THE RESPONSIBILITY OF MEMBER STATES IN CONNECTION WITH ACTS OF INTERNATIONAL ORGANIZATIONS: ASSESSING THE RECENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract This article maps the approach of the European Court of Human Rights regarding the responsibility of Member States for the acts of international organizations. It compares this approach with the International Law Commission's approach in the Draft Articles on the Responsibility of International Organizations. It concludes that the Court's requirement of State action, coupled with the application of a principle of equivalent rights protection, goes some way to ease concerns over the erosion of the almost hallowed principle that Member States should generally not be held responsible for the acts of international organizations. However, the Court's recent development of a principle pursuant to which Member States could be held responsible in case of a structural lacuna as regards the protection of rights within the organization's internal dispute-settlement mechanism is reason for some concern, as it appears to negate the separate legal personality of the organization.

It is generally considered that an international organization (IO) has an international legal personality which is distinct from that of its Member States, as a result of which the IO itself, rather than the Member States, is to be held responsible for the IO's internationally wrongful acts.[1] It appears to be an accepted principle that Member States cannot generally be held liable for the acts of IOs by virtue of their membership of an IO alone. This view can be found in a 1996 resolution of the *Institut de Droit International*, which provides that 'there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members'.[2] This is echoed in the International Law Commission's ('ILC') Commentary to article 61 of the Draft Articles on the Responsibility of International Organizations ('ILC DARIO'): 'It is clear that . . . membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act'.[3] The ILC is of the view that only in the case of an intervening act by a Member State that influences the commission of a wrongful act by the IO (aid and assistance, direction and control, coercion, avoidance of compliance, acceptance) could the Member State be held responsible.[4]

[1] R Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12 ILSA Journal of International and Comparative Law 395, 401.

[2] Institut de Droit International, 'The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of Their Obligations Toward Third Parties' (1996) 66-II Annuaire de L'Institut de Droit International 445, art 6(a).

[3] ILC, Report of the Law Commission on the Work of its Sixty-First Session', UN Doc A/64/10 art 2(b), UN GAOR 64th Sess, Supp No 10, (2009) art 61, Commentary no (2).

[4] ILC, DARIO, Part V, arts 57–61.

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While the principle that Member States are not to be held responsible for the acts of IOs, appears to be well established, some authors have contested it on various (policy) grounds, not least on the ground that an individual who is harmed by IO action should have a remedy.[5] Arguably, as IOs typically provide few, if any, remedies to aggrieved individuals,[6] an accountability gap has opened up that could (only) be closed by holding Member States responsible for wrongful IO action. More mechanisms are indeed available to hold States to account.

Probably the most well-known mechanism to hold States accountable for human rights violations is the European Court of Human Rights ('ECtHR'). The court has held, in a string of cases, which has recently expanded considerably, that when Contracting States to the European Convention on Human Rights ('ECHR') establish an international organization, they are not absolved of their responsibility under the Convention in relation to the field of activity transferred to the organization. Admittedly, in those cases, and their progenies, the Court eventually did not find the Member States of the IOs in question responsible. However dicta does seem to imply that Member States remain responsible after having transferred competencies to an IO, and thus can incur liability for the wrongful acts of the IO by their membership.

At first sight, the ECtHR's case law appears to pierce the liability veil of IO and to negate the IO's separate legal personality. For that reason, it may be subject to criticism.[7] At the same time, however, one cannot fail to note that the ECtHR, despite formally maintaining that Member States are not absolved of their responsibility under the ECHR upon joining an IO, has never held a Member State actually responsible. This is attributable to the Court's requirement that the absence of equivalent human rights protection at the level of the IO has to be demonstrated by the claimant.

This article will (1) map the ECtHR's recent case law on the responsibility of States in connection with the acts of IOs to which they have transferred competencies (starting with *Bosphorus*); (2) compare this case law with the ILC's views on such responsibility in the DARIO; and (3) assess, from a legal policy perspective, whether this case law adequately negotiates the tension between the principle that a State should not incur responsibility for the acts of an IO of which it is a member, and the individual's right to have a remedy for inflicted injuries.

[5] See, eg A Stumer, 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections' (2007) 48 Harvard International Law Journal 553. S Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law' (2006) 44 Columbia Journal of Transnational Law 691.

[6] See for a general discussion: J Wouters, E Brems, S Smis and P Schmitt (eds), *Accountability for Human Rights Violations by International Organizations* (Intersentia 2010).

[7] cf J d'Aspremont, 'The Limits to the Exclusive Responsibility of International Organizations' (2007) 1 Human Rights and International Legal Discourse 217, 223 : '[I]t is anything but clear that such a principle can be transposed at a universal level'. Also ILC, Fifty-Eighth Session 'Responsibility of International Organization', (2006) A/CN4/568/14, Comment by the International Criminal Police Organization (II.F) (submitting that 'there exists no international practice that would support a finding that a derogating customary rule of international law has evolved, entailing that a State is also responsible for internationally wrongful acts of an international organization of which it is a member', and that the responsibility of member States would only be engaged if the organization was 'substantially indistinguishable' from them).

When comparing the ECtHR's case law with the DARIO, specifically article 60[8]—which cites *Bosphorus*, apparently approvingly—we do so without necessarily considering the DARIO as the applicable *lex lata generalis* as regards the responsibility of IOs or the responsibility of Member States in connection with acts of IOs. It is *not* the aim of this article to test whether ECtHR case law is compatible with the DARIO, as it is not clear whether the DARIO will represent valid international law. The DARIO project has been criticized by a number of prominent scholars, on various grounds, such as its over-reliance on the State responsibility regime and its failure to cite sufficient practice.[9] Alvarez recently discerned the following five general problems with the DARIO: (1) the lack of evident State practice; (2) the lack of clarity as to the status of an IO's internal rules and procedures; (3) the assumption that all IOs are equal and subject to the same rules of responsibility; (4) the assumption that IOs are presumptively responsible for their acts; (5) the assumption that States are presumptively responsible for their IO acts.[10]

However, while the DARIO may be criticised that it is based on the above assumptions, and in addition is short on references to State and institutional practice, and may not be a statement of the law as it currently stands, it can provide useful guidance as an authoritative statement of the ILC, and can also assist to identify the circumstances under which Member States may incur responsibility for the acts of IOs. The ECtHR's decisions and judgments on this question also may qualify as equally authoritative statements of a recognized regional human rights court. However, in spite of this, neither the ILC's nor the ECtHR's approach to the question necessarily represents currently applicable general international law.[11]

Although reference may be made to the DARIO, the touchstone of the analysis is not the DARIO, but two—possibly competing—normative principles: (1) the principle that IOs, being autonomous persons in international law, should incur liability for their acts, rather than the States which have established them; (2) the principle that a remedy should be available for individuals harmed by IO action.

In regards to the first principle, it is observed that the great majority of IOs have a legal personality separate from their Member States.[12] IOs are not simply fronts for their

[8] DARIO, art 60: '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 the 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'.

