corresponding provision is contained in Protocol 14 to the European Convention, amending Article 59(2) of the Convention permitting EU accession. The EU accession to the Convention will constitute the most important concrete step in closing a 'responsibility gap' between the organization and its Member States.

The common feature to all these different legal situations is that, firstly, all of them in fact provide for 'primary rule' solutions to the issues at stake, whether it is a question of interpretation or application of substantive rules or whether it involves adoption of new rules by way of succession or accession to international treaties. Secondly, all of them involve case-by-case solutions of particular situations, rather than across the board solutions of all such situations where the obligations of the Member States and the organization itself differ.

2.4. *Comments*

The prospect of the EU accession to the European Convention of Human Rights in the near future sends a clear signal about the manner in which the EU prefers to proceed with responsibility gaps: by closing the gaps in the most relevant treaty obligations on a case-by-case basis. That approach will eventually allow the responsibility to lie where it belongs: either with the organization or its Member States, whichever is genuinely responsible. It will complete the circle that was initiated by the transfer of competence from the Member States to the organization in the 1957 Rome Treaty, by levelling out any differences there may be in human rights standards between the organization and its Member States. Thereby, it signals a new model for enhancing the responsibility of an international organization when exercising the powers that have been transferred to it by its Member States. For present purposes, it suffices to note that the EU accession to the European Convention of Human Rights will bring to a close an important

competence/responsibility dilemma by way of adjustment to the primary rules, rather than by re-reading the secondary (responsibility) rules. Such major institutional adjustments also reflect the fact they are as much political as legal processes, and as such subject to case-by-case assessment.

3. Subjective Standard for Member State Responsibility: Intent to Evade International Obligations

3.1. Article 60 of the 2009 ILC Report

After the 2007 ILC Report, Professor Gaja, Special Rapporteur, has presented his Seventh Report on the subject,¹⁰ and the ILC has further refined its approach in summer 2009 in the context of the first reading of the entire set of draft articles on the responsibility of international organizations.¹¹ The relevant text is now included in Article 60 of the 2009 ILC Report. The new text now puts more emphasis on the intent of a Member State in relation to an international organization.

The new Article 60 reads as follows:

Responsibility of a member State seeking to avoid compliance

1. A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

The above draft article retains three conditions for the responsibility of a Member State of the organization: (1) the international obligation covers an area where the organization has competence in relation to the subject matter of an international obligation of a Member State; (2) the organization commits an act that, if committed by the State, would have constituted a breach of the obligation and (3), as the commentary says, there is a “significant link”

¹⁰⁾ *Seventh Report on Responsibility of International Organizations*, UN Doc. A/CN.4/610.

¹¹⁾ International Law Commission, *Report of the Sixty-first Session*, A/64/10, 2009, p. 163.

between the conduct of the Member State seeking to avoid compliance and the act of the international organization.¹² It is this third condition where a major shift of emphasis from an objective standard towards a subjective standard has taken place.¹³

The ILC commentary says that no “specific intent” is required, suggesting that it is not necessary to obtain hard evidence that the State intends to avoid complying with its obligations. Nevertheless, the text clearly suggests that some measure of intent is needed, though it can be inferred from the circumstances, as explained in the commentary. This is crystal-clear from the re-formulated heading (“seeking to avoid compliance”), which creates the impression that avoidance of its obligations is the (bad faith) objective of the Member State in question. The commentary explains that “the fact that a State ‘seeks to avoid complying with one of its own obligations’ is meant to exclude that international responsibility, arises when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as an unwitting result of prompting a competent organization to commit an act”.¹⁴

Furthermore, the ILC commentary stresses that “[t]he act of the international organization has to be prompted by the member State”. The reference to “prompting” the organization to act seems to imply that the Member State has some control or influence of some significant degree over the organization, rather than being merely a member or even voting in favour of a certain type of action.

It may also be noted that the idea that a Member State incurs responsibility by mere “provision of competence” has now been removed from the text, as has the term “circumvention”. The latter is kept only in the commentary, probably to maintain a link with Article 16, with some analogy to Article 60.

3.2. *Comments*

Article 60 of the 2009 ILC Report has a narrower scope of application than the draft Article 28 of the 2007 Report. The latter had potentially a very wide scope, and it was unclear how far it went. The current text targets a

¹²⁾ *Ibid*, p. 166.

¹³⁾ In fact, the new text is quite close to what was originally proposed by the Special Rapporteur. See his *Fourth Report*, *supra* note 4, p. 11.

¹⁴⁾ *Ibid*. p. 164.

much narrower set of cases, basically bordering an abuse of rights situations. The new emphasis on subjective elements resonates better with the practice of the European Court of Human Rights, in particular in view of the fact that in cases such as *Waite and Kennedy v. Bosphorus*, mentioned in the commentary, the practical end-result was that the States concerned did not incur responsibility under the European Convention of Human Rights.

The new draft goes in a more realistic direction, also in the light of the EU experience. It is quite unimaginable that any Member State, by conferring competence to the EU, just seeks to avoid complying with its international obligations. Moreover, the EU Member States are hardly ever in a position to ‘prompt’ their organization to act, already for the reason that in most cases they lack right of initiative. That belongs exclusively to the Commission in most areas of ordinary EU legislation. In the case of legislation, individual Member States have merely a weighted vote in a body, the Council, which decides by qualified majority and shares its legislative power with the European Parliament, whereas executive decisions are normally taken by the Commission, as in the case of application of EU law in competition cases. Seen in this light “prompting the [EU] to act” within the meaning of Article 60 is simply an illusion for the Member States.

4. Concluding Remarks

There are numerous examples where the obligations of an international organization itself and those of its Member States differ from each other. This is so especially in the case of treaties, for the reason that formal treaty participation has been traditionally restricted to States. As a result, international organizations are subject to fewer substantive treaty obligations than their Member States. Whilst this is inevitable for historical reasons, it also opens up possible ‘responsibility gaps’ when international organizations at the same time exercise important tasks and functions.

The key challenge for the ILC project is that the root cause for the potential responsibility gaps lies at the level of ‘primary’ rules, in the different substantive obligations between an organization and its members, whereas correction has been explored in the sphere of ‘secondary’ rules. This is a difficult match, as the ECHR practice and the EU experience demonstrate. Solutions to such differences are usually sought at the level of primary rules and subject to case-by-case assessment, rather than across the board solutions covering different situations.

In any event, the ILC 2009 Report has certainly moved in a realistic direction by narrowing down the range of situations where Member State responsibility for the acts of an international organization could be established. The new emphasis on intent of evasion leaves only a narrow scope for Article 60 to be applied. But so should it be, if that provision is to be applied in exceptional situations. In practical terms, its sphere of application would probably lie in the context of small organizations with limited membership and with structure which effectively permits control or direction by a Member State.

On reflection, the new draft Article 60, and its emphasis on the intent to evade obligations as a condition for Member State responsibility, is perhaps best understood as introducing a new primary rule, rather than as codifying a secondary rule of responsibility.