[9] See, eg R McCorquodale, 'International Organizations and International Human Rights Law: one Giant Leap for Humankind' in KH Kaikobad and M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Nijhoff 2009) 141, 148: regretting that 'there is almost no substantial evidence provided by the ILC to support its view that the general principles of State responsibility are applicable automatically to international organizations'.

[10] Memo on the ILC's DARIO to the U.S. State Department's Advisory Committee on International Law, 21 June 2010, available at <http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__faculty__faculty_profiles__jalvarez/documents/documents/ecm_pro_066900.pdf>. See also J Alvarez, 'Misadventures in Subjecthood', *EJIL Talk*, 29 September 2010.

[11] See on the application of general international law by the ECtHR: F Vanneste, *General International Law before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law* (Intersentia 2010).

[12] See eg McCorquodale (n 9) 143–145.

Member States. They have a life of their own, which means that wrongful acts over which they had power and control engage *their* responsibility, and not the responsibility of Member States. Member States do not, and should not, incur responsibility by reason of their membership alone. Deciding otherwise would invite Member State intervention in the affairs of IOs and erode the latter's autonomy, or alternatively, would discourage Member States from setting up international organizations that deal with pressing global problems.[13]

The second normative principle is that an individual who has been harmed should have a remedy to have the harm repaired. Ideally, to obtain a remedy, the individual should be allowed to bring a case before a judicial or quasi-judicial mechanism that is endowed with due process guarantees,[14] against the person who is directly responsible for the harm. However, where it is unclear whether that person is actually bound by international human rights law, and where no adequate mechanisms are made available that allow a claim to be brought against the said person, pressure will arise to bring a claim against *another* person that is considered as possibly *indirectly* responsible for the harm. Unfortunately, many IOs qualify as legal persons that are not bound by international human rights treaties, and that are not subject to adequate accountability mechanisms.[15] These shortcomings do not apply to their Member States, however, which makes the latter, as the persons having constituted the IO, easy targets for individuals aggrieved by IO action.[16] Such targeting of Member States, however, is in obvious competition with the above-discussed principle that IOs are autonomous legal persons whose acts are solely attributable to them.

Whereas the IO accountability gap explains why action has been taken against Member States, it is not the aim of this article to generally explore ways of closing the accountability gap, eg through the reinforcement of intra-institutional (quasi-)judicial mechanisms, or through accession to human rights treaties and subjection to international human rights supervision. This article limits itself to examining what course an existing international supervisory human rights body with jurisdiction over *States* (including IO Member States)—the ECtHR—has steered to reconcile the above-mentioned two principles—one of human rights and another of institutional origin—and whether this course is defensible. As the Court is a *human rights* court that has

[13] The argument is made at length in C Ryngaert and H Buchanan, 'Member State Responsibility for the Acts of International Organizations' 7 Utrecht Law Review 2011 (forthcoming). See also E Paasivirta, 'Responsibility of a Member State of an International Organization: Where Will It End?' (2010) 7 International Organizations Law Review 49, 50–51 (2010) (arguing that the imposition of responsibility on member States rather than on the international organization itself is a 'strong disincentive for trusting common tasks for international organizations' and 'could also deter the organizations from developing means to address the wrongs resulting from their own acts'.

[14] See notably the ECtHR's decision in *Golder v United Kingdom* [1975] 1 EHRR 524, in which it considered the right of access to a court to be part of the right to a fair trial under art 6(1) ECHR.

[15] See on the elusive theoretical basis for IO responsibility under international law, amongst others, J Klabbers, *An Introduction to International Institutional Law* (CUP 2009) 284. Note, however, that art 6(2) of the (new) Treaty on European Union and Protocol 14 ECHR (which amends art 59(2) ECHR) now provide for possible EU accession to the ECHR. After accession, the ECtHR may serve as a human rights accountability mechanism in respect of the EU.

[16] In the literature, this desire to close a real accountability gap, especially in the human rights field, has usefully been characterized as a 'moral motivation'. See Paasivirta (n 13) 55.

jurisdiction over *States*,[17] the emphasis will be laid on whether the Court has done sufficient justice to international *institutional* considerations (the separate legal personality of IOs and their Member States in particular), while nonetheless not turning a blind eye to the rightful demands of individuals harmed by State acts connected to IO activity.

I. THE *BOSPHORUS* PRINCIPLES

The ECtHR's decision in *Bosphorus* can be considered as the seminal ECtHR case concerning the responsibility of Member States for the acts of IOs. In *Bosphorus*, the Court held that the leaser of an aircraft impounded by Ireland on the basis of an EC Regulation which was binding on that country, fell within Ireland's jurisdiction and engaged its responsibility under the ECHR: as there was clearly Member State action, it did not matter that the action implemented an EC Regulation and that the Regulation was binding.[18] The Court famously observed in respect of the transfer of competencies by States to the EC:

> Absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards [. . .]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [. . .].[19]

Equally importantly, however, the Court realized the unwelcome consequences of attributing acts of IOs to Member States by w of their membership or by reason of some State action involved in (implementing) binding IO acts or decisions. In order to maintain the separate legal personality of IOs, and to forestall Contracting Parties' challenges to its jurisdiction, while at the same time protecting the legitimate rights of individuals under the Convention, the Court held:

> In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides . . . If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.[20]

[17] See art 45 ECHR: 'The jurisdiction of the Court shall extend to all cases concerning *the interpretation and application of the present Convention*' (emphasis added), in conjunction with art 1 ECHR.

[18] *Bosphorus v Ireland,* Application No 4036/98 (2006) 42 EHRR 1, para 137: 'In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act fell within the 'jurisdiction' of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci, personae* and *materiae* with the provision of the Convention.'

[19] ibid para 154.

[20] ibid paras 155–156 (citations omitted).

In *Bosphorus*, the Court did not make it fully clear at what point Member States' responsibility for the wrongful acts of the IO, under the Convention, is triggered: does the responsibility simply persist in spite of having transferred competences to the IO, irrespective of the human rights guarantees and remedies offered by the IO, or does it only arise in case the IO does not offer equivalent rights protection? Perhaps, States retain responsibility in the sense that they continue to be obliged by human rights norms, but they are not necessarily held liable for the *consequences* of violations of the norms by IOs 'as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'.[21] Alternatively, if one does not accept the distinction between responsibility and liability,[22] one could also apply the discourse of 'circumstances precluding wrongfulness' featuring in Chapter V of the Articles on State Responsibility per analogiam: Member State action taken in compliance with IO obligations will be justified or excused as long as the IO provides equivalent rights protection.[23]

Whatever the conceptual distinction between the two steps used by the Court in its analysis (the principle of the retention of Convention responsibility after the transfer of competences to an IO, and the principle of equivalent protection), since *Bosphorus* the Court has consistently held that '[i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization'.[24] If the Member State does *more*, for example, when it has discretion in implementing the obligations, the presumption of equivalent protection does not apply.[25]

It is conspicuous that ever since the decision in *Bosphorus,* the Court has presumed that all IOs 'involved' in cases before the Court provide equivalent rights protection. In order to be true, this presumption could be rebutted in accordance with the *Bosphorus* decision: 'if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'.[26] This rebuttal condition has proved to be a tall order, however as no manifest deficiency has so far been shown.

[21] ibid para 155.

[22] ibid para 154. In fact, it seems that the Court itself uses responsibility and liability interchangeably. In para 154, the Court first recognizes 'that absolving Contracting States completely from their Convention *responsibility* in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention', and states in the same breath that '[t]he State is considered to retain Convention *liability* in respect of treaty commitments subsequent to the entry into force of the Convention' (emphasis added).

[23] The ECtHR, in *Bosphorus* (n 18) para 155, indeed held that 'State action taken in compliance with such legal obligations is *justified* as long as the relevant organization [provides equivalent rights protection]' (emphasis added). As the Court has abandoned the requirement of State action in the *Gasparini* case (n 26), the 'justification' argument loses some of its strength, however.

[24] ibid para 156.

[25] ibid para 157: 'It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict legal obligations'.

[26] ibid. The establishment of the presumption and the rebuttal of the presumption are supposed to be two distinct stages of analysis. At times, however, the first collapses into the second (see the case of *Gasparini v Italy and Belgium*, Application No 10750/03, Judgment of 12 May 2009, which may lend credence to the argument that the Court presumes all IOs to provide equivalent protection anyway.

If anything, the Court's approach to the question of Member State responsibility for the acts of IOs guarantees that the Court will only in very exceptional circumstances find a Member State responsible for the acts of IOs. Practically speaking, indeed, the end-result of the practical application of the *Bosphorus* principles has always been that the State had not violated the Convention. This, in turn, would appear to respect the separate legal personality of the IO to which the State had transferred competencies. Yet, at the same time, it might deprive individuals of their rightful day in court: after all, the Court itself, citing the 'interest of international cooperation', noted that *equivalent* protection is not the same as *identical* protection.[27] Nevertheless, *Bosphorus* does *not* exclude that Member States of certain IOs could one day be held responsible for the acts of the latter, if these IOs do *not* provide equivalent rights protection. This, then, would appear to respect the individual's right to a remedy, although it may compromise the autonomy of the organization.

II. POST-BOSPHORUS ECTHR CASE LAW: FROM STATE ACTION TO A STRUCTURAL LACUNA IN GASPARINI

The ECtHR's case law in the wake of *Bosphorus* broadly respects the principles put forward by the Court. What is conspicuous, however, is that the Court initially derived a requirement of *State action* from *Bosphorus*, but gradually relaxed that requirement (*Kokkelvisserij*[28]), up to the point of abandoning it altogether and introducing a principle of a 'structural IO lacuna' (*Gasparini*[29]). The application of a strict State action criterion goes a long way to soothe concerns over holding States responsible by reason of their IO membership alone: after all, such a criterion bases responsibility, at least in part, on a Member State's *own* action; abandoning it risks negating the separate legal personality of the IO and its Member States, at least if the IO in question does not satisfy the equivalent protection standard.

A requirement of 'State action' does not figure prominently in *Bosphorus*, but it could be derived from the first jurisdictional paragraphs of the Court's assessment in that case. As noted above, the Court held that Ireland's responsibility under the Convention was potentially engaged because it had implemented an EC Regulation on its territory.[30] In the aftermath of *Bosphorus* the Court, in a string of cases, invoked the State action requirement to swiftly dispose of cases that targeted an IO decision that was *not* implemented at the domestic level.

For example, in *Boivin*, a case concerning Member State liability for an employment dispute between Eurocontrol's Institute of Air Navigation Services (an IO), one of its employees, and a decision of the ILO Administrative Tribunal, the Court held that '[a]t no time did [the respondent States] intervene directly or indirectly in the dispute, and no act or omission of those States or their authorities can be considered to engage their responsibility under the Convention'.[31] Since the employee's complaints were not

[27] *Bosphorus* (n 18) para 155: 'By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued'.

[28] *Kokkelvisserij v the Netherlands*, Application No 13645/05, Judgment of 20 January 2009.

[29] *Gasparini* (n 26).

[30] ibid para 137.

[31] *Boivin v 34 Member States of the Council of Europe*, Application No 73250/01, Judgment of 9 September 2008, p 7 of the Word version uploaded on HUDOC, available at <www.echr.coe.int>. This is a translation of the original French version, which states: '[La Court] constate qu'à

directed against an act of the respondent States but in fact against a decision of the ILO Administrative Tribunal, the employee did not fall within the jurisdiction of the respondent States, and the claim was considered to be inadmissible.

Similar considerations can be found in *Connolly*, which concerned an employment dispute between the (then) European Community and an employee.[32] The dispute had been heard on appeal by the European Court of Justice, which had denied the employee's request to submit written observations to the opinion of the Advocate General. In the applicant's view, this denial violated his rights under the ECHR, and he filed a complaint with the ECtHR against fifteen Member States of the European Union. Again the Court held that the complaint was brought against a decision of an (organ of an) IO (the ECJ), and not against the respondent States, which at no time directly or indirectly intervened.[33] This dictum was confirmed in two other employment disputes between an employee and an IO: *Rambus* (concerning the European Patent Organization),[34] and *Beygo* (concerning the Council of Europe).[35]

Pursuant to *Boivin* and *Connolly*, and the case of *Bosphorus* on which they rest, Member State action is required for the individual aggrieved by an act or a decision of an IO to fall within the respondent Member State's jurisdiction. In such cases, the need to apply the criterion of equivalent protection (ie the second level of the Court's analysis in *Bosphorus*) does not arise.

The ECtHR does not set the bar for a finding of State action very high, however. The recent judgment in *Kokkelvisserij*[36] is a case in point. The problem in *Kokkelvisserij* was similar to the one in *Connolly*: the ECJ had denied the applicant permission to submit written observations to the opinion of the Advocate General. However, unlike in *Connolly*, the case had been brought before the ECJ through the preliminary ruling procedure; the nature of such a procedure is that a national court asks the ECJ for its opinion on a question of EU law. For that reason, the ECtHR—before which Kokkelvisserij had brought proceedings on the same grounds as Connolly—held: '[The] intervention by the ECJ [was] actively sought by a domestic court in proceedings pending before it. It cannot therefore be found that the respondent party is in no way involved. . . . It is the domestic court which, finding itself faced with a question of

aucun moment la France ou la Belgique ne sont intervenues, directement ou indirectement, dans ce litige, et ne relève en l'espèce aucune action ou omission de ces Etats ou de leurs autorités qui serait de nature à engager leur responsabilité au regard de la Convention.' See for a similar consideration in a case involving an IO (the International Olive Council), its employee, and the ILOAT: *Lopez Cifuentes v Spain*, Application No 18754/06, Judgment of 7 July 2009, para 28.

[32] *Connolly v 15 Member States of the European Union*, Application No 73274/01, Judgment 9 December 2008.

[33] ibid: 'La Cour note que seuls les organes communautaires, à savoir l'AIPN, le TPICE et la CJCE, ont eu à connaître du contentieux opposant le requérant à la Commission européenne. Elle constate qu'à aucun moment l'un ou l'autre des Etats mis en cause n'est intervenu, directement ou indirectement, dans ce litige, et ne relève en l'espèce aucune action ou omission de ces Etats ou de leurs autorités qui serait de nature à engager leur responsabilité au regard de la Convention. On ne saurait donc dire que le requérant, en l'espèce, relève de la «juridiction» des Etats défendeurs au sens de l'article 1 de la Convention. La Cour estime qu'en conséquence les violations alléguées de la Convention ne sauraient être imputées aux Etats mis en cause dans la présente affaire.' (section en droit)—decision only available in French).

[34] *Rambus v Germany*, Application No 40382/04, Judgment of 16 June 2009.

[35] *Beygo v 46 Member States of the Council of Europe*, Application No 36099/06, Judgment of 16 June 2009.

[36] *Kokkelvisserij* (*n 28*).

Community law to which it requires an answer in order to decide a case pending before it, seeks the ECJ's assistance in terms of its own choosing'.[37]

Thus, from *Kokkelvisserij* it could be gleaned that if a State court asks an IO's court for a preliminary ruling on a point of law, on the basis of asking that very question the State becomes involved in the procedure, and its international responsibility for defects in this procedure could be engaged. In all fairness, attributing an IO's procedural defects to a Member State by reason of the latter's mere *initiation* of an institutional procedure, appears to compromise the autonomy and separate legal personalities of an IO and its Member States. Also, it requires a considerable stretching of the conditions of article 60 DARIO to maintain that an EU Member State, by giving its consent to the establishment of, and by subsequently using, the preliminary ruling procedure, seeks to avoid compliance with its international obligations and prompts the EU to commit an internationally wrongful act.

The ECtHR seems to have gone even further, however, in the case of *Gasparini*.[38] While in *Kokkelvisserij*, an intervening act by a State (the question for a preliminary ruling) could be discerned (whatever one thinks of the weight that should be given to this act), in *Gasparini* there was no such act at all—and still the ECtHR claimed powers of review. Like many pertinent cases before it in the context of Member State responsibility for acts of IOs, *Gasparini* concerned an employment dispute, in this case between NATO and an employee. Gasparini was of the opinion that in dealing with his case the NATO Appeals Board had not held its session in public, which in his view was a violation of his rights under the ECHR, and filed a complaint with the ECtHR.

Remarkably, the Court did not, and did not even attempt to, identify an action by a State. It distinguished *Gasparini* from *Boivin* and *Connolly*; in the latter cases, only one particular decision taken by the competent organ of the IO was disputed, whereas in *Gasparini* the applicant alleged a structural lacuna in the IO's internal dispute-settlement mechanism.[39] This structural lacuna the Court would be entitled to review,[40] or in other words Member States are responsible for the structural lacunae of IOs' internal procedures. This rather revolutionary finding goes beyond *Bosphorus*, which indeed sees some State action as a jurisdictional nexus that could trigger the State's responsibility under the ECHR.

Regrettably, the point at which a deficit in an IO's judicial protection system becomes a structural lacuna is not further defined. It therefore remains unclear why the impossibility for an individual to respond to the opinion of the Advocate General of the ECJ (the deficit alleged in *Connolly*) was not a structural lacuna warranting ECtHR review.[41] Nonetheless, what is clear after *Gasparini* is that the Court holds Member

[37] ibid pp 18 and 20 respectively.

[38] *Gasparini* (n 26).

[39] ibid p 4: '[d]e manière générale, le requérant fait grief à la Belgique, en tant que pays hôte de l'OTAN, et à l'Italie, dont il est ressortissant, de n'avoir pas veillé à ce que l'Organisation, au moment de sa création, mette en place un système juridictionnel interne compatible avec les exigences de la Convention.decision only available in French); 7.

[40] ibid p 7.

[41] See also T Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights', available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1603937>, at p 12, and forthcoming in Human Rights Law Review 2010 (submitting that *Connolly* concerned a structural deficit, as *the Statute of the ECJ and its Rules of Procedure* did not allow the applicant to respond to opinions of the AG, rather than an independent

States of IOs responsible for internationally wrongful acts of IOs in two scenarios: (1) when a Member State has directly or indirectly intervened in the act/decision of the IO; or (2) when the complaint relates to a structural lacuna in the internal dispute-settlement mechanism. The latter principle in particular is in palpable tension with the principle that Member States should not be responsible for the acts of IOs by reason of their membership alone.

As demonstrated, the threshold used by the ECtHR for a finding of State action may not be particularly high (see *Kokkelvisserij*), and the Court may even no longer require State action in case the plaintiff alleges a structural lacuna as regards rights protection in the IO's internal procedures (see *Gasparini*). These evolutions may appear undesirable in that they undermine the principle of Member States' limited responsibility and could invite Member State interventions in the IO's affairs. However, as already set out above, the ECtHR has realized the unwelcome consequences of attributing acts of IOs to Member States by reason of their membership or by reason of only some State action involved in the IO's acts or decisions. Only if the IO does not provide 'equivalent rights protection', or if rights protection by the IO is 'manifestly deficient' will the responsibility of the Member State be engaged.[42]

The Court has so far not yet held that such circumstances were present. It has always deferred to the IO, although at times it has analyzed the quality of internal dispute-settlement procedures in some detail. This policy of deferral is rationalized on the ground that the IO has separate legal personality and is not an ECHR Contracting Party. In *Gasparini*, for instance, in which the Court (oddly enough, perhaps) offered a detailed analysis of acceptable restrictions of the public character of the debates before the NATO Appeals Board in light of ECtHR jurisprudence, it observed that its powers of review to determine whether the procedure before the NATO Appeals Board—which is an organ of an IO that has separate legal personality and is not a party to the Convention—was manifestly deficient is necessarily less far-reaching (*ample*) than the powers of review which it exercises over the procedures before the Contracting States' domestic courts.[43] Not surprisingly, it did not find a manifest deficiency. Part IV, by way of comparison, will inquire whether the Court's standard of review is also stricter in relation to *domestic cases* brought against IOs (the *Waite and Kennedy*, *Beer and Regan* scenario). But first, Part III will discuss a special category of '*Bosphorus* cases': politically sensitive peace and security-related cases, to which arguably a special regime may or should apply.

III. ECTHR CASE LAW ON ATTRIBUTING ACTS OF UN TERRITORIAL ADMINISTRATIONS AND INTERNATIONAL CRIMINAL TRIBUNALS TO UN MEMBER STATES

A special category of cases before the ECtHR regarding Member State responsibility for acts of IOs is formed by cases brought against UN Member States for their participation

decision by an organ of an IO, and accordingly that the *Gasparini* principle should already have been applied to *Connolly*).

[42] *Bosphorus* (n 18) paras 156–157.

[43] *Gasparini* (n 26) pp 8–9: the Court stating that 'son contrôle en vue de déterminer si la procédure devant la CROTAN [NATO Appeals Board], organe d'une organisation internationale ayant une personnalité juridique propre et non partie à la Convention, est entachée d'une insuffisance manifeste est nécessairement moins ample que le contrôle qu'elle exerce au regard de l'article 6 sur les procédures devant les juridictions internes des Etats membres de la Convention, lesquels se sont obligés à en respecter les dispositions . . .'.

in the operation of a UN territorial administration (eg Kosovo) and UN criminal tribunals (eg ICTY). These cases have not been decided in complete accordance with the *Bosphorus* review standards set out above, which are mainly applicable to private law disputes (such as employment disputes) and may be ill-suited for disputes arising in UN-mandated peace and security operations or international criminal proceedings. Nevertheless, the ratio decidendi of these cases—which were all dismissed for that matter—resembles the rationale for dismissing the cases discussed above: the lack of State action or involvement.

This is perhaps clearest in the case of *Beric and others*,[44] where Beric and others held public and political party positions in Bosnia Herzegovina. They were removed by the UN High Representative in Bosnia from their positions, and indefinitely barred from holding such positions, along with running for election. The High Representative held that power pursuant to UN Security Council Resolution 1031 (1995), and a decision of the Bosnia Peace Implementation Council.[45] Beric and others filed an application against Bosnia with the ECtHR, but the Court logically dismissed the claims on the grounds that 'unlike legislation imposed by the High Representative, the individual measures complained of did not require any further procedural steps to be taken by the domestic authorities'.[46] Reasonably, the Court held that the acts of the UN High Representative were attributable to the UN, and that Bosnia was not involved in the decision to remove Beric and others from their positions.

Similar considerations could be found in the Court's decisions of *Galic* and *Blagojevic*. In these cases, the applicants complained of a lack of human rights protection guaranteed by the UN International Criminal Tribunal for the former Yugoslavia ('ICTY') before which they appeared. As the ICTY has its seat in the Netherlands, they filed an application with the ECtHR. Addressing the applicants' argument that a voluntary act of the Dutch authorities consisting of entering into, or ratifying, the Headquarters Agreement with the ICTY could be discerned, and that this act could give rise to Member State responsibility on the part of the Netherlands for the acts and omissions of the ICTY, the Court '[could not] find the sole fact that the ICTY has its seat and premises in The Hague sufficient ground to attribute the matters complained of to the Kingdom of the Netherlands'.[47] It added that 'the Headquarters Agreement is clearly no more than a document intended to give practical effect to actions of the Security Council and subject to its approval; it cannot therefore be considered in isolation.'[48] In the Court's view, the ICTY was simply a subsidiary organ of the UN Security Council—which had established the ICTY—and, accordingly, all its acts and omissions are attributable in principle to the United Nations.[49]

[44] *Beric and others v Bosnia and Herzegovina*, Application Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, Judgment of 16 October 2007.

[45] ibid para 26.

[46] ibid para 29.

[47] *Galić v the Netherlands*, Application No 22617/07, Judgment of 9 June 2009, and *Blagojević v the Netherlands*, Application No 49032/07, Judgment of 9 June 2009, para 46.

[48] ibid para 48.

[49] ibid para 35. There is an interesting reference in the decision on the *Bosphorus* second-level standard of equivalent protection, where the Court held that 'basic legal provisions governing [the ICTY]'s organisation and procedure are purposely designed to provide those indicted before it with

The eminently sensible decisions in *Beric*, *Galic*, and *Blagojevic* are ultimately based on *Bosphorus*, but in particular on another peace and security-related ECtHR decision: *Behrami* and *Saramati*.[50] A detailed analysis of this case, which concerned UN Member State liability for NATO/KFOR military operations in Kosovo, a territory administered by the UN Mission in Kosovo (UNMIK), is beyond the scope of this article; it has been amply and critically discussed in the literature.[51] For our purposes, it is mainly of relevance that the Court clearly distinguished *Behrami* from *Bosphorus*:

> The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.[52]

The Court basically says in this paragraph that the troop-contributing Member States were not involved in the impugned action, and could thus not incur responsibility. The Court held instead that the impugned action was, in principle, attributable to the UN, as UNMIK, under whose auspices KFOR and the troop-contributing nations operated, was a subsidiary organ of the UN created under Chapter VII of the Charter,[53] and as the UN Security Council 'was to retain ultimate control over the security mission and it delegated to NATO the power to establish, as well as the operational command of, the international presence, KFOR'.[54]

These considerations are hardly convincing, as the UN only very rarely has full command or operational control over national contingents. These contingents retain, as State organs, a strong relationship with the State, which continues to exercise command (through the National Force Commander) and control.[55] Nothing in the case record suggests otherwise in *Behrami*. In fact, the ILC DARIO—which the ECtHR cited but did not discuss—contemplates the *Behrami* scenario in article 6,[56] and makes it clear in

all appropriate guarantees'. (ibid para. 46). Not too much should probably be made of this, however.

[50] *Behrami v France* and *Saramati v France, Germany and Norway*, Application Nos 71412/01 & 78166/ 01, Judgment of 2 May 2007.

[51] See eg M Milanovic and T Papic, 'As Bad As It Gets: the European Court of Human Rights's Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267; A Sari, 'Jurisdiction and Responsibility in Peace Support Operations' (2008) 8 Human Rights Law Review 151; T Dannenbaum, 'Translating the Standard of Effective Control Into a System of Effective Accountability: how Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harvard International Law Journal 113.

[52] *Behrami* (n 50) para 151.

[53] ibid para 143.

[54] ibid para 135.

[55] cf Sari (n 51) 159–160; Dannenbaum (n 51) 142–151.

[56] 'The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international

the commentary that the State placing its troops at the disposal of the UN for a UN operation incurs responsibility for rights violations if it exercises effective control over the conduct giving rise to the violation.[57]

Ultimately, one cannot square the Court's qualification of a domestic court posing a question for a preliminary ruling to the ECJ as State involvement (*Kokkelvisserij*), with the Court's failure to discern State involvement in national troops operating under a national commander (*Behrami*), unless one takes political considerations into account—which the Court in *Behrami* did:

> Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations.[58]

As observed above, cases involving peace and security differ from employment cases. This is not because the legally relevant facts are that different, but rather because allowing peace and security-related claims against UN Member States threatens the effective conduct of UN operations (eg UN Member States, aware of the liability risk attached to contributing troops to UN operations, may no longer contribute troops, thereby jeopardizing the future viability of such operations).

The *Behrami* rationale was cited and applied by the Court in the other cases discussed in this section.[59] But as already argued, those cases could properly and justifiably be disposed of on the basis of a clear lack of State involvement; the application of an ill-conceived 'UN control' standard in these cases should not be seen as decisive.

IV. A COMPARISON WITH CASES AGAINST INTERNATIONAL ORGANIZATIONS BEFORE DOMESTIC COURTS

As noted at the end of Part II, the ECtHR in *Gasparini* drew a comparison with the—stricter—article 6 ECHR review exercised over procedures before domestic courts. This reference to domestic procedures is relevant for our purposes in that complaints against IOs are also sometimes brought before domestic courts; typically in relation to employment disputes against IOs that have their headquarters in the forum State and may avail themselves of immunity from jurisdiction.[60] These procedures are governed by the ECtHR case of *Waite and Kennedy*[61] rather than *Bosphorus*, as they concern a case against an IO which the applicant has first brought in a domestic court—which has upheld the immunity of the IO—before applying to the ECtHR.

law an act of the latter organisation *if the organisation exercises effective control over that conduct.*' (emphasis added).

[57] See also DARIO, commentaries (1), (3) and (6) to art 6.

[58] *Behrami* (n 52) para 149.

[59] cf *Beric* (n 44) para 29; *Galic* and *Blagojevic* (n 47) para 39.

[60] See for an overview C Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends' (2010) 7 International Organizations Law Review 121.

[61] *Waite and Kennedy* v *Germany*, Application No 26083/94, Judgment of 18 February 1999.

Bosphorus and its progeny only control cases in which the applicant directly applies to the ECtHR after (presumably) having exhausted the internal remedies against the IO. In similar cases to *Bosphorus*, the question of immunity does not arise. Instead, these cases relate to the responsibility of Member States, under the ECHR, for the acts of IOs. Similar cases to *Waite and Kennedy*, in contrast, do not directly concern Member State responsibility for the acts of IOs, but a possible failure of an ECHR Contracting State to give an individual access to a domestic court in his or her dispute with an IO. Nonetheless, in such cases Member States may be held *indirectly* responsible for the deficiencies in the internal review mechanisms of an IO in case their domestic courts, facing such deficiencies, unduly uphold the immunity of the IO. As the ECtHR held in *Waite and Kennedy*, a holding that was later echoed in *Bosphorus*:

> Where States establish international organization in order to pursue or strengthen their cooperation in certain field of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to 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.[62]

Domestic courts have struggled with the intensity of the review required of them under the standard enunciated in *Waite and Kennedy*. Some of them have gone quite far and have found that an IO's internal dispute-settlement mechanism did not meet the standards of article 6 ECHR, and have accordingly rejected the IO's immunity claim.[63] A more far-reaching review may appear to be in line with the ECtHR's dictum in *Gasparini*, pursuant to which the Court reviews the article 6 ECHR compatibility of procedures before the domestic jurisdictions of ECHR Contracting States thoroughly, ie also beyond a 'manifest deficiency'. ECHR Contracting States, unlike IOs, have indeed committed themselves to respecting the provisions of the ECHR. At first sight, it may not seem to matter much whether the procedure is brought against an IO or not; what matters might simply be that the procedure is brought before a domestic court.

In *Waite and Kennedy*, the exact standard of the review is left considerably vague. The Court stated that 'a material factor in determining whether granting [an IO] immunity from [domestic] jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.[64] Whether this 'reasonable alternative means' standard is interchangeable with the *Bosphorus* 'equivalent protection/manifest deficiency' standard is unclear, but it can be gleaned from the judgment in *Waite and Kennedy* that the Court supported at least some deference to the IO:

> The Court shares the Commission's conclusion that, bearing in mind the legitimate aim of immunities of international organisations . . ., the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the

[62] ibid para 67.

[63] See eg the Belgian cases of *L.M. v Secretariat General of the ACP Group of States*, 4 March 2003, *Journal des Tribunaux* 2003, 684, and *Siedler v WEU, Oxford Reports on International Law in Domestic Courts*, ILDC 53 (BE 2003).

[64] *Waite and Kennedy* (n 61) para 68.

application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.[65]

Pursuant to *Waite and Kennedy*, perhaps domestic courts should not examine whether an internal dispute-settlement mechanism entirely satisfies the standards of article 6 ECHR, but whether they are expected to go beyond a 'manifest deficiency' review.[66] This may encourage aggrieved individuals to sue an IO before a domestic court if possible, instead of directly applying to the ECtHR. However, it should not be overlooked that aggrieved individuals' chances of success before the ECtHR have increased considerably after *Gasparini*, which after all, abandoned the requirement of State involvement in the dispute between the IO and the individual.

V. BOSPHORUS AND ITS PROGENIES VERSUS THE DARIO

In the previous parts, the specific ECtHR regime concerning the responsibility of Member States for the acts of IOs was discussed. The question which now arises is how this regime relates to general international law, which the DARIO *purportedly* restates. We have already drawn attention to the general problems of DARIO, amongst which is the lack of State and institutional practice. These problems also beset the relevant Part V of DARIO, which governs the responsibility of a State in connection with the act of an IO. The Commentaries to articles 57 to 59 DARIO, which govern respectively State aid/assistance, direction/control, and coercion, even fail to cite *any* practice. Only in the Commentary to article 60 DARIO, which governs the responsibility of a Member State seeking to avoid compliance, does the ILC cite some practice. Most remarkably, the only practice cited in that Commentary is precisely the ECtHR's *Bosphorus* and *Waite and Kennedy* cases discussed above.

Therefore, one is tempted to believe that the ILC is of the view that the Court's *Bosphorus* case law reflects or constitutes general international law on IO Member State responsibility.[67] *Arguendo*, the pertinent article 60 DARIO would summarize the Court's approach as follows:

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 the 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.

[65] ibid para 72.

[66] Some authors have supported a more far-reaching qualitative review. See eg A Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', (2008) 7 Chinese Journal of International Law 285, 299–300; A Reinisch and UA Weber, 'In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', (2004) 1 International Organizations Law Review 59.

[67] It is noted that arts 57 and 59 DARIO deal with State responsibility in general. DARIO, art 61—the last article of Part V—does deal with member State responsibility, but only addresses the very specific situation of a member State having accepted responsibility for an internationally wrongful act of an IO, or of a member State having led the injured party to rely on the member State's responsibility. These specific situations are not further discussed here.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Whether that view is correct, remains to be seen, of course. In the absence of State and institutional practice, it can only be hoped that the ILC receives a sufficient number of additional comments from States, organizations and other contributors in 2011, so as to fine-tune, or possibly amend, its view. In this Part, however, it is not our ambition to identify non-ECtHR case law with a view to reconstructing the *lex lata* on the responsibility of States that have transferred competencies to IOs and have thereby possibly circumvented their international obligations. Rather, we will assess (1) whether the conditions for Member State responsibility as set out in article 60 DARIO are indeed also the conditions required by the ECtHR in the *Bosphorus* line of cases (as is implied by the Commentary to article 60); and (2) whether these conditions are desirable from a legal policy perspective: do they do sufficient justice to the autonomy, and attendant limited liability, of the organization and its constituent Member States?

It is noted first that article 60 DARIO, and all other provisions of Part V DARIO for that matter, require some *positive action* by an IO Member State for it to incur liability: aid/assistance, direction/control, coercion, acceptance, or circumvention. The DARIO does not countenance holding Member States responsible by virtue of their membership alone.[68] Our analysis of relevant ECtHR case law has demonstrated that the Court also embraces these principles. The Court indeed espouses a positive action requirement, at least until the *Gasparini* case; Member States will only be held responsible if at some time they intervened directly or indirectly in the dispute between the applicant and the IO. They do not incur responsibility by virtue of their IO membership alone.

From a legal policy perspective, allocating responsibility to a Member State in connection with IO activity on the basis of positive State action is defensible. After all, such responsibility may ultimately rest on Member State action rather than on the IO's own conduct. However, this rationale comes under pressure when the State action requirement is construed rather broadly. As set out, in *Bosphorus* the ECtHR considered *obligatory* implementation under EC law as State action, and in *Kokkelvisserij* it considered a domestic court's reference to the ECJ for a preliminary ruling as State action. Obviously, the rationale loses all its force when the State action requirement is abandoned altogether, as the ECtHR did in *Gasparini*; a situation where the applicant alleged a structural lacuna as regards procedural rights protection in the IO's internal dispute-settlement mechanism. In *Gasparini*, the Court has taken a step onto a slippery slope which calls into question the principle that Member States should not be held responsible for the acts of IOs by virtue of their membership alone. This criterion is not contemplated by the DARIO, and should not, as it encroaches on the separate legal personality of the IO and its Member States.

Admittedly, at the level of the ECtHR, this encroachment is mitigated by the Court's application of the equivalent protection standard, which softens the impact of the 'structural lacuna' criterion. After all, applying this standard, the Court eventually did *not* hold the NATO Member States responsible in *Gasparini*. Still, *Gasparini* does open the door for allowing Member States to be held responsible for the acts of IOs. It would

[68] DARIO, Commentary (2) to Article 61, p 267: 'membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act'.

be appropriate if the ILC, upon finally adopting the DARIO, were to shut that door, which is open in view of the references to the ECtHR's case law in the Commentary to article 60 DARIO.

Despite the criticism that may be levelled at the ECtHR's liberal construction of the State action requirement, and its abandonment of that requirement in *Gasparini*, it needs to be emphasized once again that in no case before the ECtHR was a Member State's liability under the ECHR eventually engaged. This is attributable to the fact that the presence of positive action or a structural lacuna is in itself not conclusive. Indeed, the Court conducts a second-level analysis in that it inquires whether the IO in question can be presumed to provide equivalent rights protection, and if so, whether this presumption can be rebutted on the ground that in the circumstances of the particular case rights protection is manifestly deficient. This rather high bar may in the end possibly explain why the ILC refers without disapproval to the *Bosphorus* jurisprudence in its Commentary to article 60 DARIO. At the same time, however, given that the ECtHR has never held a Member State liable for the acts of an IO, one may doubt whether article 60 DARIO is *at all* applicable to the sort of situations which the ECtHR has dealt with so far.[69]

Even if one is of the view that article 60 DARIO does govern *Bosphorus*-like situations, there are some more outstanding issues, however. One is whether the psychological or subjective element contained in article 60, an element that is somewhat more pronounced in the 2009 version of article 60 than in the 2006 version,[70] also flows logically from the ECtHR's case law. For a Member State to be held responsible under article 60, it is required that the Member State sought to *circumvent* or *avoid compliance* with an international obligation. Such circumvention may typically occur when States transfer competencies to an IO, *knowing that mechanisms for holding IOs accountable or responsible for wrongful acts are less developed*.

In some of the literature, it is argued that the circumvention standard of article 60 requires that an abuse of a right, an abuse of the separate legal personality of the IO, or bad faith be established.[71] The Commentary to article 60 DARIO does not set the threshold for a finding of intent to circumvent on the part of the Member State particularly high, however: 'An assessment of a specific intent on the part of the Member State of circumventing an international obligation is not required. Circumvention may reasonably be inferred from the circumstances'.[72] Of course, international responsibility should be excluded when the IO's wrongful act has to be regarded 'as an *unwitting* result of prompting a competent international organization to commit an act'.[73] But still,

[69] PJ Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 International Organizations Law Review 9, 29.

[70] At the time, the circumvention standard was laid down in art 28 DARIO 2006 (adopted at the 58th session), UN Doc A/CN4/L687: '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'.

[71] Paasivirta (n 13) 59–60; Kuijper (n 69) 29.

[72] DARIO, Commentary no (7) to Article 60.

[73] DARIO, Commentary no (2) to Article 60.

one may wonder whether the DARIO requires intent at all: does the statement that '[c]ircumvention may reasonably be inferred from the circumstances' not hint at a standard of 'constructive knowledge'? Under the latter standard, Member States may be held responsible if they have failed to inquire whether the IO adequately protects human rights (eg by providing an internal dispute-settlement system that offers adequate due process guarantees) before transferring competencies and becoming a member of the IO.

The constructive knowledge standard may appear to be the standard that is indeed applied by the ECtHR in its case law regarding Member State responsibility, as is evidenced by the *Gasparini* case.[74] But whether it is a *proper standard* is another question. Given that it *broadens* the responsibility of Member States for the acts of the organization, it may go against the 'historical trend' of imposing the responsibility of IOs on the IOs themselves rather than on the Member States.[75] If one takes the separate legal personality of an IO seriously, a strict 'abuse of personality' standard may be preferable.[76]

A second question that deserves reflection relates to the *moment* when the circumvention of obligations should be assessed: is it at the time the Member State transfers to the IO competencies in the course of which exercise breaches occur, or can a State also be held responsible if it fails to take to task, or even to withdraw from, an IO to which it has already acceded, if it becomes clear that such IO does not offer sufficient human rights protection at some point during its lifespan?

The ECHR case law on this question appears to be contradictory. In *Gasparini*, the ECtHR considered the time of accession to the IO as the relevant time[77] (although, as regards the specific facts of *Gasparini*, one may wonder how Italy and Belgium, the respondent States in *Gasparini*, could ascertain whether or not NATO's internal dispute-settlement mechanism violated the provisions of the ECHR, which at the time of those States' accession to NATO was not yet in existence).[78] In the earlier *Bosphorus* case, however, the Court stated the following with regards to the temporal dimension:

> State action taken in compliance with such legal obligations [CR: these are obligations under the IO's legal regime] is justified *as long as* the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides . . . *However, any such finding of*

[74] cf *Gasparini* (n 26) p 7: stating, in respect of Italy and Belgium having transferred competencies to NATO, that 'il lui faut en réalité déterminer si, au moment où ils ont adhéré à l'OTAN et lui ont transféré certains pouvoirs souverains, les Etats défendeurs ont pu, de bonne foi, estimer que le mécanisme de règlement des conflits du travail interne à l'OTAN n'était pas en contradiction flagrante avec les dispositions de la Convention'.

[75] I use the expression of Paasivirta (n 13) 50–51.

[76] See at length on abuse of personality: J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', (2007) 4 *International Organizations Law Review*, 91–119.

[77] *Gasparini* (n 26) p 7.

[78] Italy and Belgium are founding members of NATO and original parties to the ECHR. The North Atlantic Treaty, establishing NATO, was adopted on 4 April 1949 and came into force on 24 August 1949, after the deposition of the ratifications of all signatory states. The ECHR was adopted on 4 November 1950 and entered into force on 3 September 1953. That said, both documents were negotiated at the same time, and it is unlikely that Italy and Belgium, when acceding to NATO, were not aware of the content of the ECHR and its imminent adoption.

equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights.[79]

Thus, under the *Bosphorus* standard, Member States appear to be required to screen the IO's human rights performance *continuously*. They are not absolved from responsibility upon acceding to an IO which only at the time of accession provided sufficient human rights guarantees. Instead, any deterioration of human rights protection obliges them to bring pressure to bear on the IO so that it changes its ways.[80]

Article 60 DARIO does not expressly deal with the temporal dimension. Possibly, the reference to a Member State 'prompting the organization to commit an act' suggests that it is not the time of transferring competencies that is decisive, but the time of causing an IO to commit, or at least not preventing an IO from committing, a specific act during the lifespan of the IO. At the same time, of course, 'prompting' ('move to act', 'spur to act', 'inciting') may simply refer to the requirement of positive State action discussed above.

However that may be, from a policy perspective, allowing a Member State to be held responsible for an IO's *own conduct* during its lifetime may tend to negate the separate personality of the IO, especially so when the transfer of competences to the IO dates back many decades, and when, given the structure of the IO, an individual Member State could *not* influence the conduct which the IO developed over the years.[81]

VI. CONCLUDING REMARKS: THE ECTHR'S CASE LAW AS *LEX SPECIALIS* OR PRIMARY RULE

It has been noted above that the ILC DARIO may wrongly assume that all IOs are equal and subject to the same rules of responsibility. This criticism is perhaps not entirely fair. While the ILC may believe that IOs are subject to a common responsibility regime (otherwise the DARIO project would not make sense), the DARIO does contemplate deference to special regimes: article 63 DARIO provides that the DARIO 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the relations between the international organization and its members'.

[79] *Bosphorus* (n 18) para 155.

[80] The apparent contradiction between *Gasparini* and *Bosphorus* in respect of the time of assessing circumvention may be explained by the fact that *Bosphorus* concerned the action of a member State implementing obligations which it held vis-à-vis the IO, whilst in *Gasparini* no intervening act of a member State could be discerned: the impugned act was performed in its entirety by the IO itself. But it is doubtful whether the criterion of State action is a relevant one in this context. After all, the *Bosphorus* dictum quoted above relates to the *second level* of the Court's analysis concerning member State liability for the acts of IOs. At this level, the Court does not examine whether an intervening act of a member State occurred, or whether a structural lacuna in the IO's dispute-settlement mechanism could be identified, but whether the IO provides equivalent protection. Compare Lock (n 41) 11: submitting that 'the crucial time for the Court's assessment of the presumption applies or not must be the time of the alleged violation and not the time of accession to the organisation' and also citing *Bosphorus* in this respect.

[81] See also Paasivirta (n 13) 53: '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'.

Whether or not the ECtHR's case law is in accordance with article 60 DARIO, and whether or not it is good legal policy—these were the questions tackled in Part 5—may ultimately not matter much. After all, is the ECtHR's case law not to be considered as a 'primary' *lex specialis vis-à-vis* the general 'secondary' rules of the DARIO or of any 'general' international law on the responsibility of IOs? It should be borne in mind in this respect that, as Paasivirta observed, '[s]olutions to [IO] responsibility gaps are usually sought at the level of primary rules and subject to case-by-case assessment', 'whereas correction has been explored in the sphere of 'secondary' [DARIO] rules'.[82]

Article 63 DARIO may authorize any derogation from the responsibility rules as laid down in the DARIO, including article 60, and allow for broader possibilities for holding Member States responsible for acts of IOs, eg on the basis of the *Gasparini* principle.[83] While, admittedly, the article appears to relate primarily to relevant principles developed by the IO itself,[84] the article does not, strictly speaking, exclude that such principles could be developed by an external court with special expertise,[85] eg in the human rights field. In fact, regardless of whether or not one supports the DARIO, the ECtHR's application of responsibility standards may simply form part of the primary, substantive rules which the court is mandated to interpret and apply, and which trump any secondary responsibility rules.

Whether such an application is desirable from a *policy* perspective is a different matter altogether. As emphasized above, it is the author's view that Member States should only be held responsible for the acts of IOs in very exceptional circumstances. These circumstances are not present when no positive State action can be discerned (*Gasparini*).[86] But, again, at the level of the ECtHR, things are not as opaque as they may seem: the standard of equivalent protection has so far always served as a safety valve to prevent a finding of responsibility of a Member State, even in case State action could be established.

[82] ibid 60.

[83] It is of note that DARIO, Commentary no 5 to art 63 cites the *Bosphorus* case. But this citation does not have the effect of recognizing the ECtHR's approach as *lex specialis*: in fact, the reference is precisely to *deny* the *lex specialis* character of another rule, the special rule on attribution to the effect that, in the case of a European Union act binding a member State, State authorities would be considered as acting as organs of the Union. DARIO, Commentary nos (2)–(5) to art 63 (the Commentary still refers to 'the Community'). Indeed, as described above, in *Bosphorus* the Court precisely rejected this rule and held that a member State act implementing an EC Regulation does fall within the Court's jurisdiction. *Bosphorus* (n 18) para 137. And, after all, *Bosphorus* is widely cited in art 60 DARIO, as an application of the general rule.

[84] See notably DARIO, Commentary no (7) to art 63.

[85] DARIO, art 63 states that special rules of international law *include* rules of the organization which suggests that there could be such special rules that are *not* developed by the organization. In fact, in relation to the special rule applying to EU Member State responsibility, the ILC cited case law of the European Commission of Human Rights, the ECtHR, *and* a WTO panel. DARIO, Commentary nos (3)–(5) to art 63. But in all fairness, one should admit that the said rule was developed first by the EU (EC) itself, and that the ILC only examined whether this rule was confirmed by the practice of external mechanisms.

[86] Paasivirta (n 13) 61, interestingly observed that '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'. In the author's view, however, if *Gasparini* is anything to go by, the ECtHR rather appears to be moving in the other direction.

At the same time, this standard does justice to the legitimate interests of the victims—they can engage the responsibility of a Member State in case the IO does not provide equivalent rights protection—while also encouraging IOs to set up their own accountability mechanisms. Indeed, if the bar for a finding of Member State responsibility were set (artificially) low, the IO could be tempted to rebuff calls for enhanced organizational accountability mechanisms, by pointing out the availability of the State responsibility avenue. Yet as the ECtHR has not set the bar low, it may not only have prevented Member State intervention in the affairs of the IO, but also it may also have influenced the development of human rights awareness within IOs. With regards to the EU, this development is about to culminate in the accession of the EU to the very convention which the ECtHR interprets and applies. Logically, this accession should signify a shift from the application of a standard of *equivalent* rights protection to a standard of *identical* rights protection, or, put differently, the closing of any remaining accountability gap in respect of the activities of the EU as an IO.

